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FEATURE
MR. VICTOR DAWES SC
CHAIRMAN OF BAR ASSOCIATION

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Letter from the Editors

Dear readers,

Though it has only been five months since we published our last edition, much has developed in Hong Kong's legal landscape. With the slowdown of the coronavirus pandemic, the Hong Kong government recently lifted all mandatory mask-wearing requirements. Normal travel between Hong Kong and the Mainland has also fully resumed. On the other hand, the Hong Kong Court of Final Appeal handed down a landmark decision that allows transgender people to amend their gender listing on identity cards without having undergone full reassignment surgery. The case is a significant step towards further discussions on gender recognition in Hong Kong.

In this edition, our feature interview inquires about the responsibilities and current developments of the Hong Kong Bar Association. Featuring Mr. Victor Dawes SC, Chairman of the Hong Kong Bar Association, the Gazette examines the Bar's vital role in regulating and supporting barristers, ensuring proper administration of justice, and collaborating closely with stakeholders like the Law Society of Hong Kong. This interview not only aims to introduce our readers to the meaningful work of the Bar but also seeks to demonstrate the essential aspect of the Bar: speaking out when there is a rule of law issue.

As usual, students' contributions form the backbone of the Gazette. This issue presents an extensive collection of articles covering topics from legal protection of children's online safety to compelled apology as a civil remedy in Hong Kong and Taiwan. Our editors also explored exciting commercial issues such as the listing regime for SPACs in Hong Kong and antitrust regulatory concerns of private equity in the US.

The Gazette has received an unprecedented number of articles for this edition. We thank these writers for their enthusiasm in sharing their thoughts and observations in their articles. Furthermore, we thank our editors for their tireless work with and support of the writers. We hope our articles provide a general dose of legal knowledge for all our audiences.

We hope you all have a delightful Easter holiday break and a fruitful 2023 without masks!

Best regards,

Bertha Chui and Tony Lin
Editors-in-Chief

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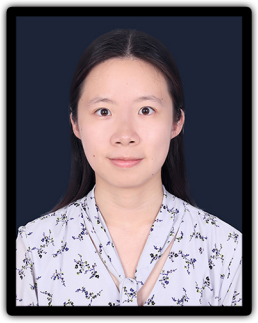

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COMMON LAW JURISPRUDENCE

Do Judges Play a Political Role in addition to Legal Duties in the United States?

Xintong Chen

Generally speaking, a common law judge is the prince of the law empire, whose legal duties are to (i) interpret pre-existing legal provisions; (ii) respect legal precedents, and (iii) apply legal doctrines to cases appropriately, especially when conflicts arise between different laws. In theory, the judge's role is solely legal, and irrespective of political factors.

However, judges cannot expect themselves to make judicial decisions fully objectively disregarding their political beliefs. This assumption might be over-idealistic and unrealistic, after all. As Richard Posner points out, political attitudes—conservative and progressive—inevitably have an impact on judges' reasoning. In practice, few observers will deny that political factors can significantly shape a judge's legal ruling. Judges' final decisions can thus reflect their political preferences.

The way judges are chosen for their seats on the bench can also be politically influenced. In the United States, for example, Constitutional Law stipulates that Supreme Court justices, Court of Appeals judges, and District Court judges are nominated by the sitting President of the United States. A judge appointed by a Democratic or Republican president may well make judicial decisions differently on the same issue, based on this political divide. Research suggests that 62% of Democratic appointees are likely to 'issue a liberal ruling' while the equivalent percentage of republican appointees is only 36%. Other research indicates that Democratic judicial appointees are more willing to be favour marginalised groups, such as the working class, members of the LGBTQ community, and ethnic minorities.

We can see how politics can influence judicial

decisions. In the United States, conservative, Republican-appointed judges are more likely to adhere to entrenched laws. In contrast, while liberal, Democrat-appointed judges tend to push for legislation that changes existing law and results in social change.

In an age of breakneck social change, current social events have thrown more curveballs at judges than ever before. The LGBTQ movement has been one of these contemporary political hot topics in the United States.

Obergefell v. Hodges (2015), a landmark case relating to the marriage right of homosexual partners, displays that political values can influence judicial decisions. A majority in the Supreme Court ruled that all states should protect same-sex marriages that are legally recognised in other jurisdictions. Notably, among the voting majority on the bench, most of the judges were appointed by Democratic presidents (e.g. Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan). In contrast, the minority on the bench - who fiercely rejected the legalization of same-sex marriage - composed of judges whom Republican presidents appointed.

The ruling of *Obergefell* illustrates how judges appointed by Democrats tend to respond positively to current political appeals (in this case, by LGBTQ groups). Democratic judges tend to be more dedicated to protecting the rights of the LGBTQ community and appear more willing to challenge 'patriarchal heteronormativity' rooted deeply in U.S. society.

The final judgement of *Obergefell* is far-reaching. It led to the enactment of the Respect for Marriage Act in December 2022, which stated that all states are obligated to protect homosexual marriage. The judgement made by the Democratic-appointed, liberalism-oriented judges brought about a huge progressive, and more notably, political change in the United States.

It can be concluded that judges not only perform legal duties but, for better or worse, can play a political role, in addition to a legal one. They tend to symbolise the political position of their appointors and can use their seat on the bench to promote political changes if they deem it suitable. Whether or not this is desirable to have is, perhaps, up to each jurisdiction to decide.

LEGAL REMEDY

Outdated Fine System in Hong Kong: Calls for Sustainability, Deterrence, and Equality

Ho Shuen Him Gideon

'No Smoking. Maximum Penalty: $5000.' Often in everyday life, we pass by these signs on the MTR and pay no thought to it. Fined offenders would simply hand over their money according to the payment notice and move on. This leaves several overlooked questions: Where does the money go? Has the maximum penalty always been $5000? In this article, I will first briefly explore how the statutory framework surrounding fines in Hong Kong function. Despite being a source of revenue, Hong Kong officials and legislators had failed to update fines according to the times and allowed inflation to erode the efficiency of the system. I shall advance an argument to reform lump-sum fines to income-based fines based on their advantages to sustainability, deterrence, and equality. Then, I shall consider potential problems with implementation on deterring certain classes of defendants and serving as a source of revenue and show that the objections are ultimately unfounded.

STATUTORY FRAMEWORK ON FINES AND PROBLEMS WITHIN

To put it simply, a fine is a sentencing option that requires a convicted defendant to pay a lump sum of money determined by the court. There is surprisingly not a single dedicated ordinance in Hong Kong that comprehensively deals with all aspects of administering a fine. In general, the Criminal Procedure Ordinance (Cap 221) **(CPO)** ss113A-114 deals with the judiciary's powers in administering the fine and the Public Finance Ordinance (Cap 2) sets out several details after the collection of fines. The system of fines contrasts the regime on fixed penalties, where in the latter, no conviction is involved before attaching liability and the amount is purely stipulated by legislation.

The destination of a fine or penalty is, under the PFO s17A, the general revenue. However, the Chief Executive may also 'direct the payment to any aggrieved person, or to any person whose information or evidence has led to the conviction of the offender or to the recovery of the fine or penalty, of such proportion of the fine or penalty as he may think fit.' In other words, every fine or fixed penalty would directly go to the government, which may elect to give an informant a cut. Yet, this source of revenue only represents 0.5% of the total revenue in 2021-22 despite outperforming previous estimates.

This strange inefficiency may be explained by the amendment history of the CPO. CPO ss113B-C and Sch 8 stipulate the levels of fines corresponding to a monetary amount for criminal offences. The sections were first amended by Bill 58 of 1994, and provided power to the Chief Executive to 'amend the amounts [set out in Schedule 8 or the table in s113C(2)] to reflect his opinion of the effect of inflation on the value of the amounts.' However, the powers had never been used since the promulgation in 1994. In comparison, cumulative inflation between 1994 and 2022 would have been 81%, meaning a level 1 fine of $2000 would have been $3627.92 today. By not amending fines according to inflation, fines would not only lose their value as a source of revenue but also lose their deterrent effect over time.

Besides weakening the sociological effects of fines as a sentencing option, this failure of maintenance also disproportionately impacts the working class over the top earners of Hong Kong. Between 1994 and 2018, the bottom 50% of the Hong Kong population had their wage share drop from 15% to 11% and the Gini coefficient rose from 55% to 62%. Having defined fines with a table of levels, a level 2 fine of $5000 could be enough to pay rent for a working family while a senior partner of a law firm may earn it in a matter of minutes. It must be noted that the common law provides safeguards to the poor in that the court will assess the defendant's financial capabilities as a whole and not impose a fine that the defendant does not have the means to pay: *HKSAR v Lau Wing* (1998). For rich defendants, however, there is no similar

discretion to go beyond the maximum fine under the stipulated level in CPO Sch 8. In effect, the court can only punish working-class offenders.

DAY FINES: A SUSTAINABLE, DETERRENT, EQUITABLE MODEL

Given the outdated nature of the Hong Kong system, this is an opportunity to consider reforms. A system that Hong Kong may adopt is the income-based fine, or day fine. This system is widely used in Europe, South America, and our neighbouring Macau SAR. The Penal Code of Macau Art 45 provides that fines shall be calculated in days, no less than 10 days and not more than 360 days, on a rate of 50 to 10,000 Macanese patacas based on the person's financial situation. This system could arguably provide far stronger results in terms of revenue, deterrence, and equity.

Firstly, the pursuit of proportional fines will punish rich defendants to bring in more revenue than the current Hong Kong system. The use of income-based fines is inflation-proof, as it is referential to each defendant's financial situation provided there are no absolute monetary caps on the fine. As the defendants' incomes rise according to inflation, the law does not have to change as the offence can simply state the maximum number of days for the fine. Additionally, other common law countries such as the US and UK had previously experimented with day fines and found promising results. In the 1992 experiment by the US National Institute of Justice, Staten Island and Milwaukee used a system similar to the Macanese day fine. The Staten Island experiment recorded an increase in the value of fines ordered by 18%, and Greene estimated that a pure day fine system without caps could have increased revenues by 80%. Both experiments found positive results in fine collection, such as the Milwaukee experiment discovering that the rate of poorer defendants paying in full doubled. Based on these favourable results, Hong Kong may see similar increases in revenue when adopting a pure day fine to capitalise on the richest defendants.

Thus, the richest defendants will also face proper deterrence, unlike the current system. A joint empirical study by the University of California Berkeley and the University of Toronto showed that upper-class individuals are far more willing to engage in unethical behaviour compared to the poor in various activities. For example, individuals of the highest class were thrice more likely than the lowest class to break traffic laws while driving. The study conducted seven activities in total and found consistent results. Ultimately, these statistics suggest that richer individuals require more deterrence than poorer individuals, which justifies the need for an income-based system. An income-based fine will ensure that upper-class defendants feel the same financial impact of the fines as a working-class defendant faces when committing the crimes. It is the subjective impact of the fine that defendants fear, not the nominal value.

With equality in subjective impact, income-based fines would likely be more in line with the Hong Kong Bill of Rights Ordinance (Cap 383) Art 22 right to equality before the law. Applying lump-sum fines itself may be a form of indirect discrimination against the working class in Hong Kong, analogous to *William Roy Leung v Secretary for Justice* (2006). It is a blanket system which impacts a class more than another, which is only saved by the interventions of the common law in sentencing. An income-based fine is a direct measure of proportionality which solves this problem, as it demands all defendants to pay the same proportion of their financial income for their wrongdoing regardless of their class and station.

POTENTIAL OBJECTIONS AND SOLUTIONS

Of course, change inevitably leads to objections to the proposed idea. Firstly, some may consider that the level of deterrence is perfectly adequate after inflation. However, some statutory offences would not support this view. For example, Employment Ordinance (Cap 57) s63A(4) makes a contravention of s72A(3) liable to a level 5 fine. The offence prohibits public officers from disclosing trade secrets from their investigations. The $50,000 maximum fine would be a mere fraction of the profits of a potential defendant who starts a business by disclosing profitable privileged information. If there were any deterrence, a fiduciary action for secret profits would far overshadow the fine. This is not considering recent legislative proposals on the topic. This December, the HKSAR government also conceded that fixed penalties from 2003 are outdated and have to be doubled. Given that CPO Sch 8 fines are a decade more outdated than fixed penalties, the same argument would overwhelmingly apply to the CPO fines.

Even if they were satisfied that the current level of deterrence was problematic, opponents may question what the court would consider if the defendant is currently unemployed or without income. A defendant without income would seem to logically suggest a fine of zero and impose no deterrence. This objection can be solved by considering the Macanese

law. PCM Art 45 provides a minimum income rate of 50 patacas, which would still provide a bare minium deterrent for unemployed individuals. This practice is common amongst European countries as well. Alternatively, PCM Art 46 allows substituting a fine with 36 to 380 hours of the defendant's labour, executed during normal working hours but without consideration of holidays or weekends. An unemployed defendant can, in most circumstances, work to repay the fine to society. Besides labour, imprisonment may also be an alternative option to the fine under PCM Art 47, which is already available here in Hong Kong in event of non-payment (CPO s113A(3)). Either of these measures may iron out potential issues with the under-deterrence of the unemployed.

Opponents may also take issue with revenue-based motivations. Firstly, some may question whether considering fines on a basis of revenue is appropriate in criminal justice. This is an ethical argument on the basis that it would corrupt incentives in law enforcement which would lead to either the government targeting richer suspects or legislating in favour of larger fines. Schierenbeck argues that this is misguided, as rich suspects are often powerful businessmen or political figures, which would likely even out the impact of the incentive. Beyond that, more revenue for the public purse is ultimately for the benefit of the greater public, which suggests more money for wider and better essential services. The other revenue-related argument comes in the form of efficiency and costs. Given that each fine requires means-testing, the system would seem to cost more time and money than a lump sum. The Milwaukee experiment found a decrease of 31% in adjusted revenue compared to a control group. On this issue, the experiments found no impacts from additional costs or delays. Meanwhile, the effect on revenue may differ depending on multiple factors such as the local distribution of wealth and the incidence of crime. The study on the experiments had stressed specifically that the two experiments ultimately had a statutory maximum imposed on the fine, which would affect the revenue data. In any event, a progressive approach to the units of day fines could also be introduced to secure more fines from rich defendants, considering that socio-psychological studies proved that they are more prone to unethical behaviour and require more deterrence. Such an approach had already been taken in *HKSAR v Lau Wing* for the current lump-sum fines.

CONCLUSION

The fine system in Hong Kong had been outdated and eroded by inflation for 36 years. Upper-class defendants were the only ones who managed to take advantage of the system, for growing inequality gave them more wealth to buy out their fines. An international survey provides that a far better system had already been in practice globally, including our neighbour Macau. The income-based day fine will be sustainable economically, provide more deterrence for the upper classes that are prone to unethical behaviour, and equalise the subjective impact of fines across the classes. Perhaps one day, anti-smoking signs will say "No Smoking. Maximum Penalty: 1 month of work."

LEGAL REMEDY

Constitutionality of Compelled Apology as Civil Remedy Hong Kong-Taiwan Comparison

Kevin Ling

INTRODUCTION

In civil cases, courts may grant an order mandating the accused to make a public apology to the victim, which is known as "court-compelled apologies." Yet, these apologies are particularly impugnable when recalcitrant defendants refuse to accept responsibility, and the order of apology is imposed against the free will of the defendants. As such, although court-compelled apologies are powerful in achieving retributive justice, it remains debatable whether the granting of such orders violates constitutional rights and individual freedoms.

Since *Ma Bik Yung v Ko Chuen* (2000), the Hong Kong Court of Final Appeal **(CFA)** has confirmed the constitutionality of court-compelled apologies. Nine years later, the Taiwan's Constitutional Court **(TCC)** decided the same in *J.Y. Interpretation No. 656* (2009) **(Compelled Apology Case I).** However, the decades following these respective decisions have seen the divergence of the two jurisdictions in their views on court-compelled apologies. While Hong Kong's court in *Wave Chow v Liang Jing* (2021) progressed to widen the applicability of court-compelled apologies beyond discrimination and harassment cases, the Taiwanese court ceased to regard these apologies as constitutional in *Judgement 111-Hsien-Pan No. 2* (2022) **(Compelled Apology Case II)**.

This article compares the judicial attitudes towards court-compelled apologies between Hong Kong and Taiwan. It argues that the Hong Kong approach, which allows courts to exercise residual discretion in granting apology orders, is more preferable.

1. TAIWAN'S EXPERIENCE: COMPELLED APOLOGY CASE II (2022)

FROM COMPELLED APOLOGY CASE I TO II

Taiwan's Civil Code Article 195(1) stipulates that 'if one's reputation has been wrongfully damaged by another, the injured person can claim the taking of proper measures for the rehabilitation of one's reputation.' As the "proper measures" for this purpose, the courts in Taiwan have resorted to granting apology orders which mandate tortfeasors to apologise publicly to the injured as a civil remedy. In *Compelled Apology Case I*, TCC confirmed the constitutionality of granting such orders inasmuch as the apologies are not self-humiliating or do not degrade humanity.

In ten years, however, the decision of *Compelled Apology Case I* was overturned. In *Compelled Apology Case II*, four petitioners (three private individuals and one press outlet) who lost in various defamation cases were ordered to make public apologies. The petitioners disagreed with the court's decision. They applied for a judicial review to TCC collectively contending that such orders had unlawfully restricted their constitutionally guaranteed freedoms and rights, and pleaded that the Compelled Apology Case I must be overturned. In the end, the majority of TCC held in favour of the petitioners and declared court-compelled apologies unconstitutional for contravening (1) freedom of expression of both natural and legal persons and (2) freedom of thought and conscience of natural persons.

COURT-COMPELLED APOLOGIES CONTRAVENING FREEDOM OF EXPRESSION

In Taiwan, freedom of expression encompasses the active freedom of expression and the passive freedom of not expressing. Such freedom may be restricted by law subject to judicial scrutiny. Depending on the types of restrictions, different levels of scrutiny apply.

In Taiwanese jurisprudence, two types of restrictions on speeches are differentiated, which are content-

based and content-neutral restrictions under the "two-track theory" imported from American free speech jurisprudence. The former restricts expressions based on their viewpoints or subject matter; it is considered more intrusive to democratic deliberation and peoples' right to know, and therefore are subject to stricter judicial scrutiny. The latter merely restricts the means of delivering a message, and is therefore subject to relatively lenient scrutiny.

Speeches subject to content-based restrictions are further divided into high-level and low-level speeches. High-level speeches including political, academic and religious speeches are regarded as falling under the crucial scope of protection for freedom of expression. Restrictions on them, hence, require more robust scrutiny, typically under strict scrutiny review.

Court-compelled apologies, as TCC noticed, involved both content-based restrictions and content-neutral restrictions, which interfered with tortfeasors' individual autonomy or even obstructed freedom of press indispensable to democratic deliberation. Additionally, TCC found apologies made under such orders were high-level speeches. Thus, the granting of apology orders should therefore be subject to strict scrutiny review. In other words, before handing down any apology order, the court must prove that (1) the aim of court-compelled apologies furthered compelling public interest, (2) court-compelled apologies were directly related to such aim, and (3) there was no other reasonably less restrictive means that could achieve the aforementioned aim.

Applying the test, TCC held that court-compelled apologies are unconstitutional. First, although court-compelled apologies could comfort the injured psychologically, restore the victim's reputation and reflect society's values, defamation cases often concern disputes between private individuals. The private nature of these cases hardly rendered the proclaimed aims qualifying as fostering compelling public interests. Second, TCC observed that compelled apologies were often insincere. It was doubtful whether these apologies could rehabilitate the injury caused; TCC disagreed that there is a direct relationship between the means and the end. Third, there were in fact other reasonably less restrictive means to remedy the injury. TCC proposed that courts might order the judgment against the tortfeasors be published at their own costs, so that the vindication of reputational injury could be done without compromising passive freedom of not expressing.

For the above reasons, TCC found that the granting of apology orders disproportionately restricts freedom of expression. Court-compelled apologies were found to be unconstitutional in Taiwan.

COURT-COMPELLED APOLOGIES CONTRAVENING FREEDOM OF THOUGHT AND CONSCIENCE

Moreover, court-compelled apologies have contravened natural persons' freedom of thought and conscience. Freedom of thought protects one's conscience. It prevents people from having to express thoughts contrary to their consciences or normative beliefs. Freedom of thought and conscience is thus fundamental to human dignity, and no interference from the State should be permitted.

TCC noted that court-compelled apologies may disregard tortfeasors' true intentions, and demand them to express thoughts contrary to their will. The apology order, in fact, imposed the court's judgements on tortfeasors, who might otherwise refuse to apologise or act in an apologetic manner. The way that apologies are forced from unwilling individuals could potentially cause self-denial and self-humiliation, and put their internal thoughts and dignity at risk. In light of this, TCC held that court-compelled apologies have contravened freedom of thought enjoyed by natural persons, thereby rendering them unconstitutional.

2. HONG KONG'S EXPERIENCE: *MA BIK YUNG* (2001) AND *WAVE CHOW* (2021)

COMPELLED APOLOGIES IN RARE AND EXCEPTIONAL CASES ONLY: MA BIK YUNG

In Hong Kong, the court had granted an apology order in *Ma Bik Yung*, which was a disability discrimination and harassment case. Holding in favour of the plaintiff, the District Court **(DC)** granted an apology order against the uncooperative defendants in addition to monetary damages. DC relied upon Section 72(4)(b) of the Disability Discrimination Ordinance (Cap.487) **(DDO)**, which sets forth that DC may order the respondent to perform 'any reasonable act or course of conduct to redress any loss or damage suffered by the claimant.' On appeal, the Court of Appeal quashed the apology order on the grounds of ultra vires, despite upholding the harassment finding. Ultimately, CFA confirmed the power of DC to grant an apology order per DDO, notwithstanding that it did not restore the order.

The respondent in *Ma Bik Yung*, similar to his Taiwanese counterparts, submitted that an apology order would necessarily infringe (1) freedom of thought or conscience and (2) freedom to manifest

one's belief and freedom of expression. CFA, however, rejected the respondent's sweeping proposition and held that the constitutionality of granting apology orders must be reviewed on a case-by-case basis.

As a starting point, CFA held that when granting an apology order against unwilling defendants, the court must be satisfied that an insincere apology would redress the plaintiffs' losses and damage to some extent, and such apology was a reasonable act for the defendants to perform in the circumstances of the case. CFA added that such order could only be done in rare cases with exceptional circumstances, and courts must ensure that the granting of such order was compatible with the freedom and rights guaranteed by the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap.383).

In deciding what counted as "rare and exceptional circumstances," CFA outlined an expansive range of factors to be considered. Courts should consider the gravity of defendants' unlawful conduct and the nature and extent of the plaintiffs' losses and damages. When courts need to examine potential infringement on constitutionally-guaranteed rights and freedoms, they may holistically consider defendants' circumstances, reasons for refusing to apologise, nature and aim of the discrimination legislation in question, the interests of the community, etc. It is the courts' duty to scrutinise the alleged contravention in each case, and the power of granting an apology order must be exercised cautiously.

POTENTIAL WIDER APPLICATION OF COURT COMPELLED APOLOGIES AS A REMEDY: WAVE CHOW

Unlike Taiwan, Hong Kong's judicial discussion on apology orders typically concerned discrimination and harassment cases. Recently, Hong Kong foreshadowed extending its application to other circumstances. In *Wave Chow*, a defamation case, although no compelled apology was made in that particular case, the court held that granting orders of apology fell within its general equitable jurisdiction. This suggests that applicability of apology orders might well go beyond the discrimination context in *Ma Bik Yung*, or even beyond the libel context in *Wave Chow*. Indeed, the court may grant apology orders where it was just and appropriate, subject to principles underlined in *Ma Bik Yung*.

3. TAIWAN-HONG KONG COMPARISON: WHY SHOULD COURTS BE LEFT WITH RESIDUAL DISCRETION TO DECIDE?

Whilst TCC's reasoning might be praised for its progressive approach in protecting rights, it is weak in a few respects.

First, the use of strict scrutiny standards to evaluate the constitutionality of court-compelled apologies might set a hurdle that is too high. Although TCC held that court-compelled apologies were "high-level speeches," the classification is doubtful, especially considering its difficulty to fit into the conventional spectrum of political, academic, and religious speeches. Indeed, apologies are arguably not as important as traditionally recognised high-level speeches which directly fosters democratic deliberation. The use of strict scrutiny standards, from the outset, might be too high of a hurdle.

Second, it may not be entirely right to deny that these compelled apologies could rehabilitate the injury. A court-compelled apology was typically made upon the plaintiffs' request and under the court's order. It is quite possible that the aggrieved plaintiff actually foresees the potential insincerity of a compelled apology, and nonetheless appreciates it. Although an insincere apology may not adequately relieve the plaintiff from his injury, it is nevertheless too simpleminded to speculate that insincere apologies can never rehabilitate the injury of the plaintiff.

Third, TCC seems to over-exaggerate how court-compelled apologies infringe freedom of conscience. In his stinging dissent, Justice Jan criticised the majority's view by giving an analogy of the provision governing parent-child relationship. Civil Code Article 1084(2) provides for parents' duty to educate their minors. Suppose a minor injured another party and were ordered by their parents to apologise, an action governed by duty to educate their minors. The reasoning of the *Compelled Apology Case II* may suggest that this action governed by duty would infringe the minors' freedom of conscience, and thereby rendering the said provision unconstitutional as well, which is perplexing upon contemplation. As such, precipitately accepting that any form of compelled apologies is against one's will would necessarily infringe the one's freedom of conscience could be dangerous. Particularly, such orders are made where injustice done has already been ascertained through court's adjudication and judgment. Relatively speaking, the infringement on freedom of conscience, if any, is rather justifiable. But if the absolute view of *Compelled Apology Case II* is to be broadly accepted, the ripple effect of view can be worrying and menacing.

Fourth, it is perhaps worth considering the public interest in protecting an individual's reputation. In the European case of *Pfeifer v Austria* (2007), the court advanced that a person's reputation forms one's personal identity and psychological integrity. Protecting one's reputation is of value, and protecting individuals' right of reputation produces mutual and communal value on the societal level. In this light, one's right of reputation is paramount if viewed in aggregation, instead of being merely important or legitimate on the individual level. Therefore, the protection of individual reputation shall be a matter of compelling public interest just like the protection of other guaranteed rights. It follows that the proclaimed aim of protecting one's right of reputation should survive the strict scrutiny review.

Comparatively, Hong Kong's approach (also the Taiwan's approach after *Compelled Apology Case I* but before *Case II*) that allows courts to exercise discretion depending on the circumstances of each case is preferable. Competent courts will consider all relevant factors, particularly the potential infringements on guaranteed rights and freedoms, and land on appropriate decisions and directions, such as whether the apology should be private or public, or the time, form, extent and manner of communication and publication, etc. Thus, the proper balance between rehabilitating one's injury and protecting guaranteed rights and freedoms can likely be struck upon due considerations by courts.

After all, it is a matter of whether court-compelled apologies should be accepted as a civil remedy. The conflicts between court-compelled apologies and constitution-guaranteed freedoms caused Taiwan's courts to cease granting apology orders. But only a stone away, Hong Kong courts allow for case-by-case review regarding circumstances that may require compelled apologies.

It is safe to say that each of the approaches consist of its own merits and demerits. Although this article exposes the flaws of Taiwan's approach and favours the more flexible approach of Hong Kong, some merits should nevertheless be given to the courts of Taiwan in respect of their reflection on the proportionality of their decisions, which showcases the rule of law. This article prefers the case-by-case approach of Hong Kong because Taiwan's indiscriminate forbiddance of court-compelled apologies, in the name of safeguarding fundamental rights, lacks flexibility and risks diluting the normative authority of guaranteed rights and freedom.

However, what truly matters is whether court-compelled apologies can at the very least function as a way of remedy. Considering this matter from different perspectives may bring us with very different answers. But in light of constitutionality, Taiwan's approach is less favourable than Hong Kong's approach in various respects.

INTERNATIONAL LAW & TRENDS

A Critique of the UK's Regulatory Response to Net Zero in the Climate Change Act 2008

Mateusz Slowik

INTRODUCTION

The United Kingdom's Climate Change Act **(the Act)** 2008 is the first legal instrument to set legally binding mitigation targets in the world. The Act creates various obligations on the United Kingdom's **(the UK's**) Secretary of State (**the SoS**) in respect of the UK's long-term and interim targets for 2050. A particular novelty in the Act is the obligation on the SoS to ensure a Net Zero reduction in carbon emissions by 2050. The Act has served as a model for several other jurisdictions, for instance the European Union (**the EU**), where the EU's implementation of the European Climate Law (**the EU Regulation**) mandated Member States to achieve climate neutrality by 2050. This article focuses solely on the UK's domestic response to climate change, given that there is a special geographical dimension to the EU Regulation which 'promot[es] fairness and solidarity' between its Member States. Nonetheless, the ideas proffered in this article could similarly apply to that of the EU Regulation.

In light of the specific context and circumstances which the Act was created in and contributes to, I posit that the current regulatory approach to Net Zero in the UK is of limited effectiveness in addressing the climate crisis. This is largely due to two reasons. First, the low climate salience among politicians and the public. Second, overreliance on technocracy and information provided by scientific experts which creates the perception that issues in relation to the climate crisis can and have been solved. This article ultimately concludes by emphasising that institutional and political change are necessary to incentivise investments, which would, in turn, lead to a greater degree of salience and potentially strive towards the Net Zero target more effectively.

CLIMATE SALIENCE

The Act creates accountability mechanisms that are intended to empower the civil society. For example, the Committee on Climate Change (**the CCC**) has

a duty to address proposals and policies in respect of meeting carbon budgets before Parliament, report annually on UK emissions, and make statements on final budgetary periods. As concluded by McGregor et al, the CCC does not hold the government to account per se, rather, it acts in a monitoring capacity over governmental activity. However, this is then contingent on the civil society taking action to hold the government to account. This presupposes that climate change is a salient issue to the civil society, and that the civil society will seek to hold the government to account. Nevertheless, Lockwood argues that climate change has low salience among politicians and the electorate. Lockwood provides the example of a focus group finding that 'even for Conservative voters, what they dislike ... is not so much Cameron's [the then UK Prime Minister] actual policy positions but rather him 'just going on about the environment all the time'. However, this can be contrasted with a recent report which found that '[p]eople are more likely to view Kier Starmer as having better leadership qualities after hearing him talk about climate'. This supports Stokes' thesis that issues that are salient to the electorate may change over time. This highlights the need for constant engagement with the affected

Meanwhile, the climate issue becomes salient to politicians during the legislative process but disappears from the fore once it is enacted because of the perception that it has been 'dealt with'. Alternatively, another issue takes precedence, for instance the Financial Crisis in 2009. In other words, the implementation of the Act may see efforts to deal with climate change but it may also eventually serve 'as a disincentive for broader publics to become personally interested in the problem of climate change'. This contributes to the regulatory ineffectiveness of the Act because the actors tasked with the governance of the targets have little interest in climate change. This is not to say that the Act should be repealed and replaced to create a sense of urgency that was evident in the run up of the Act, however, it does call for a greater degree of engagement with the public. This requires institutional and political change, for instance, by creating vested interests which would incentivise investment in, what has been termed as, the 'Green Revolution'. Ultimately, the meaningful participation of the concerned publics about the issues that are important to them is essential for consensus building which increases climate salience. This in turn influences politicians, whose careers depend on their constituents, to maintain their engagement in the climate response.

TECHNOCRACY

The UK's 2050 target was initially set at 80%, before being amended in 2019 to Net Zero by virtue of section 2(1), which grants the SoS the power to amend targets if it appears that there has been a significant development in scientific knowledge. Such amendments are subject to an affirmative resolution procedure in Parliament. In relation to short-term targets, the SoS is obliged to set five-yearly carbon

budgets, which are meant to realise the Net Zero target. When setting carbon budgets, the SoS must take into account advice given by the CCC, provide reasons if it chooses not to follow the CCC's advice, and respond to the reports made by the CCC on the progress of carbon budgets and the likelihood of them being met. It is therefore evident that the Act places a great emphasis on targets and scientific expertise.

The emphasis on climate targets is important, given that targets help to address the 'credible commitment' problem since they act as legal and political incentives for the decision-makers to achieve the overarching Net Zero commitment. For instance, interim targets in the Act play an important role as a 'pre-commitment strategy' from the government to create greater certainty and assure businesses about the sustainability of the proposal. Further, targets help to contextualise the climate crisis and focus the efforts of policy and other stakeholders towards Net Zero, considering that target setting may be both ambitious and flexible since the duration of targets may extend beyond political cycles. In other words, targets are essentially 'political duties'.

Nonetheless, if the Act is to be effective in addressing the climate crisis, it must recognise how overfocusing on targets is counterproductive because the exercise is technocratic in essence and relies on scientific expertise, which neglects aspects of public engagement. An example is the Net Zero amendment in 2019, which was subject to the affirmative procedure in the UK Parliament whereby Members of Parliament and Lords were given a vote on whether to approve the secondary legislation as it was laid before them without the chance to change its content; in effect, a 'take it or leave it' vote. This is problematic because, despite the importance of policies that advance Net Zero, there is a danger that this ultimate 'public good' does not consider the effects on the 'everyday person'. This has been underscored by Armeni and Lee; a technocratic response reduces climate change to 'policy and technical measures to reduce emissions, without acknowledging the broader socio-political implications of the climate change crisis or other political priorities'. This is also recognised by Hilson, who notes that the focus on targets fails to consider the societal impacts. This contributes to the issues of valence and climate salience mentioned above, since the technocratic response 'may serve as a disincentive for broader publics to become personally interested in the problem of climate change'.

The Act's technocratic approach to achieving Net Zero is of limited effectiveness in addressing climate change because the public is excluded from the process and even the people tasked with scrutinising the legislation are not given the ability to influence its content. This contributes to the salience problem by creating a false perception that there is a solution to the climate crisis, further disengaging the electorate.

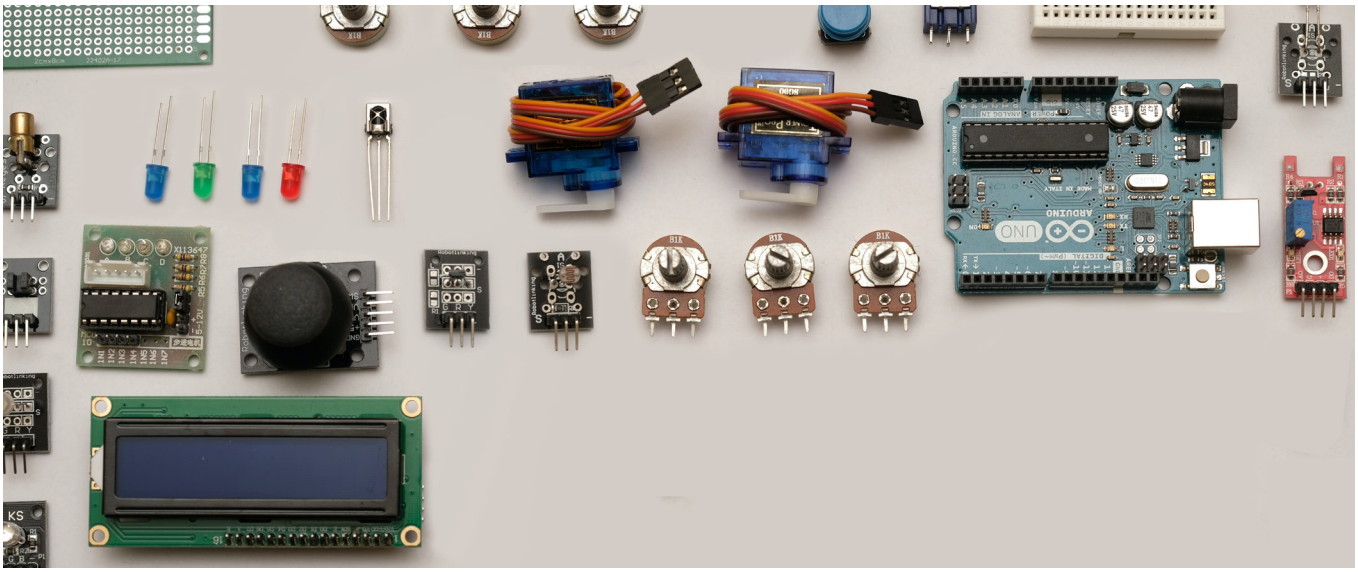
In relation to science, Hulme criticises the overreliance on scientific expertise because the uncertainty surrounding climate change will not be solved solely by scientific improvements. While science and politics are undeniably vital elements of mitigating the detrimental effects of climate change, public engagement is also paramount. It is fundamental to engage with the public in respect of potential social implications of the climate change crisis and the feasibility of possible solutions, which ultimately affect them. In addition, as stipulated by Armeni and Lee, the inherent limitations of relying on scientific expertise was exacerbated by the COVID-19 pandemic where expert knowledge on its own was insufficient in dealing with social consequences of the virus. This equally applies to climate change, especially since 'it is false scientifically to say that the climate future will be catastrophic as it is to say with certainty that it will be merely lukewarm'. In other words, it is important to engage with the available scientific information as well as with the people whose lives will be impacted by the climate crisis. In this regard, the Act falls short of addressing the climate crisis by neglecting the very people that will be affected by it.

CONCLUSION

The ultimate purpose of the Act lies in empowering the civil society. However, it fundamentally falls short of doing so as it excludes public engagement and places an overreliance on technocracy and scientific expertise. Institutional and political change are instrumental for climate change to become an issue with increased salience. Institutional and political change could incentivise politicians and businesses to meaningfully engage with the UK's regulatory approach to Net Zero, pulling the UK closer to addressing its contribution to the climate crisis. Moreover, public engagement in the process of mitigating the climate change crisis will have the positive effect of 'foster[ing] critical attitudes and democratic capacity, or generate a sense of "environmental citizenship"' if social implications of targets are taken into account.

Can Chinese Companies Claim Compensation for Their Investment in Canadian Lithium Minerals under Bilateral Investment Treaty?

Ruochen Lin



In the past two years, Chinese investors overseas have faced a riskier international business environment. On November 2, 2022, François-Philippe Champagne, the Canadian Minister of Innovation, Science and Industry of Canada (**ISED**), issued a statement regarding the government's decision to order three Chinese companies to divest themselves of their investment in Canadian lithium mineral, citing national security concerns in accordance with Section 25.4(1) of the Investment Canada Act (**ICA**). The government order (**The Order**) didn't mention any compensation.

Lithium is a critical mineral with high commercial value. It is the raw material of the lithium-ion batteries, which have a long life cycle and high power density and are widely used in new energy vehicles. Although the Order simply requires divestment, the aggrieved Chinese companies may still suffer direct loss of preparation cost and loss of future profits. The Order is binding and final under Section 25.6 of the ICA. In response, Chinese investors may seek to redress the wrong with two possible means: (1) they may apply for a judicial review of the government decision under the Federal Courts Acts, which is not the focus of this article; or (2) they may claim remedies under the Canada-China Bilateral Investment Treaty (**Canada-China BIT**).

Notably, bilateral investment treaties (**BITs**) have played an important role in promoting and protecting foreign investment. Can Chinese companies seek any remedy under the Canada-China BIT? Is there a competent tribunal with relevant jurisdiction to settle the dispute between Chinese companies and the Canadian government?

The Canada-China BIT indeed provides a dispute settlement mechanism between an investor of a contracting state and the other contracting state under its Part C. Specifically, if preconditions under Article 21 are met, investors can submit their claims to the International Centre for Settlement of Investment Disputes (**ICSID**) under Article 22.1(c). But the first

issue is whether the ICSID has the jurisdiction over such a dispute.

Unfortunately, Paragraph 1 of Annex D.34 of Canada-China BIT explicitly excludes the ICSID's jurisdiction under certain situations. Specifically, it provides that a decision by the Canadian government following an ICA review regarding whether or not to (a) initially approve an investment that is subject to review or (b) permit an investment that is subject to national security review, shall not be subject to the dispute settlement provisions under Part C. Canada's national security review targets both the pre-investment vetting and post-investment operation. This exception effectively helps Canada escape the ICSID jurisdiction when it breaches the Canada-China BIT over purported national security issues.

ICSID tribunals have always sought to balance between the investors' interests and the regulatory authorities of the host countries. In several ICSID cases, the aggrieved investors successfully challenged the security exception invoked by the host country before tribunals. In *Total SA v. Argentine Republic* (2017), Argentina invoked a security exception in customary international law to justify its breach of commitment on tariff preference, but the tribunal rejected it. But unlike the Argentina-France BIT, the Canada-China BIT not only provides a security exception but also expressly excludes the jurisdiction of international tribunals over a national security exception. In *CMS v. Argentina* (2005), Argentina did not object to the ICSID jurisdiction based on the security exception, but instead invoked it as a justification on the merit issue and it failed. The Canada-China BIT is also different from the Argentina-United States BIT, the latter of which includes a security exception but did not extend it to exclude the jurisdiction of international tribunals.

In light of the above, Chinese companies may encounter tremendous difficulties in claiming compensation before the ICSID tribunal. The lesson learned is that when Chinese companies plan to invest in critical minerals in Canada, or any countries with a similar security exception clause that excludes the jurisdiction of a competent international tribunal, they are better positioned and protected to file an application to relevant authorities for security review before closing the transaction. For example, Sinomine (Hong Kong) Rare Metals Resources Co. Limited (**Sinomine**) concluded a share purchase agreement with Tanoco, a Canada Lithium Mineral company. Sinomine filed a national security review application to Canada's ISED 5 days after signing and it secured the relevant approval after another 3 days.

A further example features another Chinese investor, Zangge Mining Investment (Chengdu) Co., Ltd (**Zangge Mining**). Its parent company disclosed that Zangge Mining concluded the share purchase agreement with Canada's Ultra Lithium Inc. on February 2, 2022 and formally registered the holding shares pending the approval of ISED on May 26, 2022. However, Canadian authorities subsequently issued a divestment order in November 2022. Considering the finality of a share purchase transaction, the divestment order effectively aborted all the efforts spent on this equity acquisition deal. If Zangge Mining had filed a security review application and secured an approval before closing the transaction, the order might only require it not to implement the investment under Section 25.4(1)(a) of the ICA.

Furthermore, where a divestment order is foreseeable, parties may also protect themselves by including an exemption clause in the investment agreement. Particularly, neither party should be deemed as breaching contractual obligations when a national security review delays or scraps an investment deal altogether.

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LAW AND PUBLIC POLICY

Should there be a Duty of Care to Protect Children Online?

Fontane Wong

INTRODUCTION

In November 2017, 14-year-old Molly Russell killed herself after viewing self-harm and suicidal content on various social platforms, including Instagram and Pinterest. The inquest into Molly's death revealed that she died from 'an act of self-harm whilst suffering from depression and the negative effects of online content'. The online content "romanticised acts of self-harm" and portrayed suicide as an inevitable consequence, which was a fatal blow to Molly and potentially many other teenagers like her. The Coroner's Court criticised social media platforms for exposing Molly to destructive content without her request.

1. A NEW BILL INTRODUCED

In the internet age, children are rendered more vulnerable to cyber risks. Thanks to the precedence of algorithms, social media platforms can turn into destructive rabbit holes that amplify negative and depressive content, which could pose serious threats to the well-being of teenagers. In light of this, in May 2021, the UK government introduced the Online Safety Bill **(the Bill)**, which was formally introduced into the Parliament in March 2022 after several amendments.

The Bill reflects the UK government's robust effort to create a safer online ecosystem and to hold tech giants accountable. Notably, a duty of care is imposed on online service providers. Some commentators regard the duty-based approach as a "third approach" distinct from the European Union's comprehensive Digital Services Act **(DSA)** regime and the United States' laissez-faire approach. Accordingly, this article argues the necessity to impose a duty of care on online service providers with amendments to some aspects of the Bill. It will also discuss the similar measures Hong Kong can pursue following the footsteps of the UK.

2. DUTY BASED APPROACH

Under the Bill, user-to-user service providers, such as Facebook and Twitter, and providers of search engines are subject to a duty of care, which requires them to conduct risk assessments and adopt mitigation measures when illegal content arises. The Bill has established several consequential duties to protect minors online.

First, regulated user-to-user services that are likely to be accessed by children are under a duty to carry out suitable and sufficient risk assessments to identify the presence of harmful content. "Children's risk assessment" is defined as an assessment of various matters, such as the user base, the level of risk of harm, ways in which the service is used, and the nature and severity of the harm that children might suffer. Second, services are required to take proportionate steps to mitigate and manage the risks of harm caused by illegal content, such as promptly taking down illegal content. Third, service providers bear a duty to prevent children from encountering primary priority content that is harmful to them. They must ensure the terms of service specify how children will be protected from the harmful content they may encounter. Apart from combating illegal content, the Bill also attempts to rein in content that is lawful but harmful, which may encompass 'grooming, bullying, pornography and the promotion of self-harm and eating disorders'.

3. ANALYSIS

Nowadays, algorithms tailor the information we receive based on our search histories and recommend relevant information, leaving children at more risk on the internet. Therefore, it is necessary and reasonable to impose a statutory duty of care on service providers, offering an incentive for tech companies to take reasonable steps to prevent or mitigate online acts. It avoids holding them liable for the illegal acts of users, but instead focuses

the failure of these providers to exercise due diligence to adopt preventive or remedial safety measures.

However, under the Bill, the duty imposed on service providers is overly broad in some respects, leading to concerns over compliance. The Bill's ambitious move to protect various values may also backfire as these values could conflict with each other.

i) LAWFUL BUT HARMFUL CONTENT

First, ambiguities as to what constitutes legal yet harmful content exist. When a service provider has reasonable grounds to believe that there is a material risk of the content having, either directly or indirectly, a significant adverse physical or psychological impact on a child of ordinary sensibilities, the duties set out in the Bill would bind the regulated service provider. The definition of 'lawful but harmful' is nebulous. "Harm" refers to 'physical or psychological harm' which may arise from the nature of the content, the fact of its dissemination, or the manner of its dissemination. In other words, innocuous content repeatedly sent to an individual could constitute harm, as repetitive acts could be intimidating. However, as aptly observed by the House of Lords, a duty to govern legal but harmful content online is 'not the right approach.' If a certain type of content is sufficiently harmful, it should be criminalised. The lack of clarity over "lawful but harmful" makes it difficult for companies to take action in practice. The test for "lawful but harmful" content is the impact on children of "ordinary sensibilities." Whilst this widens the scope of the Bill to keep more potentially "lawful but harmful" content out of reach for children, it removes the well-established standard of reasonableness. This may set the standard too low as outlandish information would be censored. For example, a post predicting the end of the world tomorrow might make a person of ordinary sensibilities experience significant adverse psychological impact, and thus the service provider bears a safety duty. But if reasonableness is a relevant attribute, such content would unlikely fall within the scope of harmful content. Psychological harm, which falls within the remit of 'harm' under the Bill, can be highly subjective. The legislation should recognise different susceptibilities of individuals and rule out mere annoyance as a kind of harm to reasonable individuals, otherwise potentially leading to the over-censorship of content on the internet.

ii) SCOPE OF DUTY

Second, the duty of care imposed on service providers is unduly wide and burdensome. The definition of user-to-user services and regulated search engines that is 'likely to be accessed by children' is not clearly defined. A wide range of service providers could potentially fall under this category. It will be down to the companies themselves to assess the likelihood of them being accessed by children, which brings a multitude of uncertainties. Once illegal content is discovered on the platforms, it requires swift removal on the part of the companies. As such, they are under a heavy burden to determine the legality of the content, which could place platform overseers in a difficult position. Although service providers are not required to remove any content until it is found to be illegal, they bear an onus to self-police and implement compliant systems. This may have cost implications as organisations are expected to invest more manpower and resources for compliance purposes. Furthermore, for fear of violation, platforms may simply choose to take down any seemingly illegal content as services that fail to comply with the rules face serious sanctions, including fines of up to £18 million or 10% of qualifying worldwide revenue, whichever is greater. This may lead to disproportionate censorship of content and eventually impediment to freedom of expression.

iii) COMPETING INTERESTS

The third concern is whether protecting online safety should be achieved at the expense of other cardinal values. The Bill strives to strike a scrupulous balance between online safety, freedom of expression, and privacy. When implementing safety measures, service providers have a duty to maintain regard for the importance of protecting users' right to freedom of expression and privacy. However, it is implausible to protect competing objectives without trade-offs. As service providers have a general monitoring duty to proactively look out for and remove harmful content on their platforms, end-to-end encryption would inevitably be undermined. It is only possible for companies to detect harmful materials contained in encrypted messages by reading them, thus sabotaging the freedom of expression, privacy, and anonymity. Due to the extraterritorial nature of the Bill, the civil liberties of all users, not just those in the UK, would be encroached upon. Therefore, the consequences can be sweeping and far-reaching. The Bill is overly aggressive in trying to protect competing interests in a single legislation but fails to recognise the difficulty in enforcement and the onerous duty imposed on service providers. As mentioned earlier, the penalties for failing to discharge the duty of care are stringent, so companies would naturally err on the side of caution and censor the content on their platforms

zealously. As such, it remains impossible to find a compromise between online safety, personal security, and freedom of expression on encrypted platforms.

4. LESSONS FOR HONG KONG

Currently, Hong Kong does not have a stand-alone legislation governing the online safety of children. The relevant laws in this area are piecemeal. For example, to regulate child pornography, the Prevention of Child Pornography Ordinance (Cap. 579) prohibits any person from printing, making, importing, or exporting child pornography, including distribution on online platforms. The Crimes Ordinance (Cap. 200) criminalises conduct such as using, procuring, or offering children to make pornography. However, there is a lack of a comprehensive legal framework governing the safety of children on the internet. It is suggested that Hong Kong should follow suit and consider adopting a "duty of care" regulatory model to impose a duty to redress illegal or harmful content online on service providers. It would be ineffective to merely rely on companies to self-regulate. A statutory duty of care regime helps to bring tech giants to heel before it becomes an afterthought.

To avoid the ambiguities arising from the "lawful but harmful" content in the Bill, the definition of lawful or unlawful content should be clearly set out. Otherwise, there may be instances where the content is illegal on the face of it, but when assessed in light of the context, it does not amount to illegal content and this would restrict the freedom of expression. To illustrate, words generally deemed incitement to violence may be quoted by a user for condemnation purposes, while connotations that do not standardly bear discriminatory meaning may amount to illegal content when used in certain combinations or contexts. Also, similar to the European Union's DSA, which is expected to come into force in 2024, the legislation should focus on restricting illegal content online. Harmful content should be made unlawful if it is sufficiently harmful and not placed under the obscure "lawful but harmful" content heading. To further redress illegal content found on platforms, various content moderation measures can be adopted to reflect the seriousness of the harm instead of just applying a blanket removal of all kinds of illegal content. As acknowledged by big tech companies like Meta and Pinterest, it is high time for service providers to afford more protection to minors in the digital world to avoid the tragedy of Molly from happening again.

From Courtroom to Restroom - The Battle for Transgender Rights

Christine Chu

INTRODUCTION

Transgender rights have become a hot topic in recent years, particularly the right of restroom access. The right to use a restroom, despite often unrecognised and uncelebrated, is a fundamental human right that needs to be protected by law. This article will first outline the current dilemma which most transgender persons face daily. It will then highlight the transgender legal issues that arise from Hong Kong's current and arguably outdated "restroom laws", and explore the possible way forward from legal and social perspectives.

1. CURRENT DILEMMA

Currently, a binary gender recognition system is applied in Hong Kong. In other words, there are only two options for the sex-entry on a Hong Kong identity card. If a transgender person wants to change the sex-entry, a gender-affirming surgery, including removal and construction of sex organ, is required. However, there can be many reasons why a transgender person may not opt for a gender-affirming surgery – such as a lengthy process to receive surgery in the public sector, high medical expenses in the private sector (either locally or overseas), or simply the fact that the extensive changes to their physical state is unnecessary for exploring their gender identity or provides no therapeutic value. In the recent Court of Appeal judgment of *Q v Commissioner of Registration* (2022), the Court recognised various forms of distress faced by transgender persons, especially the fear of using restrooms in public spaces and being questioned of using the "wrong" restroom. Under the cisgender-oriented binary recognition system in Hong Kong, transgender persons' rights are often neglected or dismissed – the sex entry on identity document and the design of public restroom are two epitomes of the rigid system.

For many transgender people, a simple question of figuring out which restroom to use can be a challenge. The current reality remains that a transgender person may feel uncomfortable or even unsafe entering either male or female restrooms, as unsatisfactory as that may be. This is especially so for a transgender person that is undergoing gender affirming process to change body shape and some sex characteristics. They may be confronted by other restroom users, or be perceived as having an ill intent, regardless of their sex entries on identity card. Consequently, transgender people may from time to time be asked to justify their choice of a particular restroom, leaving them to face potential legal consequences and mental distress.

Under these circumstances, the lack of legal guidance or protections places transgender people in a difficult position, where they may face embarrassment, confrontations or even expulsion from the restroom of their choice. This is particularly true for transgender persons who have not undergone a full gender-affirming surgery or changed the sex-entry on their identity card.

To avoid trouble and embarrassment, many transgender persons will use two stop-gap solutions, which are both not ideal. Their first option is to use restrooms for disabled persons (which are usually unisex). Their second option is to carry with them a medical document known as the "proof of real-life experience" (colloquially known as the "toilet letter") as written evidence for using the restroom if confronted by security guards and police officers. For the former, there are usually very few accessible restrooms that are in the proximity of every building. Those restrooms are also often locked by their property management companies. For the latter, the toilet letter is not seen as proof of identity, nor does it have any formal legal effect. While transgender persons already face many forms of discriminations and challenges in their lives, lacking clear legal guidance in their restroom use further adds to their

struggles.

2. HONG KONG'S "RESTROOM LAWS"

As of today, Hong Kong does not have any law that regulates the use of sex-specific public restrooms. *Q v Commissioner of Registration* referred to the relationship between the sex entry on identity cards and access to sex-specific public toilets, but did not give formal legal guidance on how a transgender person may choose a public toilet in a binary setting. In general, it is not a criminal offence to enter an opposite-sex restrooms, and it is unlikely that transgender persons will be convicted on the ground that they use the restroom of their gender identity. However, there are two legal mechanisms that complicate the picture.

Section 7 of the Public Conveniences (Conduct and Behaviour) Regulation (Cap.132BL) states the following:

(1) No male person, other than a child under the age of 5 years who is accompanied by a female relative or nurse, shall, in any public convenience, enter any part thereof which is allocated for the use of female persons.

(2) No female person, other than a child under the age of 5 years who is accompanied by a male relative or male nurse, shall, in any public convenience, enter any part thereof which is allocated for the use of male persons.

This is the only provision in Hong Kong law that mandates the segregation of sexes in public restrooms, but it only applies to public restrooms set up by the Food and Environmental Hygiene Department. Therefore, other restrooms in public spaces, such as those in shopping malls, are not regulated by this Ordinance. It is also notable that the definition of "male" and "female" is not provided in the legislation. Thus, it is unclear whether transgender male fall into the definition of "male," and whether transgender female fall into the definition of "female." This, again, serves as a reminder of Hong Kong's rigid binary gender recognition scheme and the lack of clear legal guidance on transgender people's access to restroom in public spaces.

The other regulation complicates the situation even more. Loitering is a commonly used offence to prosecute people who illegally enter an opposite-sex restroom for sexual harassment or voyeurism, because the definition of "common parts" includes any restroom in a building. Under section 160 of the Crimes Ordinance (Cap.200), a person commits an offence of loitering if:

3. …any person loiters in a public place or in the common parts of any building and his presence there, either alone or with others, causes any person reasonably to be concerned for his safety or well-being.

The ordinance gives a wide definition to loitering, and an intention to commit a crime is not an element of the offence. For example, a transgender female entering a female public restroom can be committing a loitering offence simply due to other female users' concern, even if they had no intent to cause harm. Paradoxically, if a transgender female uses a male restroom, she can also be seen as committing loitering if her presence concerns other male users. By causing this absurdity, the current laws are in fact depriving transgender persons of their restroom rights, instead of clarifying and protecting such right.

3. THE WAY FORWARD

The current legislative framework demonstrates how Hong Kong law has yet to recognise genders beyond the cisgender-oriented system. Setting up more genderless restrooms may be a solution to this dilemma, and indeed has become a new trend in many public areas. But it is arguable that Hong Kong's outdated laws are not doing enough to promote this solution. Section 8 of the Building (Standards of Sanitary Fitments, Plumbing, Drainage Works and Latrines) Regulations (Cap.123I) requires all restaurants to provide a certain number of urinals and lavatory basins in sex-specific restrooms. However, there is no requirement of setting up unisex restrooms.

Hong Kong's current "restroom laws" are passive, and not proactive enough in protecting transgender restroom rights. It is important to give a clearer legal guidance on restroom access. This can be done by recognising the legal effect of the "proof of real-life experience" issued by a doctor – a document that certifies a person is undergoing a gender affirming process. Further, the law may play a more proactive role in promoting gender inclusivity.

Apart from the legal aspect, there can be other solutions from policy-making perspectives. Following the ruling and observations made by the Court of Final Appeal in *W v Registrar of Marriages* (2013), the Hong Kong government has established the Inter-departmental Working Group on Gender Recognition. The Working Group is tasked with looking into the current cisgender-oriented binary recognition system in Hong Kong, and making suggestions for a better gender recognition system. The government should also encourage people to set up more accessible and unisex restrooms by educating the public. There are various recommendations made by the United Nation and Equal Opportunities Commission – for instance, a comprehensive gender recognition legislation and education. By implementing these recommendations, we can promote the visibility of the transgender and gender diverse community.

Perhaps it is the time for Hong Kong to review its outdated restroom-related laws, as they are creating unfair treatment towards the transgender community. Restroom access should be a fundamental human right to be legally protected regardless of gender and sexual identities. Afterall, a threat to justice somewhere, is a threat to justice everywhere. Hong Kong's legislatures should take the initiative to update the current restroom-relevant laws, in order to achieve a better tomorrow for the transgender community.

EDITOR'S COLUMN

Hong Kong's Listing Regime for SPACs: An Opportunistic Frenzy or a Sustainable Booster Shot?

Liam Shao

On January 1, 2022, Hong Kong's new listing regime for Special Purpose Acquisition Company (**SPAC**) officially went into effect. Hong Kong's new SPAC regime came at a time of SPAC frenzy in the United States (**the US**) and followed a similar move by London and Singapore that have welcomed SPACs in 2021.

A SPAC is a blank-check company without underlying businesses or assets which is publicly listed for the specific purpose of acquiring or merging with a private company. Upon completion of a De-SPAC merger, the target company subsequently goes public. Compared to the traditional go-public route of initial public offerings (**IPOs**), SPAC listings enjoy the benefits such as less burdensome vetting procedures and pricing certainty. However, due to the structural misalignment of interests between SPAC sponsors and SPAC public shareholders, sponsors are inherently incentivized to profit at the costs of public shareholders, the opportunism of which leads to severely high agency costs. These agency costs are further exacerbated by the failure of SPACs' built-in shareholder protection mechanisms such as redemption rights, shareholders' voting rights on the proposed merger, and the board's oversight to hedge against such opportunistic risks.
It is with proper regard to the opportunistic risks embedded in SPACs that Hong Kong to some extent re-engineers SPACs through its listing rules to provide prospective SPAC investors with the necessary protection. Hong Kong has put in place high entry thresholds and stipulated strict continuing obligations and De-SPAC requirements to foreclose potential risks of sponsors' opportunism. Compared to its counterparts in the US and Singapore, Hong Kong's SPAC regime adopts a distinct goal of attracting high-quality SPACs and merger targets only, and accordingly imposes a much more stringent set of risk control mechanisms to safeguard investors' interests. Lingering concerns inevitably exist, for example regarding the decoupling of shareholders' exemption rights from voting and the independence of the SPAC board.

Nevertheless, Hong Kong on paper has struck quite a fair balance between achieving sufficient investor protection and creating a commercially viable environment to attract high-quality SPACs and merger targets. How Hong Kong's new listing regime for SPACs will pan out in practice remains to be evaluated with future empirical or anecdotal evidence.

US Antitrust Regulators Focus on Private Equity

Peter Pan

Recent comments and actions of US regulators have sparked concerns among private equity funds for antitrust implications. On 13 June 2022, US Federal Trade Commission (**FTC**) announced a notable consent order to impose some first-of-their-kind requirements regarding a private equity fund's acquisition transaction.

According to a complaint filed by FTC, private equity investor JAB Consumer Partners (**JAB**) sought FTC's clearance for its 1.1 billion acquisition of speciality and emergency veterinary clinic operators, SAGE Veterinary Partners. In the consent order, FTC requires JAB to divest six clinics to purchaser United Veterinary Care and imposes a ten-year pre-transaction approval and notification requirement on JAB and United Veterinary Partners. While the requirements far exceeded what is ordinarily required under the Hart-Scott-Rodino Act, FTC heralded the measures as they 'better address stealth roll-ups by private equity firms'.

Roll-up is a process where investors acquire and merge multiple small companies in the same market. It is no surprise that PE funds feature such strategies to generate efficiencies and corporate value. Previously, the practice raised antitrust concerns only in rare cases where a PE firm orchestrated a merger of market leaders. However, US regulators seem to take notice and are increasingly likely to put similar transactions in antitrust crosshairs. On 3 June 2022, Assistant Attorney General Andrew Forman indicated at the American Bar Association's Antitrust in Healthcare Conference that the Department of Justice (**DOJ**) is 'thinking a lot about enhancing antitrust enforcement around a variety of issues surrounding private equity'. Forman specified concerns over the "roll-up risks", "short-term financial gains" which hurt innovation, and "board interlocks" to be three areas of focus.

Although PE funds must raise their antitrust antennae when they consider a new deal, it does not spell the end of PE. PE funds have a long history of fending off Washington DC as demonstrated by their continued ability to treat carried interest as capital gains. They may be called upon to show the benefits a deal could bring to companies and the market. In large part, that should not be a hard task.

Resolving Legal Challenges in the Commercial Space Industry

Yihong Liang

ADAPTING INTERNATIONAL INVESTMENT ARBITRATION FOR THE EVOLVING SPACE INDUSTRY

The current laws regulating space activities were established in the 1960s and 1970s, focusing on national security. However, as the space industry has evolved and expanded to include more non-state actors, new regulations are necessary to address the legal challenges that arise. The high-risk nature of the space sector and the technical requirements make it difficult to access remedies for damages caused by space activities and enforce arbitration awards. As the commercial space industry continues to grow, disputes are likely to occur. One potential solution is to adapt the legal framework used in international investment arbitration between investors and host countries for use in the aerospace field.

CHALLENGES AND LIMITATIONS OF INTERNATIONAL INVESTMENT ARBITRATION IN THE SPACE SECTOR

Additionally, international investments in the space sector may face more significant political risks, making resolving disputes through international investment arbitration more challenging. Efforts have been made in the past to establish arbitral institutions such as the International Court of Air and Space Arbitration (**ICASA**) or the adoption of Outer Space Rules by the Permanent Court of Arbitration (**PCA**) in 2011. However, these developments have not successfully addressed the challenges and secrecy considerations of private parties.

THE DUBAI SPACE COURT: A NEW SOLUTION IN COMMERCIAL SPACE INDUSTRY

The Dubai Space Court, established in 2020, is an international judicial institution that aims to provide specialized and effective dispute resolution for commercial and civil disputes in the space sector. It operates under the jurisdiction of the Dubai International Financial Centre, and its jurisdiction covers disputes arising from commercial activities in outer space, including satellite operation and space-related investment. The court has a panel of experts, including scientists, engineers, and legal experts, who are familiar with the technical aspects of the space industry. The Dubai Space Court may be a viable solution for resolving disputes in the commercial space industry in the future.

FEATURE

Hong Kong Bar Association Interview

Interview with Mr. Victor Dawes SC

1 HOW AND WHY DID YOU DECIDE TO TAKE UP THE APPOINTMENT AS THE CHAIRMAN OF THE BAR ASSOCIATION?

When I was a pupil, my pupil master (someone I very much respected and was subsequently elevated to the bench) told me that you cannot say no when you are called upon by the Bar to serve. When the then Chairman of the Bar decided that he was not going to serve another term, the two Vice-Chairmen and I felt it was the right time to serve and give back. That was why we decided to take up the position.

2 WHAT IS YOUR TYPICAL DAY LIKE? WHAT ARE YOUR MAIN RESPONSIBILITIES?

Being the Bar Chairman in Hong Kong is different from the UK, where it is a full-time position. In Hong Kong, you still have your professional duties as a barrister, and you still have to handle your cases. So it is like having two jobs. Nevertheless, I have to adjust my workload to deal with the responsibilities as the Chairman.

There is no typical day because every day is very different. But I start very early because I have a young family. I usually reach Chambers by 7:30 and start the day by having a cup of coffee with my colleagues. On the days when there are no court hearings, I will deal with the affairs of the Bar early in the morning. We have a very professional and dedicated secretariat to support my role. We also have a Bar Council with five office bearers (the Vice-Chairmen, the Honorary Secretary and Treasurer, and the Deputy Honorary Secretary). Together with the 20 Council Members, they tirelessly support my role from day to day.

3 THE CHAIRMAN OF THE HONG KONG BAR ASSOCIATION HAS VARIOUS RESPONSIBILITIES WHICH SPAN FROM ENSURING THE PROPER ADMINISTRATION OF JUSTICE IN HONG KONG, PLAYING A CUSTOMARY ROLE OF EDUCATION, INFORMING THE PUBLIC ABOUT LEGAL ISSUES, DEFENDING THE RULE OF LAW AND INDEPENDENCE OF THE JUDICIARY WHILE ALSO COMMUNICATING WITH VARIOUS STAKEHOLDERS IN SOCIETY. IN LIGHT OF THESE MANY RESPONSIBILITIES AND YOUR OWN EXPERIENCES, WHAT ARE THE MOST ENRICHING AND DISTINCTLY CHALLENGING ROLES?

Let's start off with the enriching aspects. The Bar is a very unique body. We are a professional organisation. With just over 1,600 members, the Hong Kong Bar is relatively small compared to other professional organisations. There are many members who are my professional colleagues or friends with whom I am personally acquainted. But there are also many who I

have not had a chance to interact with throughout my career. Ever since I became Chairman, I found it most heart-warming how many members have reached out to me offering help and guidance on the affairs of the Bar. And they have been extremely helpful, for which I am really grateful. When you need help in the Bar, there is always a volunteer.

The biggest challenge is that although we are a small professional body, there is a lot of work day in and day out. We are a professional body that is also a regulator. In terms of licensing and disciplinary functions, while we have dedicated professional staff in the Secretariat and we have a very strong disciplinary committee, we need to ensure that our members are properly regulated and that our regulatory mechanism operates smoothly and efficiently. That is one time-consuming aspect.

The other challenge is to do with interactions with the judiciary. For example, my term started during the fifth wave of the pandemic. So we had to deal with the temporary closure of our courts and issues such as the acoustics in courtrooms because of pandemic measures such as face masks and protective shields. Acoustics can implicate the right to a fair trial because when a judge or lawyers have difficulty hearing witnesses, that can cause significant problems in a trial. This is just one aspect of many issues concerning administration to justice that we deal with. We also keep close contact with the Judiciary Administrator to ensure seamless cooperation.

We also maintain a cordial collaboration with the Law Society and we very much treasure that relationship. We have fruitful collaboration on different aspects of the administration of justice and legal education.

There is also our external relationship. Through the good works of its members and Jacqueline Leong SC, a former chairman of the Bar, the Bar is in touch with many professional organisations and legal bodies overseas. Part of the role of the Bar Chairman is to ensure that Hong Kong is on the international map when it comes to collaboration and communication with overseas bodies. We are attending overseas conferences, maintaining a dialogue with other jurisdictions to discuss common issues and challenges. Throughout the pandemic, we could not travel so many of these exchanges were held virtually. But since the second half of last year, there were opportunities to go abroad. So some members of the Bar and I travelled to countries such as Singapore, the UK, and Australia. It goes without saying that the international community maintains a keen interest in the legal developments in Hong Kong. We just have to do our best to keep in touch.

4 MOVING ON TO YOUR SECOND YEAR, WHAT MAIN OBJECTIVES DO YOU WANT TO ACHIEVE AS THE CHAIRMAN OF THE BAR ASSOCIATION IN 2023?

With the full opening up of Hong Kong and the lifting of restrictions in Mainland China, I am keen to re-connect and deepen our exchange with the legal community overseas, as well as our counterparts in Mainland China. Due to the pandemic, we have been unable to see many of our counterparts overseas for several years. I think it is high time that we re-establish our connection, and I hope we can firmly put Hong Kong back on the international map by at least next year.

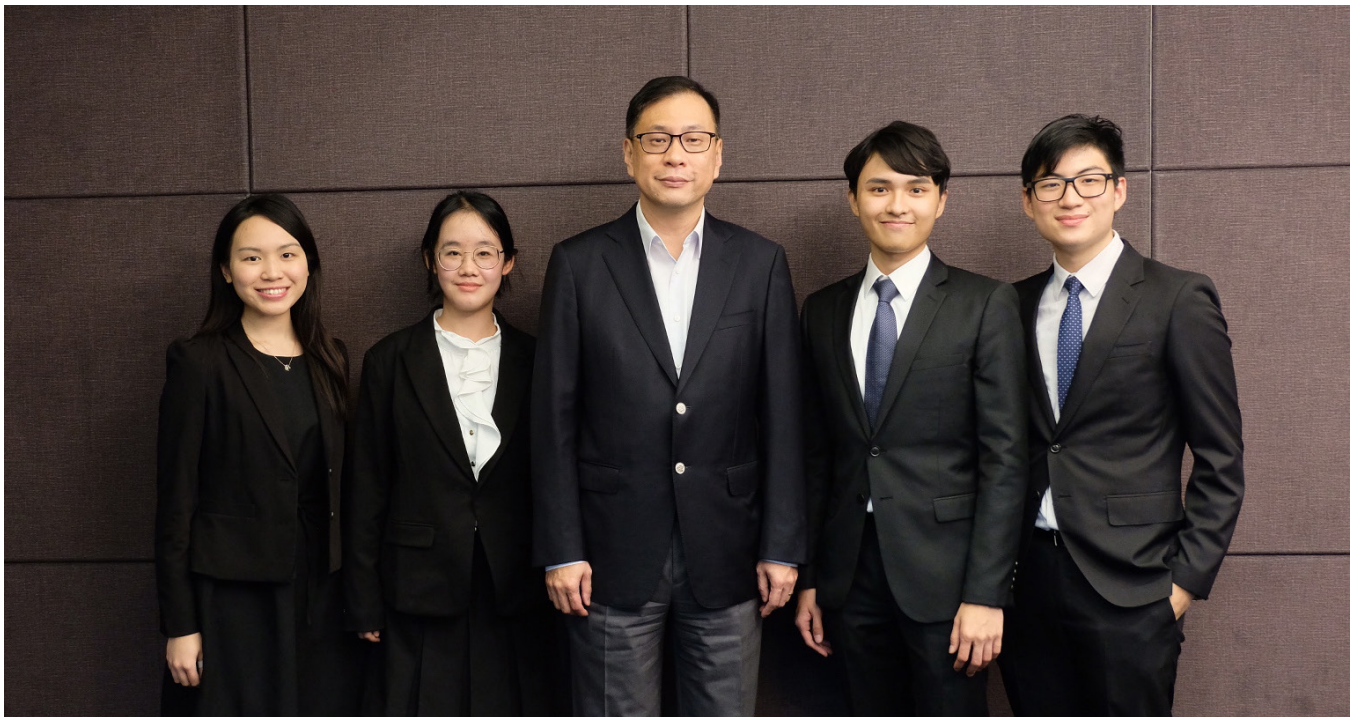
5 THE BAR ASSOCIATION HAS BEEN A GREAT SUPPORT LIKE A FRATERNITY TO YOU. WE WOULD LIKE TO KNOW MORE ABOUT THE BAR ASSOCIATION ITSELF. WHAT ARE THE LONG-TERM GOALS AND CURRENT PROJECTS THAT THE BAR ASSOCIATION IS WORKING ON?

In terms of current projects, I am interested in strengthening the competitiveness of the Bar's junior members. I am particularly keen on looking into legal education in the coming year. How do we increase the competitiveness of our young members? How do we explore opportunities both within and beyond Hong Kong?

Also, the Bar has a crucial public and societal role to play in the rule of law issues. The public expects us to speak out when there is a rule of law issue. I think this is at the top of every Bar Chairman's priority. It will not be complete if I do not mention this very important aspect of our work.

6 ARE THERE ANY CHALLENGING ASPECTS THAT THE BAR ASSOCIATION HAS SO FAR? PERHAPS THE RULE OF LAW ISSUE THAT YOU HAVE JUST MENTIONED?

Rule of law issues are shared all over the world. It would defy belief if one Bar leader or head of the judiciary tells you that their jurisdiction faces no rule of law challenges. Hong Kong is the only common law jurisdiction in the People's Republic of China. The "One Country, Two Systems" has been operating smoothly for the past 25 years in Hong Kong and ensures that the common law remains the foundation of our legal system.



Going forward, I think for Hong Kong to thrive, for the legal market in Hong Kong to develop, and also for the people of Hong Kong to fully benefit from the fruits of our system, there must be deeper understanding and communication with our Mainland counterparts. Mainland lawyers are very interested in learning more about the common law. A lack of understanding of the differences between both systems is not desirable. It will be important for Mainland lawyers to gain a deeper understanding of the common law system. By the same token, as we practise common law in Hong Kong, it is also of vital importance that we understand the legal system in Mainland China. From the perspective of the rule of law and administration of justice, there are many interactions between Hong Kong and the Mainland.

Regarding the development of the legal market, many cases litigated in Hong Kong are intricately interwoven with issues on Mainland Chinese law. Hong Kong is a common law dispute resolution hub in the region. Understanding the legal market, the legal system, and practices in Mainland China are crucial, especially for young lawyers.

7 YOU MENTIONED THE CLOSE RELATIONSHIP BETWEEN HONG KONG AND MAINLAND LAWYERS, DO YOU THINK IT ALSO CREATES COMPETITION?

I do not see Mainland lawyers as competitors. First of all, healthy competition is good anyway. What I see is more collaboration and mutual learning opportunities because Hong Kong is uniquely positioned.

Many cases with Mainland elements are resolved in Hong Kong courts or Hong Kong-seated arbitration. The bulk of the disputes that we deal with in arbitration, for example, often involve a mainland entity, and a foreign entity, dealing with different aspects of business transactions. And very often, they choose Hong Kong law, Hong Kong as a seat of the arbitration, or Hong Kong courts to resolve the dispute, primarily because of Hong Kong's rule of law and judicial independence. Moreover, the fact that we are a bilingual common law jurisdiction in the People's Republic of China.

I have had many opportunities to work with Mainland lawyers, calling them in as experts on PRC law in our courts. We learn from each other on every occasion.

8 WHEN COMMENTING ON A NOVEL OR REAL-TIME LEGAL DEVELOPMENT IN HONG KONG, ARE THERE ANY GUIDELINES OR GENERAL SETS OF FACTORS THAT THE BAR ASSOCIATION WOULD HAVE TO CONSIDER?

When there is an important real-time issue, we will comment. However, one must also bear in mind that we are not political commentators. We only speak out when the public expects us to speak up. We are guided by public interest and common sense when we speak out. That is why you do not hear from us

every day. There is no guideline as such. It depends on the issue in question.

9 ALTHOUGH THE END OF THE PANDEMIC IS IN SIGHT, THE JUDICIARY AND THE WIDER LEGAL COMMUNITY IS STILL EXPERIENCING ITS EFFECTS. ONE EXAMPLE IS THE BACKLOG OF CASES IN THE CRIMINAL COURT. WHAT WILL THE BAR ASSOCIATION DO TO REVIVE FROM THE STRIKE OF THE PANDEMIC AND ITS ONGOING EFFECTS?

I think it is not just Hong Kong. For example, if we look at England and Wales, a jurisdiction that we are quite familiar with, they are also facing a huge backlog of criminal cases because of the pandemic. What the Bar can do is to try our very best to assist in the circumstances. Many of our members have assisted as deputy judges over the years at different levels of courts. We have also tried collaborating with the judiciary by offering our services and views. For example, a key initiative is to promote remote hearings during the pandemic to enable the courts to continue to operate.

10 SPEAKING OF PUTTING HONG KONG FIRMLY BACK ON THE INTERNATIONAL MAP, FURTHERING OUR UNDERSTANDING IN DIFFERENT JURISDICTIONS, AND ITS STATUS AS A DISPUTE RESOLUTION HUB, HOW DOES THE BAR ASSOCIATION POSITION ITSELF IN COLLABORATING WITH THE GREATER BAY AREA?

The Greater Bay Area **(GBA)** is an excellent project providing maximum business opportunity. Some of our members have taken the GBA Legal Professional Examination to qualify as practitioners in the GBA. We believe that it is important to interact with our colleagues in the GBA. Therefore, lawyers in both Hong Kong and the Mainland intend to organise more collaborative events once the travel restrictions are lifted.

Barristers are specialists, litigators, and advocates. The profession is unique to Mainland China because there is a fuse of the legal profession. Our experiences in dispute resolution, advocacy, and conducting cases under the common law approach is something we can pass on or share with our Mainland colleagues. For example, Mainland businesses are increasingly engaged in international arbitration. Hong Kong barristers are uniquely placed in offering their services when Mainland businesses litigate or arbitrate in Hong Kong.

11 WHAT WERE SOME OF THE MOST MEMORABLE PROJECTS AND EXPERIENCES IN YOUR CAREER SO FAR?

I have many memorable cases, some of which are criminal cases where personal liberty was at issue. The unique thing about joining the Bar is that you are thrown into the deep end very early on. As a junior lawyer, you are on your feet and fighting for someone's liberty. Moreover, members of the Bar are bound by our professional standards and traditions, including the cab-rank rule. This rule has ensured that nobody is left unrepresented, even when the advocate does not agree with or sympathise with their cause or methods. However, it is simply part of our professional duties to take up those cases and do our best.

There were several cases where I thought the conviction was not right. But they were overturned on appeal. In particular, there was a criminal case where I lost in a trial and its conviction was partially overturned in the Court of Appeal. However, we managed to quash all the convictions in the Court of Final Appeal. Still, it was at the expense of my client because he had served a prison sentence of almost two years. But in the end, the court and our system vindicated the client. It was a memorable experience.

When I subsequently focused on commercial litigation, the experiences I gained early on in conducting criminal trials provided valuable opportunities for me to pick up skills in conducting trials and cross-examining witnesses. I truly treasure my criminal case experiences, which have significantly impacted my career.

12 WE UNDERSTAND THAT BEFORE SPECIALISING IN COMMERCIAL LAW, YOU ALSO PRACTISED CRIMINAL LAW. BUT WHAT IN PARTICULAR INSPIRED YOU TO PUSH AHEAD WITH COMMERCIAL PRACTICE?

It was really by chance. The good thing about the Hong Kong Bar is that most of our junior members practise in a diverse range of legal disciplines, and many of us specialise at a later stage in our careers. Since we are specialised advocates, there are opportunities for us to be exposed to a wide range of cases. For myself, I have always been fascinated by aspects of commercial transactions. I have a keen interest in banking and the securities market. So I try to keep myself up to date in the financial markets with the latest development. Such knowledge has definitely assisted my legal practice.

13 WHAT INSPIRED YOU TO PURSUE A CAREER IN LAW WHEN YOU STUDIED IT?

I studied law shortly before the Handover. There was a major confidence crisis at the time. Almost every year, you would hear people saying the rule of law would no longer exist in Hong Kong. Many of my friends did not want to study law back then, and joining the Bar was considered a risky.

Well, I will say that I have always found opportunities whenever there is a crisis. Many people are worried about our future because we have undergone a lot of changes in the past few years. However, there are actually many opportunities. I encourage young people to keep faith in our system. The situation we are facing now is like what we faced 25 years ago, when I decided to study law and decided to join the Bar shortly after the Handover.

14 OVERVIEWING HONG KONG'S LEGAL INDUSTRY IN THE LAST FEW YEARS, WHAT HAS THE INDUSTRY DONE WELL IN, AND WHAT AREAS COULD IMPROVE WITH MORE CARE/INVESTMENT?

I think members of the Bar should be commended. Over the past few years, whether one is talking about a complex commercial case or a complicated criminal case, it has not been difficult for clients to find talents from the Bar to represent them. There is a deep pool of talent within the Hong Kong Bar to serve the needs of litigants involved in dispute resolution in Hong Kong.

Of course, we cannot be easily satisfied with what we have done in the past. We need to constantly improve our competitiveness. For example, looking forward, it is vital to understand the legal system in the Mainland. It also helps to be fully bilingual. Just remember, there are always opportunities when you look up north and when you look internationally.

15 AS A COMMERCIAL LITIGATOR, HOW DO YOU SEE THE ROLE PLAYED BY LAWYERS IN SHAPING OUR COMMERCIAL PRACTICES FOR BETTER OR WORSE?

It is difficult to say because we only deal with commercial issues when there is a crisis. When there is a dispute, the clients learn from their mistakes. They will sometimes improve contractual terms as a result of a bad experience. After seeking advice, they will improve their business practices. Everybody learns from their mistakes, and nobody wants to be involved in litigation. So clients always learn from a dispute. Lawyers can play a part in it by offering their professional advice.

16 WHAT ABILITIES, SKILLS AND EXPERTISE DO YOU THINK CURRENT LAW STUDENTS NEED TO HAVE IN ORDER TO MAXIMISE THEIR FUTURE OPPORTUNITIES AND COMPETITIVENESS IN THE COMING YEARS?

We should learn to walk before we run. For law students, you must have a solid foundation in the very basic subjects. I have always told my law students about the importance of being acquainted with the

principles of contract, tort, and trust. If you want to engage in commercial practice, you have to lay a very solid foundation in these subjects. Moving to more advanced subjects (e.g. company law, commercial law) is only possible when your foundations are strong. In your first and second years, you should spend plenty of time laying those foundations because many disputes hinge upon the most basic concepts (such as contractual interpretation). If your foundation is solid, the disputes will be more manageable.

The other aspect that you should consider is this. The common law is also developed in other jurisdictions besides Hong Kong, which tend to have longer legal traditions. For example, we rely heavily on English precedents. If there are opportunities to go abroad, be it going on exchange or completing a master's degree, you should embrace them and meet more people. Don't merely bury yourselves in textbooks. Like me, you will probably be in practice for many years. But the opportunities to see the world and interact with other students from other countries are precious. So do treasure those opportunities as they arise.

Thirdly, it is also crucial for law students to understand how non-lawyers see the world. Studying law is difficult and time-consuming, but you should still interact with non-lawyers for fresh perspectives. When a group of lawyers gathers, you tend to talk about the same subject, creating an echo chamber. It is crucial to have exposure to the lives of other people. After all, legal practice is really a study of human interactions.

Last but not least, you should have a sense of community. Many of us are born and brought up here. You should develop a sense of community and the spirit of helping the vulnerable. Studying law and being a law student is a perfect place to start. There are many pro bono schemes where you can offer your services and provide legal advice. For example, the Young Barristers' Committee of the Hong Kong Bar Association offers several outreach programmes, such as the Street Law Programme. It would be interesting for you to meet and work with the Young Barristers' Committee.

17 DO YOU HAVE ANY SPECIFIC ADVICE FOR STUDENTS WHO WANT TO PURSUE A CAREER AS A BARRISTER, AND HOW THE BAR ASSOCIATION CAN HELP THEM?

Generally, members of the Bar are very generous with their time in grooming young lawyers. Most of us end up being close friends with our pupil masters. I encourage young lawyers to seize opportunities to learn more about the Bar by serving mini pupillages.

But first and foremost, we are specialised advocates. We are supposed to argue cases in court. Having a deep and solid understanding of the law is a must. If you are keen on pursuing a career as a barrister, do participate in moots. It gives you a taste of advocacy and a glimpse into our day-to-day work.

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