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FEATURE

MR. JASON CHAN - ASSISTANT OFFICIAL SOLICITOR OF THE OFFICIAL SOLICITOR'S OFFICE

Letter from the Editors

Dear readers,

It has been quite a while since we last published. As the pandemic persists and new norms emerge, most are striving to recover from adversity and move forward. Amongst these people, some are struggling more than others to get back on their feet. The lack of ready access to legal aid in Hong Kong, especially during difficult hours, remains to be a problem unsolved. On the bright side, we have a resilient community with devoted members who are willing to lend a helping hand.

The Gazette is honored to have interviewed Mr. Jason Chan, the Assistant Official Solicitor of the Official Solicitor's Office. Having assisted the underprivileged, disabled and even minors in their legal claims, Mr. Chan invited us to take a glimpse of how he had turned his career around to pursue his calling. This feature interview does not only aim to introduce our readers to the meaningful work of the Official Solicitor's Office, but also seeks to demonstrate the versatility of the legal profession, in which personal calling can be advanced even in a professional setting.

As usual, students' contributions form the backbone of the Gazette. This issue housed an extensive collection of articles with topics ranging from competition law in digital markets to sentencing practices for juvenile crimes. Our writers also explored controversial social issues in Hong Kong such as the stigma surrounding pregnant migrant domestic workers and the urgent need to strengthen existing anti-trafficking laws. We hope that this collection would serve beyond its academic purposes to inspire our readers and motivate us to pursue the law on a more personal level.

The Gazette has received an unprecedented number of articles for this edition. We thank these writers for their ardor in communicating their thoughts and observations in their articles. At the same time, we thank our editors for having worked with and supported the writers tirelessly throughout. Such dedication continues to motivate the Gazette to function as a liberal platform for writers to hone and showcase their legal writing skills on a chosen topic of interest.

We hope you all have had a restful summer break and are ready to forge ahead!

Best regards,

Ian Sun & Zoe Kum
Editors-in-Chief

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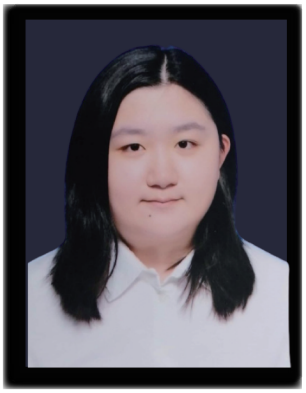

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HONG KONG STUDENT LAW GAZETTE

2021-2022

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Commercial World

Current Developments

The Bullies or The Bullied – a Discussion on Small Tax Havens

Lillian Ying Yi Lai

Introduction

With the unprecedented leak of the Pandora Papers, the inner workings of shadow economies where the rich and powerful disproportionately benefit from tax havens — offshore jurisdictions that tolerate tax evasion and conceal proceeds of illegal activities — have been exposed to the public eye again. While international organisations such as the Organisation for Economic Co-operation and Development (OECD) have implemented measures to rein in the use of tax havens, not all tax havens have taken a hit from these countermeasures to the same degree. In this article, I seek to examine the underlying reasons behind stereotypical associations that predominantly exist in relation to the term "tax havens," the detrimental effects these associations have on efforts to combat transnational financial crimes such as money laundering and tax evasion, and any further implications and suggestions on tax havens.

Media portrayals of tax havens

Media portrayals of tax havens manipulate our subconscious minds and contribute to stereotypical associations present in the society. An example would be the commonplace, societal association of the term "tax havens" with offshore jurisdictions such as the British Virgin Islands, Cayman Islands, and Bermuda. Indeed, these jurisdictions serve as tax havens. However, are tax havens limited to these jurisdictions? Certainly not. There are other jurisdictions, for instance Switzerland — a major player in the tax haven scene – that are planted with even more loopholes that affluent individuals seize to exploit. Nonetheless, media focus has concentrated on these small islands, seemingly overlooking the power major tax havens wield. This could potentially be attributed to the following reasons:

Various media reports of money laundering in small islands, for example, the infamous report of the Russian mafia that laundered illegal funds worth US$70 billion in Nauru, entrenched the impression of small islands as tax havens in our minds.

Tax haven blacklists, particularly those published by the European Union (EU) and OECD, tend to place an accentuated emphasis on tax havens that are small islands, essentially vilifying small islands that serve as tax havens and failing to show the full picture. Individuals are also likely to trust information from these eminent organisations that publish the blacklists

as they are recognised as carrying high credibility. In a similar vein, media coverage of tax havens will most likely parallel that of published information from established organisations, instilling biased perceptions of tax havens in the public community.

Detrimental effects of misleading media portrayals

The biased media portrayals of tax havens are misleading as they provide a distorted perspective. There are three major aspects of the detrimental effects that these media portrayals hold.

While the term "tax haven" is not confined to a singular definition, media coverage is often inclined to only focusing on repetitive aspects of tax havens. This depicts an incomprehensive picture of tax havens and gives rise to misconceptions, such as the unofficial and often incorrect classifications of "tax havens" and "non-tax havens."

Media portrayals have neglected aspects which expose the inner workings of tax havens, in particular, competition in the area of tax and trust laws. As international tax rates gradually decrease and major financial centres lean towards introducing schemes in support of bank secrecy and preferential tax regimes, an increased number of jurisdictions have relaxed traditional rules that were once in force against common law trusts, such as the rule against perpetuities and the rule against excessive accumulations of income. For instance, Hong Kong amended its Trustee Ordinance (Cap. 29) in a bid to better compete with Singapore in the realm of trust law. Although such implementations would undoubtedly aid the attraction of a greater number of foreign settlers, they also tend to create more room for loopholes that would likely be exploited by those seeking to reduce tax payments. And, these areas of development have not attracted adequate media attention.

While media portrayals do not outline inequities among tax havens, efforts to crackdown on tax havens have not targeted all tax havens proportionately. Some major tax havens that are also developed countries are not included in tax haven lists, potentially due to their political connections. An example would be the current international taxation model that is backed and in favour of developed countries since these countries enjoy a monopoly over institutions like OECD. Smaller and less developed jurisdictions with black or brown majorities are, conversely, targeted more frequently by measures in opposition to tax havens.

Further implications and suggestions on tax havens

There is an evident correlation between activities that occur in jurisdictions with favourable trust laws and the financing of illegal activities. In addition, investigations on the effects of listing companies that do not comply with the Financial Action Task

Force (FATF) found that listed jurisdictions are eight times more likely to criminalise terrorist financing. Although offshore countries are infamously used by individuals or corporations to conceal illegal proceeds or evade taxes, I argue that the issues we need to confront do not lie in these jurisdictions that offer preferential tax regimes. Rather, they can be attributed to the natural tendency of individuals and organisations to be drawn to locations with lower tax rates. There is also the hard truth that illicit financial flows (IFFs) will invariably exist, as observed by the European Banking Authority.

As proffered by Nicholas Shaxson in *Treasure Islands*, tax havens could be divided into four main categories: continental European, British zone of influence, the United States zone of influence, and uncategorised. Influential countries, such as the United Kingdom and France, have engaged in lobbying to prevent tax havens that are associated with them from being named. As Tax Justice Network stated, the United Kingdom's 'spider's web' of overseas territories would have ranked the highest on Tax Justice Network's Financial Secrecy Index (FSI) in 2020 if it were treated as a single body.

When compared against the FSI in 2022, developed jurisdictions that serve as tax havens and should have been listed as non-cooperative jurisdictions as stipulated by the EU, were not listed. A notable example is the United States, which ranked first on the FSI in 2022 due to her failure to comply with international standards on disclosure of information. This ironically occurred despite the passing of the Corporate Transparency Act in 2021 — a move aimed at increasing transparency — by the United States Congress.

Biased narratives and potential political manipulations bring the effectiveness of combating transnational financial crimes into question. Furthermore, lists of tax havens compiled by intergovernmental organisations such as the OECD and EU have been criticised for applying opaque and inconsistent criteria and for excluding countries that are members of their organisations from the blacklist.

With the facilitation by globalisation, individuals with offshore assets could simply shift their assets to another jurisdiction with similar preferential tax rates if a specific jurisdiction is under fire for tolerating activities related to tax evasion. Data from Tax Justice Network shows that developed countries are responsible for 98% of global tax losses, while only 2% of global tax losses are attributed to jurisdictions with lower incomes. The fact that higher income countries contributing more to tax revenue losses have been tolerated suggest that intergovernmental organisations like the EU have been essentially 'shutting [their] eyes to real tax havens.' The global tax system has not been made more equitable.

Conclusion

The concentrated attention on relatively small tax havens hinders efforts to tackle global financial crimes. Small tax havens have been more emphatically portrayed as such due to publications such as media coverage. This portrayal is misleading as it neglects the problems caused by major tax havens and fails to effectively address illegal financial activities that tend to occur in major tax havens on a larger scale as compared to that of small tax havens.

Current Developments

Lawful Act Economic Duress: The High Threshold of Judicial Policing for Commercial Bargains

Victoria Wing Sheung Lok

I. INTRODUCTION

What may come as a surprise to many would be that the doctrine of "lawful act economic duress" – a doctrine that falls within the realm of contract law – had virtually not been inspected by authorities in the legal profession until the Supreme Court reviewed the doctrine in the 2021 case of *Pakistan International Airline Corporation v Times Travel (UK) Ltd ("PIAC v TT")*. The decision in *PIAC v TT* essentially overturned the binding precedent of *CTN Cash and Carry Ltd v Gallaher Ltd* ("*CTN v Gallaher*") that was previously in force.

II. KEY FACTS AND OUTCOME OF *PIAC v TT*

In *PIAC v TT*, PIAC was the sole operator of flights to and from Pakistan and TT was a travel agent whose business relied on selling flight tickets to and from Pakistan. PIAC was essentially the only operator of such flights, wielding monopoly power over the supply of flight tickets to and from Pakistan. The contractual arrangement stipulated that PIAC would distribute tickets to TT and reward TT commission for selling tickets. Furthermore, PIAC enjoyed the legal right to terminate this arrangement at one month's notice.

In 2011 and 2012, disputes surfaced as various travel agents, including TT, asserted that PIAC did not remunerate them the commission payments they were entitled to. While certain travel agents instituted legal proceedings against PIAC in their attempts to recover the unpaid commissions, TT did not follow suit as PIAC pressured it not to. Although TT subsequently gave in to the pressure imposed by PIAC, PIAC further intensified its threats by reducing TT's biweekly ticket allotment from 300 to 60 tickets in September 2012, as legally entitled to do so, and informed TT that it would discontinue the arrangement their contract enforced at the end of October of the same year.

Having relied on PIAC to sustain its business, TT was aware that disengaging with PIAC would defunct its business. Hence, in a bid to sustain its business, TT agreed to accept the terms of a new agreement which provided that TT would waive any claims it might have had regarding the previous unpaid commission it was entitled to receive.Although PIAC showed a director of TT a draft of the new agreement, it rejected the request the director made which involved taking a copy of the draft in order to solicit legal advice and discuss the new terms with personnel of TT.

Thereafter, TT took legal action against PIAC for its unpaid commission. TT posited that it should be allowed to repudiate the new agreement it made with PIAC on the basis of lawful act economic duress. The trial judge agreed with TT, however, it also held that PIAC had genuinely believed that it was not obliged to pay the disputed commissions. As such, the Court of Appeal upheld PIAC's appeal as it found that PIAC did not act in bad faith. TT then pleaded to the Supreme Court.

III. SUPREME COURT'S RULINGS IN *PIAC v TT*

The appeal that TT made to the Supreme Court was dismissed. The Supreme Court held that TT could not repudiate the new agreement on the basis of lawful act economic duress.

Lord Burrows and Lord Hodge agreed that the plaintiff must establish two elements in order to repudiate a contract in the event where the defendant induced the plaintiff to enter the contract by duress. The two elements are: (i) the pressure or threat imposed by the defendant was illegitimate and (ii) the pressure or threat resulted in the plaintiff entering the contract. In addition, economic duress also consists of a third element which prescribes that the plaintiff had no other reasonable alternative than to give in to the pressure or threat.

Since the judges reached consensus that TT entered into the new agreement due to the threats posed by PIAC and TT had no other reasonable alternative, the issue in dispute was whether the threat made by PIAC was illegitimate. Moreover, Lord Burrows and Lord Hodge reaffirmed the existence of the lawful act duress doctrine which stipulates that duress may be established in order to render a contract voidable, even if the threatened act is legal.

Ultimately, the Supreme Court held that PIAC did not impose pressure on TT illegitimately. Therefore, TT was not induced due to duress and the new agreement was not voidable.

IV. LORD HODGE'S REASONINGS AND THE TEST ADOPTED BY THE MAJORITY

Lord Hodge expounded that the English courts recognise lawful act duress in two circumstances:
(i) where defendants use their knowledge of plaintiffs' criminal activity to threaten plaintiffs and (ii) where defendants use reprehensible mediums to manoeuvre plaintiffs into positions of vulnerability to force plaintiffs exposed to civil claims to waive their claims.

V. THE TEST RELATING TO GOOD FAITH ADOPTED BY LORD BURROWS

Lord Burrows agreed that the appeal filed by TT should be dismissed. However, he disagreed on how illegitimate threats were construed. Lord Burrows proffered that accompanying threats are illegitimate where demands are unjustified. This occurs when threatening parties intentionally create or escalate the threatened parties' susceptibility to the demand and when threatening parties make the demand in bad faith, specifically, when threatening parties do not truthfully believe that they have the right to claim what they are claiming or do not truthfully believe that they have a n to the claims that are being waived.

The test of good faith does not seamlessly fit into the legal reasonings of English contract law. Although Lord Burrows' test may seem strikingly different from conventional tests adopted in English contract law, it is not unprecedented, and Lord Burrows has, indeed, acknowledged that his test was developed from the case of *CTN v Gallaher*.

VI. DOES THE 'NEVER SAY NEVER' APPROACH CONTRADICT CERTAINTY AND PREDICTABILITY?

PIAC v TT is an instance where the Supreme Court adopted a "never say never" approach. While the Supreme Court reaffirmed the existence of the doctrine of lawful act duress, the Court construed the test narrowly, leading us to question whether the doctrine will be engaged in everyday commercial life.

Although the judicial reasonings of the Supreme Court in *PIAC v TT* has made it apparent that the narrowly interpreted doctrine of lawful act duress would not be applicable in most situations, the caveats of the lawful act duress doctrine would allow us to more easily eliminate circumstances which are not aligned with those that constitute lawful act duress.

It is therefore ironic as while the Supreme Court has zealously safeguarded the freedom to contract and certainty of law by construing the doctrine narrowly, the test formulated by the Supreme Court has in fact compromised certainty and predictability.

Equity and Trust

Application of the Doctrine of Undue Influence in Hong Kong – Have Presumptions of Undue Influence been replaced by a "Common Sense" Approach?

Shannon Ho

Introduction

Historically, the doctrine of undue influence was developed by the courts of equity as a protective measure to provide relief for parties against claims to enforce transactions which they did not freely enter into. Undue influence is an equitable doctrine seen as early as 1887 in the classic case of *Allcard v Skinner,* where the court held that a transaction was voidable because undue influence was exerted on the claimant by the influencer. The doctrine, when successfully raised, may set aside transactions which were not entered into with the free and informed consent of both parties. It aims to prevent people from being forced or misled into a disadvantageous transaction and ensures that the influence of one person over another is not abused.

Today, in considering whether a defendant can rely upon the doctrine of undue influence, the courts in Hong Kong will decide foremost whether in entering into a particular transaction, "consent was freely given with full knowledge of the consequences of entering into the relevant transaction" taking into account all relevant evidence available. The courts will also consider whether the case falls into one of the sub-classes of undue influence. However, there have been recent debates as to whether presumptions and classification of undue influence are being replaced by a "common sense approach" when considering the evidence presented in a case.

In *Bank of China (Hong Kong) Ltd v Wong King Sing & Others [2002],* Recorder Ma SC expressed his view on the defence of undue influence and stressed the importance of applying common sense in these cases. The court looks for informed consent in the relevant transaction on a case-by-case basis.

The different approaches taken by Hong Kong courts in applying the doctrine today will be illustrated before the landmark case of Etridge. Debates over presumptions of undue influence will also be addressed, with a focus on the importance of common sense applications over presumptions with reference to case law when considering relevant cases in recent years.

Pre-Etridge era: Classification of undue influence and the requirements under each class

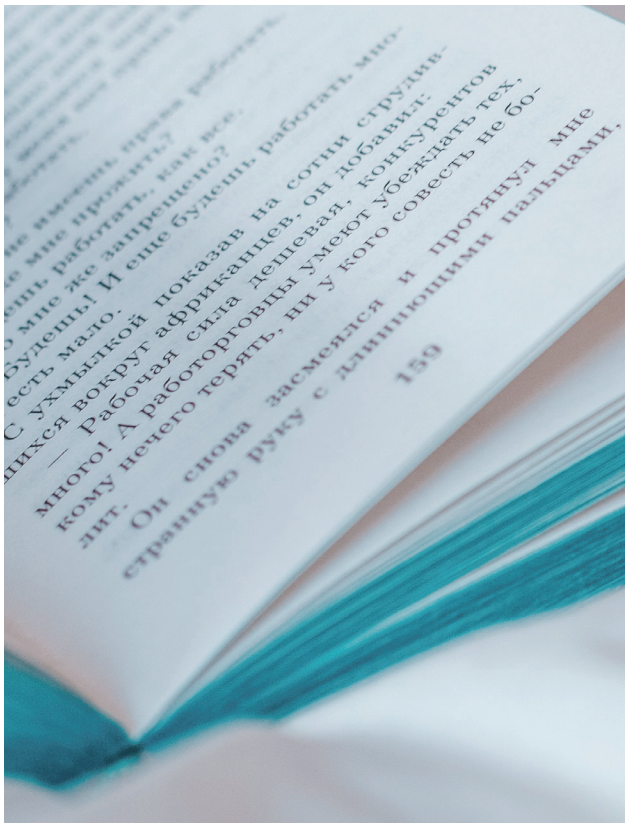
A transaction is considered to be induced by "undue

influence" when a party is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. According to Lord Browne-Wilkinson in *Barclays Bank v. O'Brien [1993]4 ALL ER 427*, undue influence can be divided into two major classes – Actual (Class 1) and Presumed (Class 2). For Class 1, the party relying on undue influence must prove that the wrongdoer has exerted actual undue influence on his decision-making process. There is no need to establish a relationship of trust between the wrongdoer and himself. For Class 2, one has to bring evidence of a special relationship, that is, one of trust and confidence that makes it fair to assume that the relationship was abused to influence a party to enter into an unusual transaction. For Class 2, can be further categorized into two subclasses – Class 2A, where presumption is automatically raised by relationships such as fiduciaries and principal, solicitor and client, doctor and patient, parent and child relationships; and Class 2B, where relationships do not fall into Class 2A but show a certain degree of trust and confidence.

Undue influence can be both direct and indirect. Direct undue influence refers to influence exerted between parties to a transaction, as demonstrated in *Chiu Tak Kwong v Tan Yufang*, where a stepmother signed a document to waive her rights to her husband's estate due to undue influence exerted by her children. The stepmother was threatened that her daughter's and her own safety would be at risk - that she would be caused trouble at work and tortured to death if she did not sign the Agreement. Therefore, the Agreement is considered to be signed under duress and this constituted direct undue influence in the case.

Indirect undue influence is found in cases where a party to a transaction knew or should have known that the other party was acting under undue influence of a third party. It is often raised as a defence in actions launched by a bank or another creditor for possession of property pledged in guarantee by the defendant for the benefit of another's debt, where the defendant claims that the bank should have known that the defendant had been unduly influenced to enter into an unusual transaction.

In addition to the above requirements, for the doctrine of undue influence to operate, the transaction has to be one that is neither a gift nor a favour.



The legal burden of proof is on the party relying on the defence - he must present evidence that he has been unduly influenced. The existence of actual undue influence must be shown if he is establishing Class 1 undue influence, or evidence of a relationship of trust and confidence where he is seeking to establish Classes 2A and 2B undue influence. He then has to prove that the undue influence made him enter into an unusual transaction. Once both of the above elements have been established, the evidential burden will be shifted to the alleged influencer to show that the transaction was entered into with the complainant's free and informed consent. The presumptions are rebuttable when there is evidence that suggests the contrary.

Disadvantages of focusing on presumptions of undue influence in making decisions

Presumptions are often useful in establishing whether undue influence operated in a transaction. It should however be noted that placing an emphasis on the classification of the relationship between the relevant parties into the distinct categories of "actual" and "presumed" undue influence as set out in *O'Brien* can create the assumption that individuals would act consistently with their own interests and identities. This presumption can be challenged by facts which suggest the contrary, in which case the courts can infer that there was deception in the process of entering into a transaction and conclude that undue influence operated.

Considering the equitable maxim "equity regards substance rather than form", those formalities that frustrate justice should be disregarded. Hence, if rigid adherence to these classifications and principles may withhold justice, these formalities should come after the consideration of the entire context, i.e. the substance. The fallacy in presumptions and classification was addressed by Lord Clyde in the case of *Royal Bank of Scotland Plc v Etridge (No 2) [2001] 3 WLR 1021*.

Departure from presumptions of undue influence to adopt a "common sense" approach

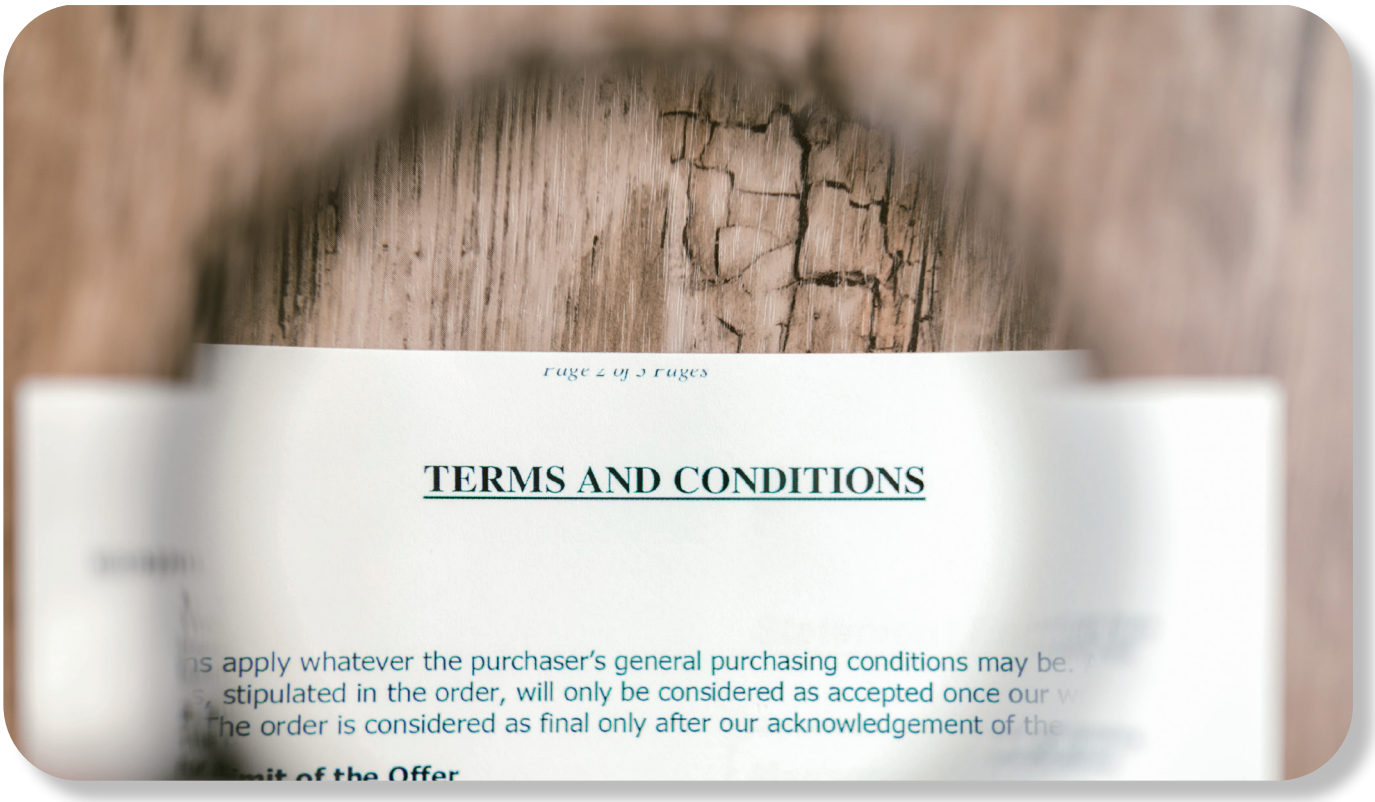
In *Royal Bank of Scotland Plc v Etridge (No 2)*, the classifications of undue influence were reviewed. Lord Clyde (at p 816) criticized the current approach, stating that attempts to classify cases of undue influence into "actual" and "presumed" appeared illogical and may lead to confusion. There is also room for uncertainty as to whether the presumption was made due to an influence, or due to its undue nature. In his view, when dealing with the doctrine of undue influence, it was only a matter of evidence and proof for the court. After reviewing all the evidence presented, the court should find either sufficient proof of undue influence, or no undue influence where there is insufficient proof to suggest so. It is illogical to argue that there was undue influence by presuming that an abuse of a relationship occurred between parties simply because the nature of the relationship involves elements of trust and confidence.

Moreover, after the decision in *Etridge*, it is now no longer necessary to demonstrate disadvantage to a party in a transaction to raise the doctrine of undue influence. With these changes, cases concerning undue influence are looked at more broadly instead of focusing on specific factors. The courts became primarily concerned with elements of substantive fairness in the transaction as a whole, and departed from adhering to the principles and formalities.

Even though *Etridge* is not binding on the Hong Kong courts, it is highly persuasive to Hong Kong Courts in making decisions relating to the doctrine of undue influence.

The Hong Kong courts' approach today in applying the doctrine of undue influence

The reasoning in both *O'Brien* and *Etridge* have been adopted by the Hong Kong courts when considering cases of undue influence, although the way in which



these principles have been applied in cases in different jurisdictions varies.

Hong Kong cases where common sense was used instead of presumptions of undue influence

In *Bank of China (Hong Kong) Ltd v Wong King Sing & Others [2002]*, the parties involved were brothers, D and X. X obtained a loan from the plaintiff and as security and D agreed to execute a charge in favour of the plaintiff. X later failed to repay the loan and the plaintiff sued D for repayment. D sought to set aside the claim on the grounds that he entered into the contract as a result of X's undue influence. The issue in the case was whether a presumption of undue influence arose based on their relationship.

In deciding the case, the Court held a similar view to the reasoning in *Etridge*. When considering an issue of undue influence, the Court should determine whether a complainant had given informed consent to the transaction. It must apply a large degree of common sense and not follow the principles mechanically. Recorder Ma SC expressed that common sense should be applied when considering the evidence of a case and recognizing the strength of the presumption in light of its weight. Presumptions should only serve as a guide for the parties in considering evidence, and should not be regarded as the decisive factor.

In the same judgement however, the Court still recognized the two-step inquiry applied in cases of presumed undue influence (Class 2). The questions to be asked were: first, whether the relationship between the complainant and the influencer was one of the established relationship under Class 2A, where undue influence is presumed as a matter of law; and second, if not, whether the relationship was one involving a sufficient degree of trust and confidence that undue influence could be presumed, under Class 2B. This showed that courts still take into account the principles and classes of undue influence when deciding whether the doctrine should be applied. However, more importantly, these presumptions should not divert the court from taking into account all relevant evidence in reaching its decision. Recorder Ma SC stressed in his judgement that common sense is required in determining the weight of presumptions, which would vary on a case-by-case basis.

Li Sau Ying v. Bank of China (Hong Kong) Limited (2004) 7 HKCFAR 579 is the first Court of Final Appeal case after *Etridge*, and *Etridge* has been applied in subsequent cases in Hong Kong. In this case, the appellant claimed that a surety agreement should be set aside on the basis that it had been entered into under undue influence, and that the bank was involved in it. Mr Li and the appellant were friends who met at a social club and their relationship was not classified under Class 2A. The bank had no

knowledge about the relationship between the parties. The Court of Final Appeal, following the decision in *Etridge*, took the view that the lower courts had complicated the matter by trying to decide whether the parties were in a Class 2B relationship. Instead of trying to classify the relationship between parties to determine whether there was presumed undue influence, the courts needed to focus on the crux of the issue - whether the evidence justifies a conclusion that the transaction was entered into under undue influence. To illustrate what the Court of Final Appeal meant, in this case, the real issue was whether Mr Li had unconscionably abused the trust and confidence between himself and the appellant in advising the transaction. The relationship between Mr Li and the appellant was not of high importance.

Li Sau Ying has been subsequently applied in *Sun Hung Kai Investment Services Ltd v Quality Prince Ltd [2009] HKEC 835*, where the court also relied on *Etridge* and decided that relationship between parties and the nature of transaction as well as all other evidences have to be considered together as a whole. Presumptions do not arise solely based on the relationships of parties involved.

Legal principles from Li Sau Ying has also been applied in *Bank of China (Hong Kong) Limited v Leung Wai Man HCMP 641/2006*, *Bank of China (Hong Kong) Limited v Leung Wah & Anor HCMP 1634/2009*, *CACV 107/2010* and a number of other recent cases. It can be inferred that principles in *Etridge* have been adopted in Hong Kong, meaning that the importance of presumptions of undue influence is largely replaced by the importance in considering evidence as a whole with a "common sense" approach.

Conclusion - The importance of factual evidence over presumptions

Today, when considering whether a defendant may rely upon the doctrine of undue influence as a defence, the courts in Hong Kong would determine whether he had given consent to the transaction in his free will with full knowledge of any consequences. The courts would consider whether the requirements under one of the sub-classes of undue influence (Class 1, 2A or 2B) are satisfied. Traditionally, a party seeking to rely upon the doctrine has had to present evidence to the court that he was under undue influence or in a special relationship of trust in which undue influence could have presumed to be involved in the unusual transaction in question.

With the evolution in case law, it can be seen that it is not practical to just classify cases into two classes of undue influence, as this classification is insufficient in addressing the crux of the issue – whether a party has been operating under undue influence when they entered into the relevant transaction. As to whether presumptions of undue influence have been replaced by a "common sense" approach, a closer look at recent cases shows that the courts in Hong Kong have followed the reasoning in *Etridge*, with a strong emphasis on "common sense". In deciding whether undue influence operated in a transaction, evidence is of utmost importance . Common sense has to be largely exercised in deciding whether undue influence was exerted on a party, while principles of presumed undue influence provide only a logical basis to approach the issue.

It is still too early to conclude that a "common sense" approach has completely replaced presumptions of undue influence. As principles and steps of inquiry under Class 2, presumed undue influence are still considered by the courts as guidelines in application of the doctrine of undue influence as evidenced by their frequent reference in various cases within Hong Kong courts. However, it should be recognized that a "common sense" approach in considering the context and evidence is dominant over the presumptions and the identification of specific factors. To reiterate, it is the substance, rather than form, that matters most in equity.

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Digital World

Hong Kong Competition Law in Digital Markets

Danli Yu

INTRODUCTION

With the continual development of digital markets worldwide, the concern for antitrust scrutiny into big tech platforms has gained its significance. Hong Kong Competition Ordinance (cap 619 Competition Ordinance, hereinafter "the Ordinance") came into force in 2015. Nonetheless, the rapidly growing digital markets have brought challenges to the application and enforcement of the Hong Kong competition law to some extent. This paper will discuss the role the Ordinance plays especially in the digital markets and make recommendations to remit the hysteretic nature of laws to ensure accessible platforms and competitive digital markets in Hong Kong.

ABUSING MARKET POWER UNDER THE SECOND CONDUCT RULE

Big tech platforms refer to the internet and algorithm-related corporations especially owning dominant market power or substantial market power which are more likely to cause a market monopoly in the tech industry. Relevant market definition, assessment of market power, and identification of abusive conduct which are mentioned in both Guideline on the First Conduct Rule and Second Conduct Rule are essential to antitrust practices. The US Supreme Court once stated that investigations into the market definition and market power are prerequisites to the determination of abusive conduct's detrimental effects. In the digital era, the same methodology as stated by the US Supreme Court is still vital in antitrust inquiries. Consequently, the following will be elaborated in three parts: relevant market definition, assessment of market power, and classification of abusive conduct.

1. Relevant Market Definition

Relevant market definition is the key issue to determine whether digital companies have substantial market power in the digital field. Guideline on the Second Conduct Rule takes "substitutability" (also called "interchangeability") as a key factor when defining relevant product market and also considers other factors such as "product characteristics, prices, and intended uses." In addition to the product market, the geographical market should also be delineated. The European Commission defines geographic markets as a region providing products or services where the homogeneous competition condition exists and the competition condition is different from those in different regions. However, the geographic markets of big tech platforms have become much wider and gradually become the same one shared globally, for the platforms can supply internet services online in almost every part of the world. Therefore, the significance of a geographic market's definition seems to be weakened.

Digital markets are characterized by two-sided markets which means providing two groups of consumers with different groups of products. In a two-sided market, consumer demands and changes in demands on both sides of the platform will affect each other. Moreover, the lock-in effect of digital markets refers to the situation where users become dependent on the platform, making it difficult to switch to other similar platforms. Today, many digital companies offer internet services such as search engines and online shopping platforms to a wide range of customers mostly for free. However, users often need to provide the online platform with their personal information on most occasions, including ages, genders, and other private data, as well as real-time updated browsing history and shopping records. In practice, non-price competition occurs when any side in the two-sided or multilateral markets provides network users with free goods or services.

When deciding the product market, the characteristics of digital markets including two-sided market, lock-

in effect, and non-price competition market should be taken into full consideration. To better define relevant digital markets, digital relevant markets can be divided into two-sided non-transaction markets and two-sided transaction markets based on whether there are transactions between users on both sides of the platform. As for the former, delimitation for two interactive markets is needed. Market delimitation refers to selecting similar markets based on transaction content and counterparties. Meanwhile, the delimitation of a single market for a two-sided transaction market is viable. In a "two-sided non-transaction market", on account of users' utilizing the big tech platforms without paying any fee, defining only one relevant market may result in a narrower scope of relevant markets.

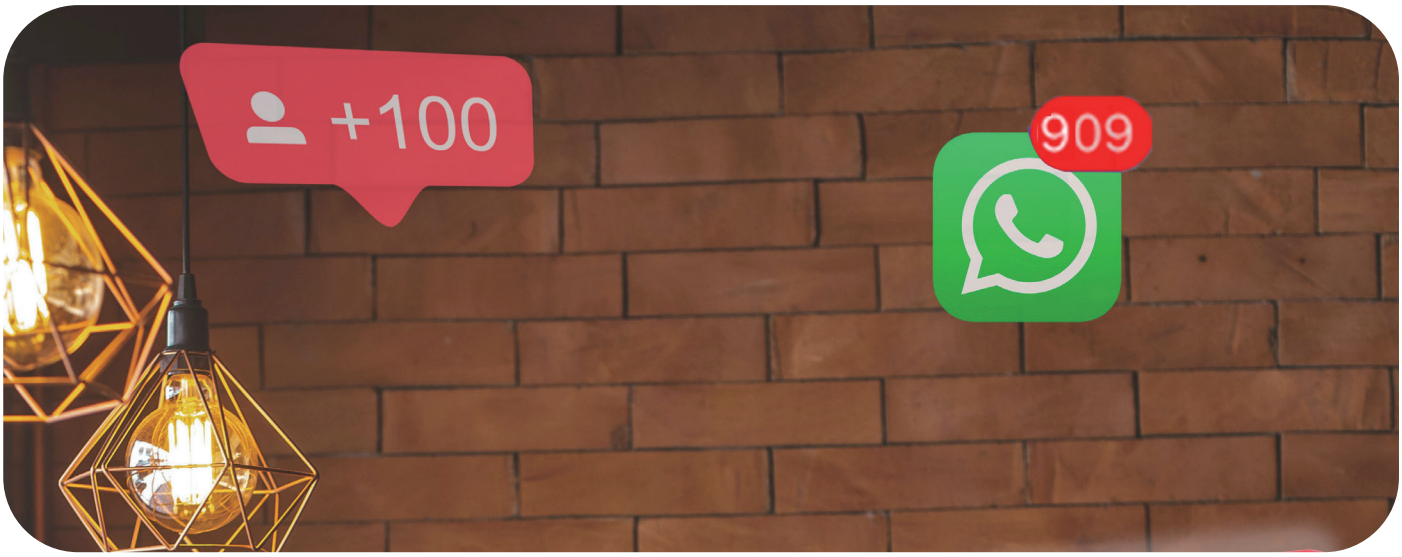
In the Guideline on the Second Conduct Rule, it is indicated that the SSNIP test is frequently used. However, due to the characteristics of the two-sided market and non-price competition in the digital markets, it is difficult to continue applying SSNIP in traditional ways. SSNIP test is only designed for one-sided markets, and it cannot be equally applied traditionally in a two-sided market. Another reason for the inapplicability of the test is the non-price competition feature. There cannot be any price increase in the product. Alternatively, relevant markets in the digital markets can be defined by combining the SSNIP test for two-sided markets with the "SSNIC" test ("Small but Significant and non-transitory Increase in Cost"). SSNIC is a test proposed in the Report of Study Group on Data and Competition Policy. It is based on a "small but significant non-temporary cost increase" imposed on users to test the substitutability of goods and services. Therefore, the SSNIC test can be used to first increase the user cost on one side of the market, and then increase the user cost on the other side to analyze the digital relevant market.

2. Redefinition of Market Power

It can be seen in the Guideline on the Second Conduct Rule that, it also takes the price of products or services as a significant consideration when defining the substantial market power. Furthermore, the Guideline on the Second Conduct Rule attaches great importance to all relevant factors related to the industry, the evolution of the market shares, and entry by potential competitors. Nonetheless, some factors and methods have to be specifically formulated in the industry of digital markets.

As to the characteristic of non-price competition in digital markets, it is hard to sustain the above-competitive level price test which indicates substantial market power. While market share is an initial factor, market share alone does not always reflect a substantial degree of market power. Instead, paragraph 3.10 also attaches great importance to other relevant factors in the industry to determine substantial market power. Competition authority can look at factors such as platform business model, network effect, and flow stipulated in the Guidelines of Anti-monopoly in the Field of Platform Economy when defining substantial market power.

As far as this paper is concerned, the factor of market shares is still heavily weighted in the definition of market power. It is absolutely because market shares in the digital markets are often in a volatile state, therefore, maintaining a continuous and relatively high proportion of the market share in the relevant market can better prove that a big tech platform has substantial market power. Moreover, since market shares are a factor that can be digitized and easily compared, it is an appropriate choice for deciding market power. This is the case in the Facebook proceeding of the FCO. In the proceeding, the FCO found Facebook owning a dominant position by holding a 90 percent market share in the relevant market. Paragraph 3.12 of the Second Conduct Rule takes turnover and sales volume data as the main considerations for the calculation of market shares which can be used in the assessment of substantial market power in digital markets in a particular way. Regarding a two-sided transaction market, the turnover can be directly taken into consideration which means the total volume of transactions between both sides. Nevertheless, it is more complicated for the two-sided non-transaction market to define the substantial market power. It is difficult for turnover to cover both sides of the market. To address this issue, we can assess the factors such as the virtual "sales volume" and the number of active users instead. From this paper's point of view, the virtual "sales volume" can be calculated in such a transaction of exchange between information and chance to utilize the platform by the frequency at which users exchange personal information, itinerary, transactional records, preference, and other private data when using the platform. Furthermore, reference can be made to the considerations used by the German Federal Cartel Office ("FCO") regarding the dimension of "users". In the Facebook case, FCO pointed out that the time users spend on social networks is a key factor in measuring the success of social networks, and it used the number of daily active users or monthly active users rather than the number of registered users to calculate market shares.



3. Abusive Conduct

Treaty on the Functioning of the European Union ("TFEU") art. 102 prohibits exclusive and exploitative abuse by dominant enterprises. Exclusive abuse refers to the actions that prevent new competitors from entering the market or are detrimental to existing competitors. Meanwhile, exploitative abuse means exploitation mainly targets consumers instead of competitors. In the digital era, the European competition practices indicate that excessive data collection may be deemed as exploitative abuse. There is much controversy over whether the Second Conduct Rule regulates both exploitative abuse and exclusive abuse. Because of the inconsistent regulation in section (1) and section 2(b) of the Ordinance, it is hard to figure out whether exploitative behavior should be carved out. What's more, the abusive conduct listed in the Guideline on the Second Conduct Rule as the example is all exclusive abuse.

However, the concept of "conditions abuse" can be adopted to better regulate exploitative behaviors to protect consumer welfare. In its decision on VBL-Gegenwert in November 2013, the German Federal Court of Justice ("FCJ") indicated that violations of laws other than competition law can also be considered exploitative abuse, which is known as the concept of "conditional abuse". For example, FCJ found that a firm with a dominant market position could constitute an abuse of that dominant position by violating consumer protection laws; FCO found that Facebook violated the data protection laws of Germany and the General Data Protection Regulation by improperly collecting user data, and then determined that Facebook's conduct was unfair which fell into the scope of exploitative abuse, thus directly applying European competition laws.

DIGITAL CARTELS UNDER THE FIRST CONDUCT RULE

As mentioned in the analysis of relevant markets above, the factors of digital markets should also be measured when applying the First Conduct Rule. For example, the characteristic of non-price competition makes a part of the traditional test inapplicable. To be specific, "price" [applicable for the "effect" test under paragraph 3.18 of Guideline on the First Conduct Rule falls out of the process of assessment. Instead, "product quality", "product variety" and "innovation" are still vital elements when applying the "effect" test. Moreover, art. 82 of the EC Treaty gives much weight to protecting consumer welfare. Consequently, consumer welfare can be taken into consideration in the test in line with the regulation on exploitative behavior in the Second Conduct Rule.

According to paragraphs 3.21 and 3.23 of the First Conduct Rule, although the factor of market power in the First Conduct Rule is less important than in the Second Conduct Rule, it will also be considered by the competition commission. Consequently, what is discussed in the application of the Second Conduct Rule regarding the relevant market and market power is still applicable in the application of the First Conduct Rule.

OTHER CONTROVERSIES

1. Scope of Application of Merger Rule

For the sake of limited application of the merger rule to the Ordinance, the applicable scope of the merger rule should be expanded to completely cover different types of digital corporations.

According to paragraphs 1 and 4 of Schedule 7 of the Ordinance, it is a mandatory requirement that the subjects of merger hold carrier licenses that are within the meaning of the Telecommunication Ordinance. Consequently, the application of the merger rule to the Ordinance is restricted in the telecommunication industry. The main function of telecommunication is however different from digital technology based on a core element of computing. Despite this, telecommunication is one of the main operating modes in digital markets, meaning that the merger rule to the Ordinance can cover part of the mergers between undertakings holding carrier licenses within the sphere of the telecommunication market. Due to the lack of merger regulation, the amount of anti-competitive mergers would probably surge leading to various outcomes, such as price increases and market concentration.

2. The Meaning of "Object and Effect"

To reduce the time and expenditure spent on investigation and assessment, exhaustively enumerated legislation for violations is needed to better apply the "object test".

The demand for owning "object of effect to prevent, restrict or distort competition" as a key component to the violation of the Ordinance can be seen not only in the First Conduct Rule but also in the Second Conduct Rule. "Object test" should precede "effect test" under EU law, which can be supported by the viewpoint that an agreement is condemned per se within the scope of 101(1) TFEU if it has an anti-competitive object. As a result, there is no need to examine its subsequent effect on the market anymore. On the contrary, the effect is only scrutinized after the lack of object in the agreement binding on both undertakings.

The application of the object and effect test is quite consistent in the Ordinance, for it is requested both in the First and the Second Conduct Rule. Nonetheless, the types of illegal conduct which have anti-competitive objects should be exhaustively enumerated, which is consistent with the anti-competitive practices in the EU and other parts of the world. However, the First Conduct Rule and the Second Conduct Rule both lack the exhaustively listed violations which are specifically elaborated from the EU's framework. This would probably result in difficulties in applying the "object test".

CONCLUSION

To make better use of competition law in digital markets, some adjustments to the definition of the relevant market, substantial market power, and abusive conduct should be made to appropriately fit the characteristics and complexity of this industry.

To start with, the factors of a two-sided market have to be included in the definition of the relevant market and the SSNIC test can be a proper substitution for the SSNIP test. Furthermore, consideration of market shares is still vital when defining substantial market power despite the fact it should be calculated respectively in the two-sided non-transaction market and two-sided transaction market. Then, "condition abuse" can be used to regulate exploitative behavior to better protect consumer welfare. Moreover, exhaustively enumeration for violations is needed when applying the "object test". At last, it is supposed to expand the scope of application of merger rules to cover all types of conduct in the digital markets.

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INTERNATIONAL LAW & TRENDS

Internnational Trends

Stuck on the Watchlist: Reflections on Hong Kong's Current Anti-Trafficking Legislative Framework

Vanessa Li

Introduction

Hong Kong is an international metropolis that is highly reliant on migrant domestic labour. There are nearly 385,000 foreign domestic workers situated in the city, accounting for approximately a tenth of Hong Kong's overall working population. However, the city does not have the greatest reputation for migrant worker's protection, with multitudinous examples of forced labour and human trafficking identified by non-governmental organisations. In 2016, the Justice Centre Hong Kong reported that one in every six migrant workers is a victim of forced labour, with 14% of them being trafficked into it. Further, Hong Kong's anti-trafficking efforts have drawn worldwide criticism. Hong Kong was initially ranked as Tier 1 in the US Department of State's Trafficking in Persons Report in 2001. The city was downgraded to Tier 2 in 2009, and was further demoted to Tier 2 Watch List (i.e. the second-lowest ranking) in 2016.

This article argues that Hong Kong's current anti-trafficking legal framework contains critical flaws by examining two decisions: (i) *ZN v Secretary for Justice & Ors*; and (ii) *CB v Commissioner of Police & Secretary for Justice* (in a rolled-up hearing).

Current anti-trafficking legal framework of Hong Kong

Currently, Hong Kong adopts a multi-legislative approach and has not introduced any legislation dedicated specifically to human trafficking. The People's Republic of China ratified the Palermo Protocol in 2010, which promotes the prevention of human trafficking, and yet the Protocol's application does not extend to Hong Kong. The Hong Kong Government also refused to support the Modern Slavery Bill 2017, which was modelled on the UK Modern Slavery Act 2015. The Government has justified its refusal on the basis that human trafficking is not a prevalent issue in the city and that such victims are well protected under the city's comprehensive legal framework. The continuous denial of the Government is based on a flawed assumption that s129 of Crimes Ordinance (Cap.200) ('CO') covers multivarious aspects of human trafficking acts, while in reality it is an extremely narrow provision that only covers trafficking for prostitution. Transportation of persons for slavery and servitude are likewise prohibited under Article 4 of the Hong Kong Bill of Rights Ordinance ('BORO') (which incorporates the International Covenant on Civil and Political Rights). However, BORO fails to define 'slavery' and 'servitude' and cases that potentially fall under Article 4 of BORO are more likely to be treated under the CO or the Employment Ordinance (Cap.57) in

practice. On the brighter side, Hong Kong does not separate migrant labour under the main labour laws from separate legislation (c.f. Singapore's Employment for Foreign Manpower Act). Hence, migrant workers in Hong Kong are not deprived of legal protection and privileges, such as statutory holidays and paid annual leave, as labour laws apply equally to workers regardless of their visa status.

ZN v Secretary for Justice & Ors

The flaws of Hong Kong's current legal framework were well reflected in the city's first judicial review on human trafficking. In the disappointing case ZN, the Hong Kong Court of Final Appeal ('CFA') failed to take a firm stance on addressing human trafficking issues by interpreting Article 4 of BORO in a restrictive manner, despite the fact that human trafficking is criminalised globally.

The brief facts are as follows: A Pakistani national ('ZN') was compelled to reside at and work for lengthy hours in his employer's residence whilst working as a domestic helper. He was constantly abused and threatened by his employer, who also retained his travel documents and denied his wages. The governmental authorities, including the Immigration Department, Labour Department, and the Hong Kong Police Force, failed to screen him as a potential victim of human trafficking, which ZN claimed such failure violated his rights under Article 4 of BORO.

The CFA overturned the High Court's decision and held that Article 4 of BORO does not prohibit human trafficking. The provision was interpreted to comprise of three separate concepts, namely (i) 'slavery'; (ii) 'servitude'; and (iii) 'forced labour', and the adoption of a broad concept of "human trafficking" blurs the lines between these concepts. Even if Article 4 of BORO was interpreted differently, the prohibition under Article 4(2) (prohibition on servitude) and Article 4(3)(a) (prohibition on forced labour) are limited to enforcing substantive instead of procedural prohibitions.

Further, the CFA did not concur with the High Court's finding that Hong Kong lacks 'any effective framework or set of measures to address human trafficking or forced labour'. It held that the Government has a wide margin of discretion under Article 4 of BORO and is not obliged to criminalise any of such prohibitions. The fact that the said employer could be prosecuted under a range of criminal offences, such as immigration-related offences and traditional criminal offences of intimidation, amounts to 'practical and effective protection' of the rights under Article 4 of BORO. The CFA reasoned that it could not be demonstrated that the victim would have been better protected from the severe mistreatment, even if a bespoke offence against forced or compulsory labour was enacted.

CB v Commissioner of Police & Secretary for Justice

After almost two years, the Hong Kong courts are presented with another opportunity to address the issue of human trafficking. In a recent rolled-up hearing, a Philippine national ("CB") who was sexually assaulted by her employer sought leave to apply for judicial review, challenging on similar grounds as *ZN*: the authorities' failure (i) to provide "practical and effective protection" of rights under Article 4 of BORO; and (ii) to screen her as a victim of forced labour and human trafficking. CB further

argued that the aforementioned alleged failures were attributed to "the lack of a bespoke offence criminalising forced labour".

Citing *ZN*, the Court of First Instance ('CFI') found that the investigation duty provided under Article 4 of BORO obliges the Government procedural to investigate suspected forced labour instances, independent of any earlier complaints. The CFI found on the facts that authorities failed to taken into relevant evidence (e.g. videos of the employer having sexual conduct with previously employed domestic helpers) were not taken into account, whilst considered evidence that exonerated the employer, hence failed to perform an "effective investigation". In addressing the third challenge, the CFI held that there was a 'causal connection" between the absence of a "bespoke criminal offence' and the failures of this case, and that such 'bespoke criminal offence' shall not be confined to foreign domestic helper employment.

As leave to apply for judicial review was granted, it is anticipated that the Court will clarify the content and application of the investigative duty created by Article 4 of BORO in the upcoming decision. More importantly, it is hoped that the Court will follow the CFI's finding and give a positive affirmation as to whether a bespoke criminal offence against forced labour is required, which was a question deliberately left open in *ZN*.

The way forward

Reflecting on the landmark *ZN* case and the forthcoming decision of *CB*, there is an imminent need to enact an anti-trafficking law that clearly addresses the issues of forced labour and slavery. Without an applicable bespoke criminal offence, the authorities are likely to resort to existing offences (such as indecent assault in *CB*) instead of performing investigative measures that will directly target complainants' status as a victim of alleged human trafficking or forced labour. The city's current legislative framework is hence ill-prepared to systematically identify alleged victims and prosecute traffickers. However, following the expulsion of former sponsors of the Modern Slavery Bill (Dennis Kwok and Kenneth Leung) from the Legislative Council in 2020, there is a glimmer of hope that new anti-trafficking initiatives could be substantiated in the near future, in addition to the enactment of an anti-trafficking law. Unless *CB* declines to follow *ZN*'s restrictive interpretation of Article 4 of BORO, victims of human trafficking and/or forced labour in Hong Kong would be stuck in a Catch-22 situation where the Government persists in denying similar issues and refuses to alter the status quo, whilst the Court, acting as a last resort for the victims to seek justice, is likely to refuse to give a generous interpretation.

Current Developments

Price of Justice - The Plight of unlawfully dismissed Migrant Domestic Workers (MDWs)

Kevin Ling

In December 2020, Hong Kong extended its statutory maternity leave to 14 weeks. Whilst the city's working mothers celebrate the good news, migrant domestic workers (MDWs) may struggle to benefit from this legislative change. Although MDWs are legally entitled to this right, in reality what often comes after pregnancy is losing their jobs instead. The extended statutory maternity leave may further deter employers from supporting pregnant MDWs, hence leading to even more unlawful dismissals.

In light of the above, this essay argues that the current mechanism in Hong Kong is insufficient in protecting MDWs' rights, particularly focusing on unlawful dismissals during pregnancy. This essay starts by reviewing the legal standards and potential violation of rights, then it explains the systematic frustration MDWs encounter when they attempt to pursue their rights through legal actions. Finally, this essay proposes plausible recommendations with reference to international standards.

Unlawful dismissal: "Live-in rule" and "Two-week rule"

Just like any other employees in Hong Kong, MDWs are legally entitled to various maternity rights. The relevant legislation is the Employment Ordinance (Cap.57), which provides, *inter alia*, a right to 14-week leave upon giving notice of pregnancy to their employers, an entitlement to leave pay if they have been employed for 40 weeks or more, and a right not to be dismissed until the date that they are due to return to work. Legal actions can be taken in case of contraventions. Institutionally, the law treats MDWs no differently from others, which coheres with Hong Kong's international responsibility to ensure equal protection of the law without any discrimination under the International Covenant on Civil and Political Rights ("ICCPR"). However, such protection is discredited by weak enforcement. PathFinders, an NGO helping pregnant MDWs, observes an acutely inadequate awareness of legal rights and obligations amongst MDWs, employers and employment agents to be the main reason for unlawful dismissal or forced resignation during pregnancy. Though this situation resonates textbook examples of pregnancy discrimination, on which court actions can be taken, it is often not the case.

The post-dismissal arrangements aggravate the circumstances for pregnant MDWs, leading to opportunistic violation of rights. Upon dismissal, the most immediate aftermath MDWs face lies with two controversial requirements – the "Live-in rule" and the "Two-week rule". The former mandates all MDWs to live with their employers within the contract period, while the latter requires all MDWs to find new employers and obtain new working visas within two weeks upon the termination of contracts, or else they must leave Hong Kong. The combined implication of these two rules is that MDWs will immediately lose shelter upon dismissal despite potential illegalities involved, whilst being pressured to find new employers within the stringent time of two weeks. Foreseeably, this situation will only be direr for migrant mothers-to-be, as it is unlikely for them to find new employers welcoming them with open arms. Consequently, many are left with no option but to return to their home countries, barring them from accessing the courts in the first place.

With that being said, the Immigration Department allows MDWs to extend their visas. However, such extension is subject to the rigid requirements of visitor's visas and on the condition that they should remain unemployed. Problems with means of support persist, if not worsen. Crucially, they can no longer enjoy public medical services at a subsidised price. Without MDWs' visas, the unbearable expenses on crucial antenatal and maternal services can cost more than 8 times of their standard monthly wages. These extra financial burdens greatly deter pregnant MDWs from staying in Hong Kong and lodging claims even

when they are unlawfully dismissed.

Frustrations in access to justice

Even if pregnant MDWs make their way through the aforementioned hurdles to stay, their paths to justice are still full of obstacles. The first problem lies with the unequal power dynamic between the disputed parties. As MDWs have little financial capacity to seek legal advice, the only few options available to them are pro bono services or public-funded legal assistance. These channels are, however, not easily accessible. Take the government-funded Free Legal Advice Scheme ("FLAS") as an example, MDWs are required to make appointments at referral agencies and wait for 2 to 8 weeks for scheduling a meeting, which in itself exceeds the time frame under the "Two-week rule". Moreover, the advice sought is only preliminary and unable to fully address MDWs' concerns or vulnerabilities. With such limited advice, they would have to confront their employers at the Labour Department ("LD") conciliation and the Labour Tribunal ("LT") all by themselves. Notably, both venues typically do not permit legal representations, which indirectly benefits employers backed up by strong, tailor-made legal advice beforehand. Given how ill-informed MDWs are of their rights, *de facto* disadvantages are imposed on them, thus causing the unjust balance between MDWs and employers.

Additionally, prolonged delays hinder MDWs from pursuing their rights. It is trite that "justice delayed is justice denied". This is particularly true for stressful migrant mothers-to-be, who have to pay for the high living costs and medical expenses in Hong Kong while waiting for trial. Expeditious trial without delay is therefore indispensable in MDWs' access to justice. Regrettably, the reality runs counter to their needs. The appointment of LD's conciliation takes around 5 weeks, while bringing claims to the LT takes another month. Not only does the delay *vis-à-vis* the stringent "Two-week rule" reflect a systematic unfairness to MDWs, but also how they are discouraged to further their claims. Many are left with no choice but to reach a settlement with minimal compensations. Justice cannot be done without providing an expeditious avenue for awards of remedy, yet the current system in Hong Kong frustrates them.

To compound the situation, the public bodies seem to be reluctant or slow in safeguarding MDWs' rights. A case in point is when MDWs need to renew their visas while commencing legal actions, during which they are unnecessarily referred back and forth between departments. Another instance is by, ironically, the Equal Opportunities Commission (EOC). In mid-2019, an alleged case of MDW's unlawful dismissal hit the headlines, yet EOC did not bring her discrimination case to courts on her behalf until late-2020. Even with wide media coverage, it took a year. One simply cannot help but wonder how long, if ever, do untold stories take to get to the court. Notably, such passive attitude does make a difference. Suppose a MDW's pregnancy discrimination case is promptly and proactively brought to courts by EOC, precedents show that the compensation can be more well-rounded. Not only can damages to loss of income be awarded, but also injury to feelings. Not to put too fine a point on it, but just because of officials' reluctance, MDWs are unfairly deprived of an opportunity to remedy that can better realise their rights.

Ways forward?

As revealed, MDWs faces *de facto* systematic frustration in accessing the courts, which runs counter to the guarantees of ICCPR article 14. The following recommends solutions from three aspects to pave the way for Hong Kong to reform.

First, the unequal arms between the employers and MDWs can be alleviated by proactive assistance by public bodies. To start with, given how crucial public-funded legal assistance is in empowering MDWs to fully realise their rights, relevant bodies should ensure the services provided can adequately address their needs. For instance, FLAS may consider following up on MDWs' cases, which will enable them to participate in conciliation services and legal proceedings meaningfully. Likewise, speeding up legal proceedings will help MDWs in accessing justice. As expeditiousness is pertinent to MDW's willingness in lodging legal actions, LD may, in the face of the "two-week rule", consider prioritising their claims in case management. This relieve pregnant MDWs from constantly worrying about uncertainties as to initiating legal actions at a foreign place. Jointly, these measures improve, both knowledge-wise and mentality-wise, the unequal power dynamics between parties during MDWs' paths to justice.

Importantly, judicial discretion should be encouraged where possible. The judiciary made significant progress in the landmark case of *Mallorca*. It involved a claimant who returned to the Philippines after dismissal. She then tried to lodge a claim against her former employer and applied for appearing before the court via Video Conference facilities (VCF).

Her application was rejected at LT, but succeeded on appeal. Chu HCJ, ruling in her favour, criticised the LT for depriving her of a fair hearing and remedies, which constituted serious prejudice. Following the pro-right approach taken in Mallorca, the exercise of discretions in lower courts in similar cases has been encouraged. Now, MDWs may start cross-border proceedings and appear before the court via VCF, which relieve them of the burden to stay in Hong Kong for legal actions. Also, MDWs may have labour union members, who are equipped with paralegal training and experience in handling like cases, to represent them in LT. Hopefully, this trend of robustly exercising judicial discretion does not stop here.

Last, in fully discharging their duties to provide equal access to justice, relevant bodies should not be limited to reform within existing frameworks, but take their actions further to consider providing MDWs with access to minimum basic needs during legal actions. Particularly, temporary shelter and subsidised medical services are essential for migrant mothers-to-be, which international organisations recognise it as being crucial for States to discharge fully its obligation to secure equal access to justice under treaties. Importantly, one should not take this out of context. The need for temporary shelters is a result of the mandatory "live-in rule" imposed by the government; the need for affordable medical care owes to employers' potential illegalities. None of which arise from the "faults" of migrant mothers-to-be. Effectively, these systematic barriers are penalising them for pursuing justice. Therefore, only by robust reforms in these regards can MDWs be guaranteed a genuinely "equal" access to justice.

Conclusion

This essay discusses how difficult it is for pregnant MDWs to have access to justice. Ironically perhaps, when we regard fairness and justice as the lifeblood of our society, shouldn't we first reflect upon the injustice suffered by those who supported us every day?

Current Developments

A Great Leap in Sentencing Practice – Comprehensive Analysis of Juvenile Crimes

Tung Yuet Yin Kelly

In Hong Kong, juvenile delinquency has long been a highly controversial topic. The Anti-Extradition Law Amendment Bill Movement in 2019 led to an increased crime rate among the youths, posing an even greater challenge for Hong Kong courts when it comes to striking a fair balance between public order and juvenile rights. This article aims to evaluate Hong Kong's practice in sentencing juvenile offenders committing offenses under the Public Order Ordinance (Cap. 245) ("POO"), focusing particularly on unlawful assembly and riot; and to illustrate how loopholes in the local practice could be resolved by comparing it against the youth justice model of the United Kingdom ("UK").

Juvenile offenders above 14 and under 21 years of age are generally given additional protection, including physical separation from adults, exclusion from the press and the general public as well as the advantage of using youthfulness as a mitigating factor. As a sizeable number of cases are being processed, potential loopholes in the juvenile justice system could be identified.

The Diverging Approaches of HK Courts

One noticeable loophole in the current practice stems from the sentencing disparity between unlawful assembly and riot. Hong Kong's Court of Final Appeal laid down a soft-line sentencing approach for unlawful assembly in *Secretary for Justice v Wong Chi Fung*, whilst the Court of Appeal adopted a hard-line sentencing approach for riot in *HKSAR v Leung Tin Kei*. Even though Leung Tin Kei did not involve juveniles, its emphasis on criminal deterrence had a strong influential value on subsequent decisions. In *HKSAR v Leung Pak Tim*, *HKSAR v Mok Ka Too*, and *HKSAR v Choi Tsz Chung*, defendants ranging from 16 to 19 years of age were all sentenced to more than 3 years of imprisonment. It also appears that submissions of personal background and impulsive behaviours carry little weight. In *HKSAR v Tang Ho Yin*, the 24-year-old appellant was a man of clear criminal record and suffered from Attention Deficit/Hyperactivity Disorder (ADHD). The Court of Appeal considered his mental condition but decided that 'in no way [his condition] explains, excuses or mitigates his actions and involvement in the offense.' Contrarily, the Court still retained a softer approach for unlawful assembly, as evinced in *Secretary for Justice v CMT* and *YYH* and *Secretary for Justice v SWS*, in which the respondents' youth and mental conditions were reviewed and regarded as strong mitigating factors.

Despite there being an obvious departure from the traditional rehabilitative practice, there is, surprisingly, a blurry dividing line between the two offenses. According to POO sections 18(1) and 19(1), the offense of riot builds on the elements of unlawful assembly. An unlawful assembly turns into a riot when any person taking part in an unlawful assembly commits a 'breach of the peace.' Practically speaking,

unlawful assembly and riot were distinguished by the use of force in *Leung Tin Kei*. The offense of riot encompasses all elements of an unlawful assembly and with an additional element –– the 'deliberate use of or threat of violence'. This method of categorization, however, has its shortcomings. Tracing back to the earlier decision in *R v Caird*, the Court of Appeal noted that 'the borderline between the two is often not easily drawn with precision.' The problem was brought up again in *CMT* and *YYH*, in which more than 100 protestors were involved with some of them throwing bricks and petrol bombs towards the police checkline. As this was a case bordering on rioting, the factors laid down in *Wong Chi Fung* and *Leung Tin Kei* failed to provide a clear framework in distinguishing between riot and unlawful assembly, as they were mostly limited to the assessment within the spectrum of the particular offense.

Comparative Analysis of the UK's Approach

The 2011 England riots share common features with the 2019 Anti-Extradition Bill Movement –– the UK criminal justice system not only dealt with a large number of juvenile offenders, but a stricter sentencing approach was also adopted by the English Courts.

The hard-line approach for riots was evident in the landmark cases of *R v Blackshaw* and *R v Gilmour*. However, these cases gave 'little basis for confidence that juvenile offenders [in this context] should properly be regarded in a more nuanced, contextual light rather than in a catch-all spirit of condemnation and deterrence.' The lasting repercussions of such approach were first unveiled in *R v Lewis*, in which a 16-year-old defendant charged with riot, alongside a firearm offence, was sentenced to 12 years of detention. The Court of Appeal, while acknowledging that the sentence would have a 'crushing impact' on the young offender, concurred with the ruling in Blackshaw on the importance of public order: 'the particular circumstances of this case require the strong message to go out that those, of whatever age, who are tempted to become involved in this sort of group offending must expect significant deterrent sentences despite their youth.'

To mitigate the severity of sentences and ensure the consistency among decisions, the UK Parliament passed the Public Order Act 1986 ("POA"), which abolished the common law offenses of unlawful assembly and riot; and replaced unlawful assembly by 'violent disorder.' Even though there is a hierarchy in sections 1 to 3 of the POA, violent disorder and riot are considered independent blocks. The grave offense of riot is segregated from the other public order offences by two indicative factors: the number of offenders and the requirement of common purpose.

The Law Commission Report No. 123 Offenses Relating to Public Order ("the Report") further clarifies the distinction. First, a clear dividing line is drawn between unlawful assembly and riot by the number of participants. Section 1 imposes a stricter threshold by requiring 12 or more persons to be present at the scene whilst section 2 only requires 3 or more persons to be present. The Report explains that 'the weight of numbers is an essential part of that rationale, which … must be reflected in the definition of the offense itself' and 'any offense of riot, if defined by reference to a small number of people, does not adequately reflect its purpose and rationale.' The emphasis placed on the number of participants was explained in *Caird*, in which the Court of Appeal considered the offenders to be 'acting in numbers and using those numbers to achieve their purpose.' Second, the element of common purpose is a requirement for riot but not violent disorder. This demonstrates how the offense of riot is deliberately put at the most severe end of the spectrum, with a heightened hurdle for conviction. The Report concludes that: 'there is a need to distinguish a new offense of riot from violent disorder, and to mark it as an extremely serious offense, it must retain as one element the possession of a common purpose.'

The UK's approach provides instructive guidance to tackle the ambiguities in Hong Kong's practice, particularly on how the number of participants could set a clear demarcation between the two offences. The Hong Kong courts, however, take a different stance on the proof of common purpose. The recent decision in *HKSAR v Lo Kin Man* clarifies that the prosecution does not have to prove any extraneous common purpose for both unlawful assembly and riot, explaining that the legislature clearly intended to exclude the uncertain common law requirement from sections 18 and 19.

In light of the current circumstances, a set of standardised guidelines is called for to bridge the gap between different approaches, and to strike a fair balance between public interest and juvenile rights. As the old saying goes, 'justice and power must be brought together, so that whatever is just may be powerful, and whatever is powerful may be just.'

Current Developments

Codification of the Inchoate Offence of Incitement

Cherry Chu

I. Introduction

The inchoate offence of incitement ("the Offence") in Hong Kong has been transplanted from England and Wales in a common law fashion. In 2008, the English counterpart has taken a leap in codifying the law into the Serious Crime Act 2007 ("the Act") whereby acts that 'encourage and assist' the commission of a crime are proscribed. This prompts a revision of the legal attitude toward codification of the law in Hong Kong, which was left a stillborn under the Crimes (Amendment) Bill 1995 ("the Bill").

Professor Smith once criticized, 'The common law of incitement is in urgent need of codification to remove some uncertainties and to free lawyers and courts from grappling with the existing complicated case law, including some wrong decisions.' It echoed squarely with the current situation of the Offence in Hong Kong. This paper argues that the lack of a consistent principle, stemming from conflicting case law and inconsistencies among the inchoate offences, has seen a need to codify the Offence.

This essay will first provide an overview of the current law on incitement in Hong Kong, followed by a review of problems therein which justify its codification, concluding with reform recommendations in anticipation of enhancing the administration of justice in the local context.

II. The current law on incitement

The law on incitement in Hong Kong is a hybrid of the common law offence and special statutory offences. In essence, it seeks to deter the misdemeanor of propelling another to commit a crime by warranting early intervention of the law. This proposition was reiterated in *R v Higgins* that the offence is complete upon the act of incitement, and the effect of which is of no consequence to the finding of criminal liability.

An act of incitement alone does not satisfy the *actus reus* of the Offence. An inciter, one who seeks to influence the mind of another to commit a crime, may approach to someone's mind in such an array of acts as proposal, exhortation and inducement. These acts must be effectively communicated to the incitee to be actionable as 'the most salient characteristic of incitement, in comparison with the other forms of inchoate crime, is the existence of a communication that is made with a view to persuading the addressee to commit an offence.' This addressee may be a named party or the world at large. After all, the incited act must amount to a criminal offence to raise a charge of incitement.

The general position as to the *mens rea* of the Offence is intention. It must be proved that the defendant intended to incite, by which he knew or believed that the incitee will carry out the substantive offence with the necessary *mens rea*. The inciter must have also known or believed the circumstances required for that particular offence existed, thereby bringing about the required consequences.

III. A review of the need to codify the Offence in Hong Kong

A criminal code consolidates existing statutory provisions and incorporates into it common law principles laid down in judicial decisions. A need of which arises where there are gaps and inconsistencies in the law, or where the rules are of an arbitrary nature that fulfill no rational purpose. The objectives of codifying a law are to eradicate irrational distinctions and illuminate legal principles in more consistent and precise terms. Pursuant to this proposition, this section endeavors to study the inadequacies of the current law on incitement with a view to conclude whether there is a need of its codification.

A.Confusion arising from the multiple sources of law

i. A gap between the English law and Hong Kong law

The law on incitement in Hong Kong risks losing footing when the English law has undergone marked reform. Under the common law, the law on incitement in Hong Kong is largely consistent and derived from England and Wales. However, the tie had vanished since the common law offence had been abolished and codified into sections 44 to 46 of the Act. This prompts an urge to follow the English footsteps in pursuing a codification to keep the law intact and consistent.

However, as a result of the arrested development in the law, employment of abandoned rules remains evident in Hong Kong. An illustration of which is the 'rarely used' offence of incitement, which had been brought to the limelight by the Umbrella Movement. In *HKSAR v Tai Yiu Ting*, Clause 47 of the draft Criminal Code for England and Wales was referred to in establishing the charges of incitement to commit public nuisance. Authority of the legal instrument is debatable as it had yet recognized the gap in the law that, in contrast to encouragement, mere assistance in committing a crime may not fall within the spectrum of inchoate offence. Hence, codification of the Offence is desirable to catalogue the latest refinements in the law.

ii. Inconsistency among the three inchoate offences

The incomplete transplant of inchoate offences results in a conflict of law. By virtue of the Crimes (Amendment) Ordinance 1996 (No. 49 of 1996), the inchoate offences of conspiracy and attempt have respectively been codified into sections 159A and 159G of the Crimes Ordinances (Cap. 200; "the CO"), along with the abolition of the defence of impossibility. In contrast, it remains a defence at the common law offence of incitement. This has led to a paradoxical inconsistency where a man inciting another affords the defence of impossibility to a charge of incitement but not that of conspiracy where the latter agrees to the plan. This urges an alignment of the inchoate offences to 'avoid logical inconsistencies and rules which fulfil no rational purpose.'

B.The unsatisfactory common law

i. Anomaly of acts amounting to an offence of incitement

It is too narrow an interpretation of the Offence that anything short of encouragement does not incur liability. Lord Denning held in Race Relations *Board v Applin* that an act of incitement may be manifested in the form of a threat, pressure or persuasion. However, a gap in the law is noticeable that an encouragement to induce a crime is proscribed while 'forms of putative assistance – providing, without more, the weapon or plan not in the event used to commit an offence – may not necessarily incur liability.' Such a divergence in the law largely tightens the ambit of law enforcement, and undermines the function of law in crime deterrence and intervention at an early stage.

ii. Uncertainty as to the state of mind of the inciter and incitee

1. Possession of requisite *mens rea* of the substantive offence by the incitee

It is unsettled in the current law whether the prosecution are to prove that the incitee carried out the substantive offence with the necessary *mens rea*, and hence a lack of which would absolve the inciter of his liability. The debate stems from the decision in *R v Curr*, where the court erred in confusing the mens rea of incitement with that required for the substantive offence itself. Such arbitrariness in law had later been clarified by the Divisional Court in *DPP v Armstrong* that a conviction could be secured against the inciter so long as he has the belief or intention that the incitee has the necessary fault, whose actual state of mind is immaterial in relation to the former's liability. Nonetheless, this clarification has yet to be formally recognized as the Divisional Court has no jurisdiction to overrule appellate cases.

2. Commission of the substantive offence as the purpose of incitement

In not considering the defendant's purpose to incite, the current law risks extending too far to cover behavior which ought not to be classed criminal. The Law Commission challenged, with reference to *R v James* and *Ashford*, that the 'provision of equipment for the commission of crime has been held to amount to incitement, although there was no indication that the defendants were other than indifferent as to whether their customers would in fact commit the

crimes envisaged.' In effect, scope of the law enlarges such that faultless inspirers are made prone to being held criminally liable even though it was never their purpose to commit a crime.

iii. Inconsistency between the defence of impossibility and the inchoate offences

A defence of impossibility avails when the defendant mistakenly believed what he incited would amount to a crime or where the factual circumstance renders the commission impossible. It denotes a happening beyond control of the defendant and is arguably justifiable by the notion of "moral luck" as voluntariness is generally required for attracting criminal responsibility; it also appears to fit the harm principle as there is no actual harm inflicted that requires legal intervention.

However, a recall of the doctrine of incitement that commission of the principal crime is never a requirement would have proven the arguments untenable. It is to be reiterated that the offence is not merely a device to impose penalty and deterrence to whomever intends to incite a crime, but also 'those impossible of commission, because their conduct per se is socially undesirable'. Also, it is too narrow an interpretation of the harm principle as harm does not only exist in a consequential sense but a social danger in encouraging a recidivism when the first attempt was not curbed. To recognize the defence of impossibility, thus, risks bringing about 'a social absurdity for a system of criminal law to penalize the actual infliction of harm without also seeking to prevent the inflicting of such harms before they occurred.'

IV. Recommendations on codification of the Offence in Hong Kong

In view of the above problems in the current law, a codification of which is hereby proposed with the following recommendations.

A. Stipulation of a statutory definition of the offence

i. *Actus reus*

In response to the challenge raised by members of the Bills Committee on the practicality of codifying such 'a concept of uncertain width' as incitement and the absence of definition for the term 'incite' in the Bill, it is suggested that certainty of the law could be strengthened by defining what constitutes an act of incitement. In this regard, reference could be made to the English legislation in proscribing any act 'capable of' encouraging commission of a crime. This bridges the gap in the law and rules out the illogicality that an act of encouragement constitutes incitement whilst the provision of assistance in committing a crime does not.

ii. *Mens rea*

To envisage the uncertainty in the law as to mental state of the inciter, it is proposed to reinstate the common law position in this regard. First, it should be made a statutory requirement that the act of incitement must be carried out with commission of the substantive offence as the inciter's purpose. This restricts the law from extending too far to cover behavior that ought not to be classed criminal. Second, reference could be made to the English legislation where an intention or belief that an offence will be committed would suffice. This avoids the injustice of absolving the inciter of his liability on an irrelevant basis of lacking mens rea on the part of the incitee.

B. Abolition of the defence of impossibility

For the purpose of consistency and rationality, abolition of the defence of impossibility is recommended. First, it is the logical inconsistency in its admissibility among the inchoate offences. Second, as culpability of an inciter hinges purely on

his act and state of mind, any factual circumstance rendering commission of the substantive offence impossible would not justify or excuse his guilt. This proposal contemplates eradicating the logical paradox and irrational leeway open to the inciters.

C. Reinstatement of the common law offences of double inchoate liability

Due to its significance to triad crime in Hong Kong, retention of the double inchoate offence of 'incitement to conspire' is desirable. Although neither a charge of conspiracy to incite/attempt nor an attempt to conspire was incorporated into the local legislation, it was stressed in the HKLRC Report that to '[abolish] the offence of incitement to conspire in Hong Kong' would undermine 'the importance in the context of triad crime relates to long term conspiracies'. As the Law Commission criticized that the 'absurd distinction' in recognizing an incitement to conspire but not an incitement to incite should not be restated, both offences ought to be reinstated in the codified law.

In contrast, reinstatement of a charge of 'incitement to attempt' lacks practicality. Although it would be admissible to raise this charge, it as a matter of course amounts to an incitement to commit. In view of the negligible distinction, it is advisable to specify in the codified law that an incitement to attempt would not amount to a chargeable offence and any charge of the kind should resort to the offence of incitement of the relevant substantive offence.

D. Clarification on the 'incitement and accessory' offence

In view of the conflict of law in the application of a 'conspiracy to aid and abet', the inadmissibility of an 'incitement to aid and abet' ought to be specified in the codified law. Although an 'attempt to aid and abet' is expressly excluded under section 159G(5) of the CO, the same has yet to be addressed for that of conspiracy. It leaves a lacuna in the law as to whether such pre-existing common law position as *Po Koon-tai* prevails, or a consistent position with section 159G(5) of the CO presumably applies. With this benefit of hindsight, it should be made explicit in the new statutory provision that an 'incitement to aid and abet' will not amount to a chargeable offence as being a secondary party in itself is not an offence, subject to substantive offences which consist aiding, abetting, counselling or procuring as an element.

E. Reinstatement of the common law position as to penalty

To bring a degree of consistency among the inchoate offences, imposing a maximum penalty as of the consummated offence on the conviction of incitement is recommended. It attaches a fair labeling that an inciter is the instigator of the principal crime, whose culpability weighs no less than the perpetrator. In anticipation of a codified law, section 101I(2)(c) of the Criminal Procedure Ordinance (Cap. 221), which gives effect to the same penalty, could be conveniently incorporated into the CO for the purpose of consistency and judicial administrative efficiency.

V. Conclusion

The need to codify the inchoate offence of incitement in Hong Kong is premised on a combination of external and internal factors; the former being the inconsistent and conflicting case law derived from the English legal system, the latter is a proliferation of the gaps in law by an incomplete codification of the inchoate offences within the jurisdiction. These conflicts in law catalyze the need to codify the inchoate offence to consolidate the statutory and common law rules into a consistent principle with precise terms, rational purposes and recognition of regional-specific crime that adds on to the practicality of the Offence in the societal context of Hong Kong.

FEATURES & OPINIONS

Editor's Column

EU General Court Overturns Intel Antitrust Fine

Peter Pan

WHAT HAPPENED?

Intel, the CPU chip supplier, was found in 2009 to have paid substantial rebates to main desktop original equipment manufacturers in return for supply deals. The rebates in some cases totaled hundreds of millions of dollars. As a result, the European Commission fined Intel €1.06 billion for its anticompetitive conduct. In 2017, the EU Court of Justice reversed the Commission's decision and remitted the case to the EU General Court (The Court).

HOLDINGS

In January 2022, the Court annulled the fine and ruled in favor of Intel. The significance is two-fold. First, it showed the jurisprudence has moved away from a *subjective* form-based condemnation of rebate schemes and confirmed an *objective* economic assessment to evaluate the effect of alleged anticompetitive conduct—the potential to exclude an as-efficient-competitor (the AEC Standard). The Court faulted the Commission for its broad-brush dismissal of Intel's rebuttal in the form of detailed economic analysis. Second, it welcomed dominant companies' pricing practices when they were within legitimate parameters considering the AEC Standard and rejected any formalistic condemnation of such pricing schemes. This brought the Court's approach closer in line with the Commission's priorities guidance on Article 102.

IMPACT

The ruling is likely to affect other pending cases in the pipeline. The Commission alleged that (i) Qualcomm paid Apple to avoid sourcing rival's chips and that (ii) Google Android induced mobile operators not to pre-install competing services with abusive revenue share agreements. Their fines, totaling €5.34 billion, are currently challenged in the Court.

FEATURES & OPINIONS

Editor's Column

US Supreme Court Overturns Landmark Decision

Stephanie Yeung

THE OVERTURNING OF ROE V WADE

With the controversial and hotly debated opinion issued for *Dobbs v. Jackson Women's Health Organization*, which was handed down on June 24th, the US Supreme Court essentially declared that abortion was not a constitutional right, thus overturning the landmark case Roe v Wade on the basis that it was wrongly decided, citing that 1) the regulation of abortion was not provided for in the US Constitution, and that 2) "the right to abortion is not deeply rooted in the Nation's history and tradition".

THE IMPLICATIONS OF THE SUPREME COURT DECISION

By ruling that abortion rights were not enshrined by the US constitution, and thus not a constitutional right, the US Supreme Court essentially allowed each of the fifty states to decide on their own laws regarding abortion. This means that the 13 states in America who have laws in place designed to be "triggered" once Roe no longer applies, will be able to outright ban abortion with very few exceptions and otherwise prosecuting those who opt for an abortion. These anti-abortion laws are predominantly passed in conservative-leaning Republican states, and the lawmakers who have passed these laws ground their reasoning for these restrictive laws in the religious belief that abortion is murder as life begins as conception or fertilization, despite the First Amendment of the US Constitution forbidding laws "respecting an establishment of religion".

These "trigger laws" have, as of now, already been implemented to devastating consequences. A 10-year-old Ohioan child who was more than six weeks pregnant as a result of rape had to travel to another state to get an abortion as Ohio's abortion laws only allowed abortions where there is no fetal cardiac activity (i.e. under 6 weeks) or in cases of severe life endangerment. This horrific case sets a dangerous precedent for other women also pregnant as a result of rape or incest, as well as pregnant women that simply cannot afford to raise a potential child due to financial difficulties or domestic abuse.

The overturning of *Roe v Wade* is a severe restriction on the bodily autonomy and rights of many US citizens, and it is imperative that the women who are now affected by this decision will receive the support needed.

Feature

Official Solicitor's Office Interview

Interview with Mr. Jason Chan (Assistant Official Solicitor of the Official Solicitor's Office)

1 Could you introduce to our reader what is an official solicitor and what do you do?

The Official Solicitor is a public office, which is created by statute, namely the Official Solicitor Ordinance (Cap. 416) of the laws of Hong Kong. Our core duty is to look after the interests of those persons under disability. For persons under disability, we can categorize them into two main categories: (1) Persons under disability of age i.e. minors or persons under the age of majority and; (2) Persons who are mentally incapacitated. Our role is to oversee if their interests are properly safeguarded.

But the duties of the Official Solicitor also extend beyond this. Our office actually inherited some further roles from history. In the past, certain official posts shouldered different duties which were not quite similar to our current core duty, but then these duties were transferred to the Official Solicitor upon our establishment. This may include the role of Official Trustee. The Official Trustee operates in a way that we deal with trust matters. So, if there are trust matters, which need to be dealt with, we can be called upon by the judiciary to act in the capacity of Official Trustee. One example is when a security trader intends to close down – the money or the shares held by it is obviously trust property. But if there are no persons interested to get back those trust property, then the Official Trustee may be involved as well.

Another additional role we fairly often get called upon to play is acting for deceased person estates, as from time to time they i.e. the estates may also be involved in litigation. One example is for mortgagee actions: Mortgagee actions taken by the mortgagee bank against some deceased land or property owner, probably because of non-repayment of mortgage. The plaintiff side, the mortgagee bank, may have difficulty in securing someone to represent the estate. In that scenario, the Official Solicitor may be called upon to intervene and assist.

However, our roles are ever-changing because the Ordinance was drafted and endowed with a certain degree of flexibility. For the interests of justice, we may always be called upon by the judiciary or by judges to interfere or to assist. In this sense we have quite a wide role in representing interested parties whether they are just limited to the two main categories mentioned above – minors or mentally disabled persons.

2 What is your typical day like? What are the main responsibilities you carry since assuming your position in the Official Solicitor's Office?

As the section head of the office, I have to deal with administrative matters every day. Apart from administrative matters, day in and day out, I have to peruse and screen documents coming from the court. They may be court documents, orders, or directions from judges, asking us to step in and represent a minor or an incapacitated litigant. And then there are also requests from private practitioners. They may be involved in similar situations dealing with or proceeding against a party with incapacity. We

also receive correspondence and documents from NGOs seeking our assistance, including the Duty Lawyer Service, Justice Centre or those who provide service to interested parties. We also have constant communication with the Department of Justice. One of our biggest major sources of work comes from is the Social Welfare Department. This is because our target clients hugely overlap with those of the Social Welfare Department who provide shelters for minors, services for elderlies who have insufficient support. If their front line social workers identify clients who need our assistance and service, they will readily refer cases to us.

In another aspect, apart from dealing with administrative matters and performing screening duties, I also have to handle my own cases and monitor the work of my colleagues. As I am the Assistant Official Solicitor, I am accountable to the Official Solicitor who is indeed the Director of Legal Aid under the legislation. The Director of Legal Aid wears two caps. He is the Head of the Legal Aid Department and also the Official Solicitor. I have to report to him and seek his direction from time to time, provide recommendations and give briefings of important cases we encounter every day. And obviously, I need to maintain good working relationships with all the stakeholders, spanning from the government to NGOs or private practitioners. And as a representative of the Official Solicitor, I am involved in the Mental Health Law Committee of the Law Society and the Family Proceedings Court Users' Committee.

3 Being the Assistant Official Solicitor means managing cases, communicating with different parties and also doing your own work. How do you manage to juggle these roles and arrange your time?

I think it is the same for every professional officer working in our section. There will always be a number of duties to perform but limited time. You have to juggle, squeeze and prioritize time. If I give a thought about it, I very much operate in the same way as before, when I was a junior member of the office.

4 Speaking about your involvement in the Legal Aid Department when you were a junior, how did you first become involved in the legal department?

I was qualified in 1994, which was twenty-eight years ago. After working as a solicitor in the private sector for roughly four years, I found the idea of working in the government to serve a public cause or to serve the general public with genuine legal needs is more meaningful and more rewarding. When you embark on your career and work in the private sector, other than dealing with your daily demanding legal work, fairly often as a junior solicitor, you will be distracted or occupied by having to think about your fees and billable hours, your business, or how to secure a steady clientele.

I confess that I am not that good at this aspect and at that juncture of time, I think I got quite distracted and occupied. So, I made a decision to apply for some legal profession posts with the government like in the Legal Aid Department and I was recruited. But then, before that time, I actually had some earlier connection with the Legal Aid Department because I was an intern during the summer of university year two. I was comfortable in that working environment and I had a feeling of satisfaction, especially when attending to the needs of the general public, without having to consider the issue of fees. I knew I was doing something that could help them.

5 Having worked in different divisions of the Legal Aid Department, which division did you find interesting to work at and why?

During these twenty-four years with the Legal Aid Department, I spent time at the Application and Processing section, which handles applications, deciding whether the applications are meritorious or whether the applicant should be given a certificate. I also worked at the Crime section and the third one is the present one at the Official Solicitor's Office.

Well, I think it is difficult to determine which one is more interesting or more challenging, but it is fair to say that all of the roles were challenging and interesting. As I have mentioned earlier on, in all these sections, you can really have a sense of engagement with the community and the general public. You have close connections with ordinary people walking in the streets, those facing marital problems and filing a divorce, or even suffered industrial accidents or encountered traffic accidents. There is a personal aspect when you can communicate with them fairly directly and face to face, and then consider the merits to decide whether the applicant should be aided. And then you go through the process and know that sometime later, he or she receives compensation and has solved their problems. You will feel that you have contributed to the resolution of their issues.

6 Working with the Legal Aid Department sounds meaningful and then the human connection part of it gives you the motivation to work at the Department. On that note, how and what inspired you to decide to take up the appointment as the Assistant Official Solicitor?

The human connection factor is obviously one of the key factors for my choice to work in the Legal Aid Department. As for working as the Assistant Official Solicitor, I was posted here due to my previous experience in this section. Before being posted as Assistant Official Solicitor, I was here for seven to eight years working as a junior professional officer. During that time, I gained much exposure and experience.

7 Speaking about the challenging aspects of your current role, maybe you need to handle many tasks and also collaborate with many people. The enriching aspect is that the Office can contribute to the aided person to solve their issues. Besides these, are there other most enriching and distinctly most challenging aspects of your current role?

The Official Solicitor's Office is indeed very closely connected to the changes and evolution of the society because people's way of life or people's needs are ever changing. These changes bring about changes of legal needs or even sometimes changes of legal status, whether in relation to minors, seniors or different roles in the family. We can see that traditional roles in families are developing and changing as well.

The staff here in the Official Solicitor's Office do not just witness those changes as bystanders. We very often get involved in the development of relevant law. We can observe that children's rights within our legal framework are developing and changing with time. The area of Mental Health Law, which governs the interests of elderly people who have lost their mental capacity, that aspect of law is also developing and we are part of it. The Official Solicitor is part of the development .

Although challenging, the work is meaningful. Nowadays we have online websites to assist accessing to judgments or legal literature. If you type in the terms "Official Solicitor", you can see the rising trend and frequency of our appearance in legal judgments.

8 The Official Solicitor Office has to often keep up with legal developments such as the landmark Fabio Case relating to development in Children's rights, while also managing numerous cases at once. How does the Office prioritize which cases need to be urgently addressed and quickly followed-up on?

We certainly prioritize urgent cases which are on

the top of the list, but without doubt we work as a team. We do not work single-handedly. I also have professional officers who possess strength in different areas of law. We always work as a team and are committed to discharge our duties as appropriately and promptly as possible. Ever since the Fabio Case, we have been approached by NGOs and courts to step into appropriate cases for minors. In those cases, we indeed act as next friend for minors who have a meritorious case for judicial review. This has caused no operational problems so far. Though the workload is heavy but then with commitment and a willing team, we can cope with all this. However if we are provided with more human resources, then that will be even better as it will help meet the changing needs of society.

9 The Office needs to frequently collaborate with the government, NGO organizations and sometimes even corporations. Within the government framework, what is the extent of collaboration and interests with the Legal Aid Department, Department of Justice and Social Welfare Department?

The collaboration and cooperation with all stakeholders is just indispensable for our effective provision of services. Earlier on, I gave the example of the Social Welfare Department because our target applicants are very much the same. From time to time, our requests for our service come from the Social Welfare Department. In relation to those cases, we will have to cooperate with them constantly and continuously. For those clients, front-line social workers will be best suited to conduct investigation or obtain information about the cases. That information will then be passed on to us for our handling.

As for the Department of Justice, normally they will be performing the role of legal adviser to the Social Welfare Department as they are like the lawyers of all government departments. Our Office needs the DOJ's assistance in putting forward appropriate legal documents. For some types of cases, we actually will have constant correspondence and communication with them.

With the judiciary, we adhere to the judges' directions as well as orders, and our reports will be perused by them. Then, they will make further directions for the purpose of additional deliberation or resolution of the case. We have to work as a team with the judiciary and provide our assistance and input to judges. Apart from these, we are also grateful for NGOs' referrals and assistance. Being part of the community, they are the front line. They communicate with those who are in need of legal service. And if their needs are to be catered for by the Official Solicitor's service, then they can be referred to us.

10 The Office recently has been handling surrogacy cases, could you share with us more about the Office's role in this type of cases?

It is noticeable that the Official Solicitor has been more involved in this type of cases. I think this phenomenon actually originated from two aspects. Firstly, there are more and more surrogacy cases nowadays than before. They may be originated from different types of family, from traditional nuclear families to same-sex parents families in some cases. The trend of engaging surrogacy services is increasing.

Another aspect is that for surrogacy cases, the main claim or order sought by the applicants are always parental orders. They primarily seek an order from the court to declare their parentage and custody over the child in question. This is basically the parental order under the Parent and Child Ordinance (Cap 429). As a matter of fact, parental orders are the fundamental sources of the rights of the child in question, his or her welfare and interests, because this order is the basis of his or her legal right in connection with the parent. In that sense, our involvement is still to safeguard the welfare and interest of children. We provide our assistance from the perspective of representatives of the children. We report to the court and provide another perspective – the child's perspective – to enable the court to deliberate and make decisions regarding parental orders. In a way, we assist in safeguarding children's interest.

We can observe that there is an increase in our involvement in these cases. As mentioned, the phenomenon originates not only from the growing number of cases, but also the intention of the judiciary to get us involved so that the interests of the children in question will be more thoroughly safeguarded.

11 The Official Solicitor's Office seems to be involved in a wide range of age groups, from children to seniors. So, on that note, the increasing ageing population has caused dementia to become a public health issue

for Hong Kong. Do you see an increasing demand for the Office to handle MIP's proceedings and how ready is the Office for the upcoming challenge?

We have actually already witnessed the increase and experienced the pressure. Around 2005 when the Practice Direction for Part II applications (Mental Health Ordinance) was first promulgated, the referral numbers were relatively small. But nowadays we have mental health applications and referrals coming in every week. The weekly number is probably more than what we were dealing with every month back in 2005 or 2006.

But for the period in time back in 2005 and 2006, our workforce was a little bit smaller. But then yes, we can see a progressing and increasing trend. This is unavoidable and undeniable. But we will see if we can have more human resources, then we can more capably and comfortably deal with all these pressures. But then we can still cope with it presently.

12 The Official Solicitor's Office was established in August 1991. In the course of these many years of institutional experience, do you think any legal reform is necessary to the department in the interest of expediency and case turnover?

Well, I think the statutory framework is clear and flexible enough. We have a clear idea of our statutory role, our target clients and our additional duties. And there is also a provision that the judiciary Chief Justice in the interest of justice can call upon us to render assistance and intervene in particular cases. So I think the legal framework is flexible enough.

As we can observe, the real problem is whether we can reasonably cope with the need for our services with our limited human resources. But if the economic situation is better in the coming years, I hope that our office will be one of the few that the government can think of to enhance our human resources.

13 Do you envision any potential issues that law students in Hong Kong should be aware of or focus on?

I think as a law student in Hong Kong, one should always remember and bear in mind that Hong Kong's common law system is a long established system which is the strength and the lifeblood of our city. That is our important asset. This precious asset is also one of the major keys to Hong Kong's success in the past. And I think it will continue to be one of the major keys to Hong Kong success in the future. So, as a law student, one should always remember and treasure this. In the past few years people were talking about students who got good results all opted to become a doctor instead of becoming a lawyer. As a lawyer, it should be fair to remember our key asset which has contributed a lot to Hong Kong's success..

14 Would you like to share any final messages to law students in Hong Kong?

I want to say that becoming a lawyer or becoming a provider of legal service should still be a meaningful endeavor for a young person. Whether you eventually work in the private sector or as a legal service provider in the public sector, you are doing something crucial and indispensable to the society as a whole and to all walks of life. You can imagine one cannot be far away from the need of legal services.

Talking from my experience in the realm of personal law, nothing is trivial. For me, IPO, joint ventures and big businesses are not all that matter. Nothing is trivial in the realm of personal law. Say for example determining the custody and care of a child in matrimonial disputes. That's very important for them – for the child in question. The impact is very profound. And if you are the one involved in it, it cannot be trivial, right? And talking from my experience, here in the office, we have to consider and plan a lot for an elderly who has become incapacitated. We were even involved in considering the funeral package of those incapacitated seniors. Because for those cases which fall into our hands, most of the seniors are without any relatives. So, for appropriate cases we have to plan ahead and arrange for their funeral services as well. That could sound trivial to some people. But I thought to myself, "No, it's not trivial." I think if you are in this job, you will be touched. You will have the feeling that you've done something important and meaningful. That you, as a court appointed committee, have properly taken care of this elderly, including planning carefully for the purchase of funeral packages for the elderly. That's really something from my perspective. I think that nothing is trivial.

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