FEATURE

INTERVIEWS WITH JUSTICE CENTRE HONG KONG AND MS. ANNETTE BAIN, PRO BONO COUNSEL - ASIA OF DLA PIPER
HONG KONG OPEN EVENING

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Dear readers,

The ongoing protests in Hong Kong remind us of the significance of law: it underpins our social structures, holds public institutions accountable, and preserves our fundamental rights. While differences in values and perspectives can be divisive, they must not be an excuse for shunning important discussions. This is why the Editorial Board of the Gazette has decided to include a themed section on the current Hong Kong protests in this issue. We hope that it will provide you with new insights into this unique period of the city’s history.

Many of our articles are driven by a concern for justice, and this concern is likewise shared by the key players in the Hong Kong pro bono scene. Our interview feature in this issue explores different approaches to pro bono work. Ms. Annette Bain from DLA Piper details how the international law giant seeks to create sustainable impacts on local communities, whereas Mr. Isaac Shaffer and Ms. Annie Li from Justice Centre Hong Kong explain their frontline advocacy and policy work.

I consider ideas to be the single most important element of any publication and, as Plutarch once said, ‘what we achieve inwardly will change outer reality.’ It is with my belief in the power of ideas, and our ability to make them real, that I present Issue 15 of the Gazette to you.

Happy reading!

Best regards,

Kelvin Chu
Editor-in-Chief

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INTRODUCTION

As the judiciary of Asia’s international business hub, Hong Kong courts are frequently tasked to ascertain the content of law of foreign jurisdiction(s). A question of foreign law may arise, for example, in a contractual dispute where the contract is explicitly governed by a foreign law; in an application for service out of jurisdiction, where the court has to first evaluate the validity of an exclusive jurisdictional clause in favour of a foreign jurisdiction in accordance with the putative proper law; or where illegality of the contract under a foreign law is pleaded as a defence despite the fact that the contract is governed under Hong Kong law.

Unlike some civil law jurisdictions, foreign law is treated as a matter of fact in common law jurisdictions. The content of foreign law must first be pleaded and then proved at trial, usually by examination and cross-examination of expert witnesses. This article casts doubt on the utility of expert evidence in proving foreign law in civil and commercial matters. It is argued that a referral mechanism should be introduced in Hong Kong so complex matters of foreign law in cross-border litigations can be resolved by the competent body, i.e. the foreign court itself.

PROBLEMS OF PROOF OF FOREIGN LAW BY WAY OF EXPERT EVIDENCE

The functions of expert evidence on foreign law is summarized in the English case of Macmillan v Bishopsgate [1999] CLC 417:

‘(1) to inform the court of the relevant contents of the foreign law; identifying statutes or other legislation and explaining where necessary the foreign court’s approach to their construction;

(2) to identify judgments or other authorities, explaining what status they have as sources of the foreign law; and

(3) where there is no authority directly in point, to assist the English judge in making a finding as to what the foreign court’s ruling would be if the issue was to arise for decision there.’

Proof of foreign law by way of expert evidence has frequently been subjected to academic and judicial criticisms in other common law countries. To start with, foreign law experts, who are usually senior practitioners or law professors, are invariably expensive. The production of oral evidence at trial will extend the length of the trial and further increase the cost of litigation. In addition, such experts may be biased. Judge Richard Posner of the US Court of Appeals for the Seventh Circuit explained why experts may be partisan in Bodum v La Cafetiere (2010) 621 F.3d 624: experts are ‘paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client or their willingness to fall in with the views urged upon them by their client’. Nonetheless, this statement may be classified as expert partisanship in the US and may not be fully reflective of the situation in Hong Kong. Expert witnesses in Hong Kong are subject to an explicit overriding duty to the court as set out in the code of conduct in Appendix D of the Rules of the High Court, while there are no equivalent provisions in the Federal Rules of Civil Procedure.

Notwithstanding the differences in litigation culture between the US and Hong Kong, Judge Posner is right to point out that where judges are experts on law, and that there are abundant published materials in English that can provide neutral illumination on issues in foreign law, proof of foreign law by expert evidence is ‘bad practice, followed like so many practices out of habit rather than reflection’. Where the foreign law concerned is the law of another common law jurisdiction, expert evidence would be of little value with regards to functions (1) and (2) in Bishopsgate. Hong Kong judges and legal practitioners are trained to make references to laws and judicial authorities across the common law world, and indeed, as Mustill LJ observed in Muduroglu Ltd v TC Ziraat Bankasi [1986] 1 QB 1225, ‘in so many practical respects there is insufficient difference between the commercial laws of one trading nation and another to make it worthwhile asserting and proving a difference’.

Even if the litigation involves a novel issue from these jurisdictions, Hong Kong judges have displayed confidence in handling matters of foreign law. In Rambas Marketing Co LLC v Chow Kam Fai David [2001] HKCFI 1361, Recorder Geoffrey Ma SC (as
cross-examination may easily turn into a prolonged philosophical debate that is of little help to the court as it was in Bishopsgate. Where that foreign law involves matters of judicial discretion and public policy, judges can do no more but second-guess what a hypothetical foreign judge would do.

It is true that for most cases of this kind, Hong Kong courts would have refused jurisdiction based on the doctrine of forum non conveniens. However, these issues might be unavoidable where foreign law comes into litigation in the second or third situations as described in the introduction, i.e. when the exclusive jurisdictional clause is contested or illegality under foreign law is used as a defence in a dispute when Hong Kong court is clearly the forum conveniens. Furthermore, the full complexity of the foreign law issue in the dispute might not be appreciated when Hong Kong courts have to decide whether to exercise jurisdiction at the early stage of the litigation. The Planeta [1993] HKCFI 106 illustrates the difficulty in assessing how complex the foreign law issues are. In that case, while the English court found - on what Barnett J in the Hong Kong court described as ‘tentative and weak’ expert evidence - that the issue of Japanese law is not at all difficult, Barnett J found that the question was ‘hotly in dispute’ under Japanese law. This case illustrates that it is laborious for local judges to determine whether a case is suited to be tried here especially when an unfamiliar foreign law is at issue.
REFERENCING QUESTIONS OF FOREIGN LAW TO THE FOREIGN COURT

An alternative mechanism has been introduced by Justice Spigelman (NPJ of HKCFA and former Chief Justice of New South Wales) between NSW and Singaporean courts, and NSW and New York courts to remediate the defects in proof of foreign law by expert evidence. The courts agreed to, in appropriate cases, refer a discrete question of law of the other jurisdiction to that jurisdiction for determination, and to follow the determination. This arrangement was inspired by the decision of the Court of Appeal in Singapore in Westacre Investments Inc v The State-Owned Company Yugoimport SDPR [2009] 2 SLR(R) 166. The appellant in that case sought to enforce an English judgment in Singapore, which raised the issue of whether the English judgment was enforceable without leave of the English court. The Court of Appeal adjourned the hearing and ordered the parties to refer the issue to the English court. An English Commercial Court judge (Tomlinson J) determined the issue and his judgment was followed by the Singapore court.

Considering the difficulties of proof of foreign law by expert evidence, and in view of the increasing amount of cross-border litigation, this mechanism should be introduced in Hong Kong to resolve cases involving difficult issues of foreign law. The court of the lex causae is clearly the most competent court to give authoritative judgments on complex disputes of foreign law. This principle is embedded in the determination of the forum conveniens as demonstrated by Barnett J’s refusal to allow jurisdiction in The Planeta. In Guangzhou Green-Enhanced Bio-Engineering Co Ltd v Green Power Health Products [2004] 3 HKLRD 223, Lam J (as V-P then was) affirmed the value of foreign judgments in resolving a dispute of foreign law, stating that ‘when there was authority [foreign judgment] directly in point, there was no room for experts to give evidence as to the likely outcome of the foreign court applying the foreign law’. There will be no need to adduce expert evidence when the issue is referred to the foreign court.

Justice Spigelman’s proposal also accords with and furthers judicial comity, which underlines the entire body of private international law. Fok PJ (2017) stated extrajudicially that ‘where the relief sought is that which the home jurisdiction could grant by reference to its own law, comity will favour acceding to the request’. In the context of determination of a matter of foreign law, Tomlinson J observed in Westacre [2008] EWHC 801 (Comm) that it was ‘clearly appropriate that the English court should assist the parties and the Singapore court by indicating, so far as it is able, how the discretion of the English court would have been likely to have been exercised in the circumstances posited’. This mechanism can facilitate cross-border cooperation between judiciaries, while strengthening Hong Kong’s position as a leading center for dispute resolution in the region.

LIMITATIONS OF THE REFERRAL MECHANISM

The referral mechanism, however, is not without flaws. The parties would incur extra costs appearing before
a foreign court. Nonetheless, when a difficult point of foreign law arises, the cost of referring the substantive issue to that foreign court for an authoritative decision might well be less than calling multiple experts to appear at trial only to argue the same foreign law issues again on appeal. Another problem identified by Teo and Wong (2011) is that the parties might decide to have a dispute that is governed by a foreign law, tried not before that foreign law court but before another court, to avoid delays or other systemic disadvantages in that foreign court. To refer the matter back to the foreign court would then defeat the intention of the parties. Therefore, courts should balance the freedom of parties in deciding the governing law of their contract and the just and efficient resolution of the dispute before referring a substantive matter to a foreign court, especially where one of the parties refuse to do so.

Foxton QC (2017) observed that since the adoption of the mechanism in 2011, there has only been one reported failed attempt to use the NSW-New York referral mechanism. It is conceded that until the mechanism is widely adopted by other jurisdictions, it is unlikely that it will be often utilized, as it is designed only to resolve cases where difficult points of foreign law arise. However, the referral mechanism is only the first step to explore more efficient ways to ascertain foreign law in cross-border litigations. Perhaps, the practice of civil law countries (e.g. German courts, which would forward questions of foreign law to the Max Plank Institutes for review) should also be examined, and adopted where appropriate. Such reviews may prompt Hong Kong courts to reverse the largely historical and fictional categorization of foreign law as a matter of fact.
Challenging Jurisdiction: How Careful Is the Hong Kong Court in Reaching the Conclusion that the Mainland Court Is Forum Non Conveniens?

John Law

INTRODUCTION

Hong Kong and the People’s Republic of China (PRC) have good economic relations with annual bilateral trade valued at over $500 billion. It therefore becomes important for Mainland parties signing Hong Kong commercial agreement to know which jurisdiction would govern the contract. In Hong Kong, the choice of court is determined by the principle of forum non conveniens, which was derived from the basic rule set out in Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460 (HL). A three-stage test is generally adopted:

1. Is it shown that Hong Kong is not the only natural or appropriate forum for the trial, but that another clearly or distinctly more appropriate forum is available?
2. Will a trial at this other forum deprive the plaintiff of any ‘legitimate personal or juridical advantages’?
3. Which forum is most suitable for the interest of all parties and the ends of justice after considering the first two stages?

This essay will focus on the second stage of the test. Data from the World Economic Forum shows that Hong Kong is ranked first place in judicial independence in Asia and fourth place in the world’s most efficient legal framework in settling disputes, while China is ranked 45th and 34th respectively. Therefore, we can expect that parties are more likely to bring their claim to Hong Kong given its sound legal environment. The main question explored is: how careful is the Hong Kong court in reaching the conclusion that the Mainland court is forum non conveniens, or more specifically, when would the plaintiffs be considered to be deprived of any ‘legitimate personal or juridical advantages’?

COURTS’ CONFIDENCE IN HONG KONG’S LEGAL SYSTEM

Hong Kong courts have shown confidence in their competency to decide on cases involving PRC law. It has been expressly stated by To J that

‘In view of the ever increasing commercial relationship between Hong Kong and the PRC, the Hong Kong courts had on numerous occasions to deal with issues of PRC law, including some complicated ones. More literature on PRC law is now available… More bilingual judges have received legal education in PRC law’

Hong Kong courts see themselves as equally equipped as Mainland courts to deal with Mainland-Hong Kong cross-border agreement. In fact, to date there has only been one reported case where Hong Kong courts said the PRC courts are more suitable in deciding cases involving PRC Law.

SUBSTANTIAL JUSTICE

Beside the fact that Hong Kong courts have been more willing to decide on cases on PRC Law, cases have also shown that the court is increasingly receptive to the argument that the plaintiff would be deprived of the ‘legitimate personal or juridical advantages’ if the case was to be heard in a PRC court. A prime example is Shenzhen Futaihing Precision Industry Co Ltd v BYD Co Ltd, where the plaintiff was alleging the misuse of confidential
Another illustration of the court rejecting these general statements can be seen in *New Link Consultants*, where the plaintiff was worried about an alleged statement that the PRC judge would side with the defendant who is a state-owned enterprise. Such evidence was not accepted by the court, which explained that the case would be handled by one of the best courts in China and that there were plenty of examples where the mainland courts gave judgments against some state-owned companies and in favour of foreign parties.

In *Botanic Ltd v China National Oil Corp*, the argument that the witnesses feared for their personal safety if they are to give testimony against a state-owned company was considered by the court to be unfounded. Compared to the submitted evidence on the deficiency in the PRC law like that cited by the plaintiff in *Shenzhen Futaihing*, this was considered merely a brief statement. These cases have shown that Hong Kong courts have drawn the line towards the right side of the spectrum. However, what is the significance of this ruling approach?

Comity should be respected and Hong Kong courts should not be quick in ruling that PRC courts cannot provide a fair trial to the parties. On the other hand, courts need to make sure that the plaintiffs' 'legitimate personal or juridical advantages' will not be compromised, which is why the Hong Kong court does not want a rigid test (i.e. clearly ruling on what is considered cogent evidence). However, uncertainties are created as a result. For instance, in the Shenzhen Futaihing case, how much of a difference in the level of damages between Hong Kong and PRC is considered to be 'substantial'? Can the data quoted in the introduction of this essay be used as a 'positive and cogent evidence' in developing the allegation? Therefore, it ultimately comes down to whether the Hong Kong courts are able to strike a good balance between leaving flexibility in achieving a fair result and upholding certainty for the parties in a contractual agreement.

In another recent case on cross-border commercial litigation, *High Hope Zhongding Corporation v 廈門墩峰進出口有限公司 and others*, the Hong Kong court accepted the plaintiff's argument that the PRC has neither the legal provisions for bankruptcy liquidation regarding foreign companies (as the third and fourth defendants of the case were companies incorporated in BVI and Hong Kong respectively), nor a personal bankruptcy system (as one of the defendants was a Hong Kong resident).

These cases suggest the trend that courts have been assertive and more willing to rule that the PRC law is handicapped in assisting the plaintiff in recovering damages. Up to this point, it seems that Hong Kong courts have agreed on various occasions that Hong Kong courts are able to provide the parties with a better dispute resolution platform.

**FAIR TRIAL**

How does the court decide whether a trial at PRC courts will deprive the plaintiff of any 'legitimate personal or juridical advantages'?

It may be helpful to visualise the situation: at one end of the spectrum, courts have accepted a simple assertion that the PRC legal system is not able to hold a fair trial; at the other end, courts have required substantial evidence of the exact weaknesses of the legal system. To address the main question of this article - particularly at what point the plaintiff is considered to be deprived of any 'legitimate personal or juridical advantages' - we have to investigate where the line is drawn by the Hong Kong court in the spectrum, which defines the standard adopted by Hong Kong courts.

Quite a few cases seemingly point to the Hong Kong court leaning towards the right side of the spectrum:

In *Duan Qi Giu v Upper Like investment Ltd*, a general assertion by the plaintiff that she has lost confidence in the PRC legal system was rejected by the court, which then required the allegation be supported by 'positive and cogent evidence'. It would have been a very disrespectful implication towards the Mainland courts if Hong Kong accepted this bare statement.
**Illegality of Contracts and Legislative Intention: Lessons from the Securities and Future Ordinance (Cap. 571)**

**Thomas Yeon**

**INTRODUCTION**

Section 114(1) of the Securities and Futures Ordinance (Cap. 571) (‘SFO’) provides that no person shall carry on a business in a ‘regulated activity’ subject to an exhaustive list of exceptions. The fact that contravening s.114(1) would attract only criminal (s.114(8)) but not civil liability gives rise to the question of validity of any contract made in breach of s.114(1): would the contract be void ab initio on the basis of a combined reading of ss.114(1) and (8), or, would any alternative legal basis be required? This article draws upon a comparative analysis of the approaches in the UK and Hong Kong, and focuses on the impact of the common law doctrine of illegality of contracts in the context of an ordinance providing only criminal but not civil consequences of an action. It argues that Hong Kong courts should adopt the new position on the illegality of contracts suggested in the UK Supreme Court decision of *Patel v Mirza*, when encountering situations where an ordinance prohibiting or regulating certain activities only provides for criminal but not civil consequences.

**THE DIFFERENCE BETWEEN THE POSITIONS IN THE UNITED KINGDOM AND HONG KONG**

Overruling the rule-based approach of *Tinsley v Milligan* which states that a contract based on a criminal act is void ab initio, Patel has laid down a factors-based approach to determine whether a contract should be void for illegality. Lord Toulson, in this case, elucidated a ‘trio of necessary considerations’ in determining the illegality of a contract: (i) ‘the underlying purpose of the prohibition which has been transgressed’, (ii) ‘any other relevant public policies which may be rendered ineffective or less effective by [denying the relevant claim(s)]’, (iii) ‘possibility of overkill unless the law is applied with a due sense of proportionality.’ In addition, his Lordship observed that while civil courts should not undermine the effectiveness of criminal law, they should not ‘impose what would amount in substance to an additional penalty disproportionate to the nature and seriousness of any wrongdoing.’ Thus, the new approach has regard to a multitude of policies and the nature and circumstances of the illegal conduct in question.

Hong Kong courts have, however, so far followed the old approach. This is because the courts remain bound by the Court of Appeal decision in *Kan Wai Chung v Hau Wun Fai*, which was in turn bound by its earlier decisions following *Tinsley*. Indeed, this is recently observed in *Arrows ECS Norway AS v M Yang Trading Ltd* - the position of illegality of contracts in Hong Kong can only be considered by the Court of Final Appeal.

**THE ROLE OF LEGISLATIVE INTENTION IN THE SFO CONTEXT IN RELATION TO ILLEGAL ACTIVITIES AND THEIR CONTRACTS**

**Conflicting authorities**

In the Hong Kong context, two decisions of the Court of First Instance provide conflicting views on the role of legislative intent in considering the illegality of a contract under s.114 of the SFO.

In *Richardson Greenshields of Canada (Pacific) Limited v Paul Chow*, Bokhary J stated that the question is ‘whether or not the statute, on its true construction, renders right acquired and obligations incurred pursuant to the contract unenforceable.’ He then moved on to discuss the grave consequences which could arise as a result of voiding a contract on grounds of illegality, noting that ‘courts must be very careful not to adopt an over-zealous interpretation of the enactment, for that may have highly counter-productive consequences.’ The fact that a contract is created as a result of a criminal act (as defined statutorily, i.e. a combined reading of s.114(1) and s.114(8) of the SFO) should not mean that it is immediately void on such basis only. This approach was reflected in *Ever Long Securities Co Ltd v Wong Sio Po*.

However, in *Wong Lung v The Chinese University of Hong Kong Employees’ Credit Union*, a different approach was taken. In that case, DHCJ Wilson Chan noted that there was ‘no provision expressly preserving the validity of transactions implicated in illegality existed in the [now repealed] Securities Ordinance.’ This seemingly amounts to a suggestion that a contract involving prohibitions under the SFO would be void or at least voidable. Absent clear statutory language preserving the validity of such contract, the focus should be on the fact that the contract is a result of criminal act(s), and thus its validity accordingly tainted. Citing from Chitty on Contracts, he concluded that even if there is explicit statutory wording preserving the validity of a contract which resulted from
a criminal action, the court has a residual discretion to refuse to enforce the contract.

**Legislative intention as an answer to lack of statutory stipulations**

As *Patel* is now good English law, it becomes necessary to consider in the case of the Court of Final Appeal considering the illegality principle, how their position should change.

The caution for over-zealous interpretation of legislative intention expressed by Bokhary J can be reflected in the ‘trio of necessary considerations’ in *Patel*. In particular, consideration of Patel reflects the need for a section-by-section analysis of the legislation, and the legislative intention underpinning it. Considerations over proportionality also suggest that it is necessary to take into account relevant underlying policy considerations in determining whether the contract should be void ab initio based on the illegal act in question.

Given that Bokhary J’s approach to statutory interpretation can be seen to have parallels in *Patel*, a revised approach to the illegality principle is likely to include the shadow of Bokhary J’s approach. The *Patel* approach can also provide for a more versatile range of considerations in determining the scope and applicability of the alleged illegality of a contract under s.114(1) of the SFO.

In contrast, the countervailing approach in *Wong Lung*, in light of *Patel*, is problematic. Apart from *Wong Lung*’s failure to consider Bokhary J’s approach in the first place, the analysis offered in DHCJ Chan’s judgement did not identify the underlying reason(s) that the contract should be void ab initio. The analysis put forward in that case, with no alternative interpretation otherwise, only suggests that the court has a discretion not to enforce the contract in light of the relevant illegal activities.

**CONCLUSION**

The grave consequences of rendering a contract void in the context of securities trading suggest that a criminal conviction per se should not necessarily render any relevant contract void. Given that the factors-based approach in *Patel* is now good English law, doors have been opened for appellate courts in Hong Kong to revamp its approach to illegality of contracts. The more detailed and comprehensive considerations over the legislative intention(s) behind a statutory provision under *Patel*, in contrast to the Tinsley approach that focuses exclusively on the (criminal) origins of the impugned contract, allow for a more accurate assessment as to its validity as envisaged by the legislature. A more prudent analysis of the relevant provisions would also permit the underlying legislative intentions to be reflected in a more comprehensive, accurate, and prudent manner.
INTRODUCTION: FROM LIGHT COMES DARKNESS

The Internet consists of three layers: infrastructure, code and content. Within the content layer are the surface web and the deep web. What lies at the bottom of the deep web is the dark web.

Our daily web use remains on the surface web, which contains only roughly 10% of all the content on the Internet. The remaining 90% belongs to the deep web and is not visible in search engines. A 2015 UK Parliamentary report estimated 2.5 million dark web users per day. Due to its anonymous nature, it does not only support illegal activities but also upholds internet freedom. Is the current regime in Hong Kong enough to tackle it? If not, how can it be improved?

SHOULD THE DARK WEB BE REGULATED: HEAVEN OF FREEDOM OR HELL OF SIN?

It is suggested that the dark web uses anonymity to cure the three traditional problems of the surface web: government surveillance, excessive commercialisation, and physical crimes and thus is a reign of absolute freedom. In the case of the dark web, is it a haven of freedom or sin?

The most distinct feature of the dark web compared to the surface web is a high degree of anonymity. The TOR Browser is needed to access the dark web. TOR stands for The Onion Router, which is a technology that allows users to hide their IP address in an encrypted overlay network. The whole process is encrypted except the traffic between the exit node and the server. Although it does not guarantee the user’s full anonymity, it surpasses the surface web remarkably in terms of protecting identities.

GOVERNMENT SURVEILLANCE

The notion of ‘nothing to hide, nothing to fear’ suggests that the societal need for security and mass surveillance overrides the individual need for personal privacy. Thus, some argue that the dark web should be shut down to control security threats.

However, internet freedom is inextricably linked to freedom of speech and freedom of the press, which are the core values of any democratic society. Without authorial control, the dark web circumvents internet censorship and protects whistleblowers, activists and dissidents, especially those who have difficulty expressing themselves freely under repressive governance. One of the most prominent examples is ‘SecureDrop’, which is a dark web platform operated by the Freedom of the Press Foundation for communication between whistleblowers and journalists. Former United States National Security Agency (NSA) contractor Snowden exposed global surveillance programs like PRISM, Tempora and Dishfire in 2013 through the dark web. The Arab Spring, which
was an anti-government and pro-democracy campaign across the Middle East in late 2010, was made possible because of the dark web.

**EXCESSIVE COMMERCIALISATION**

The dark web evades government and corporation surveillance. The monetisation of personal information and sentiment has become more rampant since the beginning of the Internet Era: artificial intelligence and data-mining are now mature enough to study our search histories, and habitual use of emojis to calculate brand interaction and buyer intent. The algorithm helps businesses customise their online advertisement which invades consumers’ privacy. Because of the dark web's high level of anonymity, every dark web user is unidentified and thus cannot be targeted by massive customised online marketing.

**PHYSICAL CRIMES**

However, the existence of the dark web leads to the commercialisation of cybercrime. An IP address provides the computer's location. Meghan Ralston, formerly from the Drug Policy Alliance, claimed that dark web drug sales civilised the global drug war as consumers now buy drugs online without facing the physical danger of getting caught on the street. Since the dark web encrypts the IP address in an encrypted multi-layered network, it ferments cybercrime and black markets of trafficking for 7drugs, weapons, organs and humans. Before Silk Road 2.0, a dark web market which generated a turnover of US$ 32.4 million from December 2013 to July 2015 for drug sales was closed down. The profits were from sales of illegal drugs, prescription drugs and non-drugs like fake identities, hacking services and pornography. Mr. Lee's Greater Hong Kong Market, which opened for business in July 2015, was allegedly the first site on the dark web specifically targeting Hong Kong people.

Money laundering and terrorism funding are also prevalent. A pro-ISIS group was launched in January 2019 through the dark web, which The Islamic State of Iraq and Syria (ISIS) utilized to spread propaganda and raise funds. With the aid of cryptocurrency, the dark web markets are more secure and more anonymous. The volume of the black market will keep increasing since it becomes harder to be taken down.

**HOW TO REGULATE: ILLUMINATE THE DARKNESS FROM WITHIN**

While the dark web makes use of its anonymity to protect its users from government surveillance and commercial takeover, the black market and illegal activities keep growing. The proper type of regulation should balance protecting online privacy and reducing cybercrime.

**CURRENT REGIME IN HONG KONG**

The dark web is not lawless. There are currently no specific regulations for the dark web but common offences for online behaviours can be applied. The offences can be divided into three major types, including unauthorised access under the Telecommunications Ordinance (Cap. 106), obscenity under the Control of Obscene and Indecent Articles Ordinance (Cap. 390) and the Prevention of Child Pornography Ordinance (Cap. 579), and criminal damage under the Crimes Ordinance (Cap. 200).

The crux is whether the current laws are practically enforceable against the criminals lurking on the dark web. Websites on the dark web do not have fixed IP addresses and are often unindexed, making them unsearchable in surface web search engines. Thus, it is difficult to locate the server, let alone the criminals.

The Hong Kong police have been conducting traditional investigations by using the intelligence gathered to run ‘proactive cyber patrols’ on the dark web searching for illegal activities. This can mean undercover, virtual identity profiling and behaviour analysis. Acting undercover, law enforcement agencies set up their servers and send agents to act as customers. Virtual identity profiling refers to identifying dark web users using the data collected on the surface web. Behaviour analysis means tracking down the users’ identities based on what they have done on the dark web.

**GOVERNMENT ENFORCEMENT EXAMPLES**

US law enforcement agencies adopt advanced technical methods to ‘fight technology with technology’, which Hong Kong may learn from. The US has established a streamlined approach to monitor the TOR network comprehensively. The NSA's XKeyscore program, which was disclosed by Snowden, makes use of the fact that users downloading the TOR Browser were ‘automatically fingerprinted electronically’ so that the NSA might still be able to identify them later.

As mentioned before, all TOR traffic is encrypted except the exit node. Therefore, the Federal Bureau of Investigation (FBI) investigates the unencrypted exit node for personal information by setting up a lot of nodes. Those nodes can also serve as a honeypot to gather TOR traffic data. A semantic database is built to help profile malicious actors and trace future criminal activities on suspicious websites.

US law enforcement agencies are allowed to use more aggressive methods. Judges have the power to issue warrants to the FBI, therefore allowing them to use the Network Investigative Technique (NIT). Playpen was an
infamous child pornography website before getting shut down in February 2015 seven months after its creation. By using NIT, the FBI installed hacking code in Playpen after containing it. The hacking code ran automatically on the criminals’ computers once they entered Playpen and revealed their IP addresses to the FBI.

**SELF-REGULATION**

The dark web is boundless. Websites should initiate their own regulatory systems to enhance the substantiality of their private corners on the dark web. Self-regulation is a middle ground between interventionism and laissez-faire.

The community-based model proposes that the regulation-making process should be a dialogue within the community instead of something being forced on them. Galaxy was a popular dark web social networking platform from mid-2013 to late 2014 with more than 30,000 accounts at its peak. Its community standards, which were stated clearly on the registration page, were ‘No child porn. No porn. No hate speech. No commercial activities...Any abuser will be immediately banned’. It demonstrates that certain communities pursue privacy on the dark web and are trying to keep everything clean and safe.

**CO-REGULATION**

Co-regulation is the balance between government enforcement and self-regulation. The historic Hong Kong term ‘positive non-interventionism’ is appropriate to describe such practice. It originates from the local economic policy raised by the then Financial Secretary Sir Philip Haddon-Cave in 1971. It refers to the policy of ‘big market, small government’ but not the commonly perceived laissez-faire approach since the government would intervene if market failures took place or the situation was harmful to the interest of Hong Kong.

The pendulum has swung from multilateralism to multi-stakeholderism because of the transnationality of the Internet. Not a single government can seamlessly get hold of the decentralised dark web. Thus, it calls for international cooperation of various stakeholder groups and not just governments to enhance legitimacy. To aid the discussion, stakeholders include users, network operators, technical experts and government regulators.

Since the birth of the Internet, multi-stakeholderism has included web communities in the discussion of cybersecurity regulation without going through the intricate law-making process. Currently, the Internet Engineering Task Force (IETF) and Internet Corporation for Assigned Names and Numbers (ICANN) embrace this model. Even though IETF and ICANN concern domain names, they demonstrate the feasibility of regulating the Internet with the multi-stakeholder governance approach.

Such a model offers a more multi-dimensional analysis on the issue than the traditional multilateral approach provided that marginalised communities are engaged and everyone is participating on an equal footing at both domestic and international levels. The multi-stakeholder model also provides more flexibility for cross-discipline international cooperation. Since crypto markets are more likely derived from dark web marketplaces, it may help to work with international financial technology associations like the International Fintech Foundation and MENA Fintech Association.

As an international financial hub, the Hong Kong government has been dedicated to providing a liberal business environment for Hong Kong to maintain its competitive advantage in the Asia-Pacific region. The best way is to adopt co-regulation, which can also be called ‘positive non-interventionism’. Governments, as one of the stakeholders of dark web regulation, should provide maximum support to the non-criminal side of the dark web with minimum intervention just to stop cybercrime. Governments should enshrine civil rights of internet freedom, freedom
of speech and right to privacy. In addition, supporting the dark web also helps with the market economy. Hong Kong’s economy is one of the freest in the world owing to the invisible hand of competition. It has been generally suggested that the free market, partially thrived by the free flow of information to which the dark web contributes, maximises the common good.

On the other hand, government intervention is justified to safeguard the public interests such as protecting the citizens from crimes. Governments should provide adequate legal frameworks and law enforcement to combat crimes. Still, the Internet is a perfect example of the idea of a global village. Due to the internationality of the dark web and the Internet in general, a government cannot singlehandedly oversee the whole Internet without having a giant but almost impossible firewall across it. Data and information come in and out of countries. Destroying the dark web means destroying the benefits it brings. Even governments hold different stances towards different issues among themselves. Hence, the most effective practice, also coinciding with the ‘capture cyclical theory’, is to reach a level of consensus between the governments and the interested parties.

CONCLUSION: NO LIGHT WITHOUT DARKNESS

The dark web solves the three problems of the surface web by dodging internet censorship, excessive commercialisation and certain physical crimes. However, it also triggers cybercrime. While enforcement agencies should consider using advanced technical methods supplemented by traditional ones to monitor illegal activities on the dark web, it would be most effective to let the stakeholders come together to regulate its non-criminal side in addition to self-regulation in terms of protection of rights, flexibility and sustainability of the dark web.
The Leung Chun Kwong Case: Good for Same-sex Couples, but Bad for Same-sex Marriage?

INTRODUCTION

In Leung Chun Kwong v Secretary for Civil Service [2019] HKCFA 19, (2019) 22 HKCFAR 127, the Court of Final Appeal (CFA) held that the Government’s denials of spousal benefits to a civil servant entering into same-sex marriage overseas (Benefits Decision) and the right to elect for joint tax assessment to same-sex couple married overseas (Tax Decision) constituted unlawful discrimination on the ground of sexual orientation. This article argues that Leung Chun Kwong is progressive in recognizing spousal benefits and statutory spousal rights for same-sex couples, but denies same-sex marriage in Hong Kong.

SPOUSAL BENEFITS GRANTED

The CFA held that the Benefits Decision was not rationally connected to the Government’s legitimate aim of protecting the institution of marriage in Hong Kong, i.e. heterosexual marriage. Endorsing the position in Rodriguez v Minister of Housing [2009] UKPC 52 that heterosexuals ‘will not be saying to one another ‘let’s get married because we will get this benefit and our gay friends won’t’, the CFA concluded that ‘heterosexual marriage is not promoted by the differential treatment in question.’ Accordingly, the CFA granted the relief in its subsequent judgment in [2019] HKCFA 34, quashing the Benefits Decision and declaring the appellant and his same-sex spouse entitled to the spousal benefits available to heterosexual spouses. This is likely to have a significant effect for future same-sex couples challenging the Government’s denial of benefits given to married persons through judicial review. Indeed, in Infinger v Hong Kong Housing Authority [2019] HKCFI 557, a case concerning overseas same-sex spouses who were denied public rental housing, the judge admitted that ‘the outcome of the final appeal in Leung Chun Kwong is likely to have a critical impact on the present application.’ This article submits that the success of the appellant in Leung Chun Kwong is likely to strengthen the applicant’s case in Infinger.

STATUTORY SPOUSAL RIGHTS LIBERALLY CONSTRUED

Under similar analysis, the Tax Decision was found not rationally connected to the aforementioned legitimate aim either. Noteworthily, besides quashing the Tax Decision, the CFA declared that the appellant and his same-sex spouse were entitled to elect for joint tax assessment, although ‘…the appellant was not adversely affected by this basis of assessment since, even if he and [his same-sex spouse] had been assessed for salaries tax by way of joint assessment as a married couple, they would not have obtained any reduction of their total tax liability.’ Therefore, it seems that the denial of this statutory spousal right, though without causing any financial loss, is discriminatory and remedy worthy per se. Furthermore, the CFA remedially interpreted the relevant statute, the Inland Revenue Ordinance (Cap 112) (IRO), in which heterosexual-specific words such as ‘husband and wife’ were read to include overseas same-sex spouses. This approach is arguably more liberal than that in W v Registrar of Marriages (2013) 16 HKCFAR 112, where the CFA, quoting HKSAR v
one man and one woman to the exclusion of all others.’ However, it also emphasised that ‘…nothing in this judgment is intended to address the question of same sex marriage’. Thus, whilst this observation is obiter, given by the highest court in Hong Kong, it is persuasive and likely to have a negative impact on future judicial review applicants who submit to argue that the non-recognition of same-sex marriage in Hong Kong violates their right to marry. This obstacle has become apparent: in MK v Government of HKSAR [2019] HKCFI 2518, the Court of First Instance (CFI) decided that the Government was under no obligation to provide the legal framework for recognition of same-sex relationships, let alone same-sex marriages. It was held in W that ‘the word ‘marriage’ in BL 37 refers only to heterosexual marriage that has been expressly recognised by [the CFA].’

CONCLUSION

Leung Chun Kwong confirmed that the aim of protecting the institution of heterosexual marriage could not justify differential treatment based on sexual orientation in the context of civil servants’ spousal benefits and joint tax assessment. This is to the advantage of future applicants challenging other discriminatory laws and policies such as the denial of public rental housing to same-sex couples in Infinger. It is progressive that the CFA in Leung Chun Kwong was willing to grant relief in the absence of financial disadvantage to the appellant and to arguably widen the scope of remedial interpretation to meet the constitutional standard of equal protection towards same-sex couples. Nevertheless, the CFA has never really dealt with the question of whether the right to same-sex marriage is constitutionally recognised, and that its obiter inclines to answer it in the negative. The problem thus becomes straightforward: the CFA’s obiter makes all lower courts unlikely to recognise the right to same-sex marriage. The courts’ reluctance to recognise same-sex marriage may be due to controversial nature of the issue, and that it was convenient for them not to address it — until MK, a straightforward same-sex marriage case. It is possible for the courts to give same-sex couples virtually every spousal related right except for the right to marriage, citing solely the right to equality. The courts may say that the right to marriage is the only possible ground on which same-sex marriage might be recognised and, since it only protects heterosexual marriage, people could not alternatively rely on the right to equality to argue for same-sex marriage as they can do for spousal rights. The Government would not be obliged to ‘justify’ its denial of recognising same-sex marriage since it is not recognised as a constitutional right, thus there is no right infringement and no justification is required. The CFI in MK took this position. Unless the CFA changes its attitude and overrules MK, the chance of legalising same-sex marriage through the judiciary seems low.

THE RELUCTANCE TO ADDRESS THE RIGHT TO MARRY

Although ruling in favour of the appellant without difficulty, the CFA in Leung Chun Kwong made it clear that ‘this appeal does not concern the question of whether same-sex couples have a right to marry under Hong Kong law. …it was not argued in this appeal that the constitutional freedom to marry and raise a family makes marriage available to same-sex couples.’ This is consistent with W, where the CFA observed that ‘It was common ground that a marriage for constitutional as for common law purposes is the voluntary union for life of
Reflection on the First Female Legal Leaders Seminar: How Is Moving to an Inclusive Workplace Possible?

Jenna Chow

INTRODUCTION

Gender equality is a fundamental human right. When it comes to issues of fundamental human rights, it is often the court's role to identify and protect the rights of individuals. However, is gender equality achieved on the bench or within the legal sector itself? Wouldn't it be a travesty if the legal profession fails to hold the value that it is defending? Regrettably, whilst the gender gap in wages and opportunities among legal practitioners have narrowed, gender issues remain significant within the legal sector.

As implied in the speeches delivered in the first Female Legal Leaders Seminar held by the Faculty of Law of CUHK, one must identify and understand the problems before making meaningful attempts to clear the impediments to gender equality. Therefore, challenges women face in pursuing a legal career will be illustrated, and suggestions to a more inclusive workplace culture will be raised. This article aims not only to provide insights to female law students, but also to male students who are indispensable actors in resolving gender issues within the legal profession.

GENDER IMBALANCE IN THE LEGAL PROFESSION

Whichever legal career path one pursues, gender imbalance will be evident in the workplace. For instance, there are only 11 females out of 102 senior counsels in Hong Kong; among the 18 non-permanent judges in CFA, only two of them are female. Law firms are not immune from the well-criticised issues of wage gap between male and female as well as the dominance of male in senior management and leadership roles in the business world. Even in academia, the high-paying and prestigious positions are overwhelmingly occupied by males. One can possibly spot this by merely looking at the staff list of the law departments in most academic institutions.

CHALLENGES FEMALES FACE IN COMPROMISING THEIR LIVES WITH THEIR LEGAL CAREERS

As titled in the 2003 New York Times Magazine, ‘Why Don't More Women Get to the Top?, we realise the
bleak reality of female legal practitioners. Ironically, the second half of the article title: ‘They choose not to’ does not explain the phenomenon. Indeed, women are equally ambitious as men. However, as mentioned by Clifford Chance partner - Ms. Emma Davies, it is the complex hurdles women face that hinder them from progressing. Such challenges include conflicting expectations from society, soft prejudice and marginal decision-making.

The broad freeway at the start of career eventually narrows as women navigate changes in life. When they plan for the next stages of life such as marriage and pregnancy, they struggle between their identities as mothers and workers. Davies goes on to argue that some women take their foot off the pedal to meet the social expectations of women as ‘good’ mothers. As mentioned in Times Magazine, men are culturally expected to be breadwinners and gain satisfaction through their jobs. However, they are less likely to face the same struggle as women do. It is also found that women quit not necessarily because they were less competitive. Rather, they felt unwelcomed due to the negative beliefs that the workplace has asserted over the careers’ pregnant women as mentioned by former U.S. judge Nancy Gertner.

Moreover, Davies illustrates how challenges emerge when women proceed to the middle management level. They are less ‘competitive’ because they are not trained to make a move to lead in the front. This can be understood by the long-standing stereotype of feminine traits as incongruent with managerial success. For instance, psychology professor Courtney von Hippel suggests that traits associated with managerial success such as ‘analytical, independent, and assertive personality types’ are stereotypically masculine. Whilst some female lawyers and managers must separate their feminine identity from their professional identity to resist stereotypical threat at workplace, some are discouraged to proceed.

**CONCLUSION**

The gender imbalance among the high-power positions in the legal profession implies the cultural and institutional challenges female legal practitioners face in pursuing their career goals. Gender equality is no one-man job. Transformation to a more power-balanced and inclusive workplace culture requires efforts from both male and females. And as a guardian of individual rights, the legal profession has no excuse in exercising their duty.
How Government’s Attempt to Curb Protest Violence Infringes Constitutional Rights Violently

Joanna Bi

INTRODUCTION

In response to four months of unprecedented protests, the Chief Executive (CE), Carrie Lam, chose to invoke the Emergency Regulations Ordinance (ERO) to introduce the Prohibition on Face Covering Regulation (PFCR) this October, for the first time in the Special Administrative Region’s history. The recent invocation of the ERO, which originally passed nearly a century ago, violently infringes human rights protected by the Basic Law (BL).

In the latest case Leung Kwok Hung v Secretary for Justice and Another [2019] HKCFI 2820 (the ERO case), the Court of First Instance (CFI) ruled that one of the grounds which the ERO could be invoked i.e. where the CE in Council considered that there was an occasion of ‘public danger’. However, the term was deemed incompatible with the Basic Law given that it was ‘so wide in its scope, the conferment of powers so complete, its conditions for invocation so uncertain and subjective, the regulations made thereunder invested with such primacy, and the control by the Legislative Council (LegCo) so precarious.’ In addition, the Court held that several provisions of PFCR were unconstitutional. The provisions which prohibit people from wearing masks in any assembly, and empower the police to remove the mask from any person ‘go further than is reasonably necessary’. Therefore it failed the proportionality test.

The Department of Justice has lodged an appeal against the ruling. At the time of this writing, there is no appellate court decision nor interpretation from the National People’s Congress Standing Committee (NPCSC) which overturns the CFI’s decision.

THE HISTORY OF THE IMPLEMENTATION OF EMERGENCY LAW IN HONG KONG

One of the most well-known examples of Hong Kong Government’s enforcement of the Emergency Law was in 1967. In response to the 1967 Riots, where an industrial labour dispute turned into countless demonstrations, strikes and bomb attacks mobilized by local communists, the Colonial Government passed 12 Emergency Regulations as legal measures to settle the unrest. Some of those Regulations empowered the police to detain those arrested for up to one year, and prohibited meetings of all kinds.

However, it is important to keep in mind that it was a time when the Colonial Governor was appointed by London, the members of the LegCo were appointed by the Governor, and no constitution had been enacted to protect human rights of the citizens in the colony. The constitutional framework and the situation of the society have changed largely ever since. Therefore the enforcement of Emergency Law at that time is not a justification for the current invocation.

HUMAN RIGHTS PROTECTION: POST-HANDBOVER ERA

The BL, the Hong Kong Bill of Rights Ordinance (HKBORO) and the International Covenant on Civil and Political Rights (ICCPR) are the key instruments which safeguard our constitutional rights after 1997. Article 27 of the BL provides that ‘Hong Kong residents shall have freedom of speech, of the press and of publication, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.’ Article 16 and 17 of the
enforcement of Emergency Law would infringe fundamental rights and erode separation of powers.

S3 (1) (b), (c), and (d) of the PFCR provide that a person ‘must not use any facial covering that is likely to prevent identification’ at any unauthorized assembly, and even at any lawful public meeting or procession. Such coercive provisions impose highly intrusive restrictions on our freedom of expression and the right to assembly.

As recognised by the Court in the ERO case, there can be various legitimate reasons for participants in demonstrations wearing facial covering. For example, one might want to wear a mask in a labour union assembly to avoid retribution. Wearing a mask in a peaceful assembly is also the most symbolic way to express one’s objection to the invocation of the Emergency Law and the enactment of the Anti-Mask Law. Prohibiting people from wearing masks even for these legitimate reasons would impose disproportionate restrictions on the freedom of expression in peaceful public meetings and processions.

However, it is far from necessary to impose restrictions on participants of a lawful public meeting or a public procession in addition to imposing restrictions to those of an unlawful assembly. In a press conference, Secretary for Security John Lee claimed that it was necessary to extend prohibition to lawful assembly because many peaceful public meetings or procession had turned violent. Yet, such an objective can be achieved by only prohibiting the wearing masks in unlawful assembly. If a lawful assembly turns violent, it would inevitably become an unlawful one, rendering a person wearing a mask at that assembly liable to the offence under the Anti-Mask Law.

CONCLUSION

After the Court delivered its ruling on the ERO case, the Legislative Affairs Commission of the NPCSC stated that only Beijing had the power to decide whether a law is inconsistent with the BL. At the time of this writing, it is uncertain whether there will be another NPCSC interpretation. Nor is it clear whether Beijing is going to take further steps to take away our court’s power to decide the issue of constitutionality. If such steps are indeed taken, it would render the above discussion, the constitution of our jurisdiction, together with the principle of ‘One Country Two Systems’ meaningless.

The powers conferred to the CE by the ERO seem to be unlimited and extremely intrusive. The use of these powers also runs against the principle of separation of powers. The invocation of the ERO and the enactment of the Anti-Mask Law have infringed upon fundamental human rights. As stated in the ERO case, ‘the need for an urgent response is no justification for departing from or impugning the constitutional scheme.’
Quis Custodiet Ipos Custodes? (Who Will Watch the Watchman?)

Alice So

INTRODUCTION

Who will watch the watchmen? This would be a question raised by many Hong Kong citizens when members of the Hong Kong Police Force (HKPF), the city’s largest law enforcement body, uses excessive authority against protesters in the Prince Edward station on 31 August 2019. This article offers a brief overview on the existing police complaint mechanism and evaluates whether these measures are effective in holding rogue policemen liable subject to valid complaints.

PURPOSES OF POLICE COMPLAINTS SYSTEMS

There has been a global trend of reforms of police complaint mechanisms marked by the establishment of independent police complaints bodies (IPCBs) in the last fifty years across different jurisdictions. Hong Kong, for instance, set up the Independent Commission Against Corruption (ICAC) in 1974 initially to combat widespread corruption in the police force, and established the Independent Police Complaints Council (IPCC) in 1986, which was later recognised as a statutory body in 2009.

These supervisory bodies were created to provide an independent police complaints mechanism serving three major objectives: 1) to hold law enforcement officials accountable in criminal and disciplinary proceedings; 2) to serve as a regulatory mechanism that identifies risks and improves the service quality; and 3) to address citizens’ grievances with the police.

HONG KONG’S POLICE COMPLAINTS SYSTEM

The Hong Kong police complaint mechanism consists of three parties: the ICAC, the IPCC and the Complaints Against Police Office (CAPO), which sits within the HKPF. The ICAC acts individually with the focus on combating corruption and bribery-related issues across public and private sectors, while IPCC operates alongside the CAPO as a ‘two-tier system’ to handle complaint cases regarding the HKPF. The IPCC Ordinance (Cap. 604) does not vest the Commission with investigative powers, despite the HKPF having a statutory duty to comply with IPCC’s requests. All complaints against the police are referred to the CAPO for handling and investigation at the first tier.

Such complaint mechanism generally suffered less controversy in earlier days. From 1994 to 2004, over 70% of all complaints against police were reported via telephone or in person to the CAPO either directly or at a police station. The willingness to report to these two direct channels rather than making complaints via other government departments, the press, or the IPCC (which only receive a total of less than 1% of all complaints on average) reflected that citizens’ trust in the HKPF as a public institution.

APPLYING POLICE COMPLAINTS SYSTEM IN PUBLIC ORDER POLICING

While trust towards the HKPF seemed to be ingrained within the public’s mind, since 2010 the IPCC has repeatedly expressed its concern over the increasing number of complaints on the HKPF regarding improper policing within public processions and assemblies in its annual report. It is also worth mentioning that while the IPCC observed more complaints concerning public protests, the total number of complaints received by the IPCC decreased, accompanied with a decrease in the number of substantiated investigations (see Table 1). Partly prompted by the increased complaints, the IPCC organised meetings with the public procession organisers before major protests in 2011 and such meeting with the HKPF began in 2009 before the problem emerged. Followed by waves of democratic movements over the
use their status as law enforcers to act above the law and suffer no consequences for their wilful wrongdoing. By contrasting the outcome of Chu’s case with the three objectives for police complaint mechanism aforementioned, one can conclude that, none of them have been achieved so far. First, because the procedures were delayed, Chu was already retired when the disciplinary ruling was published and was not affected by the IPCC’s proceedings. Second, the CAPO’s multiple attempts to water down the complaint could not provide a strong deterrent for future misconduct. This has weakened the regulatory function of the IPCB to identify risks and prevent poor performance for the purpose of improving the delivery of policing services. Last but not least, while it might be pacifying for some to see a rogue policeman being imprisoned for his wrongdoing, the CAPO’s repeated attempts to obstruct the IPCC from substantiating the complaint cannot help address citizens’ grievances with the HKPF.

CONCLUSION

Over the past few months, there have been concerns on whether the HKPF is subverting the law by its inaction to certain illegal acts or differential treatment against parties holding different political views in society. As suggested by Joseph Raz (1979), the rule of law is dependant on the presumption that the discretion of the crime-preventing agencies should not be allowed to pervert the law, even at its minimum account. The rule of law would be undermined when a law enforcement body, such as the HKPF, ‘allocate[s] its resources so as to avoid all effort to prevent and detect certain crimes or prosecute certain classes of criminals’. Therefore, it is vital to have an effective and fair mechanism to receive and investigate complaints against police misconduct made by the public, in order to restore trust between the HKPF and the public.
Call for Scrutinising the Exercise of Power Conferred to the Hong Kong Police Force

David Yam

On 3 April 2019, Hong Kong's government introduced an amendment bill (‘The Bill’) for amendment to the legislation enabling criminal suspects to be extradited to China. Critics warned The Bill could undermine HK’s ‘high degree of autonomy’ and ‘one-country-two-system’ entrenched in the Basic Law. Subsequently, on 9 June 2019, an estimated one million people marched to the government headquarters to show the their discontentment against the proposed bill and this marked the starting point of a series of unrests in the city for the next six months. The alleged abusive use of police authority sighted in the city has drawn international attention. Furthermore, the failure to stop the mob attack at protestors and innocent passengers at Yuen Long MTR station on 21 July 2019, coupled with the physical and sexual abuse claims during police detention, tense public resentment against the Hong Kong Police Force (‘HKPF’) to its climax. ‘Five key demands, no one less.’ has become the most representative slogan among the protestors. The predominant demand is an independent inquiry committee (‘Committee’) to investigate the misconduct and malpractice of the HKPF since June in an impartial and accountable manner. The demand for a Committee to investigate misconduct of the HKPF reveals a more fundamental problem: the absence of an effective check and balance system in scrutinising the police’s exercise of authority. As there are different disciplinary offences according to the Police (Discipline) Regulations (Cap 232) (‘Regulation’), this article will focus on the ‘unlawful or unnecessary exercise of authority resulting in loss or injury to any other person’ offence. This article sets out to criticise the prejudicial Complaint Against Police Office (‘CAPO’) and dysfunctional Independent Police Complaints Council (‘IPCC’) in the investigation and prosecution of misconduct police officers. It goes on to propose submitting some propositions for setting up a Committee.

According to the Guide for Complaints (‘Guide’) published by the HKPF, all complaints against the police, regardless of their origin, are handled and investigated by the CAPO of the HKPF. Although the preamble of the Guide states that the CAPO shall ‘treats all parties impartially’, all preliminary investigations on complaints, formal or otherwise, are conducted by the CAPO officers who are de facto members of the HKPF. The undisclosed internal investigation procedure could cast doubt on the impartiality of the CAPO in treating police complaint cases. As the CAPO is a quasi-judicial procedure, the common law maxim of ‘not only must Justice be done; it must also be seen to be done’ should have merit here. Furthermore, a reported formal complaint shows that the CAPO had failed to give reasons to justify their ruling and neglect the IPCC disapproval and refusal to endorse its ruling. Although the Guide does not require a positive duty on the CAPO to give reason, when a decision engages the applicant’s fundamental right or interest that is highly regarded by the law, fairness mandates the giving of reason. All in all, the failure to give reason will undermine the transparency of the investigation and public confidence towards the CAPO.

When the Government declined to establish a Committee to investigate alleged police officers' misconduct, it directed the public to trust the IPCC. The IPCC is said to be a second-tier independent statutory body responsible for investigating formal police complaints. The establishment of the IPCC, prima facie, should provide some extent of check and balance to the CAPO's investigation. However, the statutory power conferred to the IPCC is too minimal. It does not have the power to ensure proper and effective investigation of complaints nor the power to effectively implement its recommendations. The IPCC Ordinance only confers members of the IPCC limited power such as to 'attend an interview conducted by the Commissioner in respect of a reportable complaint' and 'observe the collection of evidence by the Commissioner in the investigation of a reportable complaint' (emphasis added). The clause highlights the passive role of the IPCC. Also, the inadequate separation of the IPCC from the Commissioner of Police (‘Commissioner’) undermines the independent investigation power of the IPCC. The existing IPCC Ordinance does not confer the IPCC power to require the Commissioner to investigate a complaint categorised as non-reportable. The Hong Kong Bar Association (‘HKBA’) cited the UN Human Rights Committee's concern that the investigations of police misconduct were still carried out by the police themselves through the [CAPO]. The HKBA had proposed a Position Paper in 2007 for recommendations to revamp the IPCC to a statutory investigatory entity like the Ombudsman. Regrettably, the recommendations have never been accepted by the Government. More recently, a report to compare the complaint mechanisms against the police in different jurisdictions published...
by the Legislative Council Secretariat reviews the IPCC is second to last in the spectrum of statutory power to investigate police misconduct. Although the scope of complaints that the IPCC can investigate is the widest among other jurisdictions, its members are all appointed by the Chief Executive of HK. This poses a question to the fairness of the IPCC when the intention of police to discharge its authority might be tainted by political agenda.

After criticising the existing police complaint mechanism, some propositions are made regarding the Committee by referencing overseas civilian oversight bodies on police force. For the Committee member selection: it is proposed that a portion of members shall be selected by LegCo and chaired by a Judge to show the impartiality of the Committee. A similar mechanism of handling complaints against police is adopted in New York City. Five out of thirteen members of the New York City Civilian Complaint Review Board are designated by the City Council. This shows a greater check against the mayor-council government and the police force performance. For the power to call for an investigation: it is proposed that the Committee shall have the power to call in any case as to either investigate or supervise cases without the Commissioner’s endorsement. This proposition in modeled after the existing practice of the IPCC in England and Wales. Last but not least, for the power to award sanction against misconduct police officers: the committee can emulate the The New South Wales Police Integrity Commission that the Committee shall be vested with the power to award a penalty of imprisonment to police officers who have found with serious police misconduct.

As alleged police misconduct and abusive use of authority have been widely reported by the media since June, it is paramount for the Government to establish a Committee without undue delay. It is aimed that a Committee can bring justice to the victims of the abuse as well as reinstate the integrity of the HKPF.
Vigilantism: When a State Fails its People

Aaron Lai

INTRODUCTION

The series of protests triggered by the introduction of the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill has rocked the city for half a year. Both parties at the forefront of the battleground, the black bloc and the police, have escalated their use of force. One particular feature of that escalation is the emergence of vigilantism. Some masked protesters jumped on dissenting citizens who provoked them by taking close-up photographs or attempting to assault them with weapons. This article contends that vigilantism is not a factor undermining the rule of law but a signal of the undermined rule of law.

VIGILANTISM

Vigilantism is a mechanism of self-help or private justice in the form of corporal punishment or violence, against a perceived perpetrator. In most modern societies, there are rules proscribing the use of physical force by private citizens in response to law-breaking behaviours by another.

FACADES OF RULE OF LAW

The basic position of the rule of law is that everyone in society, including the government, government officials, legislators and citizens, is subject to the laws passed by the local legislative institute (‘the broad definition’). Any deviation to this cardinal principle undermines the ideal of rule of law.

World Justice Project (WJP) has listed nine factors to depict rule of law. The only relevant factor, for this article, is ‘Order and Security’, which concerns, inter alia, whether aggrieved citizens resort to private justice and whether crime is effectively controlled.

However, in his speech about the importance of open justice, NPJ Spigelman said that maintain public confidence is the most fundamental aspect of open justice while open justice is a key component of rule of law. Thus, public confidence is one of the fundamental aspects of the rule of law.

CAUSE OF VIGILANTISM

Justice Chaskalson, President of the Constitutional Court of South Africa, observed, in S v Makwanyane, in a constitutional state, people abandon their rights to self-help in guarding their rights only because the state assumes the obligation to protect these rights. If the state fails to discharge this duty adequately, there is a danger that individuals might feel justified in using self-help to protect their rights. (emphasis added)

The view of Justice Chaskalson, to a certain extent, echoes the speech of NPJ Spigelman in which it is the subjective perspective of citizens that drives them to resort to vigilantism.

Under the WJP model and the broad definition, vigilantism undermines the rule of law because vigilantes act extrajudicially without legal consequence. However, this analysis is misleading because the sub-limb of WJP model contains both the result, which is the emergence of vigilantism, and the cause, i.e. crime not being effectively controlled. The analysis based on WJP model overlooks the underlying conflict in Justice Chaskalson’s observation: vigilantes believed that the state has not adequately discharged its duty in upholding their constitutional rights, or vigilantes have no confidence in the state. It is the subjective element, or the lack of it, of the citizens that breeds vigilantes. Vigilantism is a sign epitomising the undermined rule of law rather than the cause of damaged rule of law.

CONCLUSION

Seeking protection by means of private justice is undoubtedly illegal. Nevertheless, such illegality does not necessarily entail impairment of the rule of law. Vigilantism is the response of the citizens as a result of their lack of trust to the state.
Does Hong Kong’s Anti-mask Legislation Erode the Rule of Law?

Samuel Yau

INTRODUCTION

It all began with the Extradition Legislation proposed by the Government to allow the exchange of fugitives between China and Hong Kong. Following continuing protests, the Government withdrew the bill. Some of the protests were unlawful and ended with serious vandalism and violent police arrests. Protesters wore masks or covered their faces in the protests to prevent reprimand from employers, threats from the public, and police targeting. The Government, on the other hand, argued that protesters wearing masks are emboldened to perform criminal acts. On 4th October 2019, the Government imposed and enforced legislation to ban masks in public assemblies. This article will address two questions: (1) should protesters and the general public be allowed to cover their faces?, and (2) how should legislation be introduced?

SHOULD PROTESTERS AND THE GENERAL PUBLIC BE ALLOWED TO COVER THEIR FACES?

The first question requires analysis of sub-legislation of Prohibition on Face Covering Regulation (Cap 241K) effective 4 October 2019. ‘A person must not use any facial covering to prevent identification’ while in a public meeting of more than 50 persons, that is not in a private premise or in a school. Proponents of the regulation suggest that this provides order to society. Opponents would argue this is an infringement of Article 39 of the Basic Law which provides that the International Covenant of Civil and Political Rights (ICCPR) prevails. I note that s.4 (2) of the Regulation states that persons with reasonable excuse can still wear a mask, and therefore some argue the regulation is not unfair. However, the reasonableness, whether subjective or objective, is not clearly defined. I agree with the opponents. First, there is no evidence that face covering leads to acts of violence. Second, the legislation restricts the entire public’s right to lawful and peaceful public meetings, which I argue goes beyond the need of unmasking the few violent criminals. Lastly, police officers have the existing power to request for face coverings to be removed for identification. Expanding the police’s power to arrest otherwise lawful citizens raises the concern of excessive police power, which could bring the rule of law to question. My reasons are affirmed in Leung Kwok Hung v Secretary of Justice [2019] HKCFI 2820, where the legislation is ruled unconstitutional for some of the above reasons.

HOW SHOULD LEGISLATION BE INTRODUCED?

The second question is a matter of procedural fairness. Is Article 73 of the Basic Law, which vests various powers in the Legislative Council, eroded by the introduction of the Regulation? Proponents of the anti-mask regulation argue that the Emergency Regulations Ordinance (Cap 241) was effective before the Handover and therefore carried over as legislation. Under Section 2 of Cap 241, legislation can first be enforced in times of emergency, and negatively vetted later by the Legislative Council. This approach encroaches on the separation of powers, where laws are generally debated and voted in the Legislative Council before being implemented by the Government, not vice versa. Opponents claim that Article 8 of the Basic Laws suggests that Cap 241 contravenes with the Basic Law and thus should be repealed. It can also be argued that Cap 241 should not apply since the Government said in a press release dated 4 October 2019 that there is no state of emergency.

CONCLUSION

In conclusion, my view is that the anti-mask legislation is unconstitutional. Therefore, I believe any introduction of legislation through the Emergency Regulations Ordinance should be prudently planned as stability and predictability in our laws are crucial pillars in the rule of law.
Mr. Isaac Shaffer, Legal Services Manager

1. WHAT INSPIRED YOU TO JOIN JUSTICE CENTRE HONG KONG?

Before working at Justice Centre, I worked in London, providing direct legal representation to refugees and migrants in the UK for a specialist public interest law firm. I loved the work and was very interested (and thought it important) to see how other states and regions outside of the UK and the EU dealt with the protection needs of refugees and migrants. Coming from practice in the UK, I thought Hong Kong would be an interesting and important anomaly that was both familiar and distinct. Generally speaking, states are divided into those that are signatories to the Refugee Convention (and therefore provide protection for qualifying individuals) and those that are non-signatories (whose governments do not engage in operating a protection system). Hong Kong is anomalous in that it is a non-signatory but does have its own government-led protection system. However, it was of obvious concern that it also had and has one of the lowest acceptance rates in the world at well below 1%, whereas most developed states generate acceptance rates of around 30-40% or higher. When you are refusing 99% of protection applications that’s an alarming indication that a system simply isn’t working. I wanted to see if I, and the work of Justice Centre, could help improve that.

2. WHAT CAN THE GOVERNMENT DO TO IMPROVE THE REFUGEE SITUATION IN HONG KONG?

There’s a long list. But at the top is improving the quality of decision-making in refugee/protection claims to bring it into line with appropriate international standards. At Justice Centre Hong Kong we see hundreds of these decisions each year and frustratingly what is apparent is that the degree of inquiry, thought and understanding of the relevant factual and legal issues is very often far lower than is acceptable for a place as well-resourced and well-administrated as Hong Kong. Fixing this is a priority: I would suggest the government carefully consider what has led to this situation. One reason, I believe, is a need for further training of officials in charge of deciding cases. It is a complex and stressful job. One thing is clear - making fairer decisions at the start avoids the pain and costs of protracted litigation.

3. WHAT DO YOU THINK DEFINES A SUCCESSFUL PRO BONO PROGRAMME?

The obvious answer is to address both need and impact – i.e. whether the programme provides an important legal service for those that need it, and otherwise would struggle, or would not get it. But one also needs to consider where pro bono sits in the provision of other public/private legal services. In Hong Kong there are publicly funded schemes such as legal aid – government-funded provision of legal representation if any of us can’t afford it and should find ourselves in a time of crisis. This is a truly vital public service and underpins the rule of law.

It’s important that pro bono work co-exists alongside publicly funded schemes and does not undermine or seek to replace them. One primary reason for this is that clients should be assisted by specialists who are dedicated to the more niche or complex areas of law. You can consider that need for yourself - if you found yourself in trouble with the police, you would obviously want to have a criminal lawyer who knows what they are doing and has relevant experience and expertise. The more complex and more niche the area of law is, the more you may need to have lawyers specialize in and dedicate themselves to that area. It’s vital that pro bono programmes understand the ecosystem and are strategic about using the resources they have wisely to help improve it. I would urge that those designing programmes think long term and as well ensure that they are providing an important service to immediate clients. They should ask themselves the important question: will this
It is important that pro bono co-exists well with legal aid and does not undermine it

programme mean that in five to ten years, the system will be improved? More sustainable? Fairer?

4. HOW DOES JUSTICE CENTRE HONG KONG COLLABORATE WITH CORPORATE LAW FIRMS?

For any collaboration you have to be responsive to the people you’re working with, especially when working with external lawyers who may have different expectations, constraints or resource needs. At Justice Centre Hong Kong we are not merely a referral agency. We have considerable in-house legal expertise and experience to bring to the collaboration. This means we can work with external teams whatever their levels of experience and expertise. The amount of training and support needed within the collaboration is calibrated accordingly. We want to open up pro bono work to all whilst also ensuring quality. Working together in this way can be a great way for lawyers to pool skills and experiences and learn from each other’s areas of expertise. In collaborating we try to make sure we are always on hand to provide the in-depth support and guidance and training needed to ensure the highest quality of work. We are also very lucky indeed – we have partners who are in many of the best international corporate law firms and the standard of their work is exceptional. In collaborating we therefore get to work with some of the best lawyers in Hong Kong. I’ve been continually impressed by both their capacity to be able to pick up work they haven’t necessarily done before and how the best firms as institutions have increasingly recognized the importance of quality pro bono work.

Ms. Annie Li, Senior Research and Policy Officer

5. WHAT INSPIRED YOU TO JOIN JUSTICE CENTRE HONG KONG?

I heard about Justice Centre Hong Kong in my previous job because it also engaged with UN treaty bodies’ periodic reviews on Hong Kong. The first project I worked on at Justice Centre was a research project about refugees and human trafficking. In the research, I read 50 clients’ testimonies. I was very impressed by their courage given that some of them had gone through very horrible experiences. In Hong Kong, the policies about non-refoulement are highly inadequate and problematic. Nevertheless, some of them still endeavoured to uphold their own rights and well-being.

6. WHAT ARE THE ISSUES IN YOUR RESEARCH THAT THE PUBLIC SHOULD HAVE MORE AWARENESS OF?

One of the biggest research projects we have done is called ‘Coming Clean’, which concerns the prevalence of forced labour and human trafficking amongst migrant domestic workers in Hong Kong. We found that, in 2016, 17% of migrant domestic workers were estimated to be forced labour. And among them 14% were trafficked for forced labour. This is something we have been trying to bring to the public’s attention. The Hong Kong government always claims that they have sufficient protection afforded to migrant domestic workers, and that the policies in Hong Kong are better than those in many jurisdictions. Our research shows that it is not true. In the United States Trafficking in Persons Report in 2016, the US downgraded Hong Kong from Tier 2 to Tier 2 watchlist, and our research findings were cited as part of the basis of the downgrading. Subsequently, the Hong Kong government introduced an action plan to combat human trafficking and a code of practice for employment agencies.

7. DO YOU THINK THERE IS TENSION BETWEEN ASSISTING REFUGEES AND ASYLUM SEEKERS, AND RESERVING ADEQUATE RESOURCES FOR LOCAL CITIZENS?

There is not necessarily tension between resources given to protection claimants and the locals. Firstly, asylum seekers and refugees do not currently have the right to work in Hong Kong, although those claimants whose claims have been substantiated can apply for permission to work if they find a job. Moreover, Hong Kong has an aging population and certain sectors clearly lack sufficient labour. Under the current government policy, asylum seekers and refugees who want to contribute to the economy in Hong Kong may not have the opportunity to do so. Secondly, the Hong Kong government classifies asylum seekers and refugees as illegal immigrants. Therefore, they are often seen as non-locals, but this does not have to be the case. Some asylum seekers and refugees may consider themselves as Hong Kongers and want to be seen as locals.

The Hong Kong government gives each non-refoulement claimant some humanitarian assistance each month, including HK$1,500 for accommodation, HK$1,200 for food, and HK$200-300 for transportation. But, obviously, the amount is not enough; in fact, the official justification for the humanitarian assistance is to prevent non-refoulement claimants from becoming destitute. The problem is that the government seems to think that if they improve what they give to asylum seekers and refugees, it may cause a so-called ‘magnet effect’, meaning such policies would attract more people to come to Hong Kong and seek asylum and non-refoulement protection. However, so far it has just been a narrative. There has never been data or research to support this.

8. WHAT CAN THE GOVERNMENT DO MORE TO PROMOTE THE PROTECTION OF HUMAN RIGHTS FOR REFUGEES AND ASYLUM SEEKERS?

In terms of promotion, education is very important and the public needs access to more information. This would depend on the Hong Kong government’s mindset towards asylum seekers. Non-refoulement is handled by the Security Bureau - security seems to be the main concern of the government when it comes to asylum seekers and refugees. As such, the government would not conduct public education about asylum seekers and refugees. The mindset of the government needs to change.
1. HOW DID YOU START YOUR LEGAL CAREER?

At first I considered working in social work, education or nursing because these were the main options for women of my generation. I became a primary school teacher, but I had this innate sense of justice and really wanted to fix things and make things better, fairer. That’s why I enrolled in law. When I graduated, I went to the Bar hoping to pursue my dream of working with marginalised people. I learnt a lot. I worked with victims of abuse who were mistreated because of their poverty, disability, migrant or Aboriginal status. These were the people who faced the most barriers. I also realised that the Bar did not suit someone as consultative as me!

2. WHAT ATTRACTED YOU TO PRO BONO WORK INITIALLY? HOW HAS YOUR MOTIVATION EVOLVED OVER TIME?

When I was leaving the Bar, one of my friends from law school told me that I’d really enjoy working at this community legal centre in Sydney for women. Because of my fairly narrow upbringing, I had no idea what this was. But soon I found it to be a most satisfying job. We mainly worked with women who had difficulty accessing justice because they were poor, rural, disabled, immigrants, LGBT or simply because they were women. You knew with every client you were making a difference, even if you were just providing them with legal information, to know their rights. Most of the work was done by telephone because we were in secured, confidential premises. We were dealing with many domestic violence cases and needed to minimise risks posed by perpetrators.

Over time, I have observed that law and community values are ever evolving and you often face new scenarios; you need to be dynamic and prepared to find or create new solutions through pro bono work. For example, how can you improve the information on the legal aid website? The provision of early legal advice is another key issue, and the Hong Kong Centre for Pro Bono Service is developing it with law firms and others in the legal sector. It is about upholding the Rule of Law, that is having a legal system which is equally accessible and applicable to every member of the community in which it operates.

3. WHAT ARE THE MOST ENJOYABLE AND MOST CHALLENGING ASPECTS OF YOUR CURRENT ROLE?

As Pro Bono Counsel - Asia at DLA Piper, I have the privilege of working with seven offices: Beijing, Shanghai, Singapore, Seoul, Tokyo, Bangkok, and Hong
Hong Kong. Different sites require different approaches. With 250 employees, the Hong Kong office is the major office in Asia, which also accounts for the vibrancy of pro bono projects here. I usually would like to go around the offices once a year, but it really depends on what's on. At the firm level within pro bono we like to think globally and act locally. We look for what is needed in a location and work with local people, then respond. For example, DLA Piper and NGO PILnet prepared a report: This Way - Finding Community Legal Assistance in Hong Kong. This has underpinned several initiatives we have built in Hong Kong, such as the Legal Clinic which we run with RainLily, assisting those who have experienced sexual assault and harassment in obtaining compensation at the Equal Opportunities Commission. I very much enjoy seeing people who have no alternative, practicable means of getting legal assistance being able to do so. It is only when everyone can do so that we can say that our system of justice is working.

It is also a real pleasure to see lawyers introduced to pro bono get hooked on it! Often this can mean having to get training first, to enable them to be able to assist individual clients with needs unlike those of the clients you see in a commercial law firm. I am ever mindful, as I raise awareness of the potential of pro bono and what we can actually achieve, that the main reason lawyers say that they don’t do pro bono is that no one ever asked. It is also rewarding when law firms act collegially and work together. With colleagues from across the legal landscape, we formed a committee to organise the 7th Asia Pro Bono Conference, which was held for the first time in Hong Kong in 2018. The conference gathered more than 500 people from across Asia and the world. It provided a great platform for pro bono professionals to exchange ideas about the areas they work in, including domestic violence, discrimination, refugee issues, LGBT rights, and people with disabilities and so forth. This collegiality totally ignited the pro bono sector in Hong Kong.

The biggest challenge, I believe, is time. People are busy. However, my colleagues are overwhelmingly open to pro bono with a great level of understanding and sophistication. I am acutely aware of the challenge of juggling the work life balance. At least I no longer need to explain the value of pro bono. In 2001, when I started out as a pro bono lawyer, I’d be explaining the basics of legal aid and what it is because lawyers back then were so separate from the pro bono world, almost disbeliefing that people could be unable to get legal assistance when there were laws in place that should assist. Nowadays people are much better informed and this generation of new lawyers comes with knowledge or experience of human rights law, wanting to contribute in some way.

4. HOW WOULD YOU COMMENT ON THE PRO BONO CULTURE IN HONG KONG?

Unbelievably vibrant! One of the best developments here is the Hong Kong Centre for Pro Bono Service, a community legal centre being developed by the founders Davyd Wong and Allen Bell and many, many supporters. It is still only part-time (this is likely to change as it builds capacity) but it is really a first for Hong Kong. Operating in Ho Man Tin, this is a generalist legal clinic where people can simply come along, set up appointments, and seek advice and referral. The clinic has volunteers from law firms of all sizes, with law students and in-house counsel supporting the evolution of the clinic too.

The pro bono scene in Hong Kong is also being driven by in-house or corporate counsels. In 2018, DLA Piper partnered with the Association of Corporate Counsel to produce a guide to pro bono legal work for in-house counsels. Related training, legal education and research workshops were also held. In-house counsel legal assistance will expand the resources available to the community.

5. WHAT ARE THE GREATEST OPPORTUNITIES FOR, AND THREATS TO, SOCIAL JUSTICE IN HONG KONG?

One thing I would like to see is the introduction of a new category of Practising Certificate for lawyers who want to practise solely in an NGO legal centre. This is not possible in Hong Kong yet, but well-established in many other jurisdictions. The clients would still get the standard of care required, just like in any other law firm. The sole difference is that it would be, in fact, a non-profit law firm for those unable to afford legal help or ineligible for legal aid. I think this is both an opportunity – if it happens, and a threat – if it does not.

The biggest threat to social justice in Hong Kong is the attitude of those people who don't think that change is possible. Negative people might believe that 'the poor are...
always going to be with us. But poverty, like other global diseases, can be reduced or eradicated. It is possible to elevate living standards. Witness the rapid growth of the middle class across Asia in recent decades to support that view.

6. HOW DOES DLA PIPER HONG KONG APPROACH PRO BONO WORK? WHAT SETS IT APART FROM OTHER LAW FIRMS IN HONG KONG?

The commitment of the firm as a whole is crucial because pro bono is core to our business. We have about 25-30 people in the pro bono team around the world, and two full-time pro-bono partners: one in the UK and one in the US. In every office in Asia we have pro bono coordinators, who all speak the local languages. We want our pro bono offerings to be as relevant and connected as possible. We rely on our local teams to tell us what’s going on. Our global strategic plan focuses on rule of law, child justice, and migration issues which are addressed quite differently from region to region to ensure what we do is relevant and impactful.

On the rule of law, we provide legal education (e.g. teaching law, introducing student groups such as the Asia Law Students Association to pro bono roundtables, supporting legal clearing-houses, strengthening the capacity of legal institutions such as professional associations and law schools, and building human rights networks and communities). On migration issues, we do a lot of work with refugees around the world. We have lawyers who travel to Greece and assist people in the camps; we have people at the US-Mexico border. Here in Asia, we do most of our work in Thailand, with the International Rescue Committee (IRC), along the Thai-Burma border. The IRC has established a parallel justice system for those residing within the nine refugee camps along the Thai-Burma border. We also have two economic empowerment programmes for refugees in development in Thailand and in Hong Kong. For child justice, we have worked to end child marriage in Asia and Africa. We collaborate with UNICEF, for example, by preparing cross-jurisdiction reports on children deprived of liberty, including children in jail with their parents, older children who have committed crimes, orphans, children with a disability, and refugees.

7. HOW DOES DLA PIPER ENSURE THAT ITS PRO BONO WORK IS SUSTAINABLE AND IMPACTFUL?

Continuing assessment and review and, above all, listening to those who we are trying to assist. With our strategic plan we try and set clear, measurable goals. Throughout the years we are asked to report on our activities by multiple stakeholders around the world: there is always internal reporting as well as reports for the NGOs, other referring agencies, commercial clients, and Law Societies. Some reports contribute to external sustainability studies and to business and human rights agendas.

Our current three-year strategic plan is coming to an end and the DLA Piper Pro Bono team will be meeting early in 2020 for its international planning retreat. In terms of the future of pro bono and our strategic focus, we will certainly be addressing and re-assessing our contribution to existing focus areas. In addition, we will consider more closely pro bono responses to climate change and extreme poverty.

8. WHAT IN YOUR OPINION IS THE MOST IMPORTANT QUALITY IN A PRO BONO LAWYER?

The ability to listen. When you first step outside your comfort zone into the lives of people with life experiences very different from your own, you will hear narratives that seem hard to believe. And of course often that is why people cannot get help - because no one will believe them. Imagine if your lawyer did not believe you. Give your client the benefit of the doubt. It is not your place to adjudicate. Ask questions. Query what is being said. Don’t judge, just test it.

9. WHAT ADVICE WOULD YOU GIVE TO STUDENTS INTERESTED IN PURSUING PRO BONO LEGAL WORK?

You do not have to be a full-time pro bono lawyer to do pro bono work. Right now while you are at university sign up for social justice clubs or legal clinics. Check out which NGOs have internship programs for law students. Ask what your student law society is doing. When you are looking for law firms to work with, see what their websites say about their community or pro bono participation. And once you have secured that position in a law firm, get involved in its pro bono program. Professional observation tells us that newcomers who get involved in pro bono projects help themselves too: they can acquire new skills and the chance to network widely across the firm and outside with others working for the same issue.

Whether you are working in a private law firm or a corporate entity, teach law, work for a law society or work for government or an NGO, everyone can fit some aspect of pro bono into their lives. I think pro bono is the most satisfying legal work you can ever do. It makes you proud and thankful to be a lawyer. It is a privilege to be a part of this dynamic.
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Libraries

Court of Final Appeal Library
High Court Library
Legal Resources Centre