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Judicial attitudes towards foreign domestic helpers in the Hong Kong criminal courts

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ABSTRACT

Within the Hong Kong media context, Ladegaard (2013) has observed that:

Employers' crimes against FDHs are consistently mitigated and explained, whereas FDHs' offences against their employers are characterised as evil actions committed by 'aliens' with a flawed character.

Deploying a content analysis methodology, in this article we ask: does the discrimination and stereotyping which foreign domestic helpers (FDHs) suffer in Hong Kong society permeate into judicial sentencing remarks in serious criminal cases involving FDHs as either perpetrators or victims? Surprisingly, we answer this question negatively. Nonetheless, the language used by judges in a few decisions did betray ingrained social prejudice against FDHs. The findings also tend to counter our expectation that the decisions would be either explicitly partial to employers or portray individual employer-defendants as aberrant members of an otherwise upstanding social group. Several decisions under analysis identified the inherent potential for the victimization of both employers and FDHs and encouraged systemic reform. However, most judgments did not call attention to the social and legal context of FDHs' employment.

KEYWORDS

Foreign Domestic Helpers; criminal law; sentencing; content analysis; Hong Kong

I. Introduction

Migrant domestic workers (MDWs), officially known as foreign domestic helpers (FDHs) in Hong Kong, are well known around the world as a vulnerable population.¹ Separated from their families, overworked, underpaid, and frequently the subject of violent or sexual

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¹L Wong, 'Prosecution in the Public Interest' (*Singapore Attorney-General's Chambers*, 2017) <<https://www.agc.gov.sg/docs/default-source/default-document-library/singapore-law-review-annual-lecture-2017---prosecuting-in-the-public-interest.pdf>>; S Strobl, 'Policing Housemaids: The Criminalization of Domestic Workers in Bahrain' (2009) 49 *British Journal of Criminology* 165, 165; RYN Chung, TF Liao, and E Fong, 'Data Collection for Migrant Live-In Domestic Workers: A Three-Stage Cluster Sampling Method' (2020) 64(6) *American Behavioral Scientist* 709, 711.

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abuse by their employers, it is little wonder that MDWs are drawn into the world's criminal justice systems both as victims and offenders.²

How do Hong Kong judges conceive of FDHs in their judgments in such criminal cases? Is the societal prejudice and stereotyping which FDHs suffer in Hong Kong replicated in case outcomes? In the context of numerous prominent cases of FDHs being victimized by³ and committing crimes against their employers in recent years,⁴ this research undertakes an empirical study of Hong Kong trial court sentencing in cases involving FDHs as both victims and perpetrators of crimes involving their employers. Within the Hong Kong media, Ladegaard observed in 2013 that:

Employers' crimes against FDHs are consistently mitigated and explained, whereas FDHs' offences against their employers are characterised as evil actions committed by 'aliens' with a flawed character.⁵

Likewise, Constable wrote in 1997 that:

public discourse on the topic of foreign domestic workers in Hong Kong generates and perpetuates certain notions and stereotypes that are openly expressed in both English- and Chinese-language newspaper editorials, in advertisements created by placement agencies, and in poems, stories, and jokes published in popular magazines.⁶

Most recently, Ho found that prejudice against FDHs vis-à-vis their employers has persisted in the public discourse in Hong Kong into the 2020s:

online discussions can portray them as dishonest, lazy, disobedient and inferior outsiders. But even the mainstream media in Hong Kong, such as the press, TV shows and advertisements, contribute to constructing prejudiced images that can present foreign domestic workers as an eerie and dehumanised cultural other ... Chinese-language media reports [emphasize] the problems experienced by employers [so as] to shift the perception of blame to the domestic workers, making mistreatment or even violence seem inevitable.⁷

This article forms part of a wider project investigating whether such popular characterizations manifest in the punishment decisions made by judges and in the way that judges convey those decisions. In this first enquiry, we focus exclusively on the *language* that sentencing judges use, employing a content analysis methodology. As Sullivan observed within a similar study conducted in Australia, 'The power of language is particularly evident in

²CARAM Asia, 'Issues & Concerns: Foreign Domestic Worker Campaign Toolkit' *CARAM Asia* (2018) <http://caram-asia.org/pdf/fdwct-section_1-issues_concerns.pdf>.

³E.g. J Siu and C Lau, 'Hong Kong's domestic workers share stories of ill-treatment, poor living conditions and rights abuses' *South China Morning Post* (15 February 2018) <<https://www.scmp.com/news/hong-kong/community/article/2133421/hong-kongs-domestic-workers-share-stories-ill-treatment>>; HKQ Wong and others, 'Victimization of Foreign Domestic Helpers in Hong Kong' (2016) 12(1) *Social Transformations in Chinese Societies* 63, 64.

⁴E.g. Hong Kong Government, 'LCQ19: Offences involving foreign domestic helpers' (2007) <<https://www.info.gov.hk/gia/general/200701/31/P200701310184.htm>>.

⁵HA Ladegaard, 'Demonising the Cultural Other: Legitimising Dehumanisation of Foreign Domestic Helpers in the Hong Kong Press' (2013) 2(3) *Discourse, Context & Media* 131, 131. See also 'Domestics' Rights "Ignored" by Police' *South China Morning Post* (14 October 1994) and T Hamlett, '9 hot tips on how to act like a domestic worker's employer, not a slave-owner' *Hong Kong Free Press* (18 August 2018) <<https://hongkongfp.com/2018/08/18/9-hot-tips-act-like-domestic-workers-employer-not-slave-owner/>>.

⁶N Constable, 'Sexuality and Discipline among Filipina Domestic Workers in Hong Kong' (1997) 24(3) *American Ethnologist* 539, 544.

⁷J Ho, 'Domestic helpers must get fairer treatment in city' *South China Morning Post* (29 September 2023). See also Y Wang and others, 'A Study of Online Media Representation of Ethnic Minorities in Hong Kong and Their Experiences of Online Racial Discrimination' (*Equal Opportunities Commission*, 2022) 28 <<https://www.eoc.org.hk/Upload/files/funding%20programme/REPORT~1.PDF>>.

sentencing. Sentencing entails a unidirectional monologue directed at the convicted by a judge.⁸ Here we ask: does the discrimination and stereotyping that FDHs suffer in Hong Kong society permeate into judicial reasoning and sentencing remarks in criminal cases involving FDHs as either perpetrators or victims? It should be noted that a textual analysis of sentencing remarks does little to clarify exactly how influential the relevant depictions are in a judge's determination of sentencing *quantum*.⁹ In our future research, we aim to employ a larger data set to evaluate whether the sentencing outcomes themselves are discriminatory against FDH defendants or confer exceptional leniency on their employers.

While our conclusions are tentative due to the restricted scope of our inquiry, overall, the results are surprising. The available evidence tends to counter our prediction that prejudicial stereotypes against FDHs in Hong Kong extend to written decision-making in sentencing. We find that, generally, judicial reasoning and rhetoric do not reflect bias against FDHs as inferior 'others', regardless of whether the FDH was a perpetrator or victim in a criminal case. Nonetheless, the language in a few decisions did betray ingrained social prejudice. Interestingly, the findings also tend to counter our expectation that the language in the decisions would be either expressly partial to employers or portray individual employer-defendants as aberrant members of an otherwise upstanding social group. A few decisions identified the inherent potential for the victimization of both employers and FDHs and encouraged systemic reform. However, most judgments did not call attention to the social and legal context of FDHs' employment. Overall, our results should encourage similar enquiries in comparable common law jurisdictions, and in Hong Kong at other trial venues and stages of the criminal justice process.

II. FDHs and intersectional disadvantage

Hong Kong is a jurisdiction in which MDWs as FDHs play a critical economic role, contributing an estimated 3.6 per cent of GDP in 2019.¹⁰ Although Hong Kong residents have benefited from live-in domestic help since the early years of the twentieth century, Hong Kong's modern FDH industry dates from the early 1970s.¹¹ At the end of 2018, Hong Kong hosted upward of 370,000 FDHs, 55 per cent originating from the Philippines, 43 per cent originating from Indonesia,¹² and the small remainder coming from other developing countries in Asia such as Thailand and Bangladesh. Almost all were female (98.5 per cent).¹³ One in every eight households in Hong Kong is now served by a live-in FDH, rising to one in every three households with children.¹⁴

⁸F Sullivan, 'Not Just Language: An Analysis of Discursive Constructions of Disability in Sentencing Remarks' (2017) 31(3) *Continuum: Journal of Media & Cultural Studies* 411, 412.

⁹M Proeve and M Tanvir, 'When "I Did It" is Not Enough: Content Analysis of Remorse in Sentencing Remarks' (2022) *Current Issues in Criminal Justice* 1, 14 <<https://www.tandfonline.com/doi/abs/10.1080/10345329.2022.2085953>>.

¹⁰J Creery, 'Domestic workers contribute HK\$98.9 billion to Hong Kong's economy, 3.6% of GDP – study' *Hong Kong Free Press* (6 March 2019) <<https://hongkongfp.com/2019/03/06/domestic-workers-contribute-hk98-9-billion-hong-kongs-economy-3-6-gdp-study/>>.

¹¹Constable, 'Sexuality and Discipline' (n 6) 541; B Sautman and E Kneehans, 'The Politics of Racial Discrimination in Hong Kong' (2002) 2 *Maryland Series in Contemporary Asian Studies* 1, 28.

¹²Hong Kong Census and Statistics Department, 'Foreign Domestic Helpers by Nationality and Sex' (2019) <https://www.censtatd.gov.hk/FileManager/EN/Content_1149/T04_49.xlsx>.

¹³*Ibid.*

¹⁴L Kuo, 'How Hong Kong's "maid trade" is making life worse for domestic workers throughout Asia' *Quartz* (19 February 2014) <<https://qz.com/176354/how-hong-kong-maid-trade-is-making-life-worse-for-domestic-workers-throughout-asia/>>.

Throughout the world, MDWs are typically subject to numerous forms of disadvantage in the societies that host them. They earn low wages for long hours performing stigmatized work; may be deceived by agents or their host employers as to employment conditions; are particularly vulnerable to verbal, physical, and sexual abuse in the workplace; and lack support through family ties and familiarity with local language and culture.¹⁵ Within developed economies, they tend to be marginalized 'others' experiencing disadvantage at the intersection of their gender, ethnicity, socio-economic position, profession, and immigration status.¹⁶ In Singapore, another Asian 'city-state' where families rely heavily on live-in MDWs, Cheah has perceptibly contrasted the position of MDWs with their middle-class female employers: 'the high-end cosmopolitanism of talented professionals [coexists with] its bipolar opposite: the underclass foreign domestic helpers who are the disavowed support of the aspiring global city'.¹⁷

FDHs in Hong Kong encounter similar difficulties, some of which are institutionalized through legal regulation. Hong Kong employment law entitles FDHs to most of the same rights as other employees in Hong Kong, including weekly rest days, annual leave, and sick leave. Under the two-year standard contract that employers must sign with their FDHs, employers must provide accommodation, medical care, and either food or a food allowance.¹⁸ Yet, several features of the FDH system facilitate widespread noncompliance and other forms of abuse. Under the 'live-in rule', FDHs must live with their employers,¹⁹ making the entitlement to a rest day or to a clear separation of work and recreation largely spurious for many. Living under the same roof as an employer clearly increases the risk of physical or sexual abuse.²⁰ While employers are required to provide reasonable accommodation, they need not provide a private room, and many FDHs have reported living in substandard living quarters that lack privacy.²¹ It is also difficult for FDHs to challenge employer illegality. FDHs often feel they cannot resign, because they have incurred agency debt to come to Hong Kong that they must repay. Likewise, FDHs have little time to pursue legal redress, because they must return to their home countries within two weeks if their employment contract

¹⁵LC Leung, 'Intersectional Challenges: Marginalization of Ethnic Minority Sexual Assault Survivors in Hong Kong' (2017) 32(2) *Affilia* 217, 219–21; Asian Migrant Centre, 'Submission by the Asian Migrant Centre for consideration by the Legislative Council Panel on Manpower at the special meeting of 21 February 2014 on policies relating to foreign domestic workers and regulation of employment agencies' (*Hong Kong Legislative Council*, 2014) 2–5 <<https://www.legco.gov.hk/yr13-14/english/panels/mp/papers/mp0227cb2-870-28-e.pdf>>; Sautman and Kneehans (n 11) 33–34; Wong and others (n 3) 66–67.

¹⁶M Lee, M Johnson and M McCahill, 'Race, Gender, and Surveillance of Migrant Domestic Workers in Asia' in M Bosworth, A Parmar and Y Vazquez (eds.) *Race, Criminal Justice, and Migration Control: Enforcing the Boundaries of Belonging* (Oxford University Press 2018) 16; CGS Tan, 'Why Rights are Not Enjoyed: The Case of Foreign Domestic Helpers' (2000) 30 *Hong Kong Law Journal* 354, 360; J Joseph, 'The Plight of Female Migrant Domestic Workers in the Gulf States' in M Shechory, S Ben-David and D Soen (eds.) *Who Pays the Price? Foreign Workers, Society, Crime and the Law* (Nova Science Publishers 2010) 226, 228; Leung (n 15) 226.

¹⁷P Cheah, 'Necessary Strangers: Law's Hospitality in the Age of Transnational Migrancy' in A Sarat and others (eds.), *Law and the Stranger* (Stanford University Press 2010) 39. See also A Stephen, 'Maid in Hong Kong' (2000) 44(11) *Christianity Today* 26, 26–27.

¹⁸Labour Department, 'Handy Guide for Employers of FDHs (English Version)' (*Labour Department*, February 2019) <https://www.fdh.labour.gov.hk/res/pdf/Handy_Guide_FDHS_eng.pdf>.

¹⁹Ibid.

²⁰N Constable, 'Obstacles to Claiming Rights: Migrant Domestic Workers in Asia's World City, Hong Kong' in S Mullally (ed.), *Care, Migration and Human Rights* (Routledge 2015) 99–101.

²¹Mission for Migrant Workers, 'Between a Toilet Bowl and a Wall' (*Google Drive*, June 2021) <<https://drive.google.com/file/d/1807LqZ0EqPDSgVtB4acinQvmHUS6WpSG/view>>.

terminates early.²² Finally, unlike other immigrants, FDHs are not eligible to become permanent residents after working in Hong Kong for seven continuous years.²³

III. FDHs and judicial attitudes during sentencing: hypotheses

In an ideal world, criminal sentencing should be carried out consistently across like cases, pursuant to the common law's parity principle²⁴ and also article 26 of the International Covenant on Civil and Political Rights (equality before the law), which forms part of the law of Hong Kong.²⁵ Nevertheless, sentencing decision-making and outcomes tend to reflect the broader cultural and societal context in which the courts operate.²⁶ Even in Hong Kong, a jurisdiction where the judiciary has a hard-earned reputation for competence and impartiality,²⁷ it is unlikely that judicial actors completely put aside their own preconceptions and prejudices in making decisions on punishment.

One reason for this is because sentencing judges often display 'bounded rationality'. 'Bounded rationality' refers to the cognitive limitations that all human beings face in processing information and otherwise determining which 'means' are most appropriate and likely to realize selected 'ends'. To deal with these limitations, decision-makers resort to 'heuristics', or logical, affective, and computational shortcuts. Individuals deploy heuristics under conditions when they have too little information to make a decision and when they are confronted with too much information. In determining a lawful punishment, judges are charged with realizing a complex set of values, among them consistency, fairness, retribution, deterrence, and rehabilitation. Furthermore, judges must often make decisions reasonably quickly and on the basis of limited case knowledge. In light of these challenges, judges sometimes 'fall back on attributions about reoffending risk and/or rehabilitation that can be linked to race and gender, and other social status stereotypes'.²⁸ Several previous text-based studies of decision-making in the sentencing context have implicitly or explicitly called to attention judges' bounded rationality and use of such heuristic devices in determining punishments.²⁹

²²Amnesty International, 'Submission to the legislative council's panel on constitutional affairs on the third report by HKSAR under the ICESCR' (*Hong Kong Legislative Council*, 2014) 3, 6 <<https://www.legco.gov.hk/yr13-14/chinese/panels/ca/papers/ca0217cb2-850-7-ec.pdf>>.

²³*Vallejos v Commissioner of Registration* [2013] HKEC 429.

²⁴Under the parity principle, those who commit similar offences under similar circumstances should receive similar punishment. This does not mean that defendants must receive identical sentences for the same crime. Consistent with the parity principle, courts may consider other factors bearing on culpability and the likelihood of recidivism, such as a defendant's age, criminal background, plea, and personal role in crimes involving multiple offenders. See SNM Young, 'Sentencing' in WH Chui and TW Lo (eds.), *Understanding Criminal Justice in Hong Kong* (Routledge 2011) 179–80.

²⁵Hong Kong Bill of Rights Ordinance Cap. 383, s 8, Art 10, 22.

²⁶KKY Cheng, 'Aggravating and Mitigating Factors in Context: Culture, Sentencing, and Plea Mitigation in Hong Kong' (2017) 20(3) *New Criminal Law Review* 506, 507–08; N Hutton, 'Sentencing as a Cultural Practice' in D Bruinsma and G Weisburd (eds.), *Encyclopedia of Criminology and Criminal Justice* (Springer 2014) 4724–25.

²⁷AHY Chen and PY Lo, 'Hong Kong's Judiciary Under "One Country, Two Systems"' in HP Lee and M Pittard (eds.), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press 2018) 131, 166.

²⁸JT Ulmer, 'Recent Developments and New Directions in Sentencing Research' (2012) 29(1) *Justice Quarterly* 1, 9; S van Wingerden, J van Wilsem and BD Johnson, 'Offender's Personal Circumstances and Punishment: Toward a More Refined Model for the Explanation of Sentencing Disparities' (2016) 33(1) *Justice Quarterly* 100, 103–07; CA Albonetti, 'An Integration of Theories to Explain Judicial Discretion' (1991) 38 *Social Problems* 247, 249.

²⁹E.g. Sullivan (n 8) 418 (disability); M Mann, H Menih and C Smith, 'There is "Hope for You Yet": The Female Drug Offender in Sentencing Discourse' (2014) 47(3) *Australian & New Zealand Journal of Criminology* 355, 364–67 (gender); C Lee, 'Judges' considerations in sentencing and the utilisation of restorative justice' (Master's Thesis in Criminology, University of Auckland, 2020) (age and gender).

On the one hand, Hong Kong judges are supposed to follow a reasonably structured reasoning process in making a punishment decision, first considering applicable tariff guidelines for the offences, then factoring in aggravating and mitigating factors, and finally considering the totality principle.³⁰ Nonetheless, we would still expect to see some negative judicial sentiment and stereotyping toward FDHs in sentencing remarks given their status as cultural ‘outsiders’,³¹ the role of employers as an implicit extension of the state in sexual, labour, and immigration control over FDHs,³² and their intersectional othering based on gender, ethnicity, immigration status, and employment.³³ Conversely, for employers committing offences against their FDHs, as relative cultural ‘insiders’ we would expect judges to consistently mitigate and explain their crimes, and cast employers in a good light collectively.³⁴

As to the specific content of negative stereotypes regarding FDHs, we first expected that judges would characterize Filipina domestic helpers as a racialized and sexualized threat to the social order of a conservative society and to the sanctity of their employers’ home lives and marriages. Cultural representations of Filipinas in Hong Kong often type-cast them as flirty and promiscuous. That Filipinas tend to be more proficient in English may contribute to this stereotype.³⁵ As for Indonesian FDHs, they have long been identified as Hong Kong’s most ‘isolated and exploited’ minority.³⁶ In recent years Indonesians have become the ‘helpers of choice’ for Hong Kong families, due to their perceived docility, obedience, poor education, and traditional values.³⁷ While Filipina FDHs are increasingly perceived as the ‘Westernized other’ and troublesome to manage, Indonesian FDHs are instead imagined as the ‘traditional other’ suited to hard work, low pay, and little rest.³⁸

IV. Methodology

The source of empirical data for our assessment is the set of ‘reasons for sentence’ offered by judges of the Hong Kong District Court (DC) and Court of First Instance (CFI) in criminal

³⁰A tariff sentence is the presumptive penalty for an offence established by court precedent. Beginning with the tariff, the court adjusts the final sentence up or down according to aggravating and mitigating factors related to the defendant (e.g. criminal history, age, health, whether the defendant pleads guilty, etc.) and the offence (e.g. the extent of the harm, and whether there was a breach of trust or abuse of authority) (Cheng (n 26) 507, 512). The totality principle then permits judges to reduce the total punishment where the defendant is tried for multiple offences committed at or around the same time, on the rationale that an arithmetical calculation of the total punishment (e.g. ten thefts multiplied by two years each for a grand total of 20 years) is often unduly harsh, given the ‘totality’ of what the defendant did (G Cross and J Chan, ‘Chapter 5: Sentences and Orders on Conviction’ in GMB Bokhary (ed.), *Archbold Hong Kong: Criminal Law, Pleadings, Evidence and Practice* (Sweet & Maxwell 2022) 484–85).

³¹Ladegaard (n 5) 131; Constable ‘Sexuality and Discipline’ (n 6) 544; S Jayawickrama, ‘Metonymic Figures: Cultural Representations of Foreign Domestic Helpers and Discourses of Diversity in Hong Kong’ (2017) 3(1) *Cultural Diversity in China* 1, 3.

³²Lee and others (n 16) 21.

³³See n 16.

³⁴Ladegaard (n 5) 131; Constable ‘Sexuality and Discipline’ (n 6) 543.

³⁵Jayawickrama (n 31) 7–10; Constable ‘Sexuality and Discipline’ (n 6) 542–45; J Raboca, ‘Domestic Helper, Prostitute, or Nurse? Living with the Filipina Stereotype in Hong Kong’ *Coconuts* (25 October 2016) <<https://coconuts.co/hongkong/features/what-it-really-feels-live-filipina-stereotype/>>.

³⁶Sautman and Kneehans (n 11) 32.

³⁷YM So, ‘Migration, culture and work: a study of Indonesian domestic workers in Hong Kong’ (Master of Philosophy Thesis, The Chinese University of Hong Kong, 2005) 43–49; Lee and others (n 16) 15–16. See also W Palmer, ‘International Migration and Stereotype Formation’ (2020) 21 *Journal of International Migration and Integration* 731, 740–42.

³⁸*Ibid*; Constable ‘Sexuality and Discipline’ (n 6) 543–44.

trials from 2009 to 2023, inclusive of both years. The District Court tries either-way offences and summary-only offences transferred alongside either-way offences from the Magistrates' Courts. It is, however, prohibited from hearing the most serious criminal cases such as murder, manslaughter, and rape. The most severe sentence that a DC judge may pass is seven years' imprisonment. Many DC cases are also resolved through fines, with the jurisdiction to fine an offender being unlimited.

The Hong Kong Court of First Instance, as part of the High Court, may try either-way offences or offences triable on indictment only, with no maximum ceiling as to severity. Therefore, the court can try murder, manslaughter, and rape cases, and can pass sentences of up to life imprisonment, the most severe punishment permissible by law in Hong Kong. A judge of the Court of First Instance always sits with a jury of seven or nine persons in criminal cases, other than in selected national security cases. The jury assists with the fact-finding phase but not the sentencing decision. In both the DC and the CFI, after hearing submissions from counsel and in some cases considering a pre-sentence report, the judge will pass sentence on the defendant and will read out his or her reasons in court. It is this reasoning that is later put into writing and may be published on the Judiciary website.³⁹

Many of the reasons for sentence penned by DC and CFI judges are available on the Hong Kong Judiciary website; however, there is some selectivity in the cases available online, with the registrar confirming by private email correspondence that only 'reasons for sentences which are of significance as legal precedents on points of law, practice and procedure of the courts and of public interest ... are available on the Judiciary website'.⁴⁰ Other reasons for sentence are available on an individual basis from the registrar on request, but these are not searchable for relevant terms such as 'domestic helper'. Nonetheless, more than 10,000 reasons for sentence are available on the judiciary website, the vast majority from 2009 onwards, hence the starting date for our analysis. These decisions provide a comprehensive overview of Hong Kong sentencing practices in the two senior trial courts, although it is unknown to what extent the decisions available on the Judiciary website are representative of all sentencing decisions for particular crimes, or all sentencing decisions involving FDHs over the relevant time period.

Still, our data represent the entire population of employer-FDH criminal cases in the DC and CFI available for download from the Hong Kong Judiciary website over the relevant time period. We coded and analyzed all reasons for sentence where an FDH was either (1) the perpetrator of a crime(s) against her employer or a family member of the employer or (2) a victim of a crime(s) by her employer or a family member of the employer. To capture all such cases, we first searched for sentencing decisions—whether published in English or Chinese—from 2009 to 2023 and mentioning in the full text of the decision 'domestic helper', or a commonly-used synonym such as 'domestic worker', 'maid', 'household help', 'domestic servant', etc. (total $n = 331$). We then narrowed this list to decisions involving FDHs and their employers (or family members of their employers) as defendants and

³⁹District Court Ordinance, Cap. 336, s 80(3)-80(4); IG Cross and PWS Cheung, *Sentencing in Hong Kong* (8th edn., Lexis-Nexis 2018) 550–52. Some sentences are passed immediately, whereas others are reserved for a future court date, giving the judge more time to consider punishment. The more serious the charge, the more likely the sentencing decision is to be reserved.

⁴⁰Personal Communication, High Court Registry, 31 October 2019.

victims, or as victims and defendants, respectively. This produced a final dossier of 54 reasons for sentence across the two courts.

We next reviewed the judicial reasoning within each of these 54 decisions. For descriptive background, we assessed each judge's consideration of relevant aggravating and mitigating factors, tariff sentences and totality, by reference to established sentencing principles in Hong Kong at the time of the decision.⁴¹ We proceeded to analyze the precise *language* used by the judges when referring to FDHs and their employers, utilizing the content analysis method to reveal judicial preferences and patterns from the express words used in addition to their implicit or underlying meaning, as several previous textual studies of sentencing remarks have done.⁴² In coding and analyzing the judicial language used, we focused on gratuitous group characterizations of FDHs and their employers and family members, rather than the individual aggravating and mitigating factors such as breach of trust that judges are bound to take into account in assessing sentence quantum.⁴³

There are two potential shortcomings of this research agenda in terms of our data selection, but neither form insurmountable obstacles to producing meaningful findings. First is the exclusive focus on District Court and Court of First Instance cases, thereby excluding criminal sentencing within Hong Kong's seven Magistrates' Courts. The Magistrates' Courts consider summary-only offences and 'either-way' offences, depending on the discretion of the Secretary for Justice and his delegates as prosecutors. More than 90 per cent of Hong Kong criminal cases are tried in the Magistrates' Courts.⁴⁴ However, most magistrates' decisions in Hong Kong are not disseminated publicly in a written form,⁴⁵ instead being announced orally in court and the written transcript being made available to the parties to the case only.

Here the danger is that the study excludes detailed consideration of sentencing for the majority of offences committed by or against FDHs, such as common assault, overstaying or working illegally as immigration offences, indecent (i.e. sexual) assault, and petty theft.⁴⁶ Furthermore, according to the 'liberation hypothesis' on sentencing disparities,

⁴¹See n 30.

⁴²E.g. B Bouhours and K Daly, 'Youth Sex Offenders in Court: An Analysis of Judicial Sentencing Remarks' (2007) 9(4) Punishment & Society 371; L Bartels, 'To Suspend or Not to Suspend: A Qualitative Analysis of Sentencing Decisions of the Supreme Court of Tasmania' (2009) 28(1) The University of Tasmania Law Review 23; A Jones, 'Judicial Cross-Referencing in the Sentencing Practice of International(ized) Criminal Courts and Tribunals' in R Mulgrew and D Abels (eds.), *Research Handbook on the International Penal System* (Edward Elgar 2016); L Edelman, *Working Law: Courts, Corporations and Symbolic Civil Rights* (University of Chicago Press 2016); Mann and others (n 29); Sullivan (n 8); Proeve and Tanvir (n 9).

⁴³We recognize that, even where judges' reasoning and remarks do not reflect negative stereotypes about FDHs or seek to rationalize the crimes of their employers, the actual sentences they impose might themselves discriminate against FDHs or offer exceptional leniency to employers for their crimes. A discriminatory decision would be one based on FDHs' intersectional status as inferior 'others' and *not* on factors relating to culpability, deterrence, recidivism, etc. Such a decision would violate the parity principle (see n 24). Conversely, it is possible that, despite judges expressing negative stereotypes about FDHs in their decisions, this did not lead to discriminatory sentencing *outcomes*. To know whether sentences are in fact discriminatory requires additional research (Cheng (n 26) 527).

⁴⁴SNM Young, 'Criminal Law' in SNM Young and Y Ghai (eds.) *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press 2013) 462.

⁴⁵KH Ng, *The Common Law in Two Voices: Language, Law, and the Postcolonial Dilemma in Hong Kong* (Stanford University Press 2009) 236.

⁴⁶N Constable, *Maid to Order in Hong Kong: Stories of Migrant Workers* (2nd edn, Cornell University Press 2007) 128–30, 147. A government reply to a question in Hong Kong's Legislative Council identified overstaying (30%), miscellaneous theft (33%), shop theft (15%), and illegal working (12%) as the most numerous crimes that FDHs were prosecuted for during the period 2004–2006 (Hong Kong Government (n 4)).

by excluding cases in the Magistrates' Courts, and thereby confining the analysis to courts that hear relatively serious offences, we may be limiting the generalizability of our findings. According to the 'liberation hypothesis', social stereotypes and prejudices regarding the defendant should appear most prominently in the sentencing for lesser offences rather than more severe offences. For more serious offences, the hypothesis predicts that the judge will look more closely at the offence itself, rather than at the characteristics of the offender.⁴⁷ Thus, even if FDHs as defendants face extensive discrimination in criminal sentencing at the Magistrates' Courts level, we might not see such unequal treatment featured so prominently in DC and CFI decisions available on the judiciary website.

The second methodological limitation is our exclusive focus on judicial sentencing practices, thereby ignoring possible discriminatory treatment against FDHs at earlier criminal justice phases, as cases are handled by police and prosecutors⁴⁸ and as judges assess criminal liability itself. Differential enforcement for crimes against FDHs may also arise as the result of underreporting. Even very serious crimes may not be reported to the authorities by FDHs due to fear of reprisal, losing employment and immigration status, and potential counter-charges.⁴⁹

The simple answer to this potential criticism is that judicial decisions (and especially those of the senior trial courts) are subject to greater scrutiny because of the very fact that they are made and disseminated in a public setting by trained experts. Despite any differential treatment that has occurred at earlier stages, each defendant who pleads guilty or is found guilty after criminal trial should be considered for punishment on an equal footing, and not be subject to unwarranted stereotyping. In other words, even if an FDH is subject to discriminatory treatment at earlier points in the process of criminalization, or even if the facts of detection, arrest, and prosecution reflect bias in the criminal justice system, this bias should not manifest in sentencing decisions unless the judge *introduces* the bias at this point in the process. Discrimination against FDHs through a deliberate refusal to arrest or charge their victimizers, or perhaps via a suspicion that prosecutors proffer lighter charges against employers than would otherwise be available⁵⁰ are potential topics for a future enquiry expanding on the results of the current research.

A methodological strength of our decision to focus exclusively on sentencing decisions in the senior trial courts is that it provides a rigorous test of our hypothesis regarding the extent to which the many social disadvantages that FDHs in Hong Kong face are reproduced in Hong Kong's often venerated legal system. As occupants of the upper echelons of Hong Kong's trial courts, we might expect DC and CFI judges to display greater levels of experience, wisdom, and professionalism in their decision-making. They likewise have more time and resources to render impartial justice than magistrates. Moreover, as

⁴⁷Ulmer (n 28) 9; EA Munoz and SG Sapp, 'Racial/Ethnic Misdemeanor Sentencing Disparities: Additional Evidence for Contextual Discrimination' (2003) 1(2) *Journal of Ethnicity in Criminal Justice* 27, 29, 42.

⁴⁸See Joseph (n 16) 234–35; Wong and others (n 3) 66.

⁴⁹See K Scully, 'Blocking Exit, Stopping Voice: How Exclusion from Labor Law Protection Puts Domestic Workers at Risk in Saudi Arabia and Around the World' (2010) 41(3) *Columbia Human Rights Law Review* 825, 842; Leung (n 15) 219–21.

⁵⁰As suggested in the MDW context elsewhere by Joseph (n 16, 234); BJ Ong, 'Offences against foreign domestic workers in Singapore: Vindicating the victim's right to dignity' (*Oxford Human Rights Hub Blog*, 2017) <<https://ohrh.law.ox.ac.uk/offences-against-foreign-domestic-workers-in-singapore-vindicating-the-victims-right-to-dignity/>> and Strobl (n 1) 168.

noted, DC and CFI judges must account for their decisions in a publicly available format. If, despite these institutional constraints, their decisions still reflect negative stereotypes about FDHs, this will reveal the pervasiveness of discrimination against FDHs in Hong Kong and the totality of their rendering as social ‘others’. Assessing sentencing decisions on a qualitative basis enables us to assess whether the particular stereotypes about FDHs as social ‘others’ that appear in cultural representations (e.g. news media, literature, social media) reach senior judicial decision-makers in similar, folk form.

V. Description of data

A. Overview of the sentencing decisions

As mentioned, our data set comprised 54 reasons for sentence issued between January 2009 and November 2023, which were available on the Hong Kong Judiciary website. Beyond the selectivity employed by the Department of Justice in publishing court decisions online, there was no further restrictive sampling, these 54 cases representing the entire population of FDH–employer cases during the relevant time period. In this section, we provide a description of the cases coded for, based on data patterns covering demographics, charges, penalties, and the factual scenarios therein.

Of the 54 decisions, 46 were published in English and 8 were published in Chinese. Forty-four of the reasons for sentence were from DC judges, whereas 10 were from the CFI, with each court issuing a mix of English and Chinese judgments. The cases from the two different courts are broadly comparable: in both trial venues, sentencing decisions are issued by single justices, albeit that CFI judges tend to have greater experience, and have the assistance of a jury at the fact-finding phase. The decision to try a case in either the DC or the CFI is, in many cases, arbitrary, except with respect to potential punishments. For ‘either-way’ offences such as theft, burglary, inflicting grievous bodily harm, or indecent assault, the offence can be brought in any of the three courts of original criminal jurisdiction. Of the sample of cases we considered, it was only for murder (one case), rape (seven cases), and attempted rape (one case) that the case must, by law, have been prosecuted in the CFI.⁵¹ For the remaining 45 cases, it was up to the prosecutor to choose the venue for trial, usually based upon the charges’ relative seriousness, as set out in Hong Kong’s Prosecution Code.⁵² In several cases, prosecutors made use of the provision allowing for summary-only (i.e. minor) offences to nonetheless be heard in the DC when tried alongside indictable offences rather than before a magistrate.⁵³

In terms of roles, FDHs were defendants in 40 cases whereas FDHs were victims in 14 cases. These figures include one decision where we treated two co-defendant employers separately for counting purposes, and another decision involving one employer defendant and two FDH victims, which again we split into two for counting purposes. There was a notable split in victim/offender status by court: 38 of 40 cases where the FDH was a defendant took place in the DC whereas eight of the 14 cases in which FDHs were victims took place in the CFI. This pattern is presumably explained by the property offences that FDHs tend to commit against their employers (and be prosecuted for) most

⁵¹Magistrates Ordinance Cap. 227, sch 2, part 3.

⁵²HKSAR Department of Justice Prosecution Code 2013, Art 8.

⁵³Magistrates Ordinance Cap. 227, s 88(1)(b).

often being tried in the DC, whereas the serious sexual offences (particularly rape) that employers and family members have committed against FDHs (and have been prosecuted for) tend to be tried in the CFI. Furthermore, it is notable that Indonesian domestic helpers were significantly overrepresented vis-à-vis Filipinas and other nationalities in the sample both as perpetrators (58 per cent) and as victims (75 per cent).

B. FDH offender cases: demographics, offences, and penalties

In the cases involving FDH offenders (40 cases), all defendants except one were female. They came from the following countries: Indonesia (23 defendants), Philippines (16 defendants, including the one male), and India (one defendant). Where the relevant information was available, the average age of the defendant was 37.9 years. These defendants almost always had a clean record before the offence occurred, at least in Hong Kong, because otherwise they could not have re-entered Hong Kong or remained in Hong Kong after being criminally convicted, with few permitted exceptions. In only one of the 38 cases where such information was available did an FDH defendant have a prior conviction (in that case for an earlier theft from the same employer).

Combining all 40 cases, the list of offences committed by FDHs in the context of the employer–employee relationship is as follows, with each crime only being counted once against each offender. So for example, if the defendant was convicted on three counts of burglary and on one count of theft this only appears as one entry for burglary and one entry for theft. We also list only the offence for which the defendant was convicted, rather than the offence originally charged, if these differ:

33: Theft (including attempts)⁵⁴

8: Burglary⁵⁵

3: Obtaining property by deception (including attempts)⁵⁶

2: Fraud⁵⁷

1: Murder⁵⁸

1: Arson with recklessness as to the endangerment of life⁵⁹

1: Wounding with intent⁶⁰

1: Inflicting grievous bodily harm⁶¹

1: Indecent assault⁶²

⁵⁴Theft Ordinance Cap. 210, s 9.

⁵⁵Ibid, s 11.

⁵⁶Ibid, s 17.

⁵⁷Theft Ordinance Cap. 210, s 16A.

⁵⁸Offences Against the Person Ordinance Cap. 212, s 2.

⁵⁹Crimes Ordinance Cap. 200, ss 60(2), 60(3), 63(1).

⁶⁰Offences Against the Person Ordinance Cap. 212, s 17.

⁶¹Offences Against the Person Ordinance Cap. 212, s 19. Here, the defendant was convicted for malicious infliction of grievous bodily harm after being charged with causing grievous bodily harm with intent (Offences Against the Person Ordinance Cap. 212, s 17).

⁶²Crimes Ordinance Cap. 200, s 122.

1: Operating a money service without a licence⁶³

The list is clearly dominated by property offences, with 48 sets of convictions, whereas offences against the person were far more infrequent, with only three sets of convictions. There was a solitary conviction for a sexual offence. Of course, the above list is likely to be an unrepresentative sample of offences committed within the employer–employee relationship. Of those allegations that are reported to the police, it is likely that most thefts, lesser offences against the person, and indecent assaults committed by FDHs will be tried in the Magistrates’ Courts, unless the value of the goods stolen is high or the harm caused to the victim is severe.⁶⁴

As for the penalties imposed by judges, the sentences are difficult to aggregate and compare across cases given that many defendants were charged with multiple offences and different counts of the same offence, attracting multiple terms of imprisonment which may then be served consecutively, concurrently, or a combination thereof, depending upon the judge’s view of totality. However, looking only at charges of theft or burglary, the two most commonly charged offences, the average sentences on each charge for FDH defendants who each pled guilty, before taking into account the totality principle, were 16.7 and 22 months, respectively. Sentences for theft charges varied significantly more than burglary, with a potential explanation being the flat tariff sentence (36 months, reduced to 24 months with an early guilty plea) for domestic burglary, compared with the graduated tariff for theft based on the value of goods stolen.⁶⁵ Initial burglary sentences ranged from 10 months to 24 months, whereas theft ranged from 3 months to 40 months. The higher average penalty for burglary than for theft is consistent with burglary in Hong Kong being defined by the aggravating feature of entering premises as a trespasser, which is reflected in its higher maximum penalty in Hong Kong (14 years) as opposed to the 10 years for theft. Yet here the average sentence imposed for burglary amounted to 33 months without the one-third mitigation of an early guilty plea, which is lower than the 36-month tariff sentence for non-commercial burglary in Hong Kong. In such cases, despite the circumstances invariably amounting to a serious breach of trust, FDHs were treated, on average, more leniently than required.

C. FDH victim cases: offenders, victims, offences, and penalties

Across the 14 cases where an FDH was victimized by her employer or by an employer’s family member, the demographic profile of offenders was as follows: 10 of 13 defendants with identifiable nationalities were from Hong Kong, with an average age of 48.8 years. Nine were male and five were female. Twelve were described as the direct ‘employer’ of the FDH whereas two were family members, such as an 81-year-old father of one employer. In all seven cases where such information was ascertainable, each defendant had a clean record before the offence in question. Where ascertainable, the victims of

⁶³Anti-Money Laundering and Counter-Terrorist Financing Ordinance Cap. 615, s 29.

⁶⁴The maximum penalty that a Hong Kong magistrate may normally administer for a single offence, two years’ imprisonment, is equal to or higher than the usual starting point for theft of less than \$250,000 in breach of trust cases (two years’ imprisonment), common assault (a fine or short term of imprisonment), assault occasioning actual bodily harm (up to 18 months’ imprisonment), and indecent assault on an adult victim (some imprisonment). See generally Cross and Chan (n 30).

⁶⁵*Ibid.*

these crimes were from Indonesia (nine cases), Philippines (two cases), and Bangladesh (one case). The average age of the victims (28.6 years, from five cases) was significantly lower than that of the perpetrators. All FDH victims were females.

Combining all 14 cases, the offences that were committed by employers or their relatives against FDHs were the following, in order of the most common to the least common. Again, only one charge for each crime is counted for each case. Moreover, these crimes reflect the courts' verdicts of guilt, rather than the original charges proffered by the Secretary for Justice:

- 9: Rape (including attempts)⁶⁶
- 4: Indecent assault⁶⁷
- 4: Causing grievous bodily harm with intent⁶⁸
- 3: Assault occasioning actual bodily harm⁶⁹
- 2: Common assault⁷⁰
- 2: Criminal intimidation⁷¹
- 2: Wounding with intent⁷²
- 1: Inflicting grievous bodily harm⁷³
- 1: Failure to pay wages⁷⁴
- 1: Failure to grant holiday⁷⁵
- 1: Failure to grant rest day⁷⁶
- 1: Failure to take out insurance for employee⁷⁷
- 1: Unlawful termination of contract of service due to incapacity⁷⁸

The most commonly established offences against FDHs in the senior trial courts were thus offences against the person, totalling 14 offences. The next most prevalent group of cases were sexual offences, consisting of 13 offences. The remainder were labour law violations, with five charges being proven across two cases, albeit in each of these cases at least one violent offence was concurrently proven. Notably, the charges covered in the list above are spread more evenly across a variety of crimes compared with the offences committed by FDHs, but this may simply reflect the definitional difference between property offences

⁶⁶Crimes Ordinance Cap. 200, s 118.

⁶⁷Ibid, s 122.

⁶⁸Offences Against the Person Ordinance Cap. 212, s 17.

⁶⁹Ibid, s 39.

⁷⁰Ibid, s 40.

⁷¹Crimes Ordinance Cap. 200, ss 24(b)(i), 27.

⁷²Offences Against the Person Ordinance Cap. 212, s 17.

⁷³Ibid, s 19.

⁷⁴Employment Ordinance Cap. 57, ss 23, 63C.

⁷⁵Employment Ordinance Cap. 57, s 39.

⁷⁶Ibid, s 17.

⁷⁷Employees' Compensation Ordinance Cap. 282, s 40.

⁷⁸Ibid, s 48.

(different levels of harm possible for the same charge, attracting different sentences) and offences against the person (different charges reflective of different levels of harm). It is again important to add that the above list is by no means a representative depiction of the nature and extent of crimes that are committed by employers against their domestic helpers, as most cases either do not result in reports to the police or are dealt with in the Magistrates' Courts, such as most common assaults or indecent assaults.

As for the penalties imposed against employers or their relatives who victimized FDHs, with so many different charges with differing levels of severity, it is, again, difficult to generalize. Nevertheless, of the three most commonly committed offences by employers or relatives, the average sentence (with a plea of not guilty) before taking into account totality was 96 months for rape (which is significantly heavier than the typical minimum starting point of 60 months),⁷⁹ 31 months for indecent assault, and 27 months for causing grievous bodily harm with intent. The latter two offences do not have tariffs or customary sentences in Hong Kong,⁸⁰ whereas the elevated quantum in the rape cases is likely explainable by 'breach of trust' within the employment relationship as an aggravating factor,⁸¹ and by the unique harms suffered by FDH rape victims living far from home.⁸² Unsurprisingly, due to their non-violent nature, the labour law violations were treated the most leniently out of any crimes within the dataset, with several resulting in only a fine, rather than a sentence of imprisonment.

D. Four scenarios: desperate breadwinners, snapping employees, sexual predators, and bullying bosses

More than three-quarters of the cases analyzed fell within one of four broad factual scenarios, which we outline below. Two of these scenarios involve FDHs as perpetrators whereas two involve FDHs as victims.⁸³ The first and most numerous types (25) were cases where the FDH had stolen from or burgled the apartment of her employer or a close relative, under heavy financial pressure. The defendants did this, so it was claimed by their counsel, to remit the money stolen or the proceeds of the pawned goods back home to Indonesia or the Philippines, given that FDHs are the sole breadwinners of their families, and often of their extended families too. Motives such as providing for dependent children or unemployed husbands, or to pay for medical care for elderly relatives, were put forward by counsel for these defendants.

Typical scenarios advanced by counsel and recounted by judges for this first category of case are the following. The stories are fairly consistent from case to case. Within the following three excerpts, we add italics for emphasis:

The defendant has four children aged between 14 and 23 years, all of whom are financially dependent on her. She also has elderly and ailing parents that she supports. *She committed*

⁷⁹The customary sentence for rape in Hong Kong, although not a binding tariff, is not less than 60 months' imprisonment. Aggravating circumstances such as breach of trust, which is present in all employer-FDH cases, demand a higher but unspecified starting point (Cross and Chan (n 30) 663).

⁸⁰Ibid, 650, 655.

⁸¹Ibid, 487. See the following case examples: *HKSAR v Chiong Bernard Leocario*, HCCC 165/2010; *HKSAR v Apelete Kokou Afla*, HCCC 74/2016; *HKSAR v Fung Hoi-yeung*, HCCC 156/2018.

⁸²See n 89–91 and associated text.

⁸³Those cases that did not fit into the four categories were primarily property offence cases where the FDH defendant's counsel did not reveal a sympathetic motive for offending.

*the present offences because of financial need as a result of her own financial burden supporting her four children and her parents. Her father has also been in ill health. Three of her children are adults aged 23, 22 and 21, and one has even recently had a baby. She has had no financial support from her husband for a long time.*⁸⁴

I have been told that you stole the items and pawned them because you needed the money for your family. Your mother has diabetes and your father has a heart condition. Neither of them work in Indonesia, but are in charge of your 6-year-old daughter. *All three of them rely on your income to survive.*⁸⁵

The defendant is married, with a 3-year-old son. Her son and husband live in the Philippines. As her husband had been unemployed for 14 years, *she being the sole breadwinner of the family*, decided to come to Hong Kong to work as a domestic helper in March 2014. *She gave almost all her monthly salary to the employment agent and her family for their household expenses ... [at] the end of July 2015, the defendant's grandmother's health was in a critical situation, and the defendant had to raise money for her medical expenses. The offences were hence committed. The stolen money was remitted back to the Philippines in payment of the medical expenses of her grandmother, who unfortunately passed away.*⁸⁶

Second were a smaller group of three cases where the FDH committed a violent offence against the employer or a family member under care after 'snapping' following a sustained period of stress, or due to a psychotic episode. The following two quotes illustrate the kinds of cases falling within this category:

Counsel said there is no explanation for this incident. I do not know what gets to you on the day in question, but clearly, to me, you failed to control yourself and led to all these serious consequences.⁸⁷

The attack was ferocious and it reflected the fact that, at the time, you were mentally ill; you were suffering from schizophrenia and, at the time of the incident, you were floridly psychotic.⁸⁸

Third were the group of eight cases where the employer or a direct relative sexually abused the FDH victim. This was invariably a male offender, older than the FDH, who tried to force himself on the FDH during times of day when the two parties were alone in the flat, after his initial sexual advances were rebuffed sometime beforehand. In these cases, judges tended to recount the vulnerability and social isolation of the FDH victim, the attitude of sexual entitlement of the perpetrator, and the particular harms suffered over and above those of other victims of sexual crimes in Hong Kong. The following are three examples:

What makes this offence particularly serious is that you took advantage of an innocent married woman and mother who had come from the Philippines to live and work in your home as a helper. The fact that she was obliged to live in close proximity to you and your family made it all the more important that you treated her with consideration and respect. Your conduct on the first time you were alone with her, which amounted to assuming that you were entitled to have sexual intercourse with her whether she

⁸⁴HKSAR v *Molina Luz Ursulum*, DCCC 414/2010.

⁸⁵HKSAR v *Saminem*, DCCC 176/2015.

⁸⁶HKSAR v *Barrion Jae Marie Luya*, DCCC22/2016.

⁸⁷HKSAR v *Palgue Jonita Awas*, DCCC 309/2010.

⁸⁸HKSAR v *San Jose, Maria Jestle Guarin*, HCCC 401/2009.

agreed or not and then offering money to her afterwards, demonstrates what your attitude to her was.⁸⁹

You cannot but have known that she had no one to turn to, that she was a stranger in a strange land; she had a limited education; she was unable to speak the language properly and she was ignorant of our system and its remedies and she was locked into her job by the need to work off a seven-month debt to her employment agency and she was fearful of the powers of her employers who controlled her life.⁹⁰

Another thing which made her much more stressed is that she is a Muslim ... she feels that she is dirty and has been stained. In addition, she cannot tell of this incident to her family members and friends since, in their religion, even if she was raped, as long as she is not a virgin, she will not be accepted by her society and community ... In addition, she is in a difficult position where, after these incidents, she is unable to work as a domestic worker to earn money since she has to wait to be a witness in this case. During this period, she relied on others to survive, especially her aunt who is her only relative in Hong Kong.⁹¹

The fourth factual category, incidents of violent abuse against the FDH (six cases), involved a more varied set of perpetrators, extending to both males and females, and in one example, both a husband and a wife as co-defendants. As recounted in the reasons for sentence, typical motives here were to punish the FDH for inadequate performance of her duties in the home, and to take out frustrations that developed in other parts of the employer's life. Again, the court usually emphasized the FDH's special vulnerability vis-à-vis the employer and social isolation in Hong Kong. Three extracts serving as prototypical examples are the following:

[The defendant employer] would have become confident that she would not be exposed because [the victim] was not allowed out nor able to communicate with others. She had no way to seek help or attempt to escape. The defendant was the only adult in the house and therefore not at risk of exposure.⁹²

I do not ignore the fact that it was impossible for the victim to escape from or alleviate the harm that was made to her back [caused by pouring boiling water] despite that being a more impulsive act of the defendant.⁹³

Employers should never resort to violence and treat them [i.e. FDHs] as a group that only knows how to be silent and vulnerable in the face of oppression, nor treat them as a tool [through which] to vent their anger.⁹⁴

Notably, the sexual and violent abuse cases echo previous victim surveys of FDHs in Hong Kong, which have reported high rates of physical, sexual, and verbal abuse in the course of employment.⁹⁵ It is likely that the cases that proceed to trial and sentencing are only

⁸⁹HKSAR v *Wong Pak-Sum*, HCCC 29/2009.

⁹⁰HKSAR v *Fok Ka-ching*, HCCC 330/2012.

⁹¹HKSAR v *Man San-Pan Saint*, HCCC 9/2012.

⁹²HKSAR v *Law Wan-tung*, DCCC 421&651/2014.

⁹³HKSAR v *Gee Hoo Giok*, DCCC 136/2018.

⁹⁴HKSAR v *Tai Chi-wai*, DCCC 251/2013; *Au Yuk-san Catherine*, DCCC 251/2013.

⁹⁵In a survey, the Hong Kong NGO Mission for Migrant Workers found that 58% of more than 3000 FDH respondents had faced verbal abuse at work, 18% had faced physical abuse, and 6% had experienced sexual abuse. See J Levine, 'Survey reveals extent of abuse of foreign maids in Hong Kong' *South China Morning Post* (4 August 2013) <<https://www.scmp.com/news/hong-kong/article/1294210/survey-reveals-extent-abuse-foreign-maids-hong-kong>>. In 2014, the Hong Kong Equal Opportunities Commission reported that 6.5% of FDHs surveyed had experienced sexual harassment either in their workplaces or at work-related functions over the past 12 months: see Hong Kong Equal Opportunities

the tip of the iceberg when it comes to the abuse of FDHs. As noted above, many cases go unreported due to fear of reprisal, unfamiliarity with the legal process, and fear of losing employment or immigration status in Hong Kong. The sample of cases under study here, while not very useful in estimating the overall prevalence of violence and sexual abuse against FDHs in Hong Kong, nonetheless illustrate the typical origins of and motivations behind such behaviour and its impact on the victims. In trying to understand whether FDHs face additional injustice via the law's treatment of their assailants, and whether the courts are poised to rationalize the behaviour of their employers, it is instructive to analyze these decisions more closely for linguistic evidence of negative FDH stereotyping, which we move to in the following section.

VI. Analysis: judicial depictions of domestic helpers and employers

In this section, we analyze patterns in the precise language that District Court and Court of First Instance judges used when describing FDHs and their employers. We deliberately ignore language merely identifying breach of trust as an individual aggravating factor in sentencing, which is a feature of almost all criminal cases that take place in an employment setting. We also avoid the parts of each decision where judges merely repeated submissions made by counsel,⁹⁶ similar to those passages described above as part of the four typical factual scenarios. Instead, we searched for examples of overt cultural stereotyping, any judicial sympathy for FDHs or their employers as groups, moral admonitions, and for general commentary on the position of FDHs in Hong Kong society vis-à-vis their employers, or vice-versa. A content analysis approach requires us to focus on both the explicit wording and the latent meaning employed by judges when referring to the offender or victim protagonists.⁹⁷

Beginning with judicial characterizations of FDHs, we break down the observations into three categories: positive or sympathetic depictions, negative or stereotyped depictions, and neutral depictions or the absence of a group characterization.⁹⁸ Within these three groups, we combine the cases where FDHs were defendants with the cases where they were victims.

A. Positive or sympathetic depictions of FDHs

There was only one instance where the judge, despite finding the FDH defendant guilty of a crime and punishing her, elicited notable sympathy for FDHs as a group, over and above the specific mitigating factors raised by counsel. In this case, the judge expressed sympathy for the defendant's family and financial circumstances that provided the apparent

Commission, 'Sexual Harassment and Discrimination in Employment – Questionnaire Survey for Foreign Domestic Workers' (*Hong Kong Equal Opportunities Commission*, 2014) 1 <<https://www.eoc.org.hk/compass/wp-content/uploads/2021/08/Sexual-Harassment-and-Discrimination-in-Employment-%E2%80%93-Questionnaire-Survey-for-Foreign-Domestic-Workers-2014-ENG.pdf>>. From the 918 respondents to this survey, there were four reports of actual or attempted rape or indecent assault over the past 12 months (*ibid*, 3). If representative of Hong Kong's entire population of FDHs, this would equate to more than 1600 such incidents per year.

⁹⁶See Mann and Daly (n 29) 360.

⁹⁷Bouhours and Daly (n 42) 378.

⁹⁸Note that while the language giving rise to positive/sympathetic depictions of FDHs or else negative/stereotyped depictions of FDHs was often fleeting, in no case under analysis did the sentencing judge overtly characterize FDHs in both positive and negative terms in different parts of the judgment.

motive for the crime, even though this could not formally mitigate the penalty.⁹⁹ The following is the relevant passage:

I accept that the defendant is not a typical criminal and she foolishly resorted to illegal means to try to resolve her financial problems. To some extent, I do sympathise with her. *Hers is the typical story of a Filipino domestic helper weighed down with a heavy financial burden for [her family] in the Philippines.*¹⁰⁰

To this case we can add ten cases where FDHs were portrayed positively or sympathetically when one was a victim of a crime by an employer. Together, these constituted the majority of FDH victim cases (10 of 14). Key passages from those decisions include the following, with added italics for emphasis:

[S]he is the financial pillar of her family, *as a lot of our domestic helpers are*, and we all know that working outside the country really helps the family in the Philippines.¹⁰¹

[I]n the relationship of employer and domestic helper, it is often the case that the helper is in a particularly vulnerable position ... not only is the helper financially dependent on the employer, the helper will be far away from her home country and her immediate family.¹⁰²

Overseas domestic helpers have contributed to the Hong Kong society greatly ... Behaviours like assaulting domestic helpers [destroy] the trust between the employer and the maid. They also [affect] the reputations of Hong Kong employers. The court must not tolerate these uncivilised acts.¹⁰³

B. Negative or stereotyped depictions of FDHs

There were seven instances, all in DC decisions, where the judge made one or more gratuitously negative remarks about FDHs as a group while sentencing an FDH defendant. Sometimes this involved stereotyping domestic helpers' behaviour, sometimes it involved a callous lack of sympathy for motive and mitigation, and in other cases it involved a belittling of FDHs' status vis-à-vis their employers and more generally within Hong Kong society. On several occasions, the judge began with qualifying remarks about the stressful lives that FDHs lead in Hong Kong, presumably to soften the blow of what was about to come. Notable statements include the following, again with added italics for emphasis:

Here we have a Filipino domestic helper stealing the employer's credit card and using it to withdraw money and purchase [goods].¹⁰⁴

[Y]ou also ran into financial difficulty because of these proceedings, [and] you incurred expenses about \$20 a day [US\$2.55] awaiting the trial. It has been almost 22 months now from the date of the offence *that added up to quite a lot to a Filipino like you.*¹⁰⁵

I do not doubt for a moment that job of a domestic helper can be demanding. Very often you work from morning to night doing all the household chores, cleaning, washing, cooking three

⁹⁹Cross and Chan (n 30) 489–90.

¹⁰⁰*HKSAR v Molina Luz Ursulum* (n 84), emphasis added.

¹⁰¹*HKSAR v Apelete Kokou Afla* (n 81).

¹⁰²*HKSAR v Chiong Bernard Leocario* (n 81).

¹⁰³*HKSAR v Au Wai-chun*, DCCC 269/2014.

¹⁰⁴See *HKSAR v Barrion Jae Marie Luya* (n 86). The impersonal nature of the statement implies that this kind of behaviour is not uncommon among domestic helpers from the Philippines.

¹⁰⁵*HKSAR v Palque Jonita Awas* (n 87).

meals a day. It would be even more demanding if on top of that you have to take care of children ... [But] I think *the court has to send a very clear message to you and many others who have children of tender age under their care as a job*. Violence does not pay. If you cannot cope with your job, quit it. As the saying goes, 'if you cannot stand the heat, get out of the kitchen'.¹⁰⁶

I understand that many foreign domestic helpers want to improve the financial situation of their families by coming to work in Hong Kong. It is also perhaps common knowledge that in order to secure their employment contracts, many of them have incurred debts in a significant sum even before their arrival. Be that as it may, it makes no sense for them to take out loans which are simply beyond their ability to repay. Working in Hong Kong may enable them to earn a meaningful income (by their homeland standard), but *it does not mean they would become rich overnight and be able to meet all demands of everyone in their families back home. They need to work earnestly and accumulate their wealth step by step like everyone else in society*.¹⁰⁷

[T]here were reports that foreign domestic helpers working in Hong Kong were abused or exploited. This should not be tolerated or condoned, *but the scenario should not be overgeneralised* ... The present case provides a good example that *local employers were exploited and their valuables were stolen by greedy domestic helpers* who might well exploit the old age and/or lax attitudes of the employers. *This case could also be the tip of the iceberg*. The defendant ... did not treasure this good job in Hong Kong.¹⁰⁸

There was no case where judges offered negative remarks about FDHs where an FDH was victimized by an employer or family member.

C. 'Neutral' depictions of FDHs

There were as many as 36 different cases where FDHs were depicted neutrally or not subject to a group characterization throughout the written judgment, apart from references to their live-in role. The decisions evincing a prima-facie neutral tone are usually shorter than reasons for sentence featuring either positive or negative depictions of FDHs. In the former cases, the judges usually adopted a formulaic, almost mathematical sentencing method, by considering the appropriate starting point given tariff sentences, followed by aggravating and mitigating factors, and then the totality principle for multiple offences. This does not mean that the judges did not hold private opinions about FDHs or their employers as groups, but only that no moral admonitions or stereotyping found their way into the published sentencing remarks.

Thus, in most of the FDH-defendant cases, judges cast no overt moral judgment regarding the crimes committed by FDHs or their position in Hong Kong society vis-à-vis their employers, other than remarking upon the potential for breach of trust that arises in the context of a close employer–employee relationship, of which the FDH–employer relationship is but one example. Representative passages include the following:

There are many domestic helpers employed in Hong Kong who live with their employers and [it] is their utmost trust that these employers place in the employees as they live and eat with

¹⁰⁶Ibid.

¹⁰⁷HKSAR v Daniati, DCCC 495/2016.

¹⁰⁸HKSAR v Qomariyah, DCCC 819/2017.

them ... for this type of breach of trust an immediate sentence of imprisonment is the only appropriate sentence.¹⁰⁹

The employer inevitably places a great deal of trust in that person not to abuse her position, for instance by stealing any of the employer's belongings ... A degree of trust was placed in her, which she abused.¹¹⁰

Taking into account the degree of trust reposed in the defendant as a domestic helper; the value of the stolen property; although charged as one offence the defendant stole property on two occasions ... all the property has been recovered and that the defendant has never been in trouble before, I am satisfied the proper starting point after trial is 12 months' imprisonment.¹¹¹

A similar situation arose in three cases where employers or family members victimized their FDHs: *HKSAR v Gee Hoo Giok*, *HKSAR v Tsang Wai-sun*, and *HKSAR v Shiu Tak Sang*.¹¹² The judges in these cases took a formulaic route to fixing sentence on the employer, providing no comment on the FDH–employer relationship other than that necessary to indicate breach of trust as an aggravating factor.

There are two ways of interpreting judicial silence over FDHs, their position in Hong Kong society, and their relationship with their employers. One interpretation of such silence is scrupulous fairness in the sentencing decision-making process, if not the outcome, that it represents. The contrary, more implied, assertion is that FDHs are just another category of employee, and the families that they live with just another category of employer. Any crime committed by either party in this context is aggravated by a breach of trust, but no more. In the eyes of such judges, there is nothing particularly special about the relationship between live-in FDHs and their employers, and no need to recognize the former's gendered, ethnic, and class-based disadvantage that may have contributed to the offending or victimization.

D. Depictions of employers

Although we observed an outwardly neutral posture from judges towards FDHs in the majority of sentencing decisions coded for, in just over a third of such cases at least one group characterization, either positive or negative, appeared. By comparison, there was far less moral commentary on *employers* as a group, this appearing in only two of 54 cases. The relative difference presumably reflects FDHs' status as an intersectional 'other' in Hong Kong, while for most judges, employers instead represent the mainstream of Hong Kong society. The only explicit commentary on employers as an entire group came from the following two passages. Both are from cases where employers committed violent offences against their FDHs:

Because of the differences in culture, background and customs, both employers and employees should reconcile their differences in a patient and tolerant manner. *Employers should never resort to violence and treat [FDHs] as a group that only knows how to be silent and vulnerable in the face of oppression, nor treat them as a tool [through which] to vent their anger.*

¹⁰⁹*HKSAR v Risnawati*, DCCC 955/2008.

¹¹⁰*HKSAR v Yunia Tamrin*, DCCC 334/2009.

¹¹¹*HKSAR v Sri-Rahayu*, DCCC 888/2017 (defendant charged with theft).

¹¹²*HKSAR v Gee Hoo Giok* (n 93); *HKSAR v Tsang Wai-sun*, HCCC 187/2018; *HKSAR v Shiu Tak Sang*, HCCC 66/2012.

The Court has the duty to deliver the correct message to society—regardless of nationality and occupation, all employees are protected by the law and therefore sentences must have deterrent effect.¹¹³

I find the defendant had no compassion towards them; people she considered beneath her. Of that, I am convinced. In my opinion, therein lies the root of her problem ... *It is regrettable that such conduct, attitude, physical and mental abuse described by [the two FDH victims] is conduct not rare and, sadly, often dealt with in the criminal courts.* In my view, such conduct could be prevented if domestic helpers were not forced to live in their employers' homes. They have no choice and this rigidity fuels such cases where domestic helpers are unfortunate enough to be employed by a bully.¹¹⁴

It is difficult to come to firm conclusions based on two decisions only, although the above cases are notable for their intimation that such behaviour by employers is not aberrant. The paucity of group characterizations of employers is also consistent with the liberation hypothesis,¹¹⁵ given that the employers committed violent or sexual crimes in all 14 cases in which they were defendants. It is possible that the relative severity of such offences made judges less likely to outwardly attribute them to defendants as members of an impugned class as opposed to wicked individuals. In contrast, FDHs committed violent or sexual crimes in only four of the 40 cases in which they were defendants, with the majority of cases involving property offences.

Continuing the same theme, there were very few cases where judges overtly characterized employers or their family members as an 'ideal victim' group,¹¹⁶ other than in two specific cases involving elderly employers who were victims of property offences¹¹⁷ and in one case involving a child victim.¹¹⁸ Whenever judges strayed from the default formulaic, mathematical decision-making process, the judicial gaze was usually fixed upon FDHs, whether as a collective of greedy or wicked perpetrators or as a collective of vulnerable victims.

E. Discussion

Adding all the cases together, both FDH offending cases and FDH victimization cases, we find that judges made positive remarks about FDHs in 11 cases, judges expressed negative sentiments towards FDHs in 7 cases, whereas judges adopted a outwardly neutral or disinterested position in 36 cases. As would be expected, characterizations of domestic helpers as positive or negative influences on Hong Kong society were to some extent correlated with the individual FDH's status as either a victim or a defendant, respectively. However, it is also clear that, rhetorically at least, FDHs were treated 'neutrally' as a group in the majority of sentencing decisions (67 per cent) that concerned them. This was especially the case in scenarios where an FDH was a defendant (80 per cent). A summary by reference to the four factual scenarios outlined in Part V is provided in [Table 1](#).

¹¹³*HKSAR v Tai Chi-wai* (n 94); *HKSAR v Au Yuk-shan Catherine* (n 94), emphasis added.

¹¹⁴*HKSAR v Law Wan-tung* (n 92), emphasis added.

¹¹⁵See n 47 and associated text.

¹¹⁶See N Christie, 'The Ideal Victim' in EA Fattah (ed.), *From Crime Policy to Victim Policy: Reorienting the Justice System* (Palgrave Macmillan 1986) 19.

¹¹⁷*HKSAR v Qomariyah* (n 108) and *HKSAR v Heri Tiyas Winanti*, DCCC 1105/2018.

¹¹⁸See *HKSAR v Palguc Jonita Awas* (n 87).

Contrary to our initial expectations, the results of this study suggest that societal prejudice against FDHs largely does *not* find its way into sentencing decisions in criminal cases, at least within judges' express language and reasoning, if not the actual quantum of sentence. As Table 1 indicates, judges did express positive, negative, and neutral or silent views of FDHs in cases where they were defendants and victims. Positive group characterizations of FDHs cast them as hardworking, family-oriented women who had sacrificed a great deal to benefit Hong Kong society. Negative group depictions cast FDHs as greedy, callous, and ungrateful for the opportunities that working in Hong Kong had afforded them.¹¹⁹ In some cases, a single positive or negative remark about FDHs may have been caused by a 'slip of the tongue' in the speech by the judge, rather than a deliberate attempt to impose a label on an entire group. A non-reserved sentencing decision increases the risk of the former.¹²⁰ Nonetheless, even an 'off the cuff' remark can be revealing of a judge's deeply-held preferences or the difficulty in preventing societal biases from subconscious lodgement. Based on the hypotheses expressed in Part III, we would have expected far more expressly negative remarks about FDHs as a group, especially in the 40 cases where FDH defendants committed crimes against their employers, the latter a mainstream group within Hong Kong.

Table 1. Summary of Findings.

Factual scenario	Positive depictions of FDHs	Negative depictions of FDHs	'Neutral'/absent depictions of FDHs	Depictions of employers	Total
'Desperate Breadwinners' (FDH Perpetrators)	1 case	6 cases	18 cases	(0 cases)	25 cases
'Snapping Employees' (FDH Perpetrators)	0 cases	1 case	2 cases	(0 cases)	3 cases
Others (FDH Perpetrators)	0 cases	0 cases	12 cases ¹²¹	(0 cases)	12 cases
'Sexual Predators' (Employer Perpetrators)	5 cases	0 cases	3 cases	(0 cases)	8 cases
'Bullying Bosses' (Employer Perpetrators)	5 cases	0 cases	1 case	(2 cases)	6 cases
Total	11 cases	7 cases	36 cases	(2 cases)	54 cases

Furthermore, contrary to our expectations at the beginning of the study, within several hundred pages of judicial opinions there were no judicial statements typecasting Filipina domestic helpers as racialized and sexualized threats to their employers' family lives. There were also no passages that pejoratively stereotyped Indonesian domestic helpers as pliant and uneducated, despite their clear overrepresentation in the cases both as perpetrators and as victims, the latter consistent with relatively recent NGO reports on the subject.¹²² These folk representations of FDHs, popular within the media and among the wider public in Hong Kong, were largely absent from judicial expression in the region's senior criminal courts.

¹¹⁹Constable 'Obstacles to Claiming Rights' (n 20, 105) outlines how typical this view is in Hong Kong: '[FDHs] work is understood by [Hong Kong] locals as a privilege, a sort of charity offered to the poor, for which they are expected to be grateful. Employment, as a form of 'gift' to the less privileged poor from Southeast Asia, presumes a response of gratitude paired with an assumption that those who are ungrateful for the privilege of work should leave.'

¹²⁰See n 39 and associated text.

¹²¹See n 83 on these cases.

¹²²Constable 'Obstacles to Claiming Rights' (n 20) 102.

There are at least two possible explanations as to why the relevant judicial decision-making did not conform to these two initial hypotheses. One explanation may be that the reasons for sentence issued by DC and CFI judges are not the most appropriate form of written discourse to analyze for overt ethnic stereotyping. Despite the official rhetoric that ‘sentencing is an art, not a science’,¹²³ it is customary for Hong Kong judges to engage in a highly structured reasoning process in passing sentence, even for crimes without tariff sentences set by the Court of Appeal. It may still be the case that judges hold private prejudices in relation to FDHs, just like many other members of Hong Kong society do. Furthermore, Hong Kong judges might instinctively favour the interests of employers, not least because many judges likely also employ live-in domestic help. Yet, these preconceptions were not visible in the wording of (most of) the sentencing decisions under analysis. Jones has suggested that published remarks only capture part of the judicial sentencing decision-making process.¹²⁴ We might hope that where judges held but did not articulate any such preconceptions, it is because institutional norms adequately disciplined them from permitting prejudices to (outwardly) shape their punishment decisions.¹²⁵ At the very least, the structured reasoning process may have forced judges to reconsider falling back upon negative stereotypes to deal with their bounded rationality.¹²⁶ While blanket discretion in decision-making allows judges to respond to unique case circumstances, it also opens the door for societal prejudices to creep into a process which, ideally, should be carried out as dispassionately as possible.

The second and more intriguing potential explanation of our unexpected results is that Hong Kong judges from the senior criminal trial courts sit outside the regular social strata, given that they are sometimes imported from (or at least educated and practised) abroad. Furthermore, Hong Kong judges are selected by their peers, legal practitioners, and the executive government, rather than being popularly elected or nominated.¹²⁷ They may therefore hold social values that do not align closely with those of the wider community. Based on the limited online information provided by the Hong Kong judiciary and related sources, all seven of the judges who engaged in negative sentiment towards FDHs were born in Hong Kong, and six out of the seven at one point worked as government counsel, crown prosecutors, or in the police force. In contrast, of the nine judges who offered positive group characterizations of FDHs, five were foreign born, seven had undertaken tertiary education abroad, and only one had previously worked as a crown prosecutor. Of course, correlation is not the same as causation. Yet it appears more likely that ingrained cultural stereotyping and prejudice will make their way into judges’ sentencing remarks for judges who have long been exposed to that very culture. It is also logical that judges from a criminal defence background might display greater sympathy for the

¹²³Hong Kong Department of Justice, ‘DPP’s Statement on Review of Sentences’ (*Hong Kong Department of Justice*, 2002) <<https://www.doj.gov.hk/doc/dpp041202e.doc>> See also the discussion in one of the cases under analysis, *HKSAR v Nones Carmelita Galay*, HCCC 129/2021.

¹²⁴Jones (n 42) 168.

¹²⁵See A Kupchik, ‘Youthfulness, Responsibility and Punishment’ (2004) 6(2) *Punishment & Society* 149, 169.

¹²⁶Another potential explanation, adapting the findings of Kupchik (*ibid*, 161, 168–69), is that the DC and CFI judges were mostly satisfied with the sentencing options available to them in dealing with FDH cases, and hence did not need to resort to moral admonitions as an additional layer of punishment.

¹²⁷Judicial Officers Recommendation Commission Ordinance Cap. 92, s 3.

more vulnerable party in the FDH–employer relationship, both rhetorically and in actual sentencing outcomes.

The high number of ‘neutral’ or entirely absent group characterizations of FDHs suggests, on its face, that most sentencing judges sought to carry out their tasks impartially in relation to FDHs. These judges considered each case on an individual basis as it came before them, assessing punishment by the severity of the crime, weighing individual mitigating and aggravating factors, and finally applying the totality principle when sentencing multiple offences. Yet, knowingly or not, judicial silence over the position of FDHs vis-à-vis their employers relegates the relationship to that of any other employer–employee compact. Silent or ‘neutral’ judges are thereby ignoring the unique intersectional vulnerabilities of FDHs in Hong Kong in their decision-making process. Moreover, by largely ignoring the social context in which FDH–employer crimes arise, Hong Kong judges forfeit the opportunity to help contribute systemic solutions.

Judges provided even less moral commentary on employers as a group. With the expectation that many DC and CFI judges employ live-in domestic helpers themselves,¹²⁸ any collective admonition of FDH employers would be self-inclusive, and therefore perhaps unlikely. The judicial gaze remained firmly on FDHs both as defendants and victims, but even then, in a majority of cases domestic helpers failed to attract either outward sympathy or opprobrium as an abstract collective.

As noted in Part I, we require additional research to determine the precise extent to which FDHs are subject to unequal treatment in sentencing *outcomes* or the extent to which their employers receive undue leniency. At the sentencing phase, neither the absence (or presence) of negative stereotyping, nor a formulaic and seemingly objective approach to sentencing in the DC and CFI provides conclusive evidence; however, at this juncture we note that the average sentences meted out to FDHs for theft and burglary were broadly in line with expectations arising from previous caselaw, and even slightly more lenient for the latter offence. The average sentence meted out to male employers or family members who raped their FDHs was significantly *higher* than the recommended minimum starting point of five years’ imprisonment. Thus, all else being equal, sentencing outcomes in FDH–employer cases tend, surprisingly, to favour the weaker party in the relationship. Further empirical research over a much larger sample of cases from the Magistrates’ Courts is necessary to confirm or refute this preliminary finding.

VII. Conclusion

District Court and Court of First Instance sentencing decisions involving FDHs and their employers reported on the Hong Kong Judiciary website tend to fall into one of four broad factual scenarios: property crimes committed by desperate employees in order to remit money back home to their families in Southeast Asia; violent offences committed by employees who ‘snap’ after a sustained period of stress at work or a psychotic episode; serious sexual crimes against FDHs committed by entitled male employers or their close relatives; and violent abuse perpetrated by employers against FDHs to punish or regain control.

¹²⁸Unfortunately, we could not collect data on whether each judge employed an FDH within their own home.

Across 54 cases, the majority falling into one of the preceding factual categories, our content analysis tested two hypotheses. We predicted that judges would take the opportunity during sentencing to collectively condemn FDHs' offences against employers. Crimes by employers or family members against FDHs would instead tend to be 'consistently mitigated and explained'.¹²⁹ We also predicted that the crimes perpetrated by and against FDHs in Hong Kong would give rise to overt cultural stereotyping within sentencing decisions. At the beginning of this research, we expected that, despite the Hong Kong judiciary's reputation for impartiality and competency, the wider community's cultural values, stereotypes, and inherent prejudices would infect sentencing decisions, just as they do any other form of public discourse. Unexpectedly, the results of the content analysis suggest that such partial and presumptuous views of FDHs do not, for the most part, make their way into the Hong Kong judiciary's decision-making process, or at least that part of the process that is capable of capture through written decisions on sentencing. Furthermore, judges had even less to say about the employers of FDHs as a largely middle-class, culturally mainstream group within Hong Kong.

An absence of outward cultural stereotypes and group characterizations is largely to the judiciary's decision-making credit. While judges should not be blind to the intersectional context of disadvantage within which FDH–employer crimes occur, neither should they pre-emptively determine punishment without considering the individual aggravating and mitigating factors present in each case. After all, the parity principle demands that similar offending receives similar punishment, even when committed by members of a disadvantaged or else privileged societal group.¹³⁰

The more immediately concerning implication of so many 'neutral' or silent characterizations of FDHs is that Hong Kong judges are generally not using their wisdom and high social esteem to recommend means of *preventing* future property crimes, sexual offences, and violent conflict within the context of the FDH–employer relationship, other than through the habitual appeal to deterrent punishment. Several limited exceptions, relayed in the quotes in Part VI, implicitly or explicitly called for lower agency fees, financial management education for helpers, patient and tolerant resolution of inevitable differences of opinion, and the abolition of the 'live-in rule'.¹³¹ While many of the same recommendations, plus others,¹³² have previously been made by Hong Kong NGOs, journalists, and academics,¹³³ judges of the DC and CFI are in a unique position to make use of

¹²⁹Ladegaard (n 5) 131.

¹³⁰See n 24.

¹³¹Furthermore, several judges implicitly alluded to basic situational crime prevention measures to prevent theft or burglary, such as locking cupboards or drawers, storing keys securely, and electronic security features or lower borrowing limits for credit cards: *HKSAR v Saminem* (n 85); *HKSAR v Consejo Elynor Consolacion*, DCCC 773/2015; *HKSAR v Barrion Jae Marie Luya* (n 86); *HKSAR v Soinem*, DCCC 138/2016; *HKSAR v Daniati* (n 107); *HKSAR v Nur Hoiriya*, DCCC 1162/2017; *HKSAR v Romos Charity Faith Esloyo*, DCCC 276/2019.

¹³²For example, increasing the minimum wage of FDHs, allowing FDHs more than two weeks to switch between employers, imposing a limit on weekly working hours, and allowing FDHs to claim permanent residency after seven years' continuous service, as with other foreign workers in Hong Kong. See Constable 'Obstacles to Claiming Rights' (n 20) 97–103; Hong Kong Helpers Campaign, 'Campaign Points Summary' (*Hong Kong Helpers Campaign*, 2019) <<http://hkhelerscampaign.com/en/campaign-points/>>; Hong Kong Federation of Asian Domestic Worker Unions, 'Calling for Protection for Migrant Domestic Workers: Treat Migrant Domestic Worker [sic] as Human' (*Legislative Council*, 13 April 2015) <https://www.legco.gov.hk/yr14-15/english/panels/ws/ws_dv/papers/ws_dv20150413cb2-1261-6-e.pdf>.

¹³³For example, PWY Lee and CJ Petersen, 'Forced Labour and Debt Bondage in Hong Kong: A Study of Indonesian and Filipina Migrant Domestic Workers' (Occasional Paper #16, Faculty of Law, The University of Hong Kong 2006) 23–30; K Ewing, 'High Court ruling on "live-in" rule guarantees further abuse of Hong Kong's domestic workers' *Hong Kong Free Press* (4 March 2018) <<https://hongkongfp.com/2018/03/04/high-court-ruling-live-rule-guarantees-abuse-hong-kongs->

their status as part of the most publicly trusted branch of government to influence government policy on FDHs.¹³⁴ This does not mean an end to the impartial resolution of criminal litigation in cases involving FDHs, but merely a concurrent focus on the bigger picture: the causality and reduction of crime in a domestic setting, involving Hong Kong's foremost marginalized population.

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¹³⁴J Chan, 'A Shrinking Space: A Dynamic Relationship between the Judiciary in a Liberal Society of Hong Kong and a Socialist-Leninist Sovereign State' (2019) 72(1) *Current Legal Problems* 85, 118–19; EW Cheng, 'United Front Work and Mechanisms of Countermobilization in Hong Kong' (2020) 83 *The China Journal* 1, 18 <<https://www.journals.uchicago.edu/doi/pdf/10.1086/706603>>.