

Public Dispute Resolution in Hong Kong: A Practitioner's Note

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Good evening, ladies and gentlemen.

It is my honour and privilege to be invited to speak before this distinguished audience and in such splendid venue. I am supposed to talk about “public dispute resolution”. But you may ask: what is a “public dispute”? That, I have to confess, was a novel concept to me when Benny Tai so kindly invited me to give this lecture in early December last year. And I’m fairly sure that it is the curiosity arising from this ambiguous concept that has prompted so many of you to choose spending your happy hour here rather than in some more pleasurable joints.

In the poster for this event, the introduction says this, “Public disputes are disputes involving many different interests arising from deep seated conflicts over values and beliefs on issues which have long term impact on the whole society.” That description may sound a bit complicated, but I think in essence, what it highlights is that public disputes are fundamental conceptual conflicts between different sectors of society, relating to matters of significant public interest which affect the whole society.

Viewed in that way, public disputes are different from private disputes between individuals, even a significant number of individuals. Of course, what may result from a dispute between individuals could have a significant bearing on other similar cases, in the same way that a superior

court judgment in, say, a personal injuries case could significantly change the law on the duty of care in tort, but that is beyond the scope of this talk.

A good example of a public dispute, and one which I can claim to have some personal experience, is the question of Statutory Minimum Wage. As you probably know, I have been the chairperson of the Minimum Wage Commission since the Commission was established in 2011 pursuant to the Minimum Wage Ordinance, Cap 608.

I need not recount here the background and history leading up to the enactment of the Minimum Wage Ordinance. It is probably an understatement to say that the introduction of a statutory minimum wage in Hong Kong, one of the most famously free market economies in the world, is a matter of considerable controversy.

There are at least 2 broad theories for and against a statutory minimum wage in Hong Kong: those who oppose it often cite the very real dangers of distortion to the free market, which underlie much of our phenomenal economic success; on the other hand, supporters of the concept argue that in a free market, workers in the lowest income bracket are often exploited and unable to fend for themselves without statutory protection to ensure that they get at least a lowest acceptable level of wages in return for their labour.

So there is a deep-seated conflict in ideology between the capitalists and labour movement. It does not take a rocket scientist to appreciate that the introduction of Statutory Minimum Wage, and the rate at which it is set, will have wide-ranging implications for employees, the business sector and the society at large.

The main function of the Minimum Wage Commission is to report to the Chief Executive in Council our recommendation on the amount of the prescribed minimum wage rate. In arriving at our recommendation, we are required by s.12(3) of the Ordinance to have regard to the need (a) to

maintain an appropriate balance between the objectives of forestalling excessively low wages and minimizing the loss of low-paid jobs; and (b) to sustain Hong Kong's economic growth and competitiveness. So one can readily discern, just from reading the statute, the opposing interests involved. Needless to say, to get at the right balance between the conflicting objectives and interests is a delicate and challenging task.

The set up of the Commission is a good example of how different interests are represented. We have 13 members. Other than the Chairperson, there are 3 public officers who are the Permanent Secretary for Labour and Welfare, the Permanent Secretary for Commerce and Economic Development (Commerce, Industry and Tourism), and the Government Economist. There are 3 members who have relevant experience in the labour sector – they are seasoned and highly respected current or past office holders of the most influential unions in Hong Kong, some of whom have been members of the Legislative Council; 3 members experienced in the business sector, who have considerable experience with SMEs, particularly in the retail and restaurant sectors; and 3 members with relevant academic experience, including professors in the fields of social gerontology, economics and business.

So by statute, the principal “interests” or “stakeholders” – employees, employers, academics and government – are not only included but equally represented on the Commission. And those who are on the Commission are big guns in their respective fields. Frankly, the only person who had no relevant experience was me. And with such diverse interests over such a controversial issue, how would the Commission arrive at a recommendation? That was the challenge facing the Commission, and in particular to me as Chairperson.

One may be forgiven to think that with a set up such as ours, our meetings are bound to be as hostile as the boxing ring. The true picture, however, is very different. Our meetings have been extremely cordial. Indeed, in my view, the inclusion of representative figures from different interests is

very much the strength of the Commission. It ensures that the interests of all stakeholders are properly and adequately represented, and enables the Commission to conduct a balanced and comprehensive survey of all relevant information, with thorough and detailed discussions and debates.

Right from the beginning, we set out to adopt a consensus-building approach in arriving at a recommendation; and in order for all members to be absolutely frank in our deliberations, we agreed that we would keep confidential what has been discussed at our meetings. So I am unable to divulge to you the details of what actually happened, but let me share with you my own experience which I can disclose.

As I said just now, although members of the Commission come from very diverse background with conflicting interests, we set out to achieve a consensus which is acceptable to all members. All of us agreed that a recommendation unanimously supported by all members of the Commission is most likely to be accepted by the community.

Working towards this objective, the Commission engaged in rational and objective discussions rather than confrontation when studying various controversial issues relating to the setting of the prescribed minimum wage rate. We also agreed that we must adopt an objective, and evidence-based approach. We conducted extensive and intensive consultation, and considered the opinions of various sectors of the community.

Additionally, we had available to us a large amount of data concerning social, economic and employment conditions in Hong Kong, including data collected from specially designed surveys and research studies. We gathered valuable views from stakeholders through consultation meetings, which allowed us a better understanding of their position on the review of the minimum wage rate, and the actual impact of the initial rate of \$28 per hour since 1 May 2011.

We also conducted two rounds of extensive public consultations so as to grasp the concerns about the impact of statutory minimum wage from a wide spectrum of the community. Each session of these public consultations lasted several full working days. All of these gave us a good understanding of the overall social and economic situation and the impact from the implementation of the statutory minimum wage since May 2011. The information enabled us to review the statutory minimum wage objectively in context and on a solid basis, not divorced from the social and economic realities.

Putting the wider interest of the community at the forefront, we considered and discussed the relevant evidence at length, with an open mind and respect for divergent views. Through rational discussions and a will to succeed, mutual understanding began to evolve. And I am very pleased to say that all members of the Commission have shown remarkable determination towards achieving that goal. At the end, we were able to reach consensus in November last year to recommend to the Chief Executive in Council that the prescribed minimum wage be adjusted to \$30 per hour. Our recommendation has been accepted and has since become law. The new rate will apply with effect from 1 May 2013.

Drawing from my own experience in this process, I propose to share with you 3 elements that I think contributed to a successful outcome.

First, those who are involved in the resolution of the issue must be prepared to engage in genuine discussions and to consider the other side or sides' views with an open mind. When issues of immense public interest are involved, very often the most acceptable solution may not be the best solution from any particular point of view. The parties who take part in the process must be genuinely prepared to accept some give and take to achieve a solution which is acceptable to all. As is often said: "Do not let the perfect be the enemy of the good."

Secondly, there must be trust amongst the participants. Trust that the other parties are also genuine in what they do and what they say. Trust that they would not abuse your confidence. And this trust is mutual – if you want others to trust you, you must demonstrate by your conduct that you are trustworthy. One cannot demand trust and confidence, or even respect, if one does not reciprocate.

Thirdly, a balancing element which the parties can accept is likely to be critical. A neutral “third force”, so to speak, if there are two main opposing interests. In the Minimum Wage Commission, the academic members play that role brilliantly and I must pay tribute to them. I suppose the Chairperson also plays an important role when it comes to bringing everyone together, but the academics provided invaluable support to me in the process. This balancing element is often critical in bringing about a consensus, because it is best placed to offer an objective and reasonable solution, taking into account the context and the overriding public interest.

All three elements I have identified must, of course, work together. Once you have two (or more) sides who are prepared to engage in genuine and rational discussions with a will to achieving a positive result, it is often possible to discover whether there are common grounds, and how to bring the various sides together to arrive at a solution acceptable to all. After all, when one is talking about resolving differences over matters of immense public interest, it is not be a zero-sum game.

The task may be more challenging where no common ground exists. In that situation, one would need to explore with the different interests and whether it is possible to create some common ground between them, and pro-actively construct a proposal to bring the different sides together towards a satisfactory overall result.

Ultimately, it must be recognised that in resolving public disputes, what is of paramount overriding importance is the public interest. Because we are talking about disputes that have long term impact on the whole society, the

society is a major stakeholder – in fact the most important stakeholder. The neutral balancing element must represent and champion the public interest in the dispute resolution process. That must always be the fundamental guiding principle.

I adopted a similar approach to my other role which is relevant to this talk: the Independent Police Complaints Council, or IPCC. I have the privilege of being the Chairman of IPCC since it became a statutory body in 2009.

The English name of the IPCC is somewhat misleading. The IPCC does not oversee or monitor the police generally, or investigate complaints against the police. Under the current two-tier complaints system, complaints against the police are handled by the Complaints Against Police Office, or CAPO, which is a dedicated team within the police.

The IPCC's Chinese name, 獨立監察警方處理投訴委員會, is more accurate in describing our role under the current system. We monitor the investigation process, and every investigation report of a reportable complaint must be endorsed by the IPCC. In the last couple of years, we endorsed over 2,000 reportable complaints each year, compared with over 4,000 cases in 2009-2010.

In addition to monitoring investigations, the IPCC is mandated to look into current practice and procedures of the police in areas where conflicts are likely to arise, and suggests possible ways which may prevent conflicts from arising in the first place. In short, IPCC plays a monitoring role, the objective of which is to ensure that the police force provides the best service to the community. The police force shares the same objective. But the nature of the police's work inevitably involves a conflict between two very important public interests: enforcing law and order on the one hand, and safeguarding our residents' rights and freedoms on the other.

What is IPCC's role in ensuring that the right balance is struck between those conflicting interests? And how does IPCC approach this "public dispute"? It may be easier for me to illustrate what we have been doing by reference to a concrete example.

One of the hot topics concerning police powers in recent years is their handling of public order events – in particular in respect of large scale processions and demonstrations. Some of these events, such as processions held on 1 July and 1 October each year, are attended by tens of thousands, even hundreds of thousands from time to time. For convenience I shall simply refer to those who take part in these processions and demonstrations as participants.

The processions usually start in Victoria Park, going through Causeway Bay and Wanchai along Hennessy Road, then onto Government Headquarters. Another popular destination these days is the Liaison Office of the Central Government in Western District. There are often protests and demonstrations outside the Central Government Complex or Liaison Office at the end of the processions.

I am sure that many of you have witnessed either personally or from the media ugly scenes between participants and frontline police officers during these events. But despite these unpleasant confrontations, these events are important because the people of Hong Kong are guaranteed the fundamental right and freedom of expression and assembly under the Basic Law. The police has a duty to facilitate the peaceful exercise of these rights. At the same time, the police has a duty to maintain public order, to ensure that the inevitable disruptions to other members of the public are minimized as much as possible. So the often conflicting rights and interests are easy to see.

Moreover, given the current political climate in Hong Kong, it is not difficult to foresee that disputes, even confrontations, between the participants and frontline police officers are likely to arise. These could range from

disagreement over the route; crowd handling measures at the start of the rally; placement of street stations along the route; and crowd control measures outside the target venues. Even the number of people participating could be a matter of controversy.

These are “public disputes” in the sense that we are discussing this evening. What role can IPCC play in helping to resolve these disputes? Broadly speaking, IPCC seeks to play the “balancing element” role and trying to bring the different sides together. In so doing, our approach is similar to what that I have discussed earlier in relation to the Minimum Wage Commission.

There are 3 aspects to what we do. **First**, we must be independent. This is crucial because we are very conscious that it is only when we remain neutral and look at the issue from the public interest point of view that we would be respected and accepted by all the parties, while we must assume the burden of safeguarding the public interest.

Secondly, we have to be objective and fair. Again, we must consider the issue in question from an objective angle, always asking ourselves what solution would be right and fair from the public interest point of view, taking into account the interests and demands of all sides.

Thirdly, we must not just act on anecdotal claims but must base our work on concrete evidence. The IPCC is like the referee in a soccer game; he must be at the scene, but not himself a contestant.

Adopting these principles, what we have been doing broadly falls into the following main areas. First, we have had periodic meetings with the event organisers and interest groups. We want to understand their concerns, what they claim to be shortcomings on the part of the police, and what they think the police should do to make the process as smooth as possible.

At the same time, we also have regular meetings and briefings with the police, so as to understand their operational concerns and appreciate the challenges they face in seeking to strike the right balance.

In addition to discussions with both sides, we have also been present in some recent large-scale processions so that we can have first hand experience of what actually happens in the course of such an event. Somewhat fortuitously, on both recent occasions when members of IPCC were present, no serious trouble occurred. Whether that was because of our presence is difficult to say, but I think the presence of someone who are regarded by both sides as being fair and independent might have helped.

What we have endeavoured to do is to have a proper understanding of the positions of the different stakeholders, so that we can take an overall view, always looking at the matter from the public interest perspective, and suggest possible solutions with a view to preventing possible disputes – hence complaints – from arising. I am glad to say that on the whole, through a lot of hardwork and appropriate publicity, the IPCC has established a positive image of being fair and independent. We have the necessary credential to act as the balancing element between the opposing interests, and we will continue to work hard to gain the public's support of our work.

Along the same vein, perhaps I may be allowed to share with you my personal experience in another real life example, that is IPCC's monitoring and scrutiny of the police investigations into complaints arising from the visit of the (then) Vice Premier Li Keqiang in August 2011.

I need not explain here the background leading to over a dozen reportable complaints following from the Vice Premier's visit. The complaints all concerned with the security measures adopted by the police on different occasions and at different locations during the visit.

In overseeing the complaint investigation into these complaints, the IPCC made 4 key decisions. **First**, owing to the widespread public concern over the incidents, we very quickly decided to put the complaints under purview of our Serious Complaints Committee. This allowed us to monitor closely the progress of these cases throughout the entire investigation process. We have also informed the public very early on that we will publish a report of our monitoring of these complaints, particularly with a view to look at whether there were any police practice and procedure which could be improved to prevent similar complaints from arising in the future. So there was an important forward-looking element in the exercise.

Secondly, when it appeared to us that the investigations would take longer than expected – and here I should emphasize that the delay was partly contributed by factors beyond IPCC or the police’s control – we decided that we should publish an interim report to keep the public informed of what was going on and what still required to be done. It is important, in my view, that we should be as transparent and open as possible. Experience tells one that mistrust and skepticism often arise from ignorance. Transparency is the best solution when one is acting in the public interest.

Thirdly, in view of the subject matter and context of the complaints, the IPCC considered it necessary to scrutinize certain confidential and highly sensitive materials which the police were reluctant to disclose. But after discussions with the police we understood their concerns, and at the same time, they understood that in discharge of our functions effectively, it was necessary for us to have sight of the information. To resolve that issue, we took considerable time to devise a mutually acceptable protocol whereby we would be provided the relevant information without compromising the integrity of the confidentiality. It took us a bit of time to work out that process, but based on mutual trust and a spirit of cooperation, we managed to resolve it.

Our Final Report was eventually forwarded to the Chief Executive and made public in December last year. We took a holistic view of the security measures taken by the police, balancing different interests, and made a number of recommendations which we think should be taken on board in future cases.

Finally, when our Final Report was ready, we needed to gain the public's support and acceptance of our conclusions and recommendations. To achieve this, I attended various public forums, answered media enquiries, so as to explain to the public why we agreed or disagreed with the police's investigation results, as well as explain our recommendations. I am pleased to say that our Report was well-received by the public. This aspect was perhaps the most important step in the whole process because, as I have emphasized a few times already, all public disputes have an impact on the whole society, and it is to the society at large that we are accountable.

In my view, the aim of public dispute resolution is to strike the right balance between the conflicting interests, to achieve the best outcome possible which is in the public interest. It is therefore essential that the solution has public support and confidence. And in terms of public support and confidence, I am glad to be able to say that both the Minimum Wage Commission and the IPCC have done reasonably well so far, but we will continue to be on our guards and strive to do better.

Thank you.