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FOREWORD

HKU students are well known for organising a wide range of extra-curriculum activities. From hall–activities, community services to political advocacy, they are often exemplary in living to the full fun, exuberant and, from time to time, mischievous campus lives. Less known perhaps is the fact that in between the heady romance of their voyages of self-discovery, ever so often, our students find the time to excel academically! All jesting aside, another hallmark of HKU is the capacity of its students to full-heartedly engage in an equally rich and diverse range of intellectual activities, a good example of which is the very worthy endeavour of academic publication.

The Hong Kong Journal of Legal Studies is a great illustration of our students' pro-active pursuit of academic excellence. I am delighted to see the successful running of our student-edited law journal and would like to commend the editors for their vision, managerial finesse and industriousness. I know how hard it is to establish and manage a journal and it is always a joy to see when hard work comes to fruition.

Student-edited academic journals serve multiple purposes. First, they incentivise students to improve the quality of their research and to share the fruits of their creative labours beyond their professors who happen to mark them. Many of the essays are well-written and truly deserve a wider audience. With a publication option in mind, students may opt for more research-focused courses and are encouraged to stretch themselves to drive forward the frontiers of knowledge. Second, they offer a rare opportunity for student editors to organise articles, constructively critique the work of their peers and hone their own writing and editorial skills. The process of reading, editing and commenting on articles is an organic learning process with creative synergies from which all involved benefit. Finally, they cultivate a research culture among students and embed critical thinking skills in the learning process. Whatever career path one may follow after graduation, with the advent of the knowledge economy elementary research skills are essential. How to formulate a research question, develop a framework, organise one's research

and promote the results can be best gleaned through active research. Participating in journal-editing is a good way to polish and master research skills.

Student-edited journals are of course not limited to publishing term papers as they have the potential to grow into fully competitive, peer-viewed journals of a very high quality. Harvard Law Review, the mostly highly ranked law-journal, is edited by law students at Harvard and a little-known Chicago community organiser began his meteoric rise to becoming the 44th President of the United States as the first African American editor of the Harvard Law Review. Our student-editors should be inspired to know that most, if not all, law reviews in the United States are entirely edited by law students. With effective leadership and support, we can move towards that direction.

A hearty congratulations is due to our student editors for a work well done and I look forward to reading the future issues.

Professor Hualing Fu
Dean of Law
University of Hong Kong

PREFACE

We are very humbled and pleased to present to you Volume 14 of the Hong Kong Journal of Legal Studies culminating in the Journal's 26th year of existence.

Since its inaugural year in 1994, the Journal remains the only legal academic treatise in Hong Kong that is managed by an editorial board comprised solely of students reading law at the University of Hong Kong. This year, our diverse and talented editorial board has been involved in every step of the editorial process. We have thus remained true to the Journal's traditional spirit of collaboration and intellectual aplomb. It is through these endeavours that we continue to make the Journal accessible to all in print, via Hong Kong courts, libraries and universities, and digitally via online platforms such as Westlaw Hong Kong and HeinOnline.

As affected elsewhere, the emergence of COVID-19 has led to adjustments in the management of the editorial board and the tailoring of its processes to ensure the smooth running of the Journal as far as possible. Through the publication of this Volume, it is our hope to contribute to the ecosystem of legal scholarship. In the auspicious footsteps of the Journal's preceding volumes, Volume 14 has strived to maintain diverse legal scholarship via six engaging articles which reflect the various authors' individual styles, bringing colour to this year's Volume. This year it has been our intention to strike an equal balance between the areas of private and public law. As a result, the volume focusses on topics ranging from the role of NGOs in public interest environmental litigation, to the ever-relevant issue of affordable housing in Hong Kong, and finally the subject of e-Justice reform in Mainland China. Conversely, the volume delves into the topics of 'continuous employment' under the Employment Ordinance, drug price regulation in Mainland China, and asset tunneling in Hong Kong family property companies.

We would like to thank Professor Fu Hualing, Dean of Law at the University of Hong Kong, for providing an insightful foreword. In addition, we extend our heartfelt gratitude to our

generous patrons for their continued support. Most significantly, we would like to voice our sincerest thanks to our dedicated Senior and Associate Editors for their hard work which has resulted in the fruition of this Volume.

Finally, it is our hope that you enjoy reading this Volume and we look forward to receiving your continued support going forward.

Lucien van Romburg and Vanessa Leigh
Editors-in-Chief

ENFORCEABILITY OF THE RIGHT TO AFFORDABLE HOUSING IN HONG KONG: REVISITING *HO CHOI WAN V HONG KONG HOUSING AUTHORITY*

Nabil M Orina*

The question of enforceability of socio-economic rights has received considerable attention in scholarship. Hong Kong courts have been measured in their approach and have given more deference to the government's policies when interpreting these rights. This may be attributed to Hong Kong's piecemeal approach to incorporation of the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) into domestic law. By focussing on the enforceability of the right to affordable housing, this article interrogates the Court of Final Appeal's decision in Ho Choi Wan and offers propositions on a pragmatic approach to interpretation of socio-economic rights drawing on judicial developments in South Africa and Kenya.

INTRODUCTION

The question of enforceability of social and economic rights has always taken centre stage in the debate on the nature of legal rights. Despite having been recognised in the Universal Declaration of Human Rights (UDHR) alongside civil and political rights, socio-economic rights have lagged behind in their development in domestic jurisdictions owing to what may be challenges of enforceability.[1] This challenge is made obvious in

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many jurisdictions that have express provisions in regard to civil and political rights but fewer that address socio-economic rights. Much, however, has to do with the judicial approaches and attitude towards such rights. In Hong Kong, for instance, courts have shown reluctance in interfering with government policy, arguing that they are not best suited to deal with socio-economic issues.[2] Some judges have observed that socio-economic rights as created in the International Covenant on Economic, Social and Cultural Rights (ICESCR) were merely aspirational in nature and are to be realised progressively, and thus they do not create absolute obligations.[3]

The challenge in Hong Kong can also be seen in the failure to incorporate into domestic law most of the obligations under the ICESCR. While courts are not inhibited in applying these provisions when adjudicating domestic applications of socio-economic rights, they have taken a cautious approach.[4] In some cases where the domesticating law is of a general nature, deference is given to the discretion of the government but subject to the power of the courts to exercise judicial review. Relevant to the discussion herein, the right to affordable housing is given effect through the Housing Ordinance but without definition of what amounts to affordability. The discussion will therefore focus on the Court of Final Appeal's (CFA) decision in *Ho Choi Wan v Hong Kong Housing Authority*[5] (*Ho Choi Wan*) from the perspective of enforceability of socio-economic rights, where the domestic law contains a general obligation but lacks express provisions that would be a yardstick for the attainment of such a right or lead to a legally enforceable right.

Whilst this inquiry does not seek to propose any policy measures and certainly not a formula for domestic recognition of socio-economic rights, it seeks to establish that there is sufficient basis for judicial enforceability of the right to affordable housing

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1 Ellen Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' (2006) 22 American University International Law Review 35, 36.

2 Michael Ramsden, 'Using the ICESCR in Hong Kong Courts' (2012) 42(3) HKLJ 839, 839-40.

3 *Chan To Foon v Director of Immigration* [2001] 3 HKLRD 109 [72].

4 See Johannes Chan, 'Basic Law and Constitutional Review: The First Decade' (2007) 37 HKLJ 407, 413.

5 [2005] 8 HKCFAR 628.

in Hong Kong and how that can be done. The first part of this article provides a general background on socio-economic rights and their enactment under Hong Kong law. This is followed by a critical analysis of the seminal case, *Ho Choi Wan*, particularly focusing on how the court went about adjudicating the socio-economic claims raised in this matter. This article ultimately concludes with propositions on the case for a pragmatic approach to judicial enforcement of socio-economic rights in Hong Kong law.

I. SOCIO-ECONOMIC RIGHTS

A. The General Nature

Civil and political rights are regarded as negative rights[6] that prevent a state from doing something that would breach them, subject to any limitations that may be recognised in law, while economic, social and cultural rights are positive rights that require a state to take certain action to fulfil them.[7] For instance, while the International Covenant on Civil and Political Rights (ICCPR) expressly recognises that individuals have rights thereunder, the ICESCR requires the state to recognise the rights thereunder progressively depending on availability of resources.[8] This general demarcation of the nature of these two categories of rights explains the approach over the years by states despite both sets of rights having been recognised in the UDHR. While it is beyond the scope of this article to comprehensively engage in the debate on the nature of socio-economic rights, it aims to point out the main arguments on both sides to highlight the dilemma faced by courts in adjudication of socio-economic rights.

It has been argued that rights are only those that can be legally enforced through courts.[9] The argument goes that rights should be seen in the context of an enforceable contract between

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6 Ran Hirschl, 'Negative Rights vs. Positive Entitlements: A Comparative Study of Judicial Interpretations of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order' (2000) 22 Human Rights Quarterly 1060, 1071.

7 Ramsden (n 2) 856.

8 Ramsden (n 2) 856-857.

9 Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13 Human Rights Brief 1, 1.

citizens and the state.[10] In a report before the Legislative Council, it is noted that, 'Hong Kong enacted the Bill of Rights Ordinance in June 1991. However, the Ordinance only covers the ICCPR because the government is of the view that rights under the ICESCR cannot be easily enforced in the courts.'[11] This view of the nature of socio-economic rights is again reiterated in reports submitted by Hong Kong to the United Nations Committee on Economic, Social and Cultural Rights (CESCR), the body that monitors compliance with ICESCR, where it is noted that these rights 'are in the form of objectives to be achieved progressively and are not rights which individuals could easily enforce in the courts. They are not, therefore, well suited for inclusion in a Bill of Rights designed to give people the right of direct action in the courts'.[12]

These concerns underlie the often-raised objection to the enforcement of socio-economic rights that their enforcement by the courts would violate the separation of powers doctrine. It is contended that it would be undemocratic to let courts usurp the role of the executive and legislature in formulating policy and passing laws on utilisation of resources.[13] The proponents of this approach, therefore, argue that the question of how to allocate resources should be left to the legislature which is representative and 'should not be settled by some person exercising superior wisdom, who comes along as a sort of Platonic guardian and decides this is the way it ought to be'.[14] Similarly, it is argued that the courts may lack the technical knowledge for expending resources on behalf of the state.[15] Lon Fuller has advanced this line of thought in his 'polycentricity' argument.[16] Fuller posits that

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10 ibid.

11 Research and Library Services Division, 'The Implementation of the International Covenant on Economic, Social and Cultural Rights in Overseas Jurisdictions and Hong Kong' (April 1995) [22] <www.legco.gov.hk/yr97-98/english/sec/library/9495rp02e.pdf> accessed 5 April 2019.

12 ibid [22] quoting the Second Periodic Report on Hong Kong regarding Articles 10 to 15 of the ICESCR.

13 Neier (n 9) 2. See also Eric C Christiansen, 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court' (2007) 38 Columbia Human Rights Law Review 321, 322.

14 ibid.

15 Christiansen (n 13) 349-50.

16 See generally Lon Fuller and Kenneth I Winston, 'The Forms and Limits of Adjudication' (1978) 92 HLR 353, 394-404.

there are limits to adjudication and some matters should be left to the market (or legislature) to resolve. This is because polycentric tasks entail various variables and a change in one variable will produce changes in all others. He demonstrates this interconnection through a spider web - when an action is taken to address an individual issue, a tug on any part of the web, it reverberates through the entire system, affecting both potential future actions, as well as the parameters that led to the original decision.[17] Over the years, it has been appreciated that the degree of polycentricity in socio-economic rights litigation is extremely high. In *Soobramoney v Minister of Health (KwaZulu-Natal*),[18] for instance, the court rejected the applicant's attempt to draw a line between 'terminal' illnesses and other illnesses in construing the right to emergency treatment.[19]

The extent of enjoyment of economic social and cultural rights in a society may also be seen in light of compromises in the power balance. A capitalist society hinged on free markets will have minimal concern for securing these rights, while a communist state has a higher degree of interference in the economic markets and as a result the affairs of its citizens would be expected to play a bigger role in social welfare. The weakness of such a premise in regard to free market economies is the assumption that the economic freedom granted by the state would achieve an equitable society. The contrary, however, is true and non-interventionist policies may inhibit the realisation of equality in a society by ignoring the economically disadvantaged. As noted by the CESCR in its Concluding Observations on Hong Kong's first report in light of the ICESCR:

> the economic policies of HKSAR, based essentially on the philosophy of 'positive non-interventionism', i.e. keeping taxes low and limiting government expenditure to the provision of essential services, in accordance with Article 5 of the Basic Law, which guarantees its free trade, free enterprise and low tax regime for at least 50 years, have had a

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17 ibid 395.

18 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 769 (CC).

19 ibid [19].

> negative impact on the realisation and enjoyment of the economic, social and cultural rights of Hong Kong's inhabitants, the more so as those policies have been exacerbated by globalisation.[20]

It has, however, been argued that socio-economic rights are intricately linked with civil and political rights. Taking the example of the right to housing, the United Nations notes that this interdependence is best expressed through this right, which would foster the full enjoyment of, 'such rights as the right to human dignity, the principle of non-discrimination… and the right not to be subjected to arbitrary interference with one's privacy, family home or correspondence…'[21] It has been argued that one of the approaches that can be used for enforcing socio-economic rights would be the invocation of civil and political rights as a means to achieving socio-economic rights.[22] One may invoke, for instance, the freedom from 'inhuman and degrading treatment' in relation to inadequate living conditions.[23] The Indian Supreme Court has taken this approach in *Olga Tellis v Bombay Municipal Corporation*[24] (famously known as the *'Pavement Dwellers Case'*) read a 'right to livelihood' from 'right to life'. The court observed:

> The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean, merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of death sentence, except according to procedure established by law. That is but one aspect if the right to life. An equally important facet of the right to life is the right to livelihood

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20 United Nations Committee on Economic, Social and Cultural Rights, 'Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant' (11 May 2001) [14] <www.cmab.gov.hk/en/press/reports_human.htm> accessed 5 April 2019.

21 United Nations, Fact Sheet No 21, The Human Right to Adequate Housing <www.un.org/ruleoflaw/files/FactSheet21en.pdf> accessed on 2 April 2019 (Fact Sheet No 21).

22 Wiles (n 1) 41.

23 ibid. See also *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) [23].

24 AIR 1986 SC 180.

because, no person can live without the means of living, that is, livelihood.[25]

With increased attention on socio-economic rights in the past few decades, the distinction between civil and political rights, on one hand, and socio-economic rights, on the other, is shrinking.

B. Socio-Economic Rights under Hong Kong Law

The Basic Law recognises that the application of the ICESCR alongside the ICCPR as were applicable before the handover shall continue to be implemented through domestic legislation.[26] The provisions of the ICCPR were incorporated into domestic legislation through the Bill of Rights Ordinance on 8 June 1991.[27] On the other hand, the ICESCR has not been entirely incorporated into legislation but has been enshrined in various laws in addition to recognition of some socio-economic rights in the Basic Law itself. As noted by the then Secretary for Home Affairs Dr Patrick Ho in response to a question by a member of the Legislative Council:

> there is no single law - corresponding to the Hong Kong Bill of Rights Ordinance in relation to the ICCPR that incorporates the ICESCR into Hong Kong's domestic legal order. However, ICESCR provisions are incorporated into our domestic law through several Articles of the Basic Law (for example Articles 27, 36, 37 137, 144 and 149), and through provisions in over 50 Ordinances.[28]

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25 ibid 23.

26 Art 39 of the Basic Law of the Hong Kong Special Administrative Region provides:
'The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and *shall be implemented through the laws* of the Hong Kong Special Administrative Region…'.

27 Hong Kong Bill of Rights Ordinance (Cap 383).

28 Legislative Council, 'Legislative Council Question 2: Implementation of the International Covenant on Economic, Social and Cultural Rights in Hong Kong' (*Constitutional and Mainland Affairs Bureau*, 6 April

In justifying its failure to fully implement the ICESCR, the Hong Kong government has argued that in order to fulfil obligations under the Convention, legislative and administrative mechanisms were being enacted in a progressive manner.[29] In effect, most of the provisions of the ICESCR, not just on the substantive rights but also principles on enforcement and the applicable standards for review, have not been incorporated into Hong Kong law.

The effect of failing to fully incorporate the ICESCR is that courts have been hesitant to interpret specific laws as incorporating the rights under the ICESCR. Karen Kong attributes this problem to a lack of a rights-approach to legislative drafting and policy making.[30] In *Ho Choi Wan* for instance, the majority was not convinced that the Housing Ordinance incorporated the requirement of affordability under the ICESCR.[31] Bokhary PJ in his dissenting opinion, however, held that the law under section 4(1) required the Housing Authority (the Authority) to provide affordable housing and there was no need to resort to the ICESCR for interpretation even though one could do that.[32]

Where the courts have found an enforceable socio-economic right, there is, arguably, unsettled jurisprudence on the correct test for assessing any limitation to socio-economic rights with different courts adopting different standards. In *Fok Chun Wa v The Hospital Authority,*[33] the court applied the justification test in finding that the Hospital Authority had not acted discriminatorily in charging different obstetric charges for mainland Chinese mothers who were not residents as compared with those who had Hong Kong residency status. In that case, the court was of the view that it would not interfere with the government's allocation of resources unless an impugned policy is 'manifestly without reasonable foundation,' a standard applied

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2005) <www.cmab.gov.hk/en/upload/20050406humanq02_e.pdf> accessed 26 July 2020.

29 Research and Library Services Division (n 11) [32].

30 Karen Kong, 'Social Justice and Social Rights in Hong Kong: Recent Judicial Review Developments and Proposals for Legislative Change' in Surya Deva (ed), *Social-Economic Rights in Emerging Free Markets: Comparing Insights from India and China* (Routledge 2016).

31 *Ho Choi Wan* (n 5) [47].

32 ibid [68].

33 [2012] 2 HKC 413 (CFA).

by the European Court of Human Rights in regard to domestic law of the EU member states where a large margin of appreciation is afforded to state parties.[34] In *Kong Yunming v Director of Social Welfare,*[35] the CFA adopted the proportionality analysis while agreeing with the reasonableness assessment in *Fok Chun Wa* holding that a restriction on a right, 'will only be held to be disproportionate if it is manifestly without reasonable foundation'.[36]

C. The Right to Affordable Housing

The right to affordable housing is derived from the right to adequate housing. The ICESCR requires states to 'recognise the right to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.' The CESCR notes in its General Comment No 4 that 'while adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors… it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context'.[37] The CESCR identifies affordability, among others, and extrapolates the following:

> Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases. In societies

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34 ibid [71]-[76].

35 [2014] 1 HKC 518 (CFA).

36 ibid [43].

37 UN Committee on Economic, Social and Cultural Rights General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant) (*Refworld*, 13 December 1991) [8] <www.refworld.org/pdfid/47a7079a1.pdf> accessed 10 April 2019 (General Comment No 4).

where natural materials constitute the chief sources of building materials for housing, steps should be taken by States parties to ensure the availability of such materials…[38]

The United Nations has also defined affordable housing to mean that the financial costs related to housing are at a level that the satisfaction of other basic needs, such as food, transport, clothing etc. are not threatened or severely compromised.[39] The sense here is that one should be able to pay rent and still have enough to live on without falling below certain minimum standards of living. This definition further requires states to provide subsidies for those who are unable to obtain affordable housing and to protect tenants from unreasonable rent levels or increments.

The Hong Kong housing legislation, the Housing Ordinance[40], does not carry a definition of what affordability entails. The lack of a definition of affordability then consequentially means that the Authority would also lack a policy, or that it would be difficult to hold its policy to account on the basis of non-existent parameters of affordability.[41] Further, the Housing Ordinance does not expressly establish the Authority for the purposes of fulfilling a duty to provide affordable housing, but rather grants it leeway to determine the kind of accommodation to provide and to what classes of persons as it may deem fit with the approval of the Chief Executive.[42] This power has, however, been interpreted as granting the Authority the core mandate of provision of affordable housing.[43]

While the CFA rejected the assumption that the capping of the Median Rent to Income Ratio (MRIR) at 10% was a statutory definition of affordability,[44] there is no clear policy on

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38 ibid para 8(c).

39 Fact Sheet No 21 (n 21).

40 Cap 283 (Housing Ordinance).

41 Nicholas Brooke, 'Hong Kong's housing conundrum - affordable to whom?' (*SCMP*, 12 September 2017) <www.scmp.com/property/hong-kong-china/article/2110747/hong-kongs-housing-conundrum-affordable-whom> accessed 3 April 2019. It is noted that there is a much-needed focus on what entails affordability and what policies should be put into place to achieve it.

42 Housing Ordinance (n 40), s 4(1).

43 *Ho Choi Wan* (n 5) [1].

44 See discussion below.

the part of the Hong Kong government to ensure affordable housing for low income earners within the territory. The law requires the Authority to price the rent chargeable on public rental houses in accordance with the MRIR which ensured that 50% of households' rent-to-income ratios were below 10%.[45] Even if the MRIR ratio were to be considered as the statutory definition for affordability, it would still face criticism for failing to consider those whose income would be below the median.[46]

The objective approach, following the CESCR General Comment No 4, would then be to take into consideration household income and the amount spent on rent. This means that the household's total rent expenditure should not be more than a certain percentage of the income.[47] This percentage is arrived at taking into consideration a range factors that would be relevant in measuring affordability from one society to another but would necessarily include income levels and cost of living.

D. The Adequacy Problem in Hong Kong

Access to adequate housing is not just a problem of the developing countries that are heavily constrained with resources. It is also a challenge for developed countries that have to deal with inadequacy and homelessness.[48] For Hong Kong, a regional economic powerhouse, affordability has led to soaring cases of homelessness in some cases and living conditions that would barely qualify as adequate in most cases. It is estimated that in

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45 Kwok Yu Lau, 'A Comparison of Indicators Used in Measuring Housing Affordability in Hong Kong and their Validity' (2001) Working Paper Series No 2, 5 <http://www.cityu.edu.hk/pol/staff/KYLau/wp0102.pdf> accessed 2 September 2020.

46 ibid 13.

47 ibid 2.

48 General Comment No 4 (n 37) noted in 1991 that there were 100 million homeless people worldwide and over 1 billion inadequately housed. Similar recent reports have stated the number of homeless to be at 100 million (See UN Economic and Social Council, 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living' (3 March 2005) <digitallibrary.un.org/record/543696?ln=en> accessed 2 April 2019) and the number of inadequately housed at 1.6 billion (See Global Homeless Statistics <homelessworldcup.org/homelessness-statistics/> accessed 2 April 2019).

2017 the number of homeless persons increased double fold from 908 persons in 2016 to 1800.[49] While these numbers are comparatively fewer to other cities like Los Angeles,[50] the alarming rise in numbers highlights a big problem. In the same vein, in 2016 it was estimated that there were over 200,000 people living in subdivided flats with another 10,000 people living in industrial buildings.[51]

As the gap between the rich and poor keeps rising in Hong Kong, so does the problem of housing. The Authority, whose mandate is the provision of affordable housing seems to be clearly overwhelmed. The Authority estimated that as at the end of March 2020, the average waiting time for general applicants and for elderly one-person applicant is 5.4 years and 3.0 years, respectively.[52] There are also 153,500 general applicants and 103,600 elderly one person applicants on the waiting list.[53]

II. REVISITING HO CHOI WAN v HONG KONG HOUSING AUTHORITY

The appellant in this case was a widow who lived with her two sons in a public rental housing (PRH) provided by the Authority. She had successfully filed a judicial review application before the

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49 Wyman Ma and Chermaine Lee, 'Homeless in Hong Kong: soaring costs fuel housing crisis in Asian financial hub' (*Reuters*, 26 January 2018) <www.reuters.com/article/us-hongkong-property-homelessness/homeless-in-hong-kong-soaring-costs-fuel-housing-crisis-in-asian-financial-hub-idUSKBN1FE38W> accessed 2 April 2019.

50 ibid.

51 Naomi Ng, 'Hong Kong's poorest squeezed as rents for tiny subdivided flats rise at double rate for other homes' (*SCMP*, 9 October 2016). See also UN Economic and Social Council, 'Concluding observations on the second periodic report of China, including Hong Kong, China and Macao' (13 June 2014) [49] (ECOSOC Report June 2014) where it is noted that the inadequate investment in providing affordable and adequate housing had resulted in, 'a high percentage of the population living in informal settlements, industrial buildings, cage-homes and bed-space apartments, which do not have adequate services and utilities'.

52 'Number of Applications and Average Waiting Time for Public Rental Housing' (*Hong Kong Housing Authority*, 22 June 2020) <www.housingauthority.gov.hk/en/about-us/publications-and-statistics/prh-applications-average-waiting-time/index.html> accessed 26 July 2020.

53 ibid.

Court of First Instance (CFI), where she challenged the Authority's decision to defer reviewing rents of the PRH estates in 2001 and 2002. The CFI ordered the Authority to review and determine the rent variation of the PRH estates to which the appellant was part of.[54] On appeal, the Court of Appeal allowed the appeal, which was consolidated with another party, Lam, who had sought similar reliefs as the appellant. The appellants appealed to the CFA having obtained leave of the Court of Appeal.

The CFA identified three issues from the appeal as set out in its judgement, being:

(a) whether the Authority's decision to defer rent reviews for various estates, including the appellant's estate, amounted to determinations of variations of rent within the central provision ('the 1st issue');

(b) whether the Authority is under a statutory duty to review rents and to revise them so as to ensure that the 10% MRIR is not exceeded ('the 2nd issue'); and

(c) whether the appellant has a legitimate expectation that the Authority would review rents and revise them at three yearly intervals so as to ensure that the 10% MRIR is not exceeded ('the 3rd issue').[55]

A. The Affordability Issue

The key question before the CFA, though not expressly framed as such, was whether there was a standard of affordability under the Housing Ordinance, and if yes, whether the Authority had breached that standard. The majority was persuaded that there was no statutory duty on the part of the Authority to ensure compliance with the 10% MRIR. In its opinion, the power under s 16(1)(a) could not be interpreted to bestow such an obligation on the Authority, but rather is a power exercised by the Authority within the context of the objects laid down under s 4(1) to provide affordable housing.[56] For the reason that the law did not define

54 *Ho Choi Wan* (n 5) [39].
55 ibid [42].
56 ibid [47].

what amounts to affordable housing, the CFA concluded that such a power is left to the discretion of the Authority.[57]

Curiously, the majority made a finding that, taking into consideration a number of factors including the Authority's financial position and the number of people on the waiting list and waiting time, the Authority had performed its duty to provide affordable housing.[58] This determination would seem to imply that the CFA had determined some criteria, in the absence of a statutory definition, of what amounted to affordability. That was not the case. The CFA failed to give some guidance on what parameters would be used to determine if the Authority had complied with its duty under the law. Even though the court noted that the question of whether the Authority had breached the duty to provide affordable housing was not in issue, a reasoned determination conceptualising this right and the standard of review adopted could have helped develop the law.

In the absence of domestic clarity on the standard of application of such a socio-economic right which the CFA acknowledged is given effect through the Housing Ordinance, one approach would be to seek guidance from international instruments, in this case the ICESR, that Hong Kong is party to.[59] Such an approach would have assisted the Court in applying a coherent standard of affordability which would not conflict with domestic laws and policies in any case. In *Mok Chi Hung v Director of Immigration*, the court observed that the 'rectification [sic] of an international covenant gives rise to a legitimate expectation, absence statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the international covenants'.[60]

B. The Dissenting Opinion

The affordability standards recognised under the ICESR as discussed above, are reflected in General Comment No 4 would

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57 ibid.
58 ibid [49].
59 See discussion under Part D.
60 [2001] HKCFI 103, [2001] 2 HKLRD 125, [11(2)] (Cheung J).

have required the Court to ascertain whether taking into consideration the ratio of rent to income, the Authority had exercised its discretion in a manner that would give effect to affordability. Bokhary, PJ, in his dissenting opinion does not have a doubt that, even without recourse to the ICESCR, the Housing Ordinance is sufficient to determine affordability. In his view, affordability is not a matter for the discretion of the Authority but rather a statutory obligation under s. 16 (1A) (b) which caps the MRIR at 10%.[61] Holding that the MRIR represented the affordability criteria under the Housing Ordinance presents a problem. Even though General Comment No 4 refers to the consideration of a rent to ratio income, as argued above, the MRIR approach would not address the affordability problem of the low-income earners who would fall below the median. Therefore, the MRIR would not logically be the affordability standard.

Bokhary PJ, further contended that taking into account the Authority's obligation to ensure that revenue obtained from the public rentals is sufficient to cover recurrent expenditure as part of the consideration for achieving affordability as held by the majority would be contrary to the Authority's object. According to him, what the Authority saw as a loss of revenue as a result of reviewing rents to comply with the 10% MRIR requirement would have resulted in rent saving for the tenants and hence fostered affordability.[62] In his view, the Authority was not established for the purposes of "balancing books" but rather the provision of affordable housing. Though pragmatic, this approach must be faulted for ignoring the fact that the realisation of socio-economic rights is dependent on a country's financial ability. In this case, holding that the Authority should not be concerned with its statutory obligation to raise revenue for its expenses would be tantamount to requiring the government to fund the Authority's projects without the benefit of the government's fiscal policies and plans. This however presents a dilemma on the part of the judiciary as highlighted by Yap and Wong:

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61 *Ho Choi Wan* (n 5) [95].
62 *Ho Choi Wan* (n 5) [78].

> Socio-economic issues…present the judiciary with an institutional dilemma; in carrying out its reviewing role, judges usually do not have all the information, expertise and training available to the primary decision makers to assess the proportionality of the impugned socio-economic policy; and deference is thus a rational, consequentialist response to this epistemic certainty.[63]

One cannot help but see the judiciary as a helpless arbiter in this case who might get the sense of the rights claimed but has no tools to require the government to make amends. A court should appreciate its central role in holding the government to account and should be innovative to achieve that role. The majority failed to state what would amount to affordability, even in obiter, as per the law or policies of the Authority despite making a finding that the Authority had complied with its duty. The "non-interference" approach missed an opportunity to at least require the authority to formulate a policy that would address the many facets of the right to housing to include adequacy and affordability. Even though Chan, PJ, joined in the majority, he observed that there was a need for a review of the public housing policy despite agreeing that the applicant's legitimate expectations had not been breached.[64] Nevertheless, the role of the judiciary in shaping policy and, in effect, the enforcement of socio-economic rights was seen after the *Ho Choi Wan* case as discussed below.

C. Post-Ho Choi Wan Developments

The *Ho Choi Wan* case happened in the middle of an ongoing review of domestic rent policy that had been commissioned by the Legislative Council Panel on Housing and some of the recommendations of the ad hoc committee show the judiciary's influence in the formulation of policy. In its initial recommendations, the ad hoc committee noted that:

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63 Po Jen Yap and Thomas Wong, 'Public Welfare and The Judicial Over-Enforcement of Socio-Economic Rights in Hong Kong' (2014) 44 HKLJ 41, 53.

64 *Ho Choi Wan* (n 5) [99].

> The majority of public responses support an income-based rent adjustment mechanism which provides a closer link with tenants' affordability. The Ad hoc Committee shares this view and recommends that the HA should develop an income index tracking the movement in the household income of PRH tenants to guide future rent adjustments. The main advantage of the proposed income index is that, unlike median income or MRIR, the movement of which is affected by factors other than changes in households' income (notably the changes in the distribution of household size), it can capture the "pure income change" of PRH tenants by discounting the effects of changes in household size distribution.[65]

As a result of these policy recommendations, the Legislative Council passed, in 2007, the Housing (Amendment) Ordinance which introduced a new mechanism of determination of rent adjustment (upwards or downwards) in consideration of the changes to household income of tenants.[66] This replaced the 10% MRIR cap. This approach, it was noted, 'provides an objective basis for the HA to determine when and to what extent PRH rent should be adjusted, and *a more flexible framework that reflects tenants' affordability*.'[67]

This development is a relief for public housing tenants even though it does not deal with the problem of adequacy which also impacts on affordability. Seen in its context, it demonstrates a response to the difficulties that the CFA faced when dealing with the *Ho Choi Wan* case. Soon after the CFA judgement, the Housing, Planning and Lands Bureau informed the Legislative Council Panel on Housing that:

> In his judgement, Mr Justice Chan PJ also comments that

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65 Panel on Housing, 'Review of Domestic Rent Policy' LC Paper No CB(1)2241/05-06(01) September 2006.

66 Housing Ordinance (n 40), s 16A.

67 Panel on Housing, 'New Rent Adjustment Mechanism for Public Rental Housing' LC Paper No CB(1) 796/09-10(03) (December 2009) (emphasis added).

the problems discussed in the appeal illustrate the desirability of having a long term and comprehensive review of the whole public housing policy, including the MRIR methodology and its ceiling now fixed at 10% which has been criticised by some as arbitrary. We fully share Justice Chan's observation. The judicial review cases have clearly underlined the importance of identifying an alternative rent adjustment mechanism that is more viable and helps to promote the long-term sustainability of the public rental housing programme.[68]

In taking cue from *obiter* pronouncements from the CFA on the need for clear policy, the Legislative Council demonstrated that the courts are at a vantage position to engage with the legislature without usurping the role of the executive and legislature to formulate policy. This was also seen in the *Mazibuko*[69] case in South Africa where, even though the court dismissed the case, the litigation influenced the formulation of policy in regard to the right to water. This underscores the role of the judiciary in development of socio-economic rights even further in the future but, the central concern would be how effective a "soft approach" would be to enforcement as compared to a more direct involvement by the judiciary through its review powers. This will be considered below.

III. A PRAGMATIC APPROACH TO ENFORCEMENT OF THE RIGHT TO AFFORDABLE HOUSING

A. Applicability of the ICESCR

The Basic Law of Hong Kong provides that the provisions of the ICCPR and the ICESCR as well as the ILO Convention that were previously in force in Hong Kong, before the hand-over, would remain in force and shall be implemented through the laws of

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68 Housing, Planning and Lands Bureau, 'Court of Final Appeal's Judgement on the Judicial Review of the Housing Authority's Decisions to Defer Rent Review' LC Paper No CB(1) 390/05-06(01) November 2005.

69 *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC).

Hong Kong.[70] The Bill of Rights Ordinance (BoRO) has incorporated civil and political rights but economic social and cultural rights are not part of the BoRO. This presents difficulties in the direct application of the ICESR in Hong Kong. As held by the CFA, Hong Kong is a dualist jurisdiction that requires domestication of international treaties for them to have force of law.[71] The failure of express domestication is therefore indicative of the low priority accorded to some of the rights and is a hindrance for effective enforcement. Implementation through non-legislative measures like policies and administrative mechanisms may give rise to uncertainty and ineffective enforcement of these rights.[72] For instance, in *Clean Air Foundation Ltd v Government of the HKSAR* in dismissing the application for leave before the court, the Judge observed:

> While it purports to seek the determination of issues of law, on an objective assessment it is clear that it seeks in fact to review the merits of policy in an area in which Government must make difficult decisions in respect of competing social and economic priorities and, in law, is permitted a wide discretion to do so. While issues of importance to the community may have been raised, it is not for this court to determine those issues. They are issues for the political process.[73]

Even though the *Ho Choi Wan* case did not deal with the applicability of the ICESR, all indications are that following the Court's jurisprudence, it would have been reluctant to apply the convention without express domesticating provisions. While noting that Hong Kong may not have legislated for all the rights under the ICESCR, Bokhary PJ, however, notes that the Housing Ordinance incorporates Article 11(1) of the ICESR and that, 'if it were necessary to do so in order to establish that the Authority is duty-bound to provide affordable housing, it might well be possible to pray the ICESCR powerfully in aid of construing the

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70 The Basic Law of the Hong Kong Special Administrative Region, Art 39.

71 See *GA v Director of Immigration* [2014] HKCFA 14, (2014) 17 HKCFAR 60, [58], 81-83 (Ma CJ).

72 In ECOSOC Report June 2014 (n 51) [39] this potential challenge is noted especially in regard to applicability of ICESCR provisions before courts and tribunals in the absence of legislation.

73 *Clean Air Foundation Ltd v Government of the HKSAR* [2007] HKCFI 757 [43].

Housing Ordinance to impose that duty.'[74] A failure to domesticate has not acted as a bar from reliance on a treaty as shown in some cases where courts have accepted the possibility of reliance on an undomesticated (but ratified) treaty to obtain guidance in domestic enforcement of rights especially where there are no contradicting domestic laws and policy.[75]

The post-*Ho Choi Wan* developments have however shown a move towards incorporation of ICESCR provisions on the right to housing into domestic law, the Housing Ordinance. From what existed as a general duty to provide affordable housing in the Housing Ordinance as noted in the *Ho Choi Wan* decision, the housing policy and law has advanced in a bid to demarcate affordability in terms which accord with the ICESCR and the CESCR's commentary on affordability.[76] This development therefore gives the courts impetus to directly apply the ICESCR in interpreting the obligations under the Housing Ordinance without seeming to impose policy. Besides, applying Bokhary, NPJ's logic in *Ho Choi Wan* to the *Fok Chun Wa,* case, acceptance on the part of Hong Kong that it has incorporated the ICESCR in various domestic laws (including the Housing Ordinance) opens up such laws to ICESCR standards scrutiny, including CESCR general comments and observations.[77]

B. Incorporation of Comparative Jurisprudence

The usefulness of comparative jurisprudence cannot be gainsaid. Aharon Barak, a former Judge and President of the Supreme Court of Israel, posits that for a judge interpreting a law, 'examining a foreign solution may help…choose the best local solution.'[78] Courts in Hong Kong have often resorted to comparative jurisprudence when it comes to questions of enforcement of civil and political rights.[79] This is mainly due to an elaborate bill of

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74 *Ho Choi Wan* (n 5) [68].

75 See *Mok Chi Hun* (n 60) [11(1)].

76 See above discussion on Section 16A of the Housing Ordinance and General Comment No 4 (n 37).

77 *Fok Chun Wa* (n 33) [174]-[178].

78 Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) 530.

79 Johannes Chan (n 4) 410-413.

rights that domesticates the ICCPR hence making it easier for the courts to enrich their jurisprudence by incorporating international and domestic judicial practices. Similarly, Hong Kong courts can no doubt learn valuable lessons from some of the most advanced jurisdictions in enforcement of socio-economic rights like South Africa and Kenya. Whereas this comparative experience is arguably restrained by differences in the manner of recognition and enforcement of these rights in different jurisdictions, this article argues that the primary role of courts in the enforcement of socio-economic rights is the advancement of social justice regardless of social or political history of the society. In that regard, the jurisprudence of two domestic jurisdictions; Kenya and South Africa will be considered and how it can be transplanted by Hong Kong courts to give effect to the right to affordable housing.

1. SOUTH AFRICA

South Africa has featured prominently in discourses on the enforcement of socio-economic rights in the past two decades. This is informed by express recognition of these rights in the 1996 constitution and the subsequent jurisprudence developed by the courts. Section 26 of the Constitution of the Republic of South Africa (South African constitution) provides for the right to access to adequate housing.[80] The right to access to health care services, sufficient food and social security and the right to education are also recognised under the South African constitution.[81] Unique to the South African socio-economic rights framework is the determination at the constitution making stage by the Constitutional Court that these rights were justiciable and did not violate the separation of powers doctrine as contained in the then draft constitution.[82]

In interpreting these rights, the South African Constitutional Court has been instrumental in building a framework for their enforcement employing a 'dignity approach' in analysing limitations. In *Dawood and another v Minister of*

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80 The Constitution of the Republic of South Africa, s 26.

81 ibid, ss 27 and 29.

82 See Christiansen (n 15) for a detailed exposition of the process of inclusion of socio-economic rights in the South African Constitution.

*Home Affairs and others***,** it was stated that human dignity informs constitutional adjudication and interpretation of many other rights and it is also of 'central significance in the limitations analysis.'[83] The court has also held that in interpreting these rights, a holistic approach that would take into account promotion of social justice should be adopted:

> The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and in particular, in determining whether the state has met its obligations in terms of them.[84]

The South African Constitutional Court has also devised innovative remedies for enforcement of socio-economic rights by requiring the government to take the necessary steps for progressive realisation of those rights or reviewing measures that are unreasonable in the attainment of those rights.[85] The court has strongly established its place in a post-apartheid democratic South Africa by offering constitutional interpretations that underscore societal values and principles and the role of law in a society. Where necessary, it has been held, the courts would devise remedies that would include supervision after judgement. This approach helps the court to maintain the separation of power but exercise its constitutional power to enforce rights. In *Fose v Minister of Safety and Security*, Ackermann J held 'it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal'.[86]

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83 *Dawood v Minister of Home Affairs* 2000 (3) SA 936(CC) [35]. See also *S v Makwanyane* 1995 (3) SA 391 (CC) [144].

84 *Grootboom* (n 23) [24].

85 See Manisuli Ssenyonjo, 'The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa' (2017) 64 Netherlands International Law Review 259, 278.

86 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) [69].

The standard for reviewing government measures was set out in *Grootboom* as the reasonableness analysis, an approach that has been argued to greater deference to the state by requiring that the measures adopted for the enforcement of socio-economic rights be reasonable. As explained in *Grootboom:*

> The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measure could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.[87]

It can be argued that the CFA, in avoiding to question the existing policy on housing, implicitly adopted the reasonableness standard in *Ho Choi Wan* when it determined that on the basis of factors that would include, 'the assistance provided to tenants under its Rent Assistance Scheme, the number of public households in receipt of CSSA, the number of people on the

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87 *Grootboom* (n 23) [41]. This case involved a question whether the government had taken reasonable legislative and other measures to ensure adequate housing for the respondents who were homeless and living in squalid conditions. They had been put on the waiting list for subsidized low-cost housing for periods of up to seven years. Because of their circumstances, they moved into private land where they were evicted from prompting the suit. The court held that the government had not met its constitutional obligations and required it to devise measures to address the rights of the respondents.

waiting list and the waiting time,'[88] the Authority had complied with its objective to provide affordable housing. Even though the CFA did not conduct a review of the policies that had been put in place by the Authority to achieve affordability, it held that such a duty was within the purview of judicial review.[89]

The adoption of standard of reasonableness as the appropriate standard of review has not been without criticism. In South Africa, Sandra Liebenberg has argued against this approach which has been adopted by the Constitutional Court. In her view, the Constitutional Court has refused to determine 'minimum core obligations' in assessing compliance arguing that it is for the government to set the core.[90] This approach, she argues, has led to a conservative approach which leaves too much room for discretion.[91] By doing this, the Constitutional Court has shied away from developing a substantive content of socio-economic rights in favour of a deferential standard of review of reasonableness. This approach is seen as a way of respecting the doctrine of separation of powers.[92] In *Mazibuko*, this deferential approach (in respect of the separation of powers) was reiterated in the following terms, '[i]t is institutionally inappropriate for a court to determine what the achievement of a particular socioeconomic right entails and what steps government should take to ensure the progressive realisation of the right.'[93]

2. KENYA

Socio-economic rights have been given a constitutional status under the Constitution of Kenya. Article 43 thereof, provides for, among other socio-economic rights, the right to "accessible and adequate" housing. Further, by virtue of Article 2(6) of the Constitution, which imports into Kenyan law international treaties

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88 *Ho Choi Wan* (n 5) [49].

89 ibid.

90 Sandra Liebenberg, 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' (2002) 6(2) Law, Democracy & Development (2009) 159, 169 and190.

91 ibid 189.

92 See *Minister of Health v Treatment Action Campaign* (No 2) 2002 (5) SA 721 (CC) [38].

93 *Mazibuko* (n 69) [60].

ratified by Kenya, the ICESCR is directly applicable in Kenya.[94] Additionally, the Constitution places an obligation on the state to, 'take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization…' of socio-economic rights.[95] The deliberate constitutional anchorage of these rights was informed by the need to achieve social justice through a transformative constitutional dispensation which recognises the bill of rights as, 'an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.'[96]

The constitutional framework for socio-economic rights in Kenya, therefore, leaves no doubt as to the justiciability of such rights. As noted in the final report of the Committee of Experts, '[p]roviding for these rights as formulated in the Proposed Constitution of Kenya creates constitutional thresholds for their implementation and facilitates legislative, policy and programmatic interventions.'[97] Kenya has, however, not fulfilled its obligations in enacting legislation and policy that would give effect to these rights. As noted by the Economic and Social Council's Committee on Economic, Social and Cultural Rights, the delay in adopting enabling legislation and policies had impeded effective realisation of these rights.[98]

The post-2010 Constitution socio-economic rights litigation has opened up the extent of use of this elaborate framework in enforcement. In this regard, the courts have found the South African jurisprudence on the right to adequate housing to be useful owing to the similarities in the constitutional

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94 Kenya ratified the ICESCR on 1 May 1972. See <http://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/KSC_UPR_KEN_S08_2010_KenyaStakeholdersCoalitionforUPR_Annex3.pdf> accessed 19 April 2019. See also the Constitution of Kenya 2010, Art 21(4) which requires Kenya to 'enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.'

95 The Constitution of Kenya 2010, Art 21(2).

96 See The Constitution of Kenya 2010, Arts 19(1) and (2). See also *Kepha Omondi Onjuro v Attorney General* Petition No 239 of 2014 [2015] eKLR [137].

97 Committee of Experts on Constitutional Review, 'Final Report of the Committee of Experts on Constitutional Review' (11 October 2010) 110.

98 CESCR, 'Concluding Observations: Kenya' E/C.12/KEN/CO/2-5 (4 March 2016) [5].

provisions between the two countries.[99] Importantly, however, the courts have placed reliance on the ICESCR and the interpretation proffered in the General Comments of the CESCR in extrapolating the socio-economic rights under the constitution.[100] In *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* (*Satrose*), the court relied on General Comment No 4 in finding that the right to housing necessarily encompassed, 'the right to live somewhere in security, peace and dignity.'[101]

In interpreting the state's obligations, the courts have also been guided by Article 10 of the Constitution which requires all state organs, in interpreting the constitution or any other law, to adhere to national values which include, 'participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized…'[102] Odunga, J in *Onjuro & others* opined that even though these 'values and principles' were not justiciable themselves, courts should endeavour to give effect to them whenever possible.[103] It has been affirmed that the government has a role to play in alleviating the situation of the economically disadvantaged in society and to 'bridge the gap between the "haves" and "have nots" as a matter of ensuring dignity and equality for all'.[104] Dignity as a guiding principle in the interpretation of socio-economic rights was also relied on in *Satrose* where the High Court, in faulting the manner in which planned evictions were to be conducted, held that such evictions, 'without a plan for their resettlement would increase levels of

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99 See *Satrose Ayuma v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme* Petition No 65 of 2010 [74]. In adopting the reasoning in *Grootboom* on the meaning of 'adequate housing' Lenaola J stated, 'It is instructive that Article 43 of our Constitution uses the words "accessible and adequate housing" similar to s 26(1) of the South African Constitution which uses the words "access to adequate housing."'

100 See Ssenyonjo (n 85) 282.

101 *Satrose* (n 99) [70].

102 See also the Constitution of Kenya 2010, Art 20(4)(a) which requires a court, tribunal or other authority to promote, 'the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.'

103 *Onjuro* (n 96) para 136 making reference to *Olum v Attorney General* (2) [1995-1998] 1 EA 258.

104 ibid [133]-[134] (citing *Grootboom).*

homelessness and this Court must strive to uphold the rights of the Petitioners and *especially the right to be treated with dignity*.'[105]

Further, following in the South African jurisprudence, the courts have adopted the "reasonableness" standard in reviewing government policies and laws as against the rights as provided in the constitution. In *Consumer Federation of Kenya (COFEK) v Attorney General & 4 others,* the court observed that the standard for assessing whether the government has met its constitutional obligations under Article 43 is the existence of 'reasonable policy' and other measures towards meeting such obligations.[106] This approach gives wider deference to the government in a case where there is existing policy to implement its constitutional obligations.[107] The constitutional framework however requires the state, under Article 21(3) to pay attention to the most vulnerable in society thereby offering a safety net in such an assessment.[108] The Kenyan constitution, coming after considerable focus on the South African approach chiefly developed in *Grootboom,* therefore reflects a more progressive approach to enforcement of socio-economic rights.[109]

Kenyan courts have, however, been cautioned to move away from the reasonableness standard and adopt the minimum core approach if they are to achieve the aspirations of the Constitution, to safeguard the most vulnerable and marginalised in society. Nicholas Orago argues that this approach does not violate the separation of powers doctrine because the constitution

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105 *Satrose* (n 99) [91] (emphasis added).

106 Petition No 88 of 2011 [2012] eKLR (*Consumer Federation of Kenya),* para 39 <http://kenyalaw.org/caselaw/cases/view/82947> accessed 23 April 2019. See also *Gidion Mbuvi Kioko alias Sonko v Attorney General* Petition No 223 of 2011 [2017] eKLR [57] <http://kenyalaw.org/caselaw/cases/view/133444/> accessed 23 April 2019 where it was held that, 'while the Court may not in accordance with Article 20(5) interfere with the allocation of resources by the government, the Court may properly give directions where it considers that no reasonable provision is made for a particular vulnerable community or groups or persons.'

107 See *Consumer Federation of Kenya* ibid [41] where the court found that the government had taken 'reasonable measures' through policies which had 'ameliorated' living standards of the citizens despite the high fuel prices. See also Ssenyonjo (n 85) 280.

108 Andra le Roux-Kemp, 'The Enforceability of Health Rights in Kenya: An African Constitutional Evaluation' (2019) 27 African Journal of International and Comparative L 126, 145.

109 ibid.

contains a stringent limitation clause (Article 24) and further that Article 24(2)(c) provides that any provision limiting a right or fundamental freedom must not limit the right to such an extent that derogates from the right's core or essential content.[110]

Kenya has, no doubt, faced challenges in interpreting its progressive rights regime but these challenges have given way to innovative approaches. In some cases, courts have had to deal with a total lack of policy or law when faced with a claim for enforcement of socio-economic rights. This situation impedes the courts' ability to review whether the steps taken in the realisation of these rights are reasonable. In crafting a way to surmount this, the court in *Satrose* borrowed from the South African Constitutional Court jurisprudence by, in addition to making a declaration that the government had violated the petitioners' rights to adequate housing, directing the government to take measures and report back to court within 90 days existing or planned policies to address the problem of forced eviction and the realisation of the right to accessible and adequate housing.[111] However, the Court of Appeal was highly critical of the South African approach to redressing violations through post-judgement supervision. The Court of Appeal has sought to limit the power of the courts by cautioning that Article 20(5)(c) requires courts to, 'practice self-restraint and discipline in adjudicating government or executive policy issues … before delving and wading into the political arena which is not the province of the courts.'[112] The decision by the Court of Appeal has attracted immense criticism from the legal fraternity for its attempt to put brakes on burgeoning human rights jurisprudence. This regressive attempt to curtail the role of the courts in adjudication of socio-economic rights is an unfortunate development as Kenya develops its jurisprudence. It is hoped that the Supreme Court, where this matter has now been appealed to, will reverse this position.

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110 Nicholas Wasonga Orago, 'The Place of the "Minimum Core Approach" in the Realisation of the Entrenched Socio-Economic Rights in the 2010 Kenyan Constitution' (2015) 59 Journal of African Law 237, 255.

111 *Satrose* (n 99) [111].

112 *Kenya Airports Authority v Mitu-Bell Welfare Society* Civil Appeal No 218 of 2014 [2016] eKLR [100].

From another angle, although the Constitution of Kenya subjects the realisation of socio-economic rights to 'progressive realisation' and 'available resources', the high court has interpreted the provision to mean that the state must be seen to be doing something. In *MMM v Permanent Secretary, Ministry of Education & 2 others* [2013] eKLR the high court held that, 'Article 43 of the Constitution does not sit there like a defected football player who has lost a match. It is indeed alive and has started the run towards full realisation as opposed to a slow shuffle in the name of progressive realisation.'[113]

In sum, although Kenya and South Africa's elaborate rights regimes and jurisprudence need to be seen in the context of the two states' social and political histories of deep-seated inequalities, their approach to socio-economic rights provides a template of how law can be used as a tool for social justice. As demonstrated by these two jurisdictions, the perceived dichotomy between socio-economic rights and civil and political rights is blurred when viewed through human dignity and equality.

CONCLUSION

This article concludes that there is sufficient basis for Hong Kong courts to enforce the right to affordable housing by a pragmatic interpretation of the Housing Ordinance which has incorporated the ICESCR provisions. It is further proposed that in reviewing whether the government has complied with its obligations to provide affordable housing, the courts should help to develop the law by relying on comparative jurisprudence which has developed in this area that addresses the concerns on separation of power but ensures the courts remain relevant. Courts of law should rise up to the occasion to address challenges facing society and in this case the runaway inequality in the Hong Kong society.[114] To that end, the article proposes tweaking the reasonability standard by adopting an assessment test that evaluates reasonability through core values of human dignity and equality in order to address the growing gap between the rich and poor in Hong Kong. This

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113 *MMM v Permanent Secretary, Ministry of Education* [2013] eKLR [21].

114 Kong (n 30) 599.

approach will assist the Hong Kong courts to overcome non-justiciability concerns by focussing on the interdependence and indivisibility of rights rather than their differences. As argued by Liebenberg and Goldblatt, the needs of the economically challenged and vulnerable members of society can be tackled through a substantive interpretation of the right to equality.[115] This substantive interpretation of the right to equality would further call for the adoption of higher standard of review other than reasonableness. As demonstrated above, although the reasonableness standard of review adopted in South Africa and Kenya respects the doctrine of separation of powers, the much deference to the government has rendered the right to housing in the two countries almost hopeless. This article calls for an adoption of the minimum-core obligation as a fit standard of review. This standard would ensure the realisation of the right to equality, a proper understanding of the duties imposed on the government by the law and would breathe life into the abstract provisions of the law.

Further, even though the social and historical context of Kenya and South Africa are different from Hong Kong, and they have no doubt faced immeasurable challenges in their adjudication of socio-economic rights, they have shown that by embracing the values of equality and human dignity, a court can help bridge the gap between rights on paper and their practical implication. A judge in a common law jurisdiction, as is Hong Kong, has the power to give effect to the law in a changing society that is faced with new challenges. The lower spectrum of the Hong Kong society is struggling with adequacy of housing leading to rising cases of homelessness and of people living in squalid conditions. This situation can be alleviated through a human dignity and equality-based approach to rights interpretation.

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115 Sandra Liebenberg and Beth Goldblatt, 'The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution' (2007) 23 South African Journal of Human Rights 335, 350.

PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN CHINA: COULD NGOS HAVE A GREATER ROLE TO PLAY?

Dick Au Yeung*

While the newly revised Environmental Protection Law in 2014 contains a lot of promising amendments, the most notable and revolutionary change it brought is the opening up of public-interest environmental litigation to non-government organisation plaintiffs. This article attempts to balance the interest of both the government and environmentalists and come up with a comprehensive suggestion as to how the scope of eligible NGO could be expanded so as to meet the goal to combat pollution and simultaneously take into account Chinese government's concern.

INTRODUCTION

It has already been well recognised that the environmental debts China incurred over the Economic Reform have taken their toll not only on its economic development, but also social stability and even political legitimacy.[1] At this crunch time, a long-awaited legal framework has been devised to respond positively to public concerns on environmental issues. While the newly revised Environmental Protection Law in 2014 (EPL 2014) contains a lot of promising amendments, the most notable and revolutionary change it brought is the opening up of public-

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1 It has been stated that environmental degradation, with such stark domestic and international repercussion, poses not only a major long-term burden on the Chinese public but also an acute political challenge to the ruling Communist Party. See Joseph Kahn and Jim Yardley, 'As China Roars, Pollution Researches Deadly Extremes', (*New York Times*, 26 August 2007) <https://www.nytimes.com/2007/08/26/world/asia/26china.html> accessed 20 July 2019.

interest environmental litigation (PIEL) to non-government organisation (NGO) plaintiffs.

That said, even if great strides could be noticed, there remain both internal and external impediments that have been left unsolved. The former points to the internal design of PIEL in the EPL 2014 and the latter represents some enforcement impediments which may hinder its full implementation. While most of the academic literature expressed their concern in relation to the externalities such as a fragmented environmental governance structure,[2] this article, however, focuses back to the very fundamental provision which confers the standing to file PIEL to the NGO plaintiffs.

The assessment carried out in this article consists of two parts. The first part deals with the eligibility of NGOs to file civil PIEL against polluters, while the second part discusses the limitation of qualified NGO to bring administrative PIEL against the government authorities. It is therefore noted that two different legal regimes, namely the civil and administrative litigation, are touched upon respectively. Through a problem-oriented and qualitative analysis as to their necessity and purposes, it argues that in fact they might carry their own function and an absolute repeal of which might overlook them. To begin with, however, we shall be concerned with a brief overview of the current legal entitlement and limitation of PIEL in the EPL 2014 first.

I. THE NEW PIEL CLAUSES IN EPL 2014

The PIEL entitlement is the crux of the whole amendment with paramount importance from the public's view. This could be derived from the long combat between the Ministry of Environmental Protection (by then it was)[3] and the National

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2 Michael Wunderlich, 'Structure and Law Enforcement of Environmental Police in China"' (2017) 12(4) Cambridge Journal of China Studies 33, 43.

3 The Ministry of Environmental Protection has been superseded by the Ministry of Ecology and Environment in 2018. For details, see Yuanchao Xu and Woody Chan, 'Ministry Reform: 9 Dragons to 2' (*China Water Risk*, 18 April 2018)

Development and Reform Commission during its legislative history.[4] Prior to the amendment, although Art 55 of the Civil Procedure Law 2012 (CPL 2012) created an exception to the general rule that a plaintiff must necessarily have a direct interest to bring the case,[5] the exercise of this exception is contingent on another subsequent legislation which accords the party who wishes to institute such a case the said status.[6] For example, by virtue of a subsequent revision to the Chinese law on consumer's rights, the China Consumers Association and its local branches is allowed to file public-interest lawsuits to safeguard the interests of the consumer group.[7] By contrast, no such amendment is made in respect of environmental rights.[8] Thus, it is not surprising to see that in 2013 the courts rejected all the PIEL applications notwithstanding the exception provided in CPL 2012.[9] In fact, prior to such amendment, successful claims were still observed despite rarities, such as the *Friends of Nature and Chongqing Green Volunteer League v Luliang and Heping Science and Technology*.[10] Nonetheless, such limited hope has even been strangled by such amendment made to CPL 2012.

Fortunately, after an extensive exchange on the requirement to institute PIEL, it is now set out that a social organisation may bring an action against acts that pollute the environment, cause damage or harm the public interest if it is:

<http://www.chinawaterrisk.org/resources/analysis-reviews/ministry-reform-9-dragons-to-2/> accessed 5 October 2019.

4 Prior to the promulgation of EPL 2014, 3 proposals have been prepared but none of them satisfied the public's dire need of filing PIEL. For detail, see Qing Richard Zhang and Benoit Mayer, 'Public Interest Environmental Litigation Under China's Environmental Protection Law' (2017) 1(2) Chinese Journal of Environmental Law 202, 203-05.

5 Civil Procedure Law of the People's Republic of China 2012, art 119.

6 Zhang and Mayer (n 4) 4.

7 Law of the People's Republic of China on the Protection of Consumer Rights and Interests, art 47.

8 Zhang and Mayer (n 4) 4.

9 People's Daily, 'No Public-Interest Environmental Litigation has been entertained in 2013' (*People's Daily*, 1 March 2014) <http://scitech.people.com.cn/n/2014/0301/c1057-24498157.html> accessed 7 October 2019.

10 Daniel Carpenter-Gold, 'Castles Made of Sand: Public-Interest Litigation and China's New Environmental Protection Law' (2015) 39 Harvard Environmental Law Review 241, 262. It mentions the first successful claim brought by an NGO founded by citizens. See *Friends of Nature and Chongqing Green Volunteer League v Luliang and Heping Science and Technology*.

1. registered with a government civil affairs department at or above the level of a municipal with districts; and
2. engaged specifically in public services activities in environmental protection for five consecutive years without any record of violation of laws.[11]

Art 58 above sets out the two preliminary requirements for an NGO to be eligible to file civil public interest litigation against polluters. In particular, the first requirement in relation to the level of due registration has been substantially lightened down from a national level in the third amendment proposal to a municipal level so as to expand the eligibility of NGO plaintiffs.[12] At the same time, it is observed that conducts not only pollute the environment, but also cause ecological damage are covered by the scope of PIEL. Following this reform, the modalities, in particular the standing and procedural requirement, have also been clarified by the Judicial Interpretation of the Supreme People's Court. One notable observation is found in Art. 3, where it provides that NGOs registered at the districts of the municipalities also fall within the scope of the qualified NGOs to file PIEL under Art 58 of EPL 2014.[13] Besides, the newly revised Art 55(2) in CPL 2017 also stipulates that the people's procuratorate may, provided that no NGO has taken the initiative to file a particular PIEL, bring such an action to the people's court.[14]

Nevertheless, both requirements have been criticised as too dogmatic and unnecessarily restrictive.[15] The NGOs situated at a more local level, who are more knowledgeable of the actual environmental circumstances, are prevented from engaging in this

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11 Environmental Protection Law of the People's Republic of China 24 April 2014, art 58.

12 By some estimates, if only organisations registered at a national level is allowed to bring a PIEL, only 13 of them satisfy such requirement at the time when it was released to the public, see Tyler Liu, 'China's Revision to the Environmental Protection Law: Challenges to Public Interest Litigation and Solutions for Increasing Public Participation and Transparency' (2015) 6(2) Journal of Energy & Environmental Law 61, 64-65.

13 Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations 2015, art 3.

14 Civil Procedure Law of the People's Republic of China 2017, art 55(2).

15 Liu (n 12) 65.

civil legal regime.[16] On the other hand, since the general rule is that Art 2 of the Administrative Litigation Law (ALL) only allows those whose interest has been infringed to bring a lawsuit against the government authorities,[17] when Art 58 and other provisions of EPL 2014 make no other mention of any entities whatsoever where such a lawsuit could be brought against to, the possibility of bringing PIEL against governmental misfeasor is implicitly kept out.[18] While in practice there were exceptionally three administrative litigations filed by NGO plaintiffs in pursuit of public interest, these were all commented as wrongly accepted.[19] Although the newly added Art 25 of ALL 2017 provides the necessary basis for the people's procuratorate to file such lawsuits against any governmental misfeasors instead,[20] as will be discussed below, their conflict of interests would also offer the greatest challenge for them to play the role to guard against government misfeasance.[21]

That said, it will go too assertive to conclude their arbitrariness without reading into their underlying purpose. This is so because if the imposition of a requirement or a certain limitation is explainable by a certain legitimate aim, then we should first examine such an aim before arguing for a whole abolition of such requirement/limitation. Thus, the next part presents a comprehensive review by taking into account its aim and potential limiting effect on the standing to file PIEL. It is, however, seen below that sometimes the academia wrongly emphasised the government's aim. Furthermore, even if the true legitimate aim on the opinion of the government has been unveiled, it serves no purpose to merely point out its pros and cons without assessing their respective importance. It is always by a thorough and analytical discussion can a targeted and impartial suggestion be made.

16 See the discussion in part II(A)(2) below.
17 Administrative Litigation Law of the People's Republic of China 2017 (Administrative Litigation Law), art 2.
18 Liu (n 12) 68.
19 Zhang and Mayer (n 4) 7.
20 Administrative Litigation Law, art 25.
21 See the discussion in part II(B)(2) below.

II. ASSESSMENT ON THE REQUIREMENTS TO FILE CIVIL PIEL AGAINST POLLUTERS AND LIMITATION TO FILE ADMINISTRATIVE PIEL AGAINST GOVERNMENT MISFEASOR

A. Requirement to File Civil PIEL

It is observed that since the two requirements share the similar legitimate aims and limiting effect on the standing of the NGO plaintiffs to institute PIEL, this subpart will present the analysis of both requirements together.

1. THE LEGITIMATE AIMS – TO PREVENT FLOODGATES OF LITIGATION AND ENSURE LEGITIMACY OF THE NGO PLAINTIFFS

One of the most prominent aims to require the NGO plaintiffs to register at a municipal level and engaged in environmental-related public services activities for at least five years is to prevent floodgates of litigation.[22] Indeed, China would not like its courts to be flooded with illegitimate lawsuits as it poses adverse effects not only on social harmony but also on money misspent. Such adverse effects, as a result of opening the floodgates for lawsuits that do not even encompass a certain prospect of success, have already been demonstrated in the United States, whose litigation culture has long been criticised as 'frivolous'.[23] At the same time, the hesitation of the British, Canadian and German legal systems in endorsing this class-action lawsuit has also well implied such a risk.[24] Especially where China, as an economic giant, has been

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22 Liu (n 12) 61.

23 Sadhbh Walshe, 'America's "litigious society" is a myth' (*The Guardian*, 24 October 2013) <https://www.theguardian.com/commentisfree/2013/oct/24/america-litigious-society-myth> accessed 15 October 2019.

24 Harry Du and Thomas McGinn, 'China: Who can initiate class-action lawsuits under the draft Environmental Protection Law?' (*King & Wood Mallesons*, 26 November 2013)

according economic value a much higher priority in the past few decades, authorising an excessive number of NGOs to file PIEL against large enterprises and factories would substantially fly in the face of its economic development. While it is true that the promulgation of EPL 2014 has signalled a shift of the government's focus from economy to environmental preservation, the legal regime for PIEL is an innovative yet conservative concept in China.

On the other hand, these requirements also aim to secure the legitimacy of the NGO plaintiffs who are expectedly highly engaged in PIEL. By the end of 2016, the total number of NGOs in China has reached nearly 70 thousand.[25] Given such a large number of NGOs, the public concern of their authenticity has prompted the Ministry of Civil Affairs (MCA) to create a public online database to display the information of each of these organisations.[26] Such a database, however, is expectedly capable to present the information of those which are registered at the MCA or its district directly under the central government. Thus, it is easy to envisage that in the absence of such registration requirement, the MCA would be left no capacity to display such information for the purpose to guarantee the legitimacy of these NGOs. On the other hand, the five-year requirement, could serve as a hurdle to ensure the NGO's engagement in public activities in relation to environmental protection are long-term and continuous. In fact, such constant engagement would appear to be significant if we contemplate that some NGOs might have been deriving economic benefits or even running bribery after they have finished a mere initial screening at the MCA.

<http://www.mondaq.com/x/277388/Class+Actions/Who+can+initiate> accessed 20 October 2019.

25 Cameron Carlson, 'Ministry of Civil Affairs creates online database of social organizations' (*China Development Brief*, 20 April 2017) <http://www.chinadevelopmentbrief.cn/news/ministry-of-civil-affairs-creates-online-database-of-social-organizations/> accessed 7 October 2019.

26 ibid.

2. THE LIMITING EFFECT ON THE STANDING TO FILE PIEL

The aforementioned legitimate aims, however, have been alleged to come at the expense of NGO's right to file PIELs. Liu, in suggesting repealing such requirement, opined that local chapters not registered at the requisite level or above have been kept away from filing PIEL.[27] A sad but true example is that All-China Environmental Federation (ACEF), one of the most experienced organisations to file PIEL but with numerous subsidiaries residing at much lower levels (e.g. county level), would be prevented from lodging a class-action lawsuit against pollution.[28] It follows that the substantial advantages of these 'localised' NGOs that they are much closer and knowledgeable about local environmental issues would be kept out of the court rooms to bring PIEL.[29]

3. ASSESSMENT ON THE ABOVE PROPOSITIONS

In light of the above observations, the rigid eligibility for lodging PIEL against polluters seems to be a double-edged sword. It aims to prevent an overflowing number of illegitimate litigations on one hand but also substantially prevents some effective NGOs to file PIEL on the other hand. In order to better assess the propositions from both sides, it may be useful to look into some exemplary cases first.

The latest documentation of civil PIEL cases in China was conducted by Zhang and Mayer in 2017.[30] One of the most notable observations which is material to our discussion is the expansion of NGO plaintiffs. The table below sets out the number of NGOs involved in the civil PIEL litigation since when the EPL 2014 came into effect:

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27 Liu (n 12) 67-68.
28 ibid.
29 ibid.
30 Zhang and Mayer (n 4).

Type of NGOs	Number of NGOs involved	Number of cases
Community groups	11	31
Private non-enterprise Units	7	37
Foundations	3	57

Table 1: Cases initiated by category of NGO (Jan 2015-June 2017)[31]

A quick glance of the table could easily ascertain that among those 115 PIEL cases filed in total, more than half of them were initiated by the three foundations. That said, this should not convey the message that the foundations in China bear up the main pile of PIEL, as the China Biodiversity Conservation and Green Developments Foundation (CBCGDF), a well-established government-owned foundation,[32] has participated 46 PIEL itself. In fact, the ACEF and Friends of Nature were the other two main contributors in the institution of PIEL but belonging to the category of community group and private non-enterprise units respectively.

The above data, however, are relevant to our discussion in two other senses. Firstly, when only a small number of NGOs out of those 700 qualified has engaged in PIEL, let alone a concentration on the aforementioned 3 organisations, the government's floodgates argument appears to be crossing one bridge before it comes. In fact, another observation in their research that is worth to paying specific regard to is the number of civil PIEL cases filed in each half-year. Surprisingly, since mid-2016, it saw a constant decease, standing at only 11 cases filed in the first half-year of 2017 among the 115 cases they documented.[33] In this regard, PIEL in China has indeed not yet been expanded to the extent that descends into a litigation culture. While there are multiple reasons to explain such an infrequency, such as the

31 ibid 11.
32 For the definition of government-owned organisation, see part II(B)(4).
33 Zhang and Mayer (n 4) 10.

limited financial resources[34] and inability to collect sufficient evidence in support of a prima facie case,[35] these various reasons all point to the same phenomenon- the 700 NGO plaintiffs have not been substantially utilised and availed themselves of such legal avenue yet.[36]

Nevertheless, in a similar vein, a different criticism but based on the same observation above could be levelled against the proposition to repeal the requirement for the purpose of expanding the number of qualified NGO plaintiffs. It is because when the 700 qualified NGO plaintiffs have not yet been fully utilised due to some recognised impediments mentioned above, since these impediments are also likely to hamper those unqualified NGOs plaintiffs as they are often considered as less financially and intellectually capable, the abolishment of the impugned requirement does not rationally connect with their aim to embrace more qualified NGO plaintiffs. In short, when what offers to be a greater hindrance to the NGO's standing to file civil PIEL are reasons other than the registration requirement, the loosening of it does not serve as a right antidote in any event.

4. THE CORRECT APPROACH – A WHOLE REPEAL OR RETAIN?

In view of the above analysis, it is understandable that some may then suggest retaining the registration requirement. They based themselves on the fact that although it has no significant bearing on preventing a floodgate of litigation since it does not amount to the main barrier to the standing of the qualified NGOs either, it still appears to be a necessary requirement by taking into account the alternative alleged aim of securing the legitimacy of the NGO

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34 For example, in *Friends of Nature v Changzhou Chang-Yu Chemical Co Ltd,* the NGO plaintiff has to bear the litigation cost of over 1.89 million dollars after being rejected for its application. See Kou Jie, 'Chinese NGOs pay whopping legal fee after failed lawsuit against polluting enterprises' (*People's Daily Online*, 8 February 2017) < http://en.people.cn/n3/2017/0208/c90000-9175499.html> accessed 3 October 2019.

35 Chunyu Yik, '2016 Top Ten Environmental Litigations' (*Legal Daily,* 5 April 2017) <www.legaldaily.com.cn/index/content/2017-04/05/content_7080703.htm> accessed 5 October 2019.

36 Zhang and Mayer (n 4) 13.

plaintiffs. That said, it may go too far to say all the unqualified NGOs are hampered by these impediments, as chances are there are some exceptional subsidiaries of large-sized NGOs that were free from them. It is therefore the environmentalists' contention to insist on a whole repeal of the registration requirement in order not to miss out these NGOs which can better utilise their proximity and knowledge with the environmental problems and concern at the local level.

It is, however, reminded that sometimes we should not force ourselves into a false dichotomy. In other words, when it is possible to come up with a suggestion which strikes a balance between the two, it is unnecessary to draw a conclusion on which should be prioritised over another. This alarm in fact applies to our current discussion. By virtue of the above analysis, in fact we have already substantially narrowed down our scope of discussion to the comparison between the legitimacy and the advantages of the local NGOs in civil PIELs. When the prevention of litigation culture and expansion of NGO plaintiffs in the legal regime of civil PIEL is no longer the gist of our discussion, it is much easier to hammer out a solution which appeals to the needs of both sides. In this regard, it is suggested below that by releasing the registration requirement to the NGOs whose superiors are eligible for such civil legal regime, both the legitimacy concern and the advantage of NGO's plaintiff in filing civil PIEL are catered to.

As a matter of fact, some large-sized NGO's plaintiffs have subsidiaries situated at a more local level. A prime example will be the ACEF.[37] Due to their strong financial and intellectual capacity, the true impediments which hinder the qualified/unqualified from taking part in civil PIEL could be circumvented. Exempting these subsidiary organisations from the registration requirement, on one hand, will not result in great legitimacy concern as their superiors have already satisfied the requisite requirements, while on the other hand, these organisations could also make use of their proximity with the local citizens to file civil lawsuits on behalf of the public interest.

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[37] Liu (n 12) 67.

Placing the suggestion into practice, instead of passing an amendment bill, a more efficient way is by way of legal supplements, where the SPC may issue judicial interpretation to clarify what is the proper construction of Art 58. By referring clarification, it is noted that exempting these NGOs whose superior has already registered at the requisite level and constantly engaged in environmental-related public activities in fact does not come at odds with Art 58. Since on a broader construction of which, these NGO plaintiffs have technically satisfied the requirement. A close analogy could be drawn with the aforementioned Art 3 of the SPC Judicial Interpretation,[38] where the approach is to allow the NGO plaintiffs to file PIEL provided that they have registered at the district level of the municipalities. It is only those who have not been registered, nor their superior, have to walk away as the MCA has no way whatsoever to oversee their integrity and legitimacy.

That said, some pessimists opined that such an expansion is not a panacea in the long run. While these organisations hold a more bearing on PIEL, an over-reliance on these few highly engaged NGOs may run a risk of over-exploitation of their financial and human resources. This premise is not wholly unground if we read it in conjunction with the aforementioned fact that the institution of PIEL against polluters has already been compacted on the only 3 NGO plaintiffs according to the same research by Zhang and Mayer. Nevertheless, such a premise has also to be viewed along with the latest development in relation to the people's procuratorate's standing to file PIEL by virtue of the newly amended CPL in June 2017, where it offers the necessary standing of the people's procuratorate to file PIEL insofar as no other qualified organs decides to bring such an action.[39] As a result, between January and November 2018, the procuratorates at all levels have already handled over 89,000 public interest litigation case, where more than half of them were environmental-related.[40]

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38 Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations 2015, art 3.

39 Civil Procedure Law of the People's Republic of China 2017 (Civil Procedure Law), art 55(2).

40 Wanlin Wang and Dimitri De Boer, 'China's prosecutors are litigating government agencies for being soft on pollution' (*China Dialogue*, 22 February 2019) <https://chinadialogue.net/article/show/single/en/11095-China-s-

What is more, pursuant to Art 15 of CPL 2017, the people's procuratorate may also support the NGO plaintiff in bringing the case. [41] In this connection, given its vast and prolonged contribution to PIEL, such an alleged burden on these organisation are at least alleviated, if not wholly unloaded.

In short, by exempting the subsidiaries of those qualified NGOs from the requirement of registration on a municipal level and engaging in environment public activities for 5 years, such a partial exemption for institution of civil PIEL against polluters has catered the need of both ensuring legitimacy on one hand and provide effective assistance to the aggravated victims of excessive pollution on the other hand. The discussion of preventing a floodgate of arguments and limiting other NGOs plaintiffs have less significance in the determination of our case as the NGO plaintiffs in fact have been bound by other non-legal handicaps. While the issue of concentration on several environmental NGO plaintiffs has to be acknowledged, the recent people procuratorate's entitlement to participate in civil PIEL has also substantially lightened their burden.

B. Limitation to File PIEL Against Government Authorities

It is, however, noted that the alternative limitation on NGO plaintiffs from filing PIEL against government officials subverts the enduring objective of public participation to a larger extent, which touches upon the legal regime of administrative litigation.[42] What is this?

It is recalled that the EPL 2014 provides no provision whatsoever to hold government authorities who fail to discharge their duties, be it misfeasance or nonfeasance, accountable by way of administrative PIEL.[43] This constraint has been materialised recently with reference to the recent revelation that its local officials have devised multiple ways such as fabrication of data

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prosecutors-are-litigating-government-agencies-for-being-soft-on-pollution> accessed 7 October 2019.

41 Civil Procedure Law, art 15.

42 The purpose of public participation will be discussed in part II(B)(2).

43 See the discussion in part I.

and making up instruction to cover up their lack of action.[44] However, in a similar vein, in order to better assess this limitation, we should commence with a discussion of its government's alleged legitimate aims and adverse impacts on administrative PIEL, followed by an assessment of their respective importance before coming up with a comprehensive suggestion.

1. THE LEGITIMATE AIM – A WRONG EMPHASIS BY THE ACADEMIA

Unsurprisingly, the NPC Standing Committee did not deliver any explanation for contesting the NGO's standing to file such lawsuits against government officials. Nevertheless, one imaginably legitimate aim is to avoid diffusion of governmental resources to unnecessary court proceedings. It is understandable that a great deal of time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses of the trial, which will very likely in substantial administrative inconvenience. Besides, it is also acknowledged that an alternative argument is to preserve the government official's impression by avoiding great social grievance. This explanation may appear to be plausible if we appraise it together with the fact that EPL 2014, despite being a seed of change, was admittedly proposed in response to the public concern on environmental issues.[45] One could envisage that in cases where the government misfeasors were announced and publicised, social grievances would inevitably be incited and subvert their political legitimacy.[46]

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44 Echo Xie, 'China's green efforts hit by fake data and corruption among the grass roots' (*South China Morning Post*, 19 May 2019) <www.scmp.com/news/china/politics/article/3010679/chinas-green-efforts-hit-fake-data-and-corruption-among-grass> accessed 7 October 2019.

45 Xinhua, 'China to enhance environmental protection legislation' (*China Daily*, 4 March 2013) < www.chinadaily.com.cn/business/2013-03/04/content_16274729.htm> accessed 7 October 2019.

46 Joseph Kahn and Jim Yardley, 'As China Roars, Pollution Reaches Deadly Extremes' (*New York Times,* 26 August 2007) <www.nytimes.com/2007/08/26/world/asia/26china.html> accessed 6 October 2019.

However, with respect, such views solely based on cost and political analysis has neglected the recent amendment of ALL in 2017, where the new Art 25 provides the necessary basis for the people's procuratorate to file administrative PIEL against any governmental misfeasors. In this regard, it seems self-defeating to explain such a contestation from a resource allocation and public reaction perspective, since on a counterintuitive approach the newly provided standing conferred to the people's procuratorate would equally come at odds with these alleged legitimate aims. Therefore, it appears that there are other underlying reasons behind to explain such a contestation other than the aforementioned two grounds.

By fixating on the main featural difference between the NGO plaintiffs and the people's procuratorate, it is suggested that the true reason behind why NGO plaintiffs has been left out from the recent revisions is because of their independence from the government's environmental apparatus. Such a view was drawn squarely on the fact that what distinguishes NGO plaintiffs from the people's procuratorate is that they are not subject to any governmental mandate. What may sadden most of the advocates of independence of prosecution is that government intervention in the legal process for political aims is still commonly observed in China.[47] Such fusion of power, despite resulting in miscarriage of justice, is understandably necessary for the purpose of social stability and sovereignty. In case a certain political-sensitive lawsuit, which is conceivably prevalent in the context of administrative litigation, has been brought by the NGO plaintiffs, their lack of control on these NGO plaintiffs would become fatal to their determination of the case.

Some may find such proposition questionable. As even on the assumption that the government does not want the legal regime of the public-interest administrative litigation to be dominated by the NGO plaintiffs in some politically sensitive cases, they may simply reject its application by their leverage in the courtroom. However, a short answer to this would be such a belated rejection is likely to result in greater grievance since it appears to be even more arbitrary, which may subvert their

47 Detailed explanation will be discussed at part I(B)(3) below.

political legitimacy as what always tops their concern list to a greater extent. Perhaps, a more efficient and furtive way is to disguise such an end as a seemingly legitimate requirement from the outset.

2. THE LIMITING EFFECT ON THE STANDING TO FILE ADMINSITRATIVE PIEL

Unlike the discussion of its legitimate aim, the confinement brought by such contestation is self-explanatory. Apart from the aforementioned government intervention in the legal process, it is also observed that what is the most problematic of such limitation is the watering down of the supervisory role of the NGO plaintiffs. The significance of such a role could in fact been traced back to 2008, where the vice minister of the Ministry of Environmental Protection Pan Yue, by then he was, delivered at his speech:

> "informed public participation in environmental decision-making process can effectively prevent [the] 'will of officialdom' and abuse of power[,] give full play to the role of media and society [in] supervis[ing]… law enforcement conducts, and force the violators to make corrections in time."[48]

In this regard, although the discussion hitherto brings up a comparison between the people's procuratorate and NGO plaintiffs in filing administrative PIEL, seemingly drawing the former as an analogous to the latter, in fact a more accurate description of the purpose to accrediting NGO plaintiffs such a standing is not to provide an alternative to bring the administrative environmental lawsuit, but reinforce a tight implementation of the law. It is because on one side they are more knowledgeable of the local circumstances, while on the other side, and perhaps most importantly, they are relatively freer from local intervention when compared with the people's procuratorate. Especially in the

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48 Tseming Yang, 'The 2014 Revisions to China's Environmental Protection Law' (*Social Science Research Network,* 4 November 2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2511443> accessed 15 October 2019.

context of administrative litigation, notwithstanding an ideal separation between the procuratorate and the administrative apparatus, conflict of interest between the two particularly in economy and personnel respects, can hardly be wholly severed. On account of their independence from the local administrative organ, it is therefore the NGOs who are in a better position than the procuratorate to file administrative PIEL.

3. ASSESSMENT ON THE ABOVE PROPOSITIONS

In light of the above analysis, two conclusions could be drawn. Firstly, the NGOs are prevented by the government from filing administrative public interest litigation in order not to lose their control on politically sensitive cases. But at the same time, such a contestation also attenuates the main function of public participation, especially given the recent accusations of lax governmental agencies. It is, however, discussed below that such a contestation in fact might not rationally connect to the alleged aim to protect political legitimacy.

In today's day and age where information overflows and the geographical ambit has been diluted by the rise of communication technologies, it is no longer possible to wholly preclude people from information exchange. In this connection, adopting a hardline policy against an allegation of the government's impugned act may in fact create backfire to the already dissatisfied victims.[49] Such a backfire has been well recognised by the Chinese Social Science academia, where they admitted that force can be counterproductive when the public grievance is substantial enough that authorities must take their outrage into consideration.[50] The 2005 Huashui Protest, which arose out of opposition against pollution in the Zhuxi Chemical Industrial Park (竹溪工业园), has already served as an alarming reminder.[51] Although what poses a stark difference here is that

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49 Lianjiang Li and Kevin J O'Brien, 'Protest Leadership in Rural China' (2008) 193 The China Quarterly 1, 18.

50 Kevin J O'Brien and Yanhua Deng, 'Repression Backfires: tactical radicalization and protest spectacle in rural China' (2015) 24(93) Journal of Contemporary China 457, 479.

51 For a detailed discourse of the event and causes, see ibid.

repercussion in the furnished example is largely attributed to extreme government repression, it is not inconceivable that consigning the public's discontent in relation to towards the oblivion would, in a similar vein, further aggravate the public dissatisfaction against the government resulting in protest and undermining of their legitimacy.

4. THE CORRECT APPROACH – A GRADUAL RATHER THAN A RADICAL REFORM

In view of this, it appears that the expansion of the NGOs' standing to file PIEL against administrative authorities is called for when the absence of which leaves none other than harm.

That said, any suggestions have to take its feasibility into account. A whole authorisation to all the NGOs which satisfy the requirement sets out in Art 58 is likely to, notwithstanding its great benefit connected, run a risk of subjecting itself to possible political opposition given the fact that such legal regime still remains rather conservative currently. Allowing all the NGO plaintiffs to file administrative PIEL may trigger another wave of academic discussion which is rather time-consuming.[52] It is thus suggested in this part that two individual proposals, but working constructively together, may bring a comparatively slow yet incremental improvement.

Firstly, pursuant to the extensive discussion regarding the reason to limit the standing on the opinion of the government, it is now clear that their concern is the possibility that the NGO's independence may take its toll on the government's legitimacy. Although the two in fact do not demonstrate a positive but rather a negative correlation, a whole abolishment of such a limitation would equally in result of strong opposition from the government sides. However, a moderate answer to this dilemma is to only grant the government-organised NGOs ('GONGOs') such a standing.[53] GONGOs are social organisations initiated by the government or

[52] For example, from the proposal to amend EPL 1989 to EPL 2014 coming into effect, it took around 20 years. See Liu (n 12) 61.

[53] ACEF and CBCGDF are examples of GONGOs. See Zhang and Mayer (n 4) 5.

where government officials occupy key functions.[54] They are, however, often deemed to be the 'transmission belts between the state, party and citizenry'.[55] In this regard, as they adopt a state-led approach,[56] GONGOs could indeed play a crucial supervisory role without overriding the government's determination to proceed with the case. While it may be true that they may be subject to the government's influence as their finances and personnel are closely linked with the ministries,[57] it is noted that these GONGOs are only responsive to national authorities, who are also seemingly inclined to tighten the supervision of the local administrative organs' performance in combatting environmental pollution. In this regard, the NGO's comparative independence from the local government forms a shield against any possible interference from them with the support of the central government in most times.

By contrast, in relation to non-government-organised NGOs ('NGONGOs'), allowing them to file administrative PIEL is more likely to give rise to political concern that the government's legitimacy may be under attack. Perhaps a more acceptable and steady approach is to strengthen the coordination between NGONGOs and the people's procuratorate in filing administrative PIEL first. It is recently found by Fu that there was an increasing number of environmental lawsuits that have been brought jointly by procurators together with NGOs.[58] Such collaboration in fact sheds some light on the solution for NGONGOs to engage in bringing administrative PIEL. The people's procuratorate may consider inviting NGONGOs to bring the case jointly. On one hand, the presence of the people's procuratorate in the lawsuit still at least ensures that the decision of whether or not to proceed on the case remains at the hands of the government. On the other hand, the participation of NGOs in

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54 Zhang and Mayer (n 4) 6.

55 Zhang and Mayer (n 4) 5; Reza Hasmath, Timothy Hildebrandt and Jennifer YJ Hsu, 'Conceptualizing Government-Organized Non-Governmental Organizations' (2019) 15(3) Journal of Civil Society 267, 269.

56 ibid.

57 ibid.

58 Stanley Lubman, 'Can Environmental Lawsuits in China Succeed?' (*China File*, 14 December 2017) < www.chinafile.com/reporting-opinion/viewpoint/can-environmental-lawsuits-china-succeed> accessed 10 October 2019.

the lawsuit could convey a message to the public, in particular the government environmental agencies, that they also play a significant part in filing and proceeding with the case.[59] This may create a certain degree of deterrence against any potential government misbehaviour and fulfil their primary role of public participation to oversee the implementation of the law.

It is, however, noted that in the long run, public participation has to enter into its entirety so as to build a concrete law-enforcing system not only among polluters but also the law enforcing agencies. The NGONGOs' degree of participation in this legal regime is rather limited and superficial.[60] Their decision is still probably bound by the people's procuratorate and cannot be freely made under this approach. However, what appears to be the most attractive for the above proposal is that it could serve as a pre-pilot scheme to demonstrate the advantages of including independent NGO plaintiffs in the legal regime for administrative PIEL. It is hoped that by such a gradual and incremental approach, the government will appreciate the effectiveness of combating lax government authorities by a high degree of public participation as what it initially proposed.

CONCLUSION

This article attempts to present an in-depth analysis of how the current requirement and limitation on the legal regime of the NGO to file PIEL could be amended by way of a problem-oriented and qualitative approach. In relation to the requisite requirement imposed by Art 58 to file civil PIEL against polluters, it is suggested that neither retaining nor repealing of the requirement serves as the right antidote. Instead, by way of a partial expansion of the standing to the subordinates of the already qualified NGO plaintiffs, it tries to cater to both the need to ensure their legitimacy and to maximise the advantage of their close proximity with the aggrieved party. As to the limitation to file administrative PIEL against environmental administrative organs and its personnel on grounds of their misbehaviour, a two-fold approach, namely authorising such a standing to GONGOs on one hand and facilitate

[59] Zhang and Mayer (n 4) 6.
[60] Zhang and Mayer (n 4) 7.

the coordination between NGONGOs and the people's procuratorate on the other hand, would bring a gradual but incremental improvement on this legal regime. It is, however, noteworthy that to secure an environmental justice in the long run, the full implementation of EPL 2014 is very dependent on the role played by the NGOs. A full standing to file administrative PIEL is necessary to supervise and deter the main law enforcement agencies from misfeasance. Although the path ahead is more daunting than ever, and the antagonism encountered in the course of the amendment continues to be apprehended, President Xi's recent grit to build an 'Ecological Civilization' should not remain as mere political propaganda, but a modus operandi not only to bring great strides towards but also achieve this end.[61]

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[61] The theory of 'Ecological Civilization' has been enshrined in the 18th Communist Party of China National Congress in 2012, see Jingjing Tan, 'Interview: China leads world in ecological civilization efforts: American scholar' (*Xinhua,* 10 April 2019) <www.xinhuanet.com/english/2019-04/10/c_137965035.htm> accessed 22 September 2019. 'Ecological Civilization' is an ultimate goal of environmental and social reform within society. It implies that the necessary changes in response to the global climate disruption are so extensive that it represents another form of human civilization but based on ecological civilization. In the context of politics, the political promotion of ecological civilization by the Chinese leadership has been supported by a theoretical argument, according to which Ecological Civilization could provide an alternative development theory capable of revolutionising the global economic order and bring about a global ecological transition, see Coraline Goron, 'Ecological Civilisation and the Political Limits of a Chinese Concept of Sustainability' (2018) 4 China Perspectives 39.

REVISITING 'CONTINUOUS EMPLOYMENT' AND 'UMBRELLA CONTRACTS': PLUGGING THE GAP IN THE EMPLOYMENT ORDINANCE

James Lee Wai Chau*

Despite progress in the statutory framework of employment law in Hong Kong, the requirement of 'continuous employment' which serves as the prerequisite for much of the entitlements under the Employment Ordinance remains a major loophole exploited by employers. This article assesses possible legislative and judicial responses to this problem, focusing in particular on the possible use of the 'umbrella contract' concept developed in case law. Upon a consideration of legislative intent, legal principles and social policy, it is suggested that a more generous, pro-worker approach should be adopted by the court in adjudicating this issue.

INTRODUCTION

In January 2019, the Employment (Amendment) (No 3) Ordinance 2018 came into operation, extending the duration of statutory paternity leave from three days to five days; in July 2020, another Employment (Amendment) Ordinance 2020, which extends statutory maternity leave from 10 weeks to 14 weeks, was passed by the Legislative Council and expected to come into force towards the end of the year.[1] These successive victories for employees must be viewed as welcoming signs that the outdated

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1 The Government of HKSAR, 'Employment (Amendment) Ordinance 2020 gazetted today' (17 July 2020) <https://www.info.gov.hk/gia/general/202007/17/P2020071600471.htm> accessed 18 August 2020.

and inadequate employment protection regime in Hong Kong is finally catching up with international standards. Amidst the progress made over the past decade, however, one glaring hole remains unplugged in the Employment Ordinance (Cap 57) (the Ordinance): the 'continuous employment' requirement, which serves as the prerequisite for most of the statutory entitlements under the Ordinance, including the aforementioned paternity and maternity leaves.

In this article, I examine the continuous employment requirement and the loophole that it creates in the statutory framework, and call for legislative and judicial responses to address this problem. The continuous employment requirement is one of the most problematic but oft-ignored aspects in Hong Kong's labour legislation, for it enables employers to avoid their basic obligations with ease if they so desire and renders most of the basic entitlements conferred by the Ordinance illusory. This article begins with an overview of the statutory regime of employment entitlements in Hong Kong, with particular focus on the prominent role played by the concept of continuous employment and the practical problems it presents towards the modern workforce.

In response to these problems, the court has tried to develop the concept of 'umbrella contract' in adjudicating labour disputes. The second part traces the relevant case law to explain how this concept was utilised as a judicial device to circumvent the statutory requirement of continuous employment, and how it eventually fell into disuse due to the high threshold required to establish an umbrella contract laid down by the Court of Appeal.

The third part is divided into two parts, looking at two possible options in addressing this issue, namely the legislative route and the judicial route. In light of the institutional and political barriers against legislative reform, I argue that the judicial solution is the more realistic and preferable option. Drawing on the legislative framework and case law in other areas of Hong Kong courts, as well as from other jurisdictions, I submit that a more pro-worker interpretation of the continuous employment requirement is permissible and desirable both as a matter of social policy, and as a matter of legal principles, in terms of protecting

employees, fulfilling the legislative intent and ensuring consistency in case law.

I. OVERVIEW OF THE ORDINANCE AND THE ROLE OF 'CONTINUOUS EMPLOYMENT'

First enacted in 1968 in response to civil disturbances,[2] the Ordinance has served as the backbone of the labour legislation regime in Hong Kong since then and undergone a series of incremental amendments over the decades. As of 2001, over 30 major amendments have been made to the Ordinance and other labour legislation which have brought about notable changes and 'considerable improvements', including the expansion of the scope of the Ordinance to cover all salaried employees; the introduction of maternity leave, severance payment and protection against unreasonable or unlawful dismissal; and progressive increases in leave payments and other benefits.[3] Since then, a total of ten further amendment bills to the Ordinance have been tabled before the Legislative Council. However, they mostly involve 'tweakings of older eactments' which leave major gaps unaddressed in the statutory framework,[4] leaving the Ordinance to be described as being 'chronically in need of reform' and Hong Kong labour law as being in a 'sorry state'.[5]

Of the many gaps present in the Ordinance, the continuous employment requirement has been singled out as the most problematic, granting 'virtually untrammelled freedom' for employers to 'avoid the application of all but the basic provisions of the Employment Ordinance'.[6] To appreciate why, we must first understand the overall framework of the Ordinance. The protections, benefits and entitlements provided under the

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2 For the historical background and developments relating to the Ordinance and other labour legislations see generally Ng Sek-hong, 'Labour Administration and Tripartitism in Hong Kong: Past and Future' (1993) 15 Asian Journal of Public Administration 59.

3 Legislative Council, *Official Record of Proceedings* (30 May 2001) 5696-5698.

4 Rick Glofcheski, 'The Sorry State of Hong Kong Labour Law' (2013) 43 HKLJ 1, 1.

5 ibid 2.

6 ibid 2.

Ordinance are essentially divided into two tiers: at the most basic level, entitlements and protections such as payment of wages, statutory holidays and protections against anti-union discrimination or unlawful dismissal are available to all within the scope of the Ordinance; however, the remainder of the extensive benefits listed under the Ordinance, including rest days, sickness allowance and severance payments, are only available to employees who satisfy the 'continuous employment' requirement for the prescribed period of time.[7]

The meaning of 'continuous employment' is stipulated under section 3(1) of the Ordinance and fully defined in Schedule 1, which provides that an employee shall be deemed to have been in continuous employment only if he has been employed under a contract of employment with the same employer for a period of at least four weeks, working at least 18 hours in each of those weeks[8] - this is commonly known as the '4-18' requirement. It is further provided that the continuity of employment shall not be broken by absence from work, by reason of sickness and injury,[9] lawful strike and lockout,[10] transfer of business,[11] or absence in circumstances 'such that, by law, mutual arrangement or the custom of the trade, business or undertaking, he is regarded as continuing in the employment of his employer.'[12] These exceptions, however, do not prevent employers from exploiting this requirement with ease, through the practice of 'employing workers on a sequence of short term contracts so that workers do not acquire continuous employment status'[13] and thus deny their entitlement to statutory benefits.

To understand the magnitude of the problem posed by the continuous employment provision, one must examine the wide range of benefits under the Ordinance which are subject to this requirement. As listed below, most of the statutory benefits under the Ordinance are only available to employees if they are continuously employed for a certain period of time, the required

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7 Rick Glofcheski and Farzana Aslam (eds), *Employment Law and Practice in Hong Kong* (2nd edn, Sweet & Maxwell 2016) [1.015].

8 Employment Ordinance (Cap 57) (EO), sch 1 paras 2 and 3(1).

9 ibid para 3(2)(a).

10 ibid para 4.

11 ibid para 5.

12 ibid para 3(2)(b).

13 Glofcheski (n 4) 2.

period often exceeding the minimum duration of four weeks necessary to establish continuous employment itself:

a) Maternity leave: a female employee employed under a continuous contract is entitled to at least ten continuous weeks of maternity leave (section 12);
b) Paternity leave (for a child born on or after 18 January 2019): a male employee employed under a continuous contract is entitled to five days of paternity leave (section 15E);
c) Maternity and paternity leave pay: an employee continuously employed for at least 40 weeks are entitled to paid maternity or paternity leave (sections 14 and 15H);
d) Rest day: an employee employed under a continuous contract is entitled to at least one rest day in every seven days (section 17);
e) Severance payment: an employee continuously employed for at least 24 months is entitled to severance payment when he is dismissed by reason of redundancy or laid off (section 31B), with the amount determined by the number of years of employment under a continuous contract (section 31G);
f) Long service payment: an employee continuously employed for at least five years is entitled to long service payment if his contract is terminated or not renewed under certain circumstances (section 31R), with the amount determined by the number of years of employment under a continuous contract (section 31V);
g) Sickness allowance: an employee continuously employed for at least one month is entitled to sickness allowance if he takes at least four consecutive ‘sickness days’; such sickness days are accrued at the rate of two paid sickness days for every month of employment under a continuous contract for the first 12 months, and four paid sickness days for every month

thereafter, up to a maximum of 120 days (section 33);

h) Holiday pay for statutory holiday: while every employee covered by the Ordinance is entitled to be granted statutory holiday (section 39), he is entitled to holiday pay only if he is continuously employed for at least three months (section 40); and

i) Paid annual leave: an employee continuously employed for at least 12 months is entitled to annual leave with pay, with the number of days of annual leave determined by the number of years employed under a continuous contract (section 41AA).

The fundamental flaw with the 'continuous employment' requirement lies in fact that a single week of non-employment or underemployment, where an employee works below 18 hours, is all that is required to break the continuity of the employment contract. This enables employers to easily circumvent the statutory framework and escape from the obligations imposed thereunder by inserting a break during every four-week period between successive contracts with the same employee. This is not an uncommon practice for shrewd employers seeking to minimise their labour costs, and could be adopted with limited repercussions given the lack of awareness and bargaining power of their employees.[14] As shown in the case law analysed in the next part, breaks are frequently inserted by employers in order to avoid particular benefits - most typically severance payment, which is only available to employees under at least two years of continuous employment. Thus, some employers constantly engage employees on short contracts lasting for 18 months such that they would be under no obligation to pay severance payments when dismissing employees.

This problem is exacerbated by the phenomenon of casualisation and fragmentation in the modern workforce, with casual, informal and part-time work becoming increasingly

[14] Rick Glofcheski, 'Job Security Issues in a Laissez-faire Economy: The Case of Hong Kong' in Roger Blanpain and others (eds), *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective* (Kluwer Law International 2009) 429-30.

prominent forms of employment. A Special Topics Report[15] published by the Census and Statistics Department in 2011 revealed that there were around 148,300 private-sector employees failing to fulfil the 4-18 requirement at the time, which could be further broken down into several categories: 56,300 part-time workers (working under 18 hours per week), 75,800 short-term workers (working at least 18 hours per week but under four weeks at the time of enumeration, with around 25,600 expecting that their employment would not continue beyond four weeks) and 16,200 non-continuous workers (working for at least four weeks but failing to meet the requirement of working 18 hours per week continuously over the period).[16] Latest available statistics in 2016 show that the number of non-4-18 employees has further increased to some 150,000 persons, an increase of 15% over the previous 15 years and taking up around 5% of total employment in the private sector.[17]

The popularity of such flexible employment is hardly surprising given its appeal to both parties. On the one hand, instead of committing to a full-time, long-term job, these employees can work in accordance with their personal needs (e.g. health conditions or financial need) and retain sufficient time for their personal development or other commitments like housework or studies.[18] On the other hand, employers can also adjust their labour force in accordance with the workload, market conditions

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15 Census and Statistics Department, 'Social data collected via the General Household Survey: Special Topics Report No. 55 - Employees engaged under employment contracts with short duration or working hours' (*Census and Statistics Department*, 19 July 2011) <www.censtatd.gov.hk/hkstat/sub/sp200.jsp?productCode=C0000016> accessed 30 January 2020. The report is based on statistics from the year 2009.

16 ibid [3.1]. Categorisation based on Yu Chun-Ho, 'Review of employment benefits under continuous contract in Hong Kong' (*Legislative Council Secretariat*, 25 May 2017) [3.2] <www.legco.gov.hk/research-publications/english/1617in13-review-of-employment-benefits-under-continuous-contract-in-hong-kong-20170525-e.pdf> accessed 18 August 2020 (Legislative Council Information Note).

17 Legislative Council Secretariat (n 16) [3.1], citing data obtained from an annual business establishment survey namely the Annual Earnings and Hours Survey.

18 See Census and Statistics Department (n 15) [3.13] and Table 4a.

and trade customs,[19] saving the costs incurred by hiring idle workers and paying fixed wages under a full-time contract. However, the short, flexible working hours that characterises these forms of employment inevitably make it more difficult for employees to fulfil the 4-18 requirement and build up continuity in employment to qualify for statutory benefits. The preference of the modern labour force towards flexibility and informality in employment can thus be exploited by employers who are intent on avoiding their obligations under the Ordinance.

II. THE RISE AND FALL OF 'UMBRELLA CONTRACT'

The gap created by the continuous employment requirement in the Ordinance became apparent to the Hong Kong courts in the early to mid-2000s as they grappled with the legal issues and disputes arising from the relevant statutory provisions. No doubt with an eye on the damaging policy implications of allowing employers to break the continuity of employment and evade their statutory obligations through successive fixed-term contracts, a series of decisions by the Court of First Instance formulated and developed the concept of 'umbrella contract' as a judicial device to bridge the gap in continuity and fill in the loophole in the statutory framework. The concept of 'umbrella contract' first emerged from overseas jurisprudence and its validity has received recognition at the highest appellate level locally in the case of *Poon Chau Nam v Yim Siu Cheung*.[20]

That case arose in the slightly different context of a claim by a casual worker for statutory compensation under the Employees' Compensation Ordinance (Cap 282) (ECO), the entitlement to which depends on whether the claimant is an 'employee' injured by accident arising out of and in the course of

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19 ibid [3.13] where around 4.9% of the non-4-18 workers surveyed cited 'custom of trade/norm of company/business arrangement of company' as the main reason for not working longer hours, whilst another 3.3% cited 'slack work in company'.

20 [2007] HKCFA 19, (2007) 10 HKCFAR 156.

employment.[21] Both the District Court[22] and the Court of Appeal[23] found against the claimant, holding that no employment relationship existed primarily on the basis of the absence of mutual obligation between the parties to provide and accept work. However, this was overturned by the Court of Final Appeal, which clarified that mutual obligation is only relevant to establishing an 'umbrella' or 'global' contract, and in the absence of mutual obligation, a contract in relation to a specific engagement can still exist and qualify as a contract of employment as required under the ECO.[24] The court stated the following in relation to 'umbrella contract', clearly acknowledging its potential relevance to establishing continuous employment for the purpose of meeting the requirements for certain statutory entitlements other than the ECO:

> [A]n 'umbrella' or 'global' contract…is an over-arching and continuous agreement between the parties, encompassing a series of specific engagements within its span. Where an umbrella contract exists, the question may arise as to whether it is a contract of employment (whether or not each specific engagement within its ambit gives rise to its own such contract). Such a question is generally *only relevant where a person claiming a particular statutory right needs to establish a period of continuous employment by relying on an umbrella contract* and cannot do so merely by showing that he has worked in a series of specific engagements. An umbrella contract therefore embodies an obligation mutually

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21 Employees' Compensation Ordinance (Cap 282) (ECO), s 5(1). The meaning of 'employee' is defined under s 2(1) as 'any person who has…entered into or works under a contract of service or apprenticeship with an employer in any employment, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing…'. Note that the entitlement to statutory compensation under the ECO is not subject to any continuity requirements (as in the Employment Ordinance), hence the Court of Final Appeal's remarks on umbrella contract is merely *obiter*.

22 DCEC 410/2003, 8 February 2005.

23 CACV 86/2005, 15 November 2005, citing Privy Council in *Cheng Yuen v The Royal Hong Kong Golf Club* [1997] UKPC 40, [1997] HKLRD 1132 for the requirement of mutual obligations.

24 *Poon Chau Nam* (n 20) [35]-[36] (Ribeiro PJ).

> undertaken by the parties to supply and take up work. It obviously follows that if no such obligation is undertaken, no umbrella contract comes into existence.[25]

An earlier ECO case was decided to similar effect by the Court of First Instance in *Wong Man Kwan v Chun Shing Holdings Ltd*,[26] in which Lam DHCJ (as he then was) first raised the possibility of using the concept of 'global contract' in English case law to satisfy the prerequisite of continuous contract under the Employment Ordinance for statutory rights such as holiday pay, annual leave, severance pay and long service payment.[27] After citing the relevant paragraphs in Schedule 1 of the Ordinance, his Lordship stated:

> Hence, if there were a successive series of ad hoc engagements which, on proper analysis, amounted to successive contracts of employment, an employee is entitled to add them together to make out a case of continuous employment by showing he has worked for the same employer for 4 consecutive weeks with at least 18 hours of work in each week. On the other hand, if a casual worker cannot show that, he might have to resort to the concept of 'global contract'. If he could establish a case of 'global contract', he would be able to rely on Paragraph 2(b) of the First Schedule and argue that the absence from work was by mutual agreement and should also be counted as working hours. For this purpose, the question of mutuality of obligation is important.[28]

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25 ibid [36]-[37] (Riberio PJ) (emphasis added).

26 [2003] HKCFI 742, [2003] 3 HKLRD 403. Cited with approval in *Poon Chau Nam* (n 20) [44] (Riberio PJ).

27 ibid [16] (Lam DHCJ). See also the English case law cited in [13]-[14] explaining the concept of 'global contract'.

28 ibid [28]-[29] (Lam DHCJ). For the meaning of 'mutuality of obligation' and its implications under the Employment Ordinance, in relation to both global contracts and contracts arising from specific engagements, see further *Poon Siu Kuen v Pine Corporation Ltd* HCLA 71/2001, 10 July 2004 and *Lau Chak Yan v China Moore Development Co Ltd* HCLA 72/2001, 10 July 2004.

This principle was readily applied by the same judge shortly afterwards in *Lui Lin Kam v Nice Creation Development Ltd*, [29] which involved claims for severance payments by restaurant workers employed on successive 18-month contracts with a two-week break in-between. Prima facie, their claims would have been barred by the requirement of 24 months of continuous employment under the Ordinance. However, the court drew an inference from the indisputable facts that 'there was at least a tacit understanding between the Claimants and the Defendant that they would continue to work for the Defendant after the expiry of their second contracts' which amounted to a global contract situation.[30] Lam DHCJ aptly made the following observations on the employer's practice of adopting successive contracts:

> It seems to me that the whole point of this arrangement of successive contracts was a scheme to avoid liabilities for severance payment or long service payment. DW3 admitted as much in his testimony. In these circumstances, taking the defence case to its highest, the so-called break at the Disputed Period was an artificial one.[31]

In coming to the 'the firm view that in the eyes of the law, the employment of the Claimants was regarded as continuing despite the alleged absence from work during the Disputed Period', [32] his Lordship took into consideration not only the concept of global contract, but also other provisions under the Ordinance, such as Part VI A and section 70, which granted protection against attempts to 'extinguish or reduce any right, benefit or protection conferred' by the Ordinance.[33] In a telling declaration of the court's intent to protect workers and ensure that the statutory framework is not circumvented, his Lordship was 'glad to come to this conclusion because if the law were otherwise, an employer could easily escape liabilities…by offering to re-engage an employee after a short break'.[34] A decision to the same

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29 [2003] HKCFI 748, [2006] 3 HKLRD 655.
30 ibid [23] (Tang JA).
31 ibid [22] (Tang JA).
32 ibid [23] (Tang JA).
33 ibid [23] (Tang JA).
34 ibid [24] (Tang JA).

effect was reached by Yam J in *Wong Man Sum v Wonderland Seafood Restaurant O/B Long Yield Co Ltd*,[35] which involved an identical factual pattern of restaurant workers employed under successive 18-month contracts with a short break inserted in-between claiming for severance payment.

Unfortunately, the victory for employees was short-lived as the concept of umbrella contract met its demise when these cases reached the Court of Appeal level. In *Lui Lin Kam v Nice Creation Development Ltd*,[36] the Court of Appeal unanimously reversed the decision at first instance. Instead of focusing on employee protection or the statutory framework, the main judgment delivered by Tang JA (as he then was) emphasised upholding the employer's legal right. As to what is required to establish a global contract, his Lordship referred to overseas authorities and held that 'there must be an irreducible minimum of obligation on each side to create a global contract'; a mere high expectation (whether on the part of the employee only or shared by the employer) or even virtual certainty of re-employment after the break is not sufficient.[37] Applying these principles, his Lordship disagreed with the inference drawn by the judge and found that there was no evidence supporting the finding of a global contract.[38] Similarly, the decision of *Wong Man Sum* was overturned on the same reasoning, with Tang JA again delivering the leading judgment.[39]

Compared with the first instance decision in *Lui Lin Kam*, the most significant difference in Tang JA's judgment is the emphasis placed on what was perceived as the legal rights enjoyed by employers under the statutory framework. His Lordship was under no illusion as to the intention behind the employer's deliberate practice of inserting breaks between successive contracts, but held that such practice is perfectly within the legal rights of the employer:

> It is quite obvious from the evidence that the defendant had adopted the practice of entering into employment contracts of 18 months only

35 [2005] HKCFI 431, [2005] 3 HKC 21.
36 [2006] HKCA 271, [2006] 3 HKLRD 655.
37 ibid [36] (Tang JA).
38 ibid [37] (Tang JA).
39 [2006] HKCA 396, [2007] 1 HKC 365.

> with its employees, with the view to avoid liability to pay, for example, severance pay. Insofar as the right to such payment depended on a continuous contract for 24 months, the defendant was acting perfectly within its legal right not to employ a worker for a continuous period of 24 months. I am concerned with the legal rights of the parties and not with the morality of such a practice…provided an employer was acting within the law, he is also entitled to the full measure of the law.[40]

Turning the judge's comment that such a break in continuity was 'artificial' on its head, Tang JA forcefully expressed the view that the court must uphold an employer's right to arrange his affairs and give effect to the break as it was designed to have: '[t]here is nothing unreal about the break (if, in fact, there was a break). It was designed to break the continuity of employment. An employer is entitled to arrange its affairs to take advantage of the provisions of Schedule 1. I conceive it to be my duty to uphold his right to do so'.[41]

In sharp contrast from the pro-worker sentiments expressed by Lam DHCJ at the Court of First Instance, Tang JA's judgment demonstrated a narrow, strictly literal approach in construing the continuous employment requirement, with little regard for its policy implications or legislative framework and purpose, though the reference to 'morality' possibly suggested that his Lordship had misgivings over the employer's ethics in adopting such arrangements to avoid liability.[42]

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40 *Lui Lin Kam* (n 36) [38] (Tang JA).

41 ibid [47].

42 Abdul Majid and others, 'The Avoidance of Statutory Benefits to Employees by Hong Kong Employers' (2012) 42 HKLJ 865, 884. The authors observed that despite the comment on morality, 'his Lordship does not call for an amendment to the EO to prevent such avoidance. The absence of such a call is striking - particularly as may be construed as indicating that the Court of Appeal approves of the law as it stands.' Nonetheless, as noted below, comments to similar effect have been made in another case which clearly demonstrated the disapproval of the Court with the current statutory framework. See also Gordon Chung, 'Can employers lawfully "opt out" of their statutory obligations? A call for reform of fixed-term employment in Hong Kong' (2017) 25 Asia Pacific Law Review 29, 34.

In *Wong Man Sum*, such misgivings were expressed much more clearly by Cheung JA. In an outright expression of dissatisfaction, his Lordship devoted a section under the heading 'unsatisfactory state' in his short concurring judgment to give a sharp critique of the current statutory framework:

> The Employment Ordinance is clearly in the nature of a social legislation. Its aim is to provide some minimum benefits to workers who, more often than not, do not have equal bargaining powers as their employers. This disparity is even more intense in Hong Kong when there is no system of collective bargaining between employers and workers' unions. The situation is clearly unsatisfactory when employers are able to adopt devices which relieve them of their obligation towards their employees. The consequence is that a large sector of the labour force is being deprived of the entitlement intended by the legislature for their benefit. This is not conducive towards social harmony.[43]

His Lordship then recognised 'umbrella contracts' as a means to overcome this 'highly unsatisfactory situation' but recognised the limits of the concept and endorsed Tang JA's approach,[44] before ending his judgment by calling for legislative changes to 'to prevent the abuse of the use of successive fixed term contracts'.[45]

The effect of these Court of Appeal decisions is to set a high threshold for establishing an umbrella contract and largely aborted the judicial attempt to utilise the concept as a means to circumvent the loophole in the statutory framework that enables employers to avoid liability. The proposition that a high expectation or even virtual certainty of re-employment is insufficient to constitute an umbrella contract makes it nigh-impossible for employees to satisfy the court that an umbrella contract exists, given the difficulty of producing positive evidence

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43 *Wong Man Sum* (n 39) [5]-[6].
44 ibid [7]-[8].
45 ibid [9].

to prove that mutual obligations of re-employment exist when the initial fixed-term contract is terminated.

Indeed, the author's review of subsequent reported cases has not revealed a single instance of umbrella contract being established successfully to fulfil the continuous employment requirement under the Ordinance. In *Fong Anne v Hong Kong Adventist Hospital*, [46] one of the rare cases where counsel attempted to rely on the concept of umbrella contract in establishing continuity, the argument was rejected again due to the lack of mutuality of obligation in terms of future engagements, even though the casual hygienist involved in that case had been employed under successive contracts with breaks inserted by the hospital every four weeks over an eight-year period.

III. PLUGGING THE GAP: TWO POSSIBLE ROUTES

A. The Legislative Route

The issues presented by the continuous employment requirement have not gone unnoticed and legislators, commentators and community organisations have constantly called for reforms. As early as in 1997, a Legislative Council Member made the following remarks:

> … [A] lot of unscrupulous employers take advantage of the loopholes in the legislation to dismiss employees or deprive them of their benefits by changing the contract of employment. For example, some employers force their employees who have a service of nearly five years to resign first and then re-engage them, and thus prevent their employee(s) from obtaining long service payment provided in the legislation. Some employers may sign non-consecutive short-term contracts of employment of less than two years with their

[46] HCLA 33/2009, 22 June 2010.

> employees to render the latter unprotected under the provisions concerning severance.[47]

More recently in 2017 and 2018, numerous Legislative Councillors and community organisations like Oxfam Hong Kong have made submissions and requests to the Legislative Council Panel on Manpower calling for discussion and review of the continuous employment issue.[48] Even the Equal Opportunities Commission became involved, with its Chairperson raising the potential issues of inequality and discrimination created by the statutory requirement against part-time workers, which consisted of a disproportionate number of women.[49]

Despite all these efforts, the progress made towards reform on this issue has been disappointingly slow, if not non-existent. It was back in 2013 that the government initiated a review of the continuous employment requirement[50] and no concrete follow-up action has been taken to bring about any amendment despite the constant pressure from various stakeholders. As of January 2020, the review of continuous contract remains on the 'list of outstanding items for discussions' of the Panel on Manpower without any proposed timetable for discussion.[51] The latest updates from the administration involved an undertaking to provide updates on the deliberations of the Labour Advisory Board, and briefing on a 2018 survey on employment patterns and characteristics.[52]

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47 Legislative Council, *Official Record of Proceedings* (17 June 1997) 131, cited in Chung (n 42) fn 6.

48 See papers on employee's rights and benefits submitted to the Panel on Manpower listed on Legislative Council website: Panel on Manpower, 'Employee's rights and benefits' (2012-16) <www.legco.gov.hk/yr15-16/english/panels/mp/papers/mp_e.htm> accessed 30 January 2020.

49 Alfred CM Chan, 'Give Hong Kong's part-time workers their due benefits' *South China Morning Post* (Hong Kong, 13 August 2017) <https://www.scmp.com/comment/insight-opinion/article/2106470/give-hong-kongs-part-time-workers-their-due-benefits> accessed 30 January 2020.

50 Legislative Council Panel on Manpower, *Review of continuous contract requirement under the Employment Ordinance'* LC Paper No CB(2)1654/12-13(01), (31 July 2013) (Labour Department Paper).

51 Legislative Council Panel on Manpower, *List of outstanding items for discussion (position as at 14 January 2020)* LC Paper No CB(2)526/19-20(01), (14 January 2020).

52 ibid 1-2.

In a paper prepared for the 2013 review, the Labour Department suggested five possible approaches in dealing with the issue of continuous employment; the following options were raised: (a) removing the continuous contract requirement entirely; (b) calculating employment benefits on a pro-rata basis; (c) calculating on a four-weekly basis (e.g. '4-72'); (d) lowering the threshold e.g. from '4-18' to '4-16'; (e) maintaining the status quo.[53]

A follow-up review on these options was conducted by the Legislative Council Secretariat Research Office in 2017,[54] which also surveyed the relevant arrangements in Singapore, South Korea, Taiwan and Japan. It was found that none had a comparable definition of continuous employment under their respective labour legislations and part-time workers in these places are largely entitled to the same set of statutory benefits as full-time workers, usually calculated on a pro-rata basis, showing how far Hong Kong's statutory regime on part-time workers has fallen behind regional standards.[55]

Among the options suggested in the Labour Department's 2013 review, option (a) would hardly be a satisfactory or complete answer, for the issue of minimum employment period required to qualify for statutory benefits must still be addressed one way or the other, most likely along the lines of one of the remaining options. Meanwhile, options (c) and (d) would be the easiest to implement and involve minimal changes, but they would still allow employers who are intent on evading statutory liability to avoid meeting the new threshold by simply re-scheduling their contracts with employees, and therefore do not represent truly effective solutions. In particular, an estimate based on the census statistics from 2009 shows that option (d) would only have benefited around 27,200 employees (or around 18%) out of the total of 148,300 non-4-18 workers.[56]

Therefore, it is submitted that option (b) would be the most appropriate direction for reform. Though relatively complex

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53 Labour Department Paper (n 50) [18-32]. See also Chung (n 42) fn 54 and the sources cited therein.

54 Legislative Council Information Note (n 16) [5].

55 ibid [4] and Table 3.

56 ibid [5] and Table 4.

to devise and implement, it would ensure part-time and short-term workers are entitled to statutory benefits in a fair manner. Evidence from other jurisdictions shows that such an approach has been widely adopted and proved to be very much workable in practice. For instance, part-time workers in South Korea are entitled to most statutory employment benefits 'on the basis of the relative ratio of their working hours' relative to full-time workers, while part-time employees in Singapore (defined as working for less than 35 hours per week) are similarly entitled to all seven types of employment benefits calculated on a pro-rata basis.[57]

This article would not proceed further on the discussion of statutory reform, however, given the lack of prospect for legislative changes being introduced in the foreseeable future as a matter of political reality. The recent developments outlined above show an inertia on the part of the government since the 2013 review. Not only that no legislative changes on continuous employment are forthcoming; even concrete amendment proposals or a timetable for discussions on the issue appear to be lacking. Sadly, such inactivity and lack of progress are representative of the general practice of labour law reform in Hong Kong, as one commentator has observed:

> It is evident that there is much work to be done in labour law reform in Hong Kong. Large gaps exist, and much of the statutory law in place is in need of overhaul, if not outright repeal and replacement. The current practice of tweaking through minor amendments is cumbersome, piecemeal, and fails to address basic shortcomings in the core legislation, discussed earlier in this chapter. There is an almost institutional resistance to change.[58]

Such 'institutional resistance to change' can only be explained with reference to the wider socio-political context of

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57 ibid [4.2] and Table 3 and the citations therein. Note that exceptions in South Korea include rest day and paid annual leave, which can only be enjoyed by part-time employees who reach the minimum threshold of working 15 hours per week.

58 Rick Glofcheski, 'The Dynamics of Labour Law Reform in Hong Kong' in Michael Tilbury, Simon NM Young and Ludwig Ng (eds), *Reforming Law Reform: Perspectives from Hong Kong and Beyond* (HKU Press 2014) 169.

labour politics in Hong Kong. The business sector has long exerted prominent influence on the political scene, with business elites co-opted to form part of a 'governing coalition' or 'state-business alliance'[59] and given disproportionate influence via the design of the electoral system.[60] On the other hand, pro-labour forces are handicapped by partisan division between the two largest unions, the pro-Beijing Federation of Trade Unions and the pro-democracy Confederation of Trade Unions,[61] as well as the lack of collective bargaining rights which give trade unions little leverage in dealing with employers.[62] This has been described as an 'inherent imbalance of power in Hong Kong labour relations',[63] providing an explanation for the outdated statutory framework of labour legislation and the frustrating progress of reform described earlier.

This also means that the prospect for legislative reform on the issue of continuous employment is grim in the near future, particularly as more prominent issues like standard working hours and the extension of existing statutory entitlements - most recently statutory holidays - dominate the labour policy agenda. However, the implications of leaving such a loophole open are profound in terms of employees' welfare: no matter how extensive the list of benefits conferred by the Ordinance becomes, so long as their provisions remain subject to the fulfilment of continuous employment, marginal workers remain vulnerable to exploitation by employers and deprived of protection in terms of even the most basic entitlements that every employee should enjoy.

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59 Brian CH Fong, 'State-Society Conflicts under Hong Kong's Hybrid Regime: Governing Coalition Building and Civil Society Challenges' (2013) 53 Asian Survey 854.

60 See Mathew YH Wong, 'The Politics of the Minimum Wage in Hong Kong' (2014) 44 Journal of Contemporary Asia 735, 739 where the author described Hong Kong as a 'business-oriented' state and used this to explain the lack of progress on minimum wage legislation. It is submitted that the same explanation could be readily applied to other areas of labour legislation in Hong Kong, including the reform (or lack thereof) on continuous employment.

61 Lawrence KK Ho and Ming K Chan, 'From Minimum Wage to Standard Working Hour: HKSAR Labour Politics in Regime Change' (2013) 42(3) Journal of Current Chinese Affairs 55, 80-81; Wong (n 60) 744-45.

62 Glofcheski, 'The Sorry State of Hong Kong Labour Law' (n 4) 1; Chung (n 42) 39-40.

63 Chung (n 42) 37.

B. The Judicial Route

In light of the difficulty in achieving legislative reform, the key proposition advanced by this article is that the court should adopt a different approach to the interpretation of continuous employment in order to prevent employers from abusing successive fixed-term contracts and circumventing their statutory obligations. This suggestion might raise a few eyebrows and draw criticisms as an impermissible act of judicial activism, as judges and academics appear to have generally regarded the current approach laid down by the Court of Appeal in *Lui Lin Kam* and *Wong Man Sum* as the authoritative one. Such a view has been expressed even by those who have called for legislative reform: for instance, some submitted that the poorly drafted provisions of the Ordinance 'do not admit of any other interpretation under the existing canon of statutory construction'.[64] Another commentator claimed that 'a "Legislative Failure" …cannot be simply offset by judicial activism'.[65] In discussing umbrella contract in *Wong Man Sum*, Cheung JA also found it 'unsatisfactory to stretch the limits of adjudication in order to overcome the problem'.[66]

With respect, however, the approach adopted by the Court of Appeal was not the only one possible; indeed, it might not even be preferable when the nature and purpose of the Ordinance are taken into account. The following analysis attempts to demonstrate that a different approach could be supported not only on grounds of social policy, but also general principles of statutory interpretation, as well as case law developments in other areas and jurisdictions.

As observed earlier, Tang JA's judgment in *Lui Lin Kam* took on a very different perspective in construing the continuous employment requirement under the Ordinance and approaching the concept of umbrella contract when compared to the first instance judgment. Lam DHCJ, who delivered the judgment at first instance, happened to be the first local judge to formulate the principles on umbrella contract and attempt to link it up with the issue of continuous employment in *Wong Man Kwan*, which has

64 Majid and others (n 42) 891.
65 Chung (n 42) 36.
66 *Wong Man Sum* (n 39) [8] (Cheung JA).

been approved by the Court of Final Appeal as having explained and applied the law on umbrella contract 'with accuracy and cogency'.[67]

The distinguishing feature in Tang JA's approach is the strict, narrow legal interpretation of the Ordinance without taking into account the legislative framework and purpose. Despite delivering the judgment in strong terms and unequivocal language of the employer's 'lawful rights' to make arrangements to take advantage of the continuous employment provisions, there is an element of circularity in the sense that an employer is entitled to do so precisely because the Court of Appeal held that the employer's statutory obligations could be avoided through such arrangements. If the exercise of statutory construction had been conducted with proper regard for the context and purpose of the Ordinance, as Lam DHCJ appeared to have in mind, a different conclusion could well have been reached.

It is trite law that the modern approach to statutory interpretation is to adopt a purposive interpretation, ascertaining the legislative intention as expressed in the statutory language, having regard to its context and purpose at all times and not only when ambiguity arises.[68] The nature and purpose of the Employment Ordinance has been clearly recognised in various judicial statements, including Cheung JA in *Wong Man Sum* who described the Ordinance as a piece of social legislation that aims to provide some minimum benefits to workers who do not have equal bargaining power vis-a-vis their employers.[69] Another judge opined that that the statute represents what constitutes an 'irreducible minimum' in terms of employee protection.[70]

Hence, to interpret the continuous employment in such a way as to enable employers to easily avoid their statutory obligations to provide such minimum benefits to employees would clearly frustrate the legislative purpose. As scholars who have

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67 *Poon Chau Nam* (n 20) [44] (Riberio JA).

68 *HKSAR v Cheung Kwun Yin* [2009] HKCFA 66, (2009) 12 HKCFAR 568 [11]-[12] (Li CJ). See also the authorities cited therein and the Interpretation and General Clauses Ordinance (Cap 1) s 19.

69 *Wong Man Sum* (n 39) [5] (Cheung JA).

70 *Tadjudin Sunny v Bank of America National Assocation* [2010] HKCA 163, [2010] 3 HKLRD 417 [12] (Stone J).

called for statutory reform have observed, the Ordinance is enacted to confer 'the employment rights, benefits and protections that the legislature had previously clearly identified as being necessary [to employees]', 'only to have the legislative intentions thwarted by "heartless" employers taking advantage of loopholes' in the statutory provisions.[71] If it is possible that such an undesirable result could be avoided through judicial interpretation, a purposive approach to statutory interpretation mandates that the legislative intent must be given due weight in construing the relevant provisions.

Of course, any attempts to give effect to legislative intent must be confined within proper limits and must not give the statutory language a meaning it is incapable of bearing.[72] However, quite contrary to Tang JA's assertion, there is nothing in the Ordinance which suggests any lawful rights or entitlements for employers to avoid their statutory obligations by inserting artificial breaks between successive fixed-term contracts; instead, there are many other provisions in the Ordinance which suggest that the statutory provisions are not to be lightly circumvented by employers' own arrangements with employees, which provide an important context for construing the continuous employment provisions. For instance, section 70 provides that '[a]ny term of a contract of employment which purports to extinguish or reduce any right, benefit or protection conferred upon the employee by this Ordinance shall be void', which has been described as a critical feature of the Ordinance in achieving its aim of protecting employees.[73] Similarly, Part VIA of the Ordinance, which provides for employment protection and grants remedies to employees in certain circumstances, covers cases of dismissal or unilateral variation of contractual terms of an employee under a continuous contract 'because the employer intends to extinguish or reduce any right, benefit or protection' conferred by the Ordinance;[74] and where the right involved concerns severance or

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71 Majid and others (n 42) 865-66.

72 *HKSAR v Lam Kwong Wai* [2006] HKCFA 84, (2006) 9 HKCFAR 574 [63] (Sir Anthony Mason NPJ); *China Field Ltd v Appeal Tribunal (Buildings)* [2009] HKCFA 95, (2009) 12 HKCFAR 342 [36] (Lord Millett NPJ).

73 Prue Bindon, 'Section 70 of the Employment Ordinance: Does It Stand in the Way of Employers and Employees Settling Matters Once and for All?' (2010) 40 HKLJ 593.

74 Employment Ordinance, ss 32A(1)(a) and (b).

long service payment, a termination or non-renewal of contract would be deemed to be dismissal by the employer.[75]

The clear legislative intent as manifested in these statutory provisions is that the minimum entitlements conferred by the Ordinance upon employees should not be extinguished or reduced by employers. These provisions had been considered by Lam DHCJ in coming to the conclusion in *Lui Lin Kam*, but unfortunately on appeal Tang JA only dealt with section 70 summarily by stating that the employer's practice in that case was not covered by the section at all, giving little explanation as to why. It has been rightly pointed out that such a narrow construction would render section 70 'devoid of practical effect in reality' and confine its applicability to an express denial of employment protection rights.[76] This could not have been what the legislature intended.

We turn now to a consideration of the provisions on continuous employment itself. Although they have rightly been criticised as poorly drafted without any consideration of the undesirable results,[77] it has been noted that the purpose of Schedule 1 was to 'equate the position of a regular casual employee with that of a person engaged under a continuous contract of employment', by enabling these casual employees to qualify for statutory entitlements in the same way as full-time employees so long as the requirements on working hours and duration are fulfilled. More generally speaking, members of the Labour Advisory Board have recognised that the legislative intent behind the continuous contract provisions is to 'require employers to provide relevant employment benefits to employees with stable employment relationships and provision of certain level of service consistently'.[78] It would be paradoxical if statutory provisions enacted to expand the scope of entitlements under the Ordinance to casual employees ended up creating an easy method for employers to evade their obligation to provide the very same entitlements, and the rule of statutory interpretation that the

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75 ibid, ss 32B(1)(a) and (b).
76 Chung (n 42) 33.
77 Majid and others (n 42) 891.
78 Labour Department Paper (n 50) [34].

legislature could not have intended to bring about an absurd result should be borne in mind. [79]

Moreover, Schedule 1 itself provides for a wide range of exceptions to ensure that continuity of employment would not be broken easily, which serves as yet another indication of the legislative intent. Among these exceptions is the broadly-phrased paragraph 3(2)(b), which refers to a situation where the employee is 'absent from work in circumstances such that, by law, mutual arrangement or the custom of the trade, business or undertaking, he is regarded as continuing in the employment of his employer for any purpose'. This particular provision enables the court to reach the conclusion that inserting an artificial break between successive fixed-term contracts should amount to a break in continuity in employment 'by mutual arrangement' or by operation of law, by virtue of the concept of umbrella contract, as Lam DHCJ had interpreted the provision in *Lui Lin Kam*.[80] Such a finding would be particularly pertinent in cases where it is apparent that the sole purpose of the break is to avoid statutory liability and re-engagement after the break is clearly contemplated by both parties.

As to the issue of umbrella contract, the approach adopted by Tang JA set a high threshold on establishing mutual obligation and put employees in an unfavourable position. Such an approach is unwarranted as a matter of legal principles. First and foremost, section 3(2) of the Ordinance allocates the onus of proving a contract of employment is not a continuous contract on the employer. Insofar as the employees were required to adduce evidence of mutual obligation to establish an umbrella contract in *Lui Lin Kam*, the burden of proof appears to have been reversed.

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79 The traditional 'golden rule', noted in *The Medical Council of Hong Kong v David Chow Siu Shek* [2000] HKCFA 58, (2000) 3 HKCFAR 144 [25] (Bokhary PJ).

80 *Lui Lin Kam* (n 29) [23], where Lam DHCJ stated:
'This is because in applying Paragraph 3(2)(b) of the First Schedule, the court needs to consider whether a period of absence from work was in circumstances such that an employee is regarded as continuing in the employment of his employer by law. Such consideration involves…taking into account the common law concept of global contract...'

Secondly, there are English authorities to the effect that the expectation of work over a substantial period of time, in which a casual worker regularly accepted work (even if he could refuse any particular shift), could take on a legally binding nature and amount to mutuality of obligation through the course of dealing, thus giving rise to an umbrella contract.[81] This line of cases had not been considered in the Court of Appeal judgments and illustrate a more flexible, expansive approach in construing the concept, particularly when compared to Tang JA's proposition that high expectation or even virtual certainty of re-employment does not amount to an umbrella contract. Cases like *Fong Anne*, which involved regular engagements over a substantial period of eight years, might well be decided differently had the English position been adopted.

Finally, it must be noted that Hong Kong courts have often adopted a pro-worker position in adjudicating labour disputes. As one scholar has observed, the courts have 'strained to ensure ample coverage through creative interpretations' and 'become a guardian of labour rights, tipping the balance in favour of workers in a statutory framework that otherwise favours employers', arguably making labour law reform less urgent in the process.[82] The commonly cited example is the court's expansive approach in interpreting key provisions of the ECO, particularly the meaning of phrases such as 'accident arising out of and in the course of employment' (section 5(1)) which determine the claimant's entitlement to statutory compensation.[83]

As explained earlier, another condition that has to be established for the purposes of qualifying for entitlements to the ECO is the existence of a contract of employment. In approaching this issue, the court has been eager to prevent employers from evading their liabilities to pay by inserting terms that designate employees as 'independent contractors' or 'self-employed' in written agreement, emphasising the need to look at the entire

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81 *St Ives Plymouth Ltd v Haggerty* [2008] UKEAT/0107/08 [21]-[24], citing *Airfix Footwear Ltd v Cope* [1978] ICR 1210; *Nethermere (St Neots Ltd) v Gardiner* [1984] ICR 612, 626D-627A (Stephenson LJ) and 634G-635A (Dillon LJ).

82 Glofcheski, 'The Dynamics of Labour Law Reform in Hong Kong' (n 58) 167.

83 ibid. See generally Rick Glofcheski, *Tort Law in Hong Kong* (4th edn, Sweet & Maxwell 2018) ch 14.

factual matrix and relevant circumstances rather than just the label.[84] It is worth noting that the court has readily applied the concept of umbrella contract to establish a contract of employment in the context of ECO claims, typically in cases concerning casual workers who regularly undertake work from the same person.[85] This accords with the more flexible approach in foreign jurisprudence discussed earlier and appears to be at variance with the high threshold set by the Court of Appeal in establishing umbrella contract. Ironically, therefore, a concept first conceived as a judicial device to overcome the loophole created by continuous employment is now rarely applied for such purposes, but finds usage in an entirely different statutory context where continuity is generally not a relevant issue.

One possible concern as to the judicial solution is the lack of a clear scope and the potential risk of judicial overreach. It is true that some form of distinction is necessary between ordinary and casual workers, and the court has no legitimate power to usurp the role of the legislature in drawing up the dividing lines. Thus, in advocating the judicial solution, I am not suggesting that employment benefits should be made as widely available as possible through judge-made law. Instead, by adopting a more generous approach towards the interpretation of the continuous employment provisions and the concept of umbrella contract, the problem of employers evading statutory obligations through successive fixed-term contracts to can be addressed. As both judgments in *Lui Lin Kam* show, the court should have little difficulty in discerning 'artificial' breaks inserted deliberately to break the continuity of employment, and thus such an expansive approach would be properly confined in scope to cases where casual workers are exploited by employers through the loophole of the current statutory framework and denied their basic benefits.

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84 See Glofcheski, *Tort Law in Hong Kong* (n 85) 556-62 and the authorities cited therein.

85 See for example *Mohammad Saleem v Lau Wai Leung* DCEC 1558/2010, 22 December 2011; *Ma Kam Sing v Lau Sui Keung* DCEC 1022/2010 27 September 2012.

CONCLUSION

The foregoing discussion should in no way be taken as suggesting that legislative reform on continuous employment, which remains the optimal solution, is unnecessary. There are limits to what judicial activism can achieve and Cheung JA's caution against stretching the limits of adjudication should be kept in mind. However, the dynamics of labour politics and the disappointing progress made over the past decades make reform highly unlikely in the foreseeable future. Even if the constant pressure from various stakeholders does forge a political will for change, complex issues of practical implementation remain to be negotiated and resolved.[86]

In light of this situation, judicial interpretation represents the most viable and realistic solution to the plight of non-418 employees. A more worker-friendly approach can be adopted without stretching the limits of judge-made law if proper regard is had to the nature and purpose of the Employment Ordinance. At the very least, the court should apply the concept of umbrella contract more readily and require the employer to show that breaks inserted between successive contracts are for valid reasons instead of 'artificial' breaks designated to break the continuity of employment, instead of placing the burden of proof on the employee. Such an approach is supported not only on grounds of policy but also legal principles and the statutory framework, and would be more consistent with the approach adopted in other jurisdictions, as well as in other areas of labour law.

That said, it must still be conceded that the possibility of another case on continuous employment reaching the higher courts remains unlikely in light of the general lack of resources, awareness and willingness to take cases to court on the part of employees. When such an occasion arises, the court should seize

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[86] Labour Department Paper (n 50) [35]-[36] where members of the Labour Advisory Board stated:
'…[A]ny legislative proposals must be clear, simple and easy to administer. It would be undesirable to introduce proposals that could involve complicated calculation or easily cause disputes between employers and employees. Given the complexity of the subject and the considerable practical operational problems involved, LAB will need to continue to deliberate on individual approaches in greater detail with a view to reaching a consensus.'

the opportunity and reformulate the principles on continuous employment and umbrella contract to minimise the gap in the Employment Ordinance. Until then, however, short-term, part-time and casual workers on the fringes of Hong Kong's workforce must continue to make a living beyond the safety net afforded by the statutory framework, bereft of the basic rights and benefits that every member of the working class should be entitled to.

E-JUSTICE REFORM IN CHINA: A COMMITTED MOVE TOWARDS THE RULE OF LAW, OR OLD WINE IN NEW BOTTLES?

Clara Wong*

Calls for greater judicial transparency and accountability have long resounded in China, but have met with little success. China's newly-unveiled e-Justice reform has, however, instilled an unprecedented degree of transparency into its legal system – court proceedings are live-streamed, and judgments published online. But given China's institutional landscape and strong authoritarian ideologies, judicial transparency under the e-Justice reform, one propelled by instrumental political goals, remains translucent, and judicial accountability dubious. That said, it is hoped that the reform would provide greater incentives for China to undertake more substantive reforms, and eventually steer China towards a 'thicker' form of rule of law.

INTRODUCTION

As the saying goes, 'justice should not only be done, but should manifestly and undoubtedly be *seen* to be done'.[1] This rhetoric was echoed by President Xi Jinping lately, who pledged to 'let the public feel fairness and justice in every single judicial case'[2] as China accelerates its steps to develop open justice. But while transparency reforms are no strangers to China, China's recent rollout of the e-Justice reform,[3] which entails putting every stage

* LLB (HKU); PCLL (HKU). The author is grateful to the anonymous reviewer and the HKJLS editorial team for their helpful comments. All errors are the author's own.

1 *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256, 259 (Lord Hewart CJ).

2 President Xi Jinping, 'Address' (*Capital Conference Commemorating the 30th Anniversary of the Promulgation and Entry Into Force of the Current Constitution*, 4 December 2012) <http://www.gov.cn/ldhd/2012-12/04/content_2282522.htm> accessed 24 January 2020.

3 Qiang Zhou, 'Vigorously promote broadcasting court hearings, comprehensively deepening judicial transparency' (*People's Court*

of judicial proceedings onto digital platforms, elevates judicial transparency in China to an unprecedented level. Yet in a repressive authoritarian regime like China which is partly defined by its black-box judiciary, questions surrounding the effectiveness of its e-Justice reform immediately abound: what motivates China to usher transparency into its secretive legal system? Is China's e-Justice reform really capable of enhancing judicial transparency and accountability? And how far, if at all, can the e-Justice reform help further China's pursuit of the rule of law?

This enquiry is significant – it explores the true motives underpinning China's e-Justice reform, which in turn foreshadows how the rule of law will take shape in China, if at all, in the long term. Building on existing jurisprudence characterising China's landscape as a 'double-track legality',[4] this article provides fresh insight by taking China's latest e-Justice reform as a unique case study, and from that entry point analyses its wider implications on the future trajectory of China's legal reforms. Further, by drawing on comparative experiences of various transitional states which have undertaken similar legal reforms in the past, this article argues that the desire to legitimise the exercise of political powers is what predominantly incentivises China to introduce the e-Justice reform. Finally, departing from existing literature which generally suggests that China's transparency reforms would most likely be locked in stalemate, this article comes to a different conclusion – the ambition of the Chinese Communist Party (CCP) to bolster its political legitimacy may instead provide incentives for it to expand its political safety zone, sowing the seeds for more substantive and qualitative reforms in the long term.

This article proceeds in six stages. Part I begins with outlining the contours of China's latest e-Justice reform. Part II then analyses the forces which have driven the CCP towards greater transparency and accountability through the e-Justice

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Daily, 29 September 2016) <http://rmfyb.chinacourt.org/paper/html/2016-09/28/content_116933.htm?div=-1> accessed 6 March 2019.

4 See eg Hualing Fu, 'Building Judicial Integrity in China' (2016) 39(1) Hastings International and Comparative Law Review 167; Jieli Li, 'In Transformation toward Socio-Legality with Chinese Characteristics: A Critical View' in Xiaobing Li and Qiang Fang (eds), *Modern Chinese Legal Reform* (University Press of Kentucky 2013) 112.

reform. Having set the scene, Part III argues that while the e-Justice reform steers China towards the path of greater judicial transparency and accountability, its qualitative impact remains limited due to various institutional and ideological barriers (Part IV). Part V picks up this theme by investigating and making sense of China's keenness on propelling the e-Justice reform despite its obvious limitations, and argues that the reform is underpinned by the CCP's instrumental motives. Finally, Part VI evaluates the significance of the e-Justice reform to China, and concludes with a few observations on the future trajectory of China's rule of law reforms.

I. E-JUSTICE REFORM IN CHINA

E-Litigation, e-Discovery, e-Filing, e-Evidence, e-Service, e-Hearing and e-Judgment – when all of these combined together, they complete the picture of China's latest e-Justice reform. Introduced in the name of furthering the rule of law (*fazhi*), the e-Justice reform is part of China's recent efforts to overhaul its judicial system by publicising court proceedings through greater use of information technologies.[5] Under the e-Justice reform, each stage of legal proceedings, from case-filing to service, evidence production to hearings, and to the court's handing down of decisions, is now taken online and put under light for public scrutiny.

Most noticeably, in an attempt to enhance judicial transparency, the Supreme People's Court (SPC) unveiled 'China Trials Online' in 2016,[6] which is a centralised online platform that broadcasts court proceedings all over China. Thus, Chinese court proceedings are now only one 'click' away from global netizens. In yet another move to intensify judicial reform, the SPC also established an online database, 'China Judgments Online',[7] which contains the archive of judgments of every court in China,[8]

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5 Zhou (n 3).

6 'China Trials Online' (中國庭審公開網) <www.tingshen.court.gov.cn> accessed 6 March 2019.

7 'China Judgements Online' (中國裁判文書網) <http://wenshu.court.gov.cn> accessed 6 March 2019.

8 'SPC Regulations on Online Publication of Decision Documents of People's Courts' (最高人民法院關於人民法院在互聯網公布裁判文

except for those that involve state secrets, judicial work secrets or where otherwise provided for by law.[9] At present, over 2 million cases have been streamed online and archived on China Trials Online, whereas more than 85 million decisions have been uploaded to China Judgments Online.[10] Together with 'China Judicial Process Information Online' and 'China Enforcement Information Online', the four open justice platforms form the backbone of China's latest e-Justice reform. Given the broad coverage of the e-Justice reform, this article will focus specifically on China Trials Online and China Judgments Online, the two most significant initiatives under the e-Justice reform.[11]

II. A CALL FOR JUDICIAL TRANSPARENCY: BACKGROUND OF THE EMERGENCE OF CHINA'S E-JUSTICE REFORM

China's e-Justice reform – one introduced under the banner of judicial transparency and accountability – might at first sight appear difficult to reconcile with China's nature as an authoritarian state with a secretive judiciary. This conundrum thus raises the interesting question: what makes China so eager to incorporate the universal values of transparency and accountability into its judicial system through the e-Justice reform? This part argues that China's latest e-Justice reform is driven not only with a view to reforming the judiciary, but is also underpinned by a multitude of legal, political and socio-economic factors.[12]

Resonating with the SPC's recent call for the 'construction of sunshine judicial mechanisms that are open,

書的規定, 25 July 2016) <http://www.court.gov.cn/zixun-xiangqing-25321.html> accessed 6 March 2019.

9 ibid Arts 4(3)-(4) and 10.

10 'China Trials Online' (n 6) and 'China Judgements Online' (n 7).

11 Amongst the four initiatives under the e-Justice reform, China Trials Online and China Judgements Online were chosen by the author in particular given their unprecedented nature and their more direct relationship with judicial transparency and accountability, the core issues discussed in this article.

12 Renu Rana, 'China's Information Disclosure Initiative: Assessing the Reforms' (2015) 51(2) China Report 129.

dynamic, transparent and convenient',[13] the e-Justice reform was formally introduced as part of China's latest series of judicial reform, with the aim of elevating judicial transparency and furthering the rule of law (*fazhi*).[14] Indeed, calls for legal reforms have long resounded in China.[15] However, past initiatives, such as promises to comprehensively deepen legal reform in China in 2013,[16] have proved desultory with little 'theoretical or ideological breakthrough'.[17] Yet in the modern information era where demands for public supervision of justice become greater than ever, China's existing initiatives are now met with public dissatisfaction which severely undermines judicial authority in China.[18] Confronted with growing public sentiments towards surging judicial corruption[19] and frequent accusations of weak judicial credibility,[20] China's judiciary is in need of immediate sunshine to restore public confidence in its authority. Against this background, the e-Justice reform was introduced as an avenue to rebuild judicial legitimacy in China.[21]

China's e-Justice reform must also be viewed within a wider context. As Fu pointed out, the Chinese court is an integral

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13 'Opinion of the Supreme People's Court on Deepening Reform of the People's Courts Comprehensively: Outline of the Fourth Five-year Reform of the People's Courts (2014-2018)' (*Supreme People's Court*, 4 February 2015) <https://www.chinacourt.org/law/detail/2015/02/id/148096.shtml> accessed 10 March 2019.

14 Zhou (n 3).

15 See eg 'Decision of the Chinese Communist Party Central Committee on Several Major Questions About Deepening Reform' (*The Third Plenary Session of the 18th Chinese Communist Party Central Committee*, 12 November 2013) <https://www.chinacourt.org/article/detail/2013/11/id/1146036.shtml> accessed 10 March 2019.

16 ibid.

17 Randall Peerenboom, 'The Future of Legal Reforms in China: A Critical Appraisal of the Decision on Comprehensively Deepening Reform' (*SSRN*, 13 August 2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379161> accessed 24 January 2020.

18 Guannan Xin, 'Value Orientation of Judicial Transparency and Possibilities of its Realization' (2016) 4 China Legal Science 107, 109.

19 Shumei Hou and Ronald C Keith, 'A new prospect for transparent court judgment in China' (2012) 26(1) China Information 61, 69; Ling Li, 'Corruption in China's Courts' in Randall Peerenboom (ed) *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (CUP 2010).

20 Xinbao Zhang and Weiguo Wang, 'The Current Situation and Outlook of Open Justice in China' (2013) 1 China Legal Science 131, 143.

21 Zhou (n 3).

part of China's political system – and judicial reforms 'tak[e] place decisively within the framework of its authoritarian system'.[22] Given that weak judicial credibility shatters public trust in good governance and may well threaten China's political stability, the need for the CCP to maintain its legitimacy further catalyses the birth of the e-Justice reform.[23] Indeed, institutional restrictions on litigation in China, which have resulted in the public's waning confidence in the courts, have driven numerous aggrieved citizens to lodge petitions against the authorities,[24] and have 'caused social tensions to escalate to such extent... that has jeopardised social stability'.[25] Aware of the same, the CCP saw the need to introduce the e-Justice reform as a way to strengthen judicial credibility and promote social stability, a point which will be analysed in greater detail in Part V below.

The advancement of modern information technologies provides a further impetus to China's introduction of the e-Justice reform. With nearly 800 million Internet users currently,[26] China is much incentivised to leverage its innovative capacity to 'build a new way of judicial transparency in the Internet+ era'.[27] Coupled with a growing demand for speedy resolution of a huge volume of cases in the face of a booming population, a digitalised judicial system can also help alleviate the burden of China's overwhelmed judiciary.

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22 Fu (n 4) 8.

23 See Parts II and V below.

24 For a fuller discussion on petitions in China, see Xin He and Yuqing Feng, 'Mismatched Discourses in the Petition Offices of Chinese Court' (2016) 41(1) Law and Social Inquiry 212.

25 Li (n 4) 123-24.

26 China Internet Network Information Centre, 'The 41st Statistical Report on Internet Development in China' (*Cyberspace Administration of China*, 31 January 2018) <http://www.cac.gov.cn/2018-01/31/c_1122347026.htm> accessed 6 March 2019.

27 The 11th issue of Chinese Trial in 2015 made a special issue titled 'The "Internet +" Era of Courts', which was published on 7 June 2015.

III. E-JUSTICE TRANSPARENCY REFORM: A COMMITTED MOVE TOWARDS THE RULE OF LAW, OR OLD WINE IN NEW BOTTLES?

Having put China's e-Justice reform in perspective, this article moves on to examine the crucial question: to what extent is China's e-Justice reform capable of achieving its declared objectives of deepening the rule of law by enhancing judicial transparency and accountability? In particular, given the constant tug of war between China's strong authoritarian political ideologies and the ideal of the rule of law,[28] how far can the e-Justice reform take China?

To recall, China's e-Justice reform was introduced in the name of 'deepening the rule of law (*fazhi*) comprehensively'.[29] But in China the term 'rule of law' carries vastly different meanings from those in the Western world. While rule of law in the Western world is characterised by the hallmarks of separation of powers, restraint of powers by the law and judicial independence, rule of law (*fazhi*) in China simply means formalism (*yifa zhiguo*), and a 'process of codification that can promote administrative efficiency in social control'.[30] That said, a direct transplant of the Western understanding of the rule of law to the study of Chinese law risks falling prey to 'legal orientalism',[31] which would forestall any meaningful discussion on China's progression towards the rule of law – for China's conception of the rule of law has deep historical roots, and must be understood with regard to its unique socio-political background, economic environment and cultural heritage.[32] Likewise, this article argues that any attempt to measure the success of China's e-Justice reform based *solely* on the Western ideals of the rule of law would unlikely bear fruit, as China has never intended to rubberstamp the rule of law model adopted by its Western counterparts, but is instead determined to develop its own model with distinctive Chinese characteristics.[33]

That said, this does not mean that China is not committed to any reform, including the e-Justice reform, to improve its legal

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28 Fu (n 4).
29 Zhou (n 3).
30 Li (n 4) 113.
31 Albert H Y Chen, 'China's Long March towards Rule of Law or China's Turn against Law?' (2016) 4 Chinese Journal of Comparative Law 1.
32 ibid.
33 Li (n 4) 114.

system.[34] As Fu pointed out, China is currently pursuing a 'thin' (formal) version of the rule of law which primarily focuses on procedural aspects and internal qualities of law, such as openness and accessibility of the law.[35] Indeed, there appears to be a wide consensus that 'thin' rule of law is 'what China needs, and is what legal reforms should try to achieve'.[36] Seen in such light, the enquiry of this article thus becomes one concerned with the extent to which China's e-Justice reform is capable of achieving 'thin' rule of law in terms of enhancing judicial transparency and accountability, and poses the question as to China's potential in achieving a 'thicker' form of rule of law in the long term.

A. Judicial Transparency

Judicial transparency is the 'soil for justice, public credibility, honesty and judicial professionalism'.[37] As judicial transparency is more concerned with procedural than political issues, it is often considered a 'politically permissible' and 'feasible first step' in any rule of law reform.[38] Indeed, China's e-Justice reform, which heralds judicial transparency as one of its key themes, heads towards the same direction. This part argues that the e-Justice reform does – to a certain degree – enhance judicial transparency in China. But to the extent that judicial transparency challenges the CCP's authority and legitimacy, China's pursuit of a 'thin' rule of law is still under pressure to succumb to the CCP's prerogatives.

To begin with, in terms of enhancing *external* judicial transparency from the viewpoint of the general public, both China Trials Online and China Judgments Online enable litigants to more closely scrutinise whether the court has fairly handled their claims and disputes. Previously, due to a lack of confidence in the judicial system, it was common for litigants to attribute judicial outcomes to nepotism whenever the odds were not in their favour.[39] Now that live-streaming of proceedings is made

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34 Chen (n 31) 12.
35 Fu (n 4) 11. See also Chen (n 31) 9.
36 Chen (n 31) 10.
37 Xin (n 18) 108.
38 Hualing Fu, Michael Palmer and Xianchu Zhang, 'Introduction: Selectively Seeking Transparency in China' in Fu Hualing, Michael Palmer and Zhang Xianchu (eds), *Transparency Challenges Facing China* (Wildy, Simmonds and Hill Publishing 2019) 4-5.
39 Xin (n 18) 115.

possible by China Trials Online, litigants are able to observe the court's conduct with greater transparency. From a broader perspective, the e-Justice reform also significantly heightens judicial transparency in the public domain. While the use of social media and technology to report trials from the courtroom used to be strictly forbidden, and lawyers were previously barred from disclosing court audios and recordings outside the courtroom,[40] the e-Justice reform marks a significant turn: all netizens can now scrutinise court proceedings at all times, and at anywhere, under the China Trials Online initiative. With over 2 million cases being streamed online and archived,[41] the e-Justice initiative does seem to accord with the CCP's promise to 'let power be executed in sunshine',[42] shedding light into China's opaque judicial system. All of these are conducive to enhancing judicial integrity and strengthening public trust in China's judicial system, an important facet of the rule of law.

Likewise, the public can now easily scrutinise the court's reasoning through browsing judgments published on China Judgments Online. In fact, this online judgment database has now become the world's largest.[43] As of March 2019, over 80 million decisions have been uploaded to China's judgment database, with the site recording more than 20 billion visits, an impressive figure especially when compared with China's previous piecemeal transparency initiatives. From an era where court proceedings were conducted closed-door and decisions were believed to be intermeddled in the dark, China's e-Justice reform indeed marks a significant turn towards a more transparent judiciary.

Importantly, both China Trials Online and China Judgments Online can bring about transparency repercussions beyond the case at hand. An example was hypothecated by the BBC: in compulsory land resumption cases, information related to compensation payable by local authorities for demolishing houses

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40 Peerenboom (n 17) 10.

41 'China Trials Online' (n 6).

42 Zhou (n 3).

43 Guodong Du and Meng Yu, 'You Can View Almost All the Chinese Court Judgments Online for Free' (*China Justice Observer,* 8 June 2018) <https://www.chinajusticeobserver.com/insights/you-can-view-almost-all-the-chinese-court-judgments-online-for-free.html> accessed 16 March 2019.

has always been a 'red hot subject' in China. But if a citizen now takes proceedings against local authorities to court, and such sensitive information is disclosed during live-streamed proceedings, then other citizens in analogous situations would be able to bargain for similar compensation based on the court's findings, which is likely to be more just and reasonable.[44]

Media influence and the power of public opinion in China under a more transparent setting must not, moreover, be underestimated. This is aptly illustrated by the well-known Sun Zhigang incident, which concerns the death of a young man while in police custody. Although the incident was initially concealed by the authorities, it was subsequently widely reported by the Chinese media, which immediately unleashed a wave of public outcry, and, eventually, pressurised the State Council to repeal China's controversial 'custody and repatriation' system of administrative detention.[45] This was described by Hand as an example of legal reformers accelerating reform within China's authoritarian system, with far-reaching impact on inspiring the development of constitutionalism and citizen empowerment.[46] Likewise, the degree of transparency and public involvement allowed under China's e-Justice reform may also sow the seeds for future legal reforms mobilised by citizen action and public sentiment. By putting trial proceedings under the limelight, the e-Justice reform is capable of inviting more active investigative journalism and public scrutiny over the judicial process, which may in turn give greater room, and gather greater momentum for public pressure to pile up in incentivising legal reforms.

Further, the e-Justice reform also enhances *internal* transparency within China's judicial system itself. By making available live-streamed hearings presided by different judges and publishing online judgments, the e-Justice reform helps foster

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44 Stephen McDonell, 'When China began streaming trials online' (*BBC News,* 30 September 2016) <https://www.bbc.com/news/blogs-china-blog-37515399> accessed 16 March 2019.

45 For a detailed discussion on the Sun Zhigang incident, see Keith J Hand, 'Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China' (2006) 45 Columbia Journal of Transnational Law 114.

46 ibid.

horizontal learning amongst Chinese judges,[47] which may 'support increasing competence within China's legal circles',[48] particularly in light of the significant disparity in the quality of judges across cities and provinces.[49]

But whilst the e-Justice reform demonstrably enhances judicial transparency, the extent to which judicial transparency can be fully realised remains limited.

1. SELECTIVE TRANSPARENCY

To begin with, judicial transparency under the e-Justice reform is at best partial – what comes to light and what not still remains, ultimately, a question for the CCP, depending on whether the release of such information would undermine its credibility and legitimacy. Indeed, while court proceedings and judgments are now available online, they are *only* available to the extent that they are not 'state secrets' or 'judicial work secrets'.[50] But given the vague and ill-defined confines of these 'secrets',[51] one might well question whether these are limited exceptions or what are in truth open-ended categories.

As Zhang and Wang pertinently observed, the 'people's courts just open what they want to open'.[52] This is particularly true in the light of the CCP's continued emphasis on social and political stability. Thus, while cases involving pure civil and commercial disputes – matters which fall comfortably within the CCP's safe political zone – are published, politically sensitive cases involving dissidents and activists, criminal cases with political overtones, and administrative law cases which involve local bureaucrats are still kept out of reach from the tentacles of

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47 Benjamin Liebman and Tim Wu, 'China's Network Justice' (2007) 8(1) Chicago Journal of International Law 260-61.

48 Hou and Keith (n 19) 62.

49 ibid 76-77. See also Part IV below.

50 SPC Regulations on Online Publication of Decision Documents of People's Courts (最高人民法院關於人民法院在互聯網公布裁判文書的規定) (n 8) Arts 4(3)-(4) and 10.

51 Susan Finder, 'China's Translucent Judicial Transparency' in Fu, Palmer and Zhang (eds), *Transparency Challenges Facing China* (n 38) 143.

52 Zhang and Wang (n 20) 139.

the e-Justice reform. Yet the latter is precisely information which requires supervision, and information which has to be circulated for the public to generate trust in China's courts. When key information is filtered and vetted, transparency is paradoxically untransparent. This considerably undermines the supervisory function that the public can exercise over China's judicial machinery.

2. MONOPOLISATION OF INFORMATION SOURCE

The quality of transparency under the e-Justice reform also raises concerns. Indeed, *more* available information does not automatically translate into a more *accurate* picture overall – published decisions 'may not only be incomplete but also potential[ly] biased',[53] especially when recipients of information enjoy no real autonomy in their choice of information received due to the government's monopolisation of the information source.[54] Likewise, under the e-Justice reform, the decision as to what is to be live-streamed and what not remains in the firm grip of the SPC, which monopolises judicial information with the ability to determine both the range and depth of its actions.[55] Judicial transparency against such backdrop is therefore at best qualified, and at worst misleading. Litigants must also be excused for having doubts as to whether certain live-streamed court proceedings under the e-Justice reform are no more than a 'show', when members of the National People's Congress (NPC) and Chinese People's Political Consultative Conference (CPPCC) are regularly called on to sit in court hearings in a high-profile way,[56] and judges act with full confidence and so fluently that it appears well-rehearsed.[57] This phenomenon does raise doubts as to whether

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53 Fu, Palmer and Zhang (n 38) 6.

54 Ling Li, 'Transparency, Propaganda and Disinformation: 'Managing' Anticorruption Information in China' in Fu, Palmer and Zhang (eds), *Transparency Challenges Facing China* (n 38) 205-07 (in the context of anticorruption information in China).

55 Chengcheng Liu, 'Two Faces of Transparency: The Regulations of People's Republic of China on Open Government Information' (2016) 39(6) International Journal of Public Administration 492, 498.

56 Zhang and Wang (n 20) 134; Xin (n 18) 111.

57 Ze-ming Hu, 'Through Transparent Justice: On Construction of Judicial Transparency and the Protection Mechanism' (2008) 5 US-China Law Review 41, 44.

certain trials may become routine performances overwhelmed by publicity and educational connotations, rather than one which performs real judicial functions.

3. DANGER OF OVER-EXPOSURE OF COURT PROCEEDINGS

On the flip side of the coin, over-exposure of trial proceedings made possible by the e-Justice reform may also present its own dangers, particularly in China's highly politicised landscape. An article published in the *People's Court Daily*, the SPC's official mouthpiece, is illustrative. There, it was proclaimed that by putting judges under the camera, public opinion can 'seamlessly supervis[e] the court's work and judges' deeds'.[58] More importantly, the article stressed that 'open justice is the most powerful guidance of public opinion' – language that hints at the CCP's desire to manipulate judicial power to shape public opinion. However, populist pressure piled on courts can be a double-edged sword. While populism may provide an impetus for reform, the court's susceptibility to public opinion may also render judges prone to catering to extra-legal considerations of public opinion and party officials' directions, instead of performing their role as an impartial arbiter. The example of the trial of Liu Yong, a Shenyang triad member, is a case in point. While Liu's death sentence was reduced to life imprisonment after a finding that his confession was extracted by torture, he was again sentenced to death after media coverage of his ties with the local party-state elite.[59] But the danger of courts heeding public sentiments and media pressure for harsh penalties is real – it is at odds with the rule of law principle that rules are to administered by the courts on the basis of well-reasoned arguments, free of extraneous considerations.[60]

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58 Xianming Zhang, 'The Supreme People's Court Asks to Integrate Resources and Establishes Work Pattern of News Propaganda' *People's Court Daily* (Beijing, 11 May 2013) 1.

59 Björn Ahl and Daniel Sprick, 'Towards judicial transparency in China: The new public access database for court decisions' (2018) 32(1) China Information 3-22.

60 Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 Georgia Law Review 8-9, 23.

China's e-Justice reform is vulnerable to replicating the same danger. In fact, Liebman and Wu even made a counterintuitive yet persuasive argument – as China's judicial system is more susceptible to influence by the social media than in the US and Europe, the mobilising effect that the Internet can bring about may be more far-reaching in China than in any other countries.[61] Coupled with the influence of state-monitored media in guiding public sentiments,[62] a manipulated form of judicial transparency can indeed present dangers, and may even 'precipitate an 'information cascade' that overwhelms judges' impartial interpretation of the law'.[63] Litigants may therefore distrust the impartiality of courts and refuse to accept the legitimacy of the verdicts rendered, which, if anything, erodes rather than advances judicial credibility in China.

B. Judicial Accountability

Turning next to another core objective of the e-Justice reform: the enhancement of judicial accountability through improving the quality of judicial administration. By broadcasting court hearings online via China Trials Online, such initiative is said to exert 'pressure on judges to behave in conformity with substantive and procedural rules'[64] in the courtroom, which may better protect the interests of litigants and the integrity of the judicial system. In Zhang and Wang's words, the initiative may 'prevent judges from unscrupulousness'.[65]

Similarly, the openness entailed in China Judgments Online may also incentivise judges to improve the quality of their reasoning, and to become more impartial in making adjudications. Judges may therefore feel a greater urge to improve their capabilities, articulate their reasoning more clearly, and avoid potential backdoor dealings to maintain their public standing. As Ahl and Sprick observed, this is particularly important in administrative litigation, which is most prone to external

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61 Liebman and Wu (n 47) 260.
62 Ping Liang and Beibei Zhang, 'From a supervision by public opinion to a rule of law by the press' (2012) 30(3) Hebei Law Science 45, 50.
63 ibid 48.
64 Ahl and Sprick (n 59) 11.
65 Zhang and Wang (n 20) 139.

interference by actors of the party-state.[66] Such initiative is strengthened by the SPC's parallel effort to establish a judicial performance evaluation system linked to the publication of online judgments, under which the competence of judges is assessed based on factors such as the number of cases they handled and the quality of their judgments.[67] Such mechanism may strengthen the accountability of judges with regard to the outcome of trials, incentivising judges to withstand external interference to better protect the rights of litigants.

1. ACCOUNTABILITY TO WHOM?

On the other hand, however, there is a tendency to overlook a prior question in any discussion about judicial accountability in China: to *whom* is accountability directed to – the law, the public, or the CCP? Indeed, political control may easily be dressed in the clothes of 'judicial accountability' for the exercise of what is in fact heavy-handed control by the CCP over the judiciary. In the context of China's e-Justice reform, it is also questionable whether greater judicial transparency would ineluctably translate into greater judicial accountability, particularly when transparency is only translucent in the first place. As some scholars observed, judicial disciplinary procedures relating to judicial corruption, matters which are damaging to judicial credibility, remain hidden from the public.[68] The degree to which the public can hold judges accountable is therefore open to question.

Lessons from foreign experiences also suggest that increasing the authority of judges who may be corrupt or legally incompetent in developing countries would likely prove futile or even counter-productive, particularly in the absence of structural mechanisms to ensure judicial accountability.[69] Moreover, online exposure of court proceedings and judgments does not inevitably

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66 Ahl and Sprick (n 59) 25-26.

67 'Several Opinions of the SPC on the Perfection of the System of Judicial Responsibility of the People's Courts' (最高人民法院關於完善人民法院司法責任制的若干意見, 21 September 2015) <http://www.court.gov.cn/zixun-xiangqing-15585.html> accessed 15 March 2019.

68 Finder (n 51) 153-55.

69 Peerenboom (n 17) 6.

result in greater accountability. To avoid possible criticisms, judges may instead 'choose vague and unspecific language to play safe',[70] or may even conceal the real motives underlying their decisions[71] in order to evade personal liability. The case for enhanced judicial accountability must therefore be put to the test of time.

2. CHINESE JUDGES' MIXED RECEPTION

The effectiveness of the e-Justice reform in enhancing judicial accountability must also be assessed from the perspective of Chinese judges themselves, who are key-players of the reform. Ironically, an Investigation Report by a research group of the Jinhua Intermediate People's Court revealed that a majority of up to 74% of judges disapproved of the initiative to release judgments online, for fear that such initiative would exert huge mental stress on judges who may be confronted with 'overcritical' comments, and overwhelm judges with extra workload.[72] This casts doubt on the judges' ability to withstand public pressure and populist demands whilst being held 'accountable', and raises questions as to how practical it is to expect these judges to deliver detailed legal reasoning in the light of their already very heavy workload. Certainly, the e-Justice reform is not a panacea to problems of lack of professionalism and accountability amongst China's judicial personnel.

C. 'Thin' Rule of Law: Short Conclusion

Undeniably, China's e-Justice reform, one which invites public scrutiny and opens up its judicial proceedings and judgments, is a big leap forward from China's past non-transparent system. However, the initiative is not without impediments – judicial transparency and accountability are yet to be fully achieved.

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70 Hou and Keith (n 19) 72-73.

71 ibid.

72 The Research Group of the High People's Court of Zhejiang, 'A Research and Thinking on the Practices of Open Justice in Zhenjiang Province' (2012) Research on Rule of Law 110, 115; Zhang and Wang (n 20) 140.

IV. E-JUSTICE REFORM: BARRIERS AND OBSTACLES

At this juncture, we must now take stock and ask ourselves: if the declared objectives of the e-Justice reform are only partially successful, what, then, are the obstacles which impede China from implementing its e-Justice reform to fully achieve its envisaged outcomes? This part discusses the institutional, socio-political and ideological hurdles which confront China's introduction of the e-Justice reform, and argues that three main barriers obstruct its successful implementation.

A. Double-track Legality

In an authoritarian state like China where the CCP's core interest takes overriding priority over legal norms, transparency initiatives such as the e-Justice reform are most likely heavily controlled by the CCP in line with its prerogatives. As many scholars repeatedly observed, China's justice system presents itself as a 'double-track' legality,[73] whereby China 'prioritises rule of law in selective policy areas depending on the perceived necessity and feasibility'.[74] Thus, whilst commercial sectors are opened up to align with international standards of a capitalist system, political and ideological sectors are, on the other hand, 'kept away from legal formalisation and regulated mainly through Party policy to ensure the legitimacy of the ruling party'.[75] This presents China with a structural dilemma: while the pursuit of the rule of law drives China closer to greater transparency and accountability, the CCP's overarching desire to maintain its legitimacy and domination continues to pull China back from realising various rule of law ideals, particularly in its political and ideological sectors.[76] Building on existing jurisprudence on China's 'double-track legality', this article provides fresh insight into how China's deep-rooted 'double-track legality' continues to impede its successful realisation of 'thin' rule of law ideals in its latest e-Justice reform.

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73 Li (n 4) 112; Fu (n 4) 10.
74 Fu (n 4) 10.
75 Li (n 4) 112.
76 Li (n 4) 121.

Indeed, with no sign of change in China's long-adhered-to 'double-track' legality, authorities remain mostly concerned with maintaining political stability, and are therefore inclined to committing themselves to delicate balancing acts rather than 'a cold-water plunge into unqualified transparency'.[77] Any degree of openness which the e-Justice reform can accommodate is therefore, unsurprisingly, limited to the extent that it aligns with the CCP's interests. This poses serious challenges for China to achieve genuine openness: while court rulings in purely commercial disputes, which are generally technical, are likely to be open for online scrutiny,[78] politically sensitive cases which are cast in the name of 'state secrets' or 'judicial work secrets' are conveniently swept under the carpet if they are considered a threat to the Party's legitimacy. This squares with the socialist characteristics inherent in China's legal system, which is 'both paternalistic and authoritarian'.[79] As Fu pointed out, 'an authoritarian system struggling for a degree of rule of law undoubtedly constrains the scope of judicial reform'[80] – and the e-Justice reform is no exception. But this brings the e-Justice reform to a bottleneck: beyond the boundaries of China's 'political comfort zone' and the CCP's bottom line of facilitating formalisation for the maintenance of its continued reign,[81] nothing further can be put under the sunlight for public scrutiny. Coupled with China's structural design as a 'dissemination-based model emphasising hierarchical control',[82] full transparency – which has the potential of undermining the Party's legitimacy – is likely to receive resistance from within China's institution, further hindering China's progression towards full judicial transparency.

B. Secondary Role of Courts in China

From a wider institutional perspective, the structural design of China's institutional landscape – one which only accords courts an inferior role to the larger political system[83] – also inevitably

77 Hou and Keith (n 19) 79.
78 Li (n 4) 124.
79 Fu, Palmer and Zhang, *Transparency Challenges Facing China* (n 38) 18-19.
80 Fu (n 4) 8.
81 Li (n 4) 117.
82 Liu (n 55) 492-503.
83 Fu (n 4) 4.

restricts the degree of accountability that courts can be held to. As judges can only be genuinely accountable if they are independent from all external interferences, judges can hardly be independent under the CCP's overriding leadership which penetrates through the entire Chinese legal system. In particular, if the influence of adjudicative committees continues to permeate different levels of courts and the practice of *qingshi* remains a norm, it is doubtful how far the e-Justice reform is capable of bringing judicial accountability in China to new heights.

To be sure, so long as courts remain structurally dependent on China's political system,[84] the courts will always be torn between upholding the CCP's interest and heeding populist demands, particularly in high-profile and politically sensitive cases where judicial independence becomes particularly pertinent. Judges are caught in the dilemma of being pressurised to adhere to the law and to give detailed reasoning for their decisions which will be published online, yet confronted with the pressure of having to decide in favour of the administration on the other hand.[85] This substantially dilutes any judicial accountability which the e-Justice reform may otherwise instil into China's judicial system.

C. Institutional Structure of Chinese Courts

From a practical perspective, enhancing judicial professionalism and accountability is also a project which requires a more structural overhaul of China's legal system far beyond what the e-Justice reform *alone* may deliver. This boils down to the roots of China's governance model and the hierarchical structure of Chinese courts, under which judges are merely ordinary staff of the court, but not professionals. This results in huge discrepancy in judges' competence, as many 'judges' or 'prosecutors' actually lack the requisite expertise to execute judicial work. Open justice in such context may therefore 'reveal a plethora of mistakes'[86] which discredit, rather than advance China's judicial credibility.

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84 Fu (n 4) 10-11.
85 Ahl and Sprick (n 59) 17. See also Fu (n 4) 17-18.
86 Hou and Keith (n 19) 73.

Solutions which touch upon the structural problem of modest judicial professionalism are therefore imperative. In response to such concerns, the Chinese Government has recently committed itself to the 'quota reform' with a view to improving judicial accountability, under which the status of Chinese judges is enhanced, and incompetent judicial personnel streamlined,[87] although how successful these reforms are remains to be seen. What is certain, however, is that cultivation of judicial professionalism is incremental, and more structural reforms alongside the e-Justice reform is vital to enhance judicial accountability.

V. REAL MOTIVES: MAKING SENSE OF CHINA'S E-JUSTICE REFORM

At this juncture, two matters become apparent. First, China's e-Justice reform is a half-filled glass – the declared goals of greater transparency and accountability have only been partially achieved. Second, while China did take concrete steps to further the rule of law, at least in its 'thin' sense, the notion is yet to be fully embraced in China. This makes it opportune to reflect on the *ultimate* question: what motivates an authoritarian state like China to compromise its monopoly over information and to open up itself, notwithstanding the apparent limitations of the e-Justice reform in achieving its declared objectives? This part argues that the e-Justice reform is underpinned by the CCP's instrumental goals to bolster its political legitimacy, centralise its judicial power, and exert greater control over the shaping of public opinion, all of which lay the groundwork for the CCP to undertake larger political reforms in the future.

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87 'Decision of the CCCPC on Some Major Issues Concerning Comprehensively Deepening the Reform' (*The Supreme People's Court of the People's Republic of China*, 12 November 2013) <http://english.court.gov.cn/2015-10/08/content_22130532_8.htm> accessed 15 March 2019.

A. Promotion of Judicial Affinity and Party Legitimacy

Transparency is long recognised as paradigmatic of clean governance and open administration against corrupted powers.[88] The e-Justice reform, unveiled in the name of enhancing the universal values of openness and transparency, may therefore provide the CCP with a technical apparatus to maintain its claim to legitimacy and accountability. This is further fuelled by China's top-down accountability mechanism, which makes the incorporation of public values into its judicial system even easier. Thus, by rolling out these transparency packages, the CCP is able to present itself as emphatically dedicated to meet the people's demands.[89] This may promote judicial affinity and legitimise the Party's exercise of political powers by means of the law,[90] which in turn translates into greater political authority that helps lay the foundation for smoother political reforms ahead.

By empowering the public to monitor judicial behaviour through the Internet, the e-Justice reform may also contain the public's negative sentiment towards China's opaque judicial system, thereby fomenting social harmony, 'an essential political mission for courts in authoritarian states.'[91] And while enhanced transparency may reveal pitfalls in China's system, we have seen that information has been carefully censored to meet China's own institutional needs before it can feature online. The CCP's claim to accountability, and its self-proclamation as a 'socialist state under the people's democratic dictatorship',[92] will not, therefore, be lightly compromised. In fact, such a claim is not foreign to socialist and transitional states, of which China is one. In Marxist legal theory, law is no more than an instrument of class domination which is subservient to political ends and economic forces – one which can be manipulated to foster social cohesion and promote the political ideologies of the ruling party.[93]

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88 Hou and Keith (n 19).

89 ibid 69.

90 Liu (n 55) 498.

91 Fu (n 4) 19.

92 Constitution of the People's Republic of China, Article 1.

93 Li (n 4) 114-15. See also Karl Marx, *A Contribution to the Critique of Political Economy* (first published 1859, Progress Publishers) <www.marxists.org/archive/marx/works/download/Marx_Contribution_to_the_Critique_of_Political_Economy.pdf> Preface.

A comparative study of rule of law reforms undertaken by different transitional socialist states also supports this view, and sheds light on the real motives spurring socialist states such as China to undertake legal reforms which – on their face – do not sit well with their authoritarian nature. Although legal systems are 'fundamentally derivative' and are founded on political, economic and social factors peculiar to each country,[94] the examples of Russia, Vietnam and Indonesia are specifically chosen in the present enquiry – these countries exhibit similarities in political ideology with China, and are also transitional economies and developing states, whereby the tension between opening up themselves to facilitate economic growth, and the need to maintain political stability through avoiding subversion of existing orders generated by these new initiatives, come into sharp focus.

A contemporary case in point is Russia under the reign of Putin, which serves as one of the best reference points for measuring China's progress in pursuing the rule of law given the similarity in ideologies shared by the two countries, their shared hostility to dissidents, their common inclination towards other authoritarian regimes which pose less diffusion threat to each's internal legitimacy,[95] and their equally 'strong desire to impose tighter controls over their own societies' due to entrenched suspicion of Western interferences.[96] During the presidency of Putin, Russia's incumbent president, a string of legal reforms was initiated in the name of what Putin called the 'dictatorship of the law', which embraces the idea of 'the stronger the state, the freer the individual',[97] one which bears strong resemblance to the notion of 'democratic dictatorship' under China's constitution.[98] Most law reforms were, however, in fact directed at recentralising

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94 Daniel S Lev, 'The state and law reform in Indonesia' in Tim Lindsey (ed), *Law Reform in Developing and Transitional States* (Routledge 2007) 236.

95 Shale Horowitz and Michael Tyburski, 'When are similar regimes more likely to form alliances? Institutions and ideologies in the post-communist world' (2016) 32(2) Post-Soviet Affairs 176, 182.

96 Yaroslav Trofimov, 'The New Beijing-Moscow Axis' *Wall Street Journal* (New York, 1 February 2019) <www.wsj.com/articles/the-new-beijing-moscow-axis-11549036661> accessed 17 April 2020.

97 Vladimir Putin, 'Open Letter to Voters' (*President of Russia*, 25 February 2000) <http://en.kremlin.ru/events/president/transcripts/24144> accessed 24 January 2020.

98 Constitution of the People's Republic of China (n 92).

political power into Putin's hands. For instance, whilst Putin reintroduced the jury system, the bulwark against tyranny and the symbol of democracy, to Russia's criminal justice system, such reform was in fact motivated by Putin's desire to exempt from jury trials politically sensitive cases, such as those relating to terrorism and espionage, in the name of protecting state secrets so as to shield Russia's political institution from challenge.[99]

Another example is this: back in 2000, Putin asserted that one-fifth of Russia's regional legal regulations violated the federal constitution,[100] and again emphasised 'the dictatorship of the law', whereby the state itself is equated with constitutional law and order and discipline[101] – language that hints at Putin's ambition to bolster his political legitimacy through legal reforms, rather than to commit to Russia's transition into a genuine democracy. Indeed, as Kahn observed, a distinct category of reform undertaken by Putin was merely a 'reassertion of existing powers',[102] which allowed Putin to leverage his presidential authority to achieve his own political goals. That said, the recentralisation of power in Russia under the guise of political and legal reforms has garnered even greater support for Putin among Russian citizens, who enjoyed unparalleled popularity in Russia since the early 1990s.[103] This evidences that attempts to dress propaganda in the clothes of 'rule of law' reforms can, indeed, yield fruit in transitional states. And this precisely provides catalyst for authoritarian states to introduce legal reforms.

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99 Jeffrey Kahn, 'The Search for the Rule of Law in Russia' (2006) 37 Georgetown Journal of International Law 354, 395-96.

100 Vladimir Putin, 'Televised Address to the People of Russia' (*President of Russia*, 17 May 2000) <http://en.kremlin.ru/events/president/transcripts/21440> accessed 19 July 2020.

101 ibid. See also Geoffrey York, 'Putin begins move to centralize power in the Kremlin' *The Globe and Mail* (Moscow, 19 May 2000) <www.theglobeandmail.com/news/world/putin-begins-move-to-centralize-power-in-the-kremlin/article4163875/> accessed 19 July 2020; Jeffrey Kahn, 'Putin's Federal Reforms – A Legal-Institutional Perspective' in Kivinen and Pynnöniemi (eds), *Beyond the Garden Ring: Dimensions of Russian Regionalism* (Aleksanteri Institute 2002) fn 29 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090586> accessed 24 January 2020.

102 Jeffrey Kahn, 'Federalism, Democratization and the Rule of Law in Russia' (OUP 2002) 239.

103 ibid 242.

The same can be said of legal reforms undertaken by the Democratic Republic of Vietnam ('DRVN') in collaboration with the Soviet Union in the 1950s-60s, both of which, like China, were socialist states. Given the similarities in political orientation between the DRVN and the Soviet Union at that time, legal cooperation between the two not only did not compromise the authority of both governments, but even consolidated their domestic and international positions.[104] Likewise, legal reforms propelled in Vietnam in the late 1980s, a period where the Vietnam Communist Party ('VCP') rapidly undertook economic reform through its policy of *doi moi*, were also underpinned by the VCP's desire to maintain political stability and to coordinate its economic reform as Vietnam transitions to a market economy.[105]

Similarly, legal reforms in Indonesia under the New Order, a regime under then-President Suharto's leadership, is symptomatic of the oft-self-serving nature of legal reforms undertaken in socialist transitional states. While appeals of a *negara hukum* (law-state) were made, and legal reforms have climbed to the apex of 'formalisation, centralisation and personalisation',[106] they, too, have proved to be no more than a political rhetoric fuelled by the belief that a 'constitutionalist republic would best shelter their own legitimacy from challenges originating in revolutionary claims to social and economic justice'.[107] As Dick observed, although the formalisation of law

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104 Penelope Nicholson, 'Comparative law and legal transplants between socialist states: an historical perspective' in Tim Lindsey (ed), *Law Reform in Developing and Transitional States* (Routledge 2007) 151.

105 See Mark Sidel, 'Law Reform in Vietnam: The Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training' (1993) 11(2) Pacific Basin Law Journal 221-22. That said, some scholars have observed that due to broader participation, greater reception towards the influence of international norms, as well as fiercer competition existent among different political factions, the present-day Vietnam shows a 'deeper normative commitments than its Chinese counterpart', and is more likely to depart from the politically monolithic CCP on its path towards a 'thicker' rule of law. For a fuller discussion, see Hualing Fu and Jason Buhi, 'Diverging Trends in the Socialist Constitutionalism of the People's Republic of China and Socialist Republic of Vietnam' (2017) University of Hong Kong Faculty of Law Research Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3010724> accessed 23 January 2020.

106 Howard Dick, 'Why law reform fails: Indonesia's anti-corruption reforms' in Tim Lindsey (ed), *Law Reform in Developing and Transitional States* (Routledge 2007) 52.

107 Lev, 'The state and law reform in Indonesia' (n 94) 238.

was initiated in the name of maintaining political stability and facilitating economic development, it does in reality no more than codify a string of letters to 'formaliz[e] and legitimiz[e] discretionary state action in the interests of the ruling clique',[108] which, if anything, justifies political repression[109] rather than places greater restraints on the state. Although the New Order occurred at a time when Indonesia was less liberalised, this period, one characterised as a 'definitive symbolic reform battle' where reform judges and lawyers collectively called for greater judicial authority,[110] does resonate with China's recent rhetoric to further the rule of law against the backdrop of a deficit in ideological commitment to constrain state powers by the law.

A brief survey of comparative experiences thus sheds light on the motives underlying China's e-Justice reform. Foreign experiences have demonstrated that transparency legal reforms are particularly vital for socialist transitional states, where the need to bolster public confidence in judicial integrity and legitimise the state's exercise of political powers is of overriding importance to maintain the state's authority at a time of transition and instability. China's latest e-Justice reform – one which does not entail huge political risks – is no exception, and is precisely seen by the CCP as the best starting point to achieve its political agenda.

B. Centralisation of Judicial Power

The desire to centralise control so as to supervise the performance of lower courts, which have demonstrated significant regional discrepancies in judicial service, has also driven the CCP to pursue the e-Justice reform. Given the vast magnitude of China's judicial landscape, there is, unsurprisingly, huge disparity in the quality of China's court personnel between major cities and less developed localities. The degree to which local courts implement the CCP's guidelines also varies significantly, depending on the extent of local interference and protectionism in each region.[111] For instance, before China Judgments Online was introduced, the

108 Dick (n 106) 52.
109 ibid 52-3.
110 Lev (n 94) 243.
111 Hou and Keith (n 19) 76-77.

publication rate of judgments variedly substantially from 15% to 78%.[112] Against the proliferation of significant regional discrepancies, the e-Justice reform serves as an opportune platform for the CCP to curb local authority and redirect judicial power to itself, which enables it to exercise closer oversight over local courts. As Ahl and Sprick argued, the mere possibility of such supervision will incentivise lower courts to comply with directives issued by the Central Government.[113]

This strategy is in fact analogous to China's tactic of utilising administrative law as a 'political control' mechanism to discipline deviant behaviour of lower-level government by exposing non-conforming behaviour through court litigation.[114] Indeed, by compelling local courts to live-stream legal proceedings and publish their judgments online, the e-Justice reform is capable of exposing non-compliant behaviours and malpractices of local courts, thereby ameliorating the information barrier between the SPC and the local courts, which enables the SPC to better oversee the behaviour of local courts. In this way, the e-Justice reform provides a tool for the CCP to root out local interferences with decisions which may be inconsistent with its interests, and to conduct merit-based evaluation of judges.[115]

C. Increased Control over Public Opinion

The CCP's ability to exert greater control over the information flow and to shape public opinion presents an added attraction for it to introduce the e-Justice reform. To recall, both China Trials

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112 Chao Ma, Xiaohong Yu and Haibo He, 'Data analysis: Report on the publication of Chinese judicial decisions on the internet' (2016) 12(4) China Law Review 208.

113 Ahl and Sprick (n 59) 22.

114 Xin He, 'Administrative Law as a Mechanism for Political Control in Contemporary China' in Balme S and Dowdle MW (eds), *Building Constitutionalism in China* (Palgrave Macmillan 2009). For a similar account in the context of Vietnam's legal reform, see Brian Quinn, 'Vietnam's Continuing Legal Reform: Gaining Control over the Courts' (2003) 4(2) Asian-Pacific Law & Policy Journal 149 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=886368> accessed 23 January 2020.

115 'Supreme People's Court's Opinion on Comprehensively Depending Reform of the People's Court' (*Beijing Court*, 4 February 2015) <http://bjgy.chinacourt.gov.cn/article/detail/2018/04/id/3281188.shtml > accessed 17 March 2019 para 34.

Online and China Judgments Online are centralised platforms monopolised by the SPC itself. And as the decision as to what videos and judgments are to be published online lies solely in the SPC's hands, it can easily make use of the Internet as a social control infrastructure to distribute information that aligns with the Party's ideology, and to shape public opinion through selective disclosure. This view was echoed by Li, who, raising the example of the case China versus Google, observed how powerful the Chinese government can be in managing information flow on the Internet 'in favor of its political needs rather than succumbing to outside pressure'.[116] Likewise, the e-Justice reform enables the CCP to strengthen its ability to mobilise public sentiments in high-profile cases. When consensus-building and social stability are both in greater control by the CCP, any later political reform would also conceivably be much smoother.

China's eagerness in pushing forward the e-Justice reform – despite its limited effect in deepening the rule of law – now becomes readily explicable. The reform is propelled by pragmatic and instrumental goals which strengthen, rather than weaken the party state.

VI. VALUE OF CHINA'S E-JUSTICE REFORM: THE WAY FORWARD

But if China's e-Justice reform is primarily underpinned by instrumental objectives, will there be further incentives for China to deepen its reform, or is the e-Justice reform no more than an ideology apparatus deployed to forestall more structural reforms?

Peerenboom, while acknowledging the obstacles which beset China in realising a law-based order, appeared to be more optimistic: he contended that given the internal and external forces which constrain the CCP's choices, the 'extent of Party ambivalence toward legal reforms and rule of law should not be overstated'.[117] However, scholars are mostly sceptical, if not pessimistic about the future trajectory of China's legal reforms.

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116 Li (n 4) 126.

117 Randall Peerenboom, *China's Long March toward Rule of Law* (CUP 2002) 11-12. See also Li (n 4) 125.

For instance, Li deduced that based on China's historical traits, the CCP would not embrace any reforms which would weaken its authority, and that transparency reforms are merely a 'new mode of Party organisational control to suit the changing circumstances'.[118] This sentiment was echoed by the US Congressional Executive Commission on China, who lamented that the CCP's interest in exercising dominance over the Chinese society would continue to 'trum[p] meaningful and lasting progress on transparency'.[119]

But while it may be too idealistic to see the e-Justice reform as paving the way for China's successful transition to a full democracy, this article puts forward a distinct argument – China's e-Justice reform *does* have the potential to lead to more substantive reforms in the long run, and can bring about simultaneous improvements to *both* China's existing 'thin' rule of law *and* the CCP's governance. Indeed, the CCP's desire to preserve its political legitimacy is not necessarily antithetical to China's progression towards a relatively 'thicker' sense of rule of law, nor should it mask the progress, however small, that has been made by the e-Justice reform. Rather, the CCP's will to boost its political legitimacy may well be a catalyst which drives China to embark on a more ambitious quest towards greater transparency and accountability.

First, previous reform efforts have proved to the CCP that greater transparency can be beneficial, and indeed essential, to its continued reign. As analysed above, bolstered political legitimacy that comes with a more credible judiciary is pivotal to fomenting social harmony and maintaining political stability. Increased professionalism of Chinese courts – one which is increasingly immune to local interferences – is also conducive to the centralisation of the CCP's power. All of these instrumental benefits may therefore incentivise, rather than discourage China from further opening up itself. As Nathan pointed out, China can be characterised as a 'resilient authoritarian' which secures its power 'not simply by use of force but by delivering more stable

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118 Li (n 4) 125-26.

119 '2013 Annual Report' (*Congressional-Executive Commission on China*, 2013) <www.cecc.gov/publications/annual-reports/2013-annual-report> accessed 18 March 2019.

and legitimate govern[ance]'.[120] China will therefore, hopefully, come to realise that greater transparency can be consistent with its emerging role, and this requires plugging the holes in its legal system in the first place.

Second, from an evidential perspective, China has also proved itself a willing learner to embrace incremental changes within its system. Whilst judicial reforms used to be fitful and limited to 'mechanical improvements' in building a more professional judiciary, most of which did not extend to the substance of judicial decision-making,[121] the e-Justice reform is much more qualitative compared with previous initiatives. Not only did it signal the CCP's substantive attempt to enhance the quality of judicial decisions, it also instilled an unprecedented degree of transparency into China's judicial system. And whilst the goals of curbing local political interferences and judicial corruption fared poorly in the past,[122] they were confronted head-on in the e-Justice reform. The achievements of the e-Justice reform, particularly in contrast to China's past inclination of 'exclusive judicial non-disclosure',[123] demonstrates the CCP's political finesse in spurring concrete changes in its system when existential threats to its legitimacy loom large. As Hou and Keith pointed out, one must not overlook the CCP's organisational capacities – 'when there is political will, it can concentrate enormous administrative energies and move ahead rather quickly with reform'.[124]

Third, from a more macro perspective, China is no longer an isolated regime. Rather, the civic awareness of its people has grown tremendously in the past decade, with increasing demands

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120 Jonathan Stromseth and others, *China's Governance Puzzle* (CUP 2017) ch 10. See also Andrew J Nathan, 'China's changing of the guard: Authoritarian resilience' (2003) 14(1) Journal of Democracy; Martin Dimitrov, 'Debating the Color Revolutions: Popular Autocrats' (2009) 20(1) Journal of Democracy 78 <https://muse.jhu.edu/article/257586/pdf> accessed 19 July 2020.

121 Susan Trevaskes, 'Political Ideology, the Party, and Politicking: Justice System Reform in China' (2011) 37(3) Modern China 315, 319. See also Randall Peerenboom, 'Judicial Independence in China: Common Myths and Unfounded Assumptions' (2008) La Trobe Law School Legal Studies Research Paper, 23 <https://muse.jhu.edu/article/257586/pdf> accessed 19 July 2020.

122 Trevaskes (n 121) 319.

123 Hou and Keith (n 19) 78-79.

124 ibid 79.

for a more robust civil society. It is therefore inevitable that the CCP would have to respond, albeit in a gradual way, to the pressing calls of its people in order to maintain social stability. Furthermore, China's ambition to lead globalisation through its One Belt One Road initiative provides a further impetus for the CCP to expand its capacity, including 'greater transparency as a crucial institutional basis to serve universal values'.[125] Pressure both from within and from the international community may therefore pressurise China into embarking upon a more searching quest for a 'thicker' form of rule of law.

Admittedly, under China's double-track legality, any further reform may only be able to develop if it does not cross the CCP's bottom-line. But that does not mean that transparency reforms are incapable of expanding the limits of China's political safety zone. In fact, the e-Justice reform itself is already a major breakthrough in China in the recent decade, bearing in mind that transparency and accountability are both incipient. Seen in such light, the e-Justice reform could well sow the seeds for further reforms to overhaul China's judicial system and gradually 'thicken' rule of law in China, the success of which could lay the groundwork for more ambitious and structural reforms in the future.

CONCLUSION

This takes us back to the quote cited at the beginning: how far is justice *seen* to be done under the e-Justice reform? We have seen that China's e-Justice reform has made considerable breakthroughs, but is at the same time confronted with setbacks due to China's entrenched socio-political and ideological barriers. And whilst the rhetoric of deepening the rule of law recur, the reform is only partially successful in achieving its declared objectives. That said, this does not detract from the fact that the e-Justice reform has indeed enhanced China's judicial transparency and accountability in contrast to past initiatives. And while the e-Justice reform is primarily propelled by the CCP's instrumental goals to strengthen its rein, the reform can equally be seen as an

[125] Fu, Palmer and Zhang (n 38) 18-19.

impetus which endows the CCP with greater legitimacy and information to undertake more ambitious reforms in the long term.

Nevertheless, if the e-Justice reform were not to collapse and flatten into yet another window-dressing propaganda, complementary changes in other sectors of China's landscape, coupled with structural changes to China's judicial and political system, are imperative. It is hoped that the party-state will continue to take bold initiatives to further China's pursuit of openness and accountability – and the e-Justice reform is hopefully the entry point for a series of more substantive reforms to come.

ASSET TUNNELING IN HONG KONG FAMILY PROPERTY COMPANIES: AN ILLUSION OR A REALITY?

Hester Choi*

This article studies the connected transactions between certain Hong Kong family property companies listed on The Stock Exchange of Hong Kong and members of their controlling families from 2014 to 2018, and examines whether such transactions pose a high risk of minority expropriation. The findings reveal, amongst others, that only a few family companies proposed connected asset sales during that period. Notably, most of these transactions were exempt from the circular and shareholders' approval requirements under the Listing Rules[1]; the remainder were approved by the independent shareholders. While the risk of minority expropriation *appears* to be low, the author identifies areas of improvement under the Listing Rules which may contribute to better shareholder protection in Hong Kong.

INTRODUCTION

The Hong Kong stock market was historically dominated by local families.[2] Despite the surge of mainland state-owned companies, local family companies continued to dominate the city's property sector.[3] From the corporate governance perspective, where the

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1 The Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited.

2 Syren Johnstone and S H Goo, 'Report on Improving Corporate Governance in Hong Kong: a comparative based study' (HKICPA 2017) 163.

3 DBS Bank, 'HK Property: Local developers dominated land market' (DBS Bank, 14 January 2019).

founding families[4] are in control of the companies, whether by holding more than 50%[5] of their shares or by serving as board members, conflict of interest becomes a prominent issue when the companies enter into connected transactions with the family members and/or their associates (Family CTs).[6] The risk of minority expropriation by way of tunnelling is high if corporate governance measures are inadequate.

According to the taxonomy developed by Atanasov,[7] tunnelling may be classified into three types: asset tunnelling, cash flow tunnelling, and equity tunnelling. Since property companies have substantial assets and most Hong Kong properties have sky-high value, the author surmises that the founding family members would have greater incentive to tunnel such **assets** into their own companies or family trusts. This article examines whether the Family CTs are conducted fairly in the market and whether the current regulatory measures in detecting, exposing, and scrutinising such transactions are adequate, and suggests ways to enhance such measures where inadequate.

Based on the disclosures made by the Hong Kong listed family property companies, the author finds that Family CTs are unusual for them, with only six out of the 21 identified family companies proposed Family CTs during 2014-2018. Additionally, insofar as the identity of the parties to the Family CTs is concerned, limited companies ultimately owned by the family members are far more common than those ultimately owned by discretionary family trusts. Thirdly, instead of being subsequently sold at higher prices, most of the properties sold to the family members remained in the same hands. Lastly, as a result of the *de minimis* exemption under the Listing Rules, most of the Family CTs did not require

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4 In this article, the term 'founding family member' is construed broadly to cover the transgenerational descendants or relatives of a company's founder.

5 Note, however, that under LR1.01, any person who is or group of persons who are together entitled to exercise or control the exercise of **30%** or more of the voting power at the issuer's general meetings is a controlling shareholder.

6 In this article, the word 'associates' has the meaning given to it in the Listing Rules (LRs) 14A.12-15. See section B1 of Part I of this article below.

7 Vladimir Atanasov, Bernard Black, and Conrad S Ciccotello, 'Unbundling and Measuring Tunneling' (2014) University of Illinois Law Review 1697, 1700.

the shareholders' approval. An unresolved puzzle is whether some of the residential units sold to the family members were properly priced, but insufficient market data disables the author to conduct a meaningful analysis on this point.

This study is not intended to evaluate the fairness of all Family CTs involving property interests. Rather, it aims to test whether there is a **real risk** of minority expropriation through Family CTs as suggested by some scholars. To achieve this aim, the author relied on the land registration records from the Land Registry and companies' annual returns from the Company Registry to identify the ownership and management of the corporate vehicles used in the Family CTs. One notable limitation of this study is that undisclosed Family CTs are off the radar, hence some expropriating activities may have been omitted.

This article is structured as follows. Part I introduces the background of this study, including a literature review, a brief account of the current regulatory regime for connected transactions, and the hypotheses development process. Part II presents the methodology. Part III presents the author's findings. Part VI presents the recommendations. The final part concludes the findings.

I. BACKGROUND

A. Literature Review

1. FAMILY COMPANIES AS A DOUBLE-EDGED SWORD: BETTER PERFORMANCE AND MINORITY EXPROPRIATION

Many scholars suggest that family ownership and management offer various competitive advantages. Demsetz and Lehn argue that given the family's alignment of interests, family members have greater incentive to monitor the company and maximise

profit.[8] Ward argues that family members have greater loyalty to the company as their family's fortune and reputation are tied to the company. [9] Such factors eventually facilitate better firm performance. Anderson and Reeb examined S&P's 500 firms from 1992 to 1999 and found stronger performance in family firms than in non-family firms.[10] Jiang and Peng found that while some Asian large companies suffered from poor governance, some did manage to have their performance unaffected by or even benefited from family control.[11] However, Miller and Le Breton-Miller's empirical research reveals that it may be difficult to attribute superior performance to family firms once the definition of 'family firm' in the corporate governance academia is revisited and unified.[12] If that was the case in Hong Kong, it would mean the widely perceived success of family firms may have been overstated.

The downside of family control is equally notable. Porta argues that ownership concentration gives rise to agency problems between the controlling shareholders and the minority shareholders as the controlling families have the interest and power to expropriate the latter.[13] More specifically, Cronqvist and Nilsson argue that the higher the discrepancy between the controlling shareholders' control rights (i.e. the right to vote and hence control)[14] and their cash flow rights (i.e. the right to receive

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8 Harold Demsetz and Kenneth Lehn, 'The Structure of Corporate Ownership: Causes and Consequences' (1985) 93 Journal of Political Economy 1155, 1161.

9 John L Ward, *Perpetuating the Family Business: 50 lessons learned from long-lasting, successful families in business* (Palgrave Macmillan 2004) 73, 96.

10 Ronald C Anderson and David M Reeb, 'Founding-Family Ownership and Firm Performance: Evidence from the S&P 500' (2003) 58 The Journal of Finance 1301.

11 Yi Jiang and Mike W Peng, 'Are family ownership and control in large firms good, bad, or irrelevant?' (2010) 28 Asia Pacific Journal of Management 15.

12 Danny Miller and others, 'Are family firms really superior performers?' (2007) 13 Journal of Corporate Finance 829, 831.

13 Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'Corporate Ownership Around the World' (1999) 54 Journal of Finance 471, 511.

14 Norhidayah Abdullah and Wee Ching Pok, 'Separation of cash flow rights and control rights and debt among Malaysian family firms' (2015) 5 Journal of Accounting in Emerging Economies 184, 188.

dividends),[15] the greater the tendency is for them to extract private gains.[16] Empirical evidence from How and co-authors shows that firms with greater divergence between controlling shareholders' cash flow rights and control rights are less likely to pay dividends and, when they do, the amount of pay-out is lesser.[17] Michael and Goo argue that if such evidence was true, it would mean that outside investors would be worried about losing money to such expropriation, and would therefore be less likely to invest in these companies.[18] This in turn results in minority shareholders being locked into the company.

In short, whereas family firms may perform better, minority shareholders are in no way guaranteed to receive dividends proportional to their investment. From a wider perspective, poor minority shareholder protection lowers the city's corporate governance performance and its ranking as an international financial centre.[19] Therefore, the issue of minority protection is not only relevant to the minority shareholders in the family companies but also to the city's financial and economic development.

2. CONNECTED TRANSACTIONS DO MORE HARM THAN GOOD

While there is nothing inherently wrong with connected transactions, which, by definition, refer to transactions entered

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15 ibid.

16 Henrik Cronqvist and Mattias Nilsson, 'Agency Costs of Controlling Minority Shareholders' (2003) 38 Journal of Financial and Quantitative Analysis 695.

17 Janice C Y How, Peter Verhoeven and Cici L Wu, 'Dividends and Expropriation in Hong Kong' (2008) 4 Asian Academy of Management Journal of Accounting and Finance 71, 84.

18 Bryane Michael and S H Goo, 'Corporate governance and its reform in Hong Kong: a study in comparative corporate governance' (2015) 15 Corporate Governance: The International Journal for Effective Board Performance 444, 452.

19 Bryane Michael and S H Goo, 'Last of the Tai-Pans: Improving the Sustainability of Long-Term Financial Flows by Improving Hong Kong's Corporate Governance' (2013) AIIFL Working Paper No 16, 6, 16 <www.dx.doi.org/10.2139/ssrn.2350569> accessed July 2019.

into between a listed issuer's group and its connected person(s),[20] such transactions potentially allow family members to tunnel private gains and result in minority expropriation. Even if connected transactions may have been fairly conducted, there is indirect evidence suggesting that they are unwelcomed corporate activities. Based on Cheung and co-authors' evidence,[21] Michael and Goo calculated that the identified connected asset sales had reduced firm value by around 20%.[22] Further, the lack of information on those connected transactions reduced firm value by about 10%, and the lack of financial adviser report further reduced firm value by around 30%.[23] These figures support the conclusion that connected transactions are widely perceived as harmful activities. However, neither the Securities and Futures Commission (the SFC) nor The Stock Exchange of Hong Kong Limited (the Exchange' or SEHK) prohibits connected transactions outright, perhaps because these activities do generate certain economic benefits to the companies. This begs the question of whether the market fear of these connected transactions is well-founded.

B. The Current Regulatory Regime for Connected Transactions

1. THE MEANING OF 'CONNECTED TRANSACTION'

Chapter 14A of the Listing Rules defines a connected transaction as a transaction between the listed issuer and its connected person, or financial assistance to or from commonly held entities.[24] A connected person includes a director, chief executive or

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20 LRs 14A.23-24.

21 Yan-Leung Cheung, Aris Stouraitis and Anita Wong, 'Ownership concentration and executive compensation in closely held firms: evidence from Hong Kong' (2003) KIMR Working Paper No 14/2003 (as cited in Michael and Goo, 'Corporate governance and its reform in Hong Kong: a study in comparative corporate governance' (2015) 15 Corporate Governance: The International Journal for Effective Board Performance 444).

22 Michael and Goo (n 18) 24-25.

23 ibid.

24 LRs 14A.23-30.

substantial shareholder of the issuer or any of its subsidiaries, or an associate of the above persons.[25] Individuals who are considered an 'associate' of a connected person include (a) a spouse or the child of the spouse and/or the connected person (the immediate family members), (b) a trustee of a trust of which the connected person or his immediate family member is a beneficiary or discretionary object, (c) a company controlled by the connected person, or (d) a company in which the immediate family members, co-habitees, parents and siblings of the connected person exercise more than 50% control of voting shares or of the board.[26]

2. REQUIREMENTS UNDER THE LISTING RULES

As regards disclosure, the issuer 'must announce the connected transaction as soon as practicable after its terms have been agreed', and, unless exempted, 'send a circular to its shareholders'.[27] The circular must contain the identity of the parties to the transaction and their ultimate beneficial owners.[28] Where a connected transaction involves an acquisition or a disposal of any property interests, the valuation and information on the property must be provided.[29] All connected transactions must be disclosed in the issuer's annual report.[30]

The transaction must be approved by the shareholders at a general meeting[31] or by a written shareholders' approval where applicable.[32] Where a shareholders' approval is required, an independent board committee (IBC), which consists of independent non-executive directors (INEDs) only,[33] must be appointed,[34] and, having taken into account the recommendations of an independent financial adviser (IFA), the IBC must advise the

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25 LRs 14A.07(1) and (4).
26 LR 14A.12.
27 LRs 14A.35 and 14A.46.
28 LR 14A.70(3).
29 LRs 14A.70(7) and 5.03.
30 LR 14A.49.
31 LR 14A.36.
32 LRs 14A.36-37.
33 LR 14A.41.
34 LR 14A.39.

shareholders as to, among others, whether the terms are fair and reasonable and whether the shareholders should vote in favour of or against the proposed transaction.[35] An IFA must be appointed to give its opinions based on the written agreement for the transaction.[36]

In appropriate cases, the *de minimis* exemption[37] and waiver for transactions relating to non-executive directors (NEDs)[38] may apply, so that some or all of the above requirements may be exempted. For example, depending on its relevant percentage ratios, a connected transaction may be exempt from the shareholders' approval, INEDs' annual review and all disclosure requirements,[39] or it may only be partially exempt from the circular and shareholders' approval requirements.[40] Where a shareholders' approval is not required, the announcement must still contain the INEDs' views as to whether the terms of the connected transaction are fair and reasonable, and whether the connected transaction is on normal commercial terms or better and in the ordinary and usual course of business of the listed issuer's group, etc.[41]

3. CONSEQUENCES OF NON-COMPLIANCE OF CHAPTER 14A

According to the Policy Statement of the Hong Kong Exchanges and Clearing Limited (HKEx), warning or caution letters may be issued where the breach is minor, or no breach is established but the disputed conduct does not meet the expectation of the Exchange.[42] Disciplinary actions may be taken against defaulting issuers, depending on such factors as 'the nature and seriousness of the breach', 'the market impact and prejudice (or risk of prejudice) to investors as a result of the possible breach', and 'any

35 LR 14A.40.
36 LRs 14A.39 and 14A.44.
37 LRs 14A.76-86.
38 LR 14A.103.
39 LR 14A.76(1)(a).
40 LR 14A.76(2)(b).
41 LR 14A.68(3).
42 HKEx, 'Enforcement of the Listing Rules - Policy Statement' (17 February 2017) 1.

personal benefit accruing to the parties responsible for the possible breaches and its magnitude'.[43] In theory, the Exchange may delist a listed issuer if there is a serious breach of the Listing Rules, but this is a 'nuclear option' that the Exchange would unlikely resort to since investors may suffer as much as the defaulting directors.[44] According to the Listing Enforcement Notices, there is one incidence of Chapter 14A breach in the first half of 2019 and four incidences during 2017-2018. All of them resulted in public censure and/or criticisms.[45]

C. Hypotheses Development

Both theoretical arguments and empirical evidence suggest that as controlling shareholders of family companies have greater control rights over cash flow rights, they have a greater tendency to expropriate the companies for private gains. Hence, it is predicted that connected asset sales with the founding family members are common in family companies engaged in property development business. If that is true, then as empirical evidence suggests that connected transactions would negatively affect firm value,[46] it would suggest that these family companies are facing a real risk of minority expropriation by way of asset tunnelling.

To quantify whether such asset sales are common, the first hypothesis is put forward as follows:

H1. All family companies have conducted at least one Family CT involving asset sale during the study period.

Further, it is argued that any immediate subsequent sale by the family members on the market would imply a greater likelihood that minority expropriation has taken place. The reason is that in order for the families to maximise gains and minimise costs, they are arguably less likely to operate businesses using the

43 ibid 2.

44 Gordon Jones, *Corporate Governance and Compliance in Hong Kong* (2nd edn, LexisNexis 2015) [5], 209.

45 See Table 4 below.

46 See the evidence found by Cheung and co-authors and the interpretation made by Michael and Goo mentioned in section A2 of Part I of this article above.

acquired assets, as that would require more time and effort for them to generate profits as compared to simply selling the assets on the market at a price higher than the acquisition price. The second hypothesis is:

> *H2.* Assets of the listed companies which had been sold to the founding family members were subsequently disposed of on the market. The assets are now ultimately owned by persons other than those family members.

Additionally, it is also predicted that most connected asset sales are conducted between the listed companies and the trustee of a discretionary family trust for the founding family members. Unlike directors of a company, discretionary trustees are less likely to be equipped with the task of operating any substantial business, which makes them ideal candidates for managing the families' assets. Hence, the third hypothesis is:

> *H3.* The Family CTs are mostly conducted between the listed company and a discretionary family trust for the founding family members rather than a company owned by the family.

Fourthly, as Cheung and co-authors' empirical findings suggest that the market does not welcome connected transactions,[47] it is predicted that independent shareholders (i.e. shareholders other than controlling shareholders of the company and their associates)[48] would vote against any proposed Family CTs. The fourth hypothesis of this study is:

> *H4.* Where independent shareholders' approval is required for a connected transaction to proceed, the listed company can rarely obtain such approval.

Finally, if the conspiracy theory is taken to its highest, it may be predicted that family members sitting on the board would propose Family CTs that favour their family at the expense of the company's interest. This may be manifested in the form of selling residential units to the family members below market price. Thus, the final hypothesis is:

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47 ibid.

48 LR13.39.

H5. Any sale of residential units to the founding family members is under-priced.

II. DATA AND METHODOLOGY

A. Data Collection and Sample Selection

As the Hong Kong property sector has been dominated by a few local family companies, the author used a deduction method to identify the local family companies engaged in the property development business. The sample begins with the 500 largest listed companies on the Main Board of the SEHK in terms of market capitalisation as of 3 July 2019, a record of which is set out in Appendix 1. Companies other than Hong Kong companies (defined in section B below), family companies (defined in section C below) and property companies (i.e. companies with business operation in property development) are eliminated from the sample.

After the above elimination process, the author identified 21 Hong Kong family companies engaged in property development (the Selected Companies). The author then examined all their connected transaction announcements made between 2014 and 2019. This study begins with 2014 because both the new Companies Ordinance [49] and substantial Listing Rules amendments relating to connected transactions came into effect that year.[50] The author then eliminated announcements unrelated to any sale or purchase of property and non-property interests. The author further eliminated transactions which were not connected with the founding family members. After that, the author consolidated announcements referring to the same transaction. Finally, the author identified 18 family connected transactions (the Selected Family CTs).

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[49] Companies Ordinance (Cap 622).

[50] HKEx, 'Consultation conclusions on review of connected transaction rules' (Hong Kong Exchanges and Clearing Limited, 2014) 2-3.

B. Defining 'Hong Kong companies'

A company incorporated and registered in Hong Kong is deemed to be a Hong Kong company. Additionally, since businessmen may incorporate companies in Bermuda, the Cayman Islands or the BVI for tax saving purposes, these companies are – for the purpose of this study – considered as Hong Kong companies so long as their corporate profiles identify themselves as Hong Kong companies, have a substantial business operation in Hong Kong, or their company founders are Hong Kong residents.

C. Defining 'family companies'

There is no universal definition in academia.[51] This study follows the definition adopted by Miller and Le Breton-Miller: a family company is 'one in which multiple members of the same family are involved as major owners or managers, either contemporaneously or overtime.' [52] This formulation has the benefit of taking into account both the control and management powers of the family members within the same family tree. However, the author selected only some of the binary variables in that study as the present purpose is to consider whether a company is family-controlled, instead of how deep the family control is. To be considered as a family company, the listed company must satisfy all the following requirements: (1) the family is the largest shareholder in the firm, (2) the family directly or indirectly holds more than 30% of the company's equity, a requirement that can be satisfied so long as the family members collectively hold more than 30% of the company's equity by their interest in other companies or the family trusts which in turn hold shares in the listed company, (3) more than one family member serves as an officer and/or a director of the company, (4) a family member serves as the chief executive officer (CEO), and (5) a family member serves as the chairman of the board.

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51 La Porta, Lopez-de-Silanes and Shleifer (n 13) 831.

52 ibid 836.

D. Identifying Owners and Directors

To test H3, the author conducted land searches at the Land Registry to identify the current owners of the Hong Kong properties sold under the Selected Family CTs. Although the Hong Kong deeds registration system does not guarantee the owner's title but only confers priority of his property interest, prudent property owners, especially companies advised by lawyers, would register their interest to pre-empt future disputes. However, the author is unable to identify the ownership of four non-Hong Kong assets, three of which are located in the PRC and one is in the UK.

Once the current owners had been identified, the author conducted company research to find out the owners and, if the owners are Hong Kong incorporated companies, the directors thereof. Such information is used to determine whether the assets are still in the hands of the family members or whether they have been sold to outsiders. In most cases, the author could confirm that the directors of those purchaser companies were the founding family members of the Selected Companies by reference to the company's annual reports, announcements or website.

E. Sources of Data

Information used in this study was obtained from the following sources:

a) The list of the top 500 firms in terms of market capitalisation was obtained from the HKEx website.
b) Background information of those 500 firms, including their place of incorporation, corporate ownership structure, background information of their directors, and the types of business engaged, was obtained from their annual reports and company website.
c) Information as to the identity of the substantial shareholders of those companies and the connected transaction announcements made by the Selected Companies during 2014-2018 was obtained from the HKEx News website.

d) Information on the ownership of the assets involved in the Selected Family CTs was obtained from the searches conducted at the Land Registry and Company Registry.

As the author was not aware that Selected Companies were subject to any legal proceedings during 2014-2018, this study has not relied on any case law.

III. THE FINDINGS

The findings contradict H1, H2, H3 and H4 of this study. To begin with, only six of the 21 Selected Companies proposed connected sales with the founding family members during the study period, and only five of them proposed connected asset sales. Such finding is contrary to the H1.

Table 1 lists out the number and types of Selected Family CTs. Companies which did not conduct any Family CTs are not included in the table. The results show that only two of the Selected Family CTs involved the sale of property interests to certain entities ultimately owned by a discretionary family trust for the founding family members. Thus, this contradicts H3.

	Listed company	**Number of Selected Family CTs involving non-property interests**	**Number of Selected Family CTs involving property interests**	**For those involving property interests, the identity of the purchasers (and the number of Selected Family CTs with each kind of purchaser)**	**Total number of Selected Family CTs proposed**
1	CK Asset Holdings Limited (CK Asset)	2[(1)]	0	Limited company ultimately owned by one or more of the family members (1) and charitable foundation (2)	2
2	Henderson Land Development Company Limited (Henderson)	0	2[(2)]	Discretionary family trust (1) and limited company ultimately owned by one or more of the family members (1)	2
3	New World Development Company Limited (NWD)	1[(3)]	4[(4)]	Limited company ultimately owned by one or more of the family members (4)	5
4	K. Wah International Holdings Limited	0	1[(5)]	The family member himself (1)	1
5	Chinese Estates Holdings Limited (Chinese Estates)	1[(6)]	6[(7)]	Limited company ultimately owned by one or more of the family members (4) and a family member himself/herself (2)	7
6	Li & Fung Limited	-	1[(8)]	Partly owned by a family member himself and partly by a discretionary family trust (1)	1
	Total	**4**	**14**	**-**	**18**

Table 1. The number and types of Selected Family CTs.

Notes:

(1) The relevant announcements were made by CK Hutchison Holdings Limited (SEHK: 1) dated 27 January 2015 and CK Asset dated 2 December 2016. Note that for the purpose of this article, these two companies are regarded as one and the same company because CK Asset was created after the spin-off of Cheung Kong Group's property business in 2015.
(2) See the announcements of the company dated 20 June 2014 and 17 February 2017.
(3) See the announcement of the company dated 8 April 2014.
(4) See the announcements of the company dated 7 April 2014, 24 August 2015, 5 October 2016 and 27 October 2017.
(5) See the announcement of the company dated 15 January 2016.
(6) See the announcement of the company dated 15 March 2017.
(7) See the announcements of the company dated 19 February 2014, 2 September 2014, 12 December 2014, 21 December 2015, 23 December 2015 and 5 December 2016.
(8) See the announcement of the company dated 30 December 2016.

Secondly, the findings also contradict H2. As proven by the identity of the registered owners of the properties, in relation to the Hong Kong properties which are the subject matters of the Selected Family CTs, all except two properties remained in the hands of the founding family members.

Table 2 below shows the relevant information of the current registered owners of those properties. Where the registered owners are Hong Kong companies, their annual returns filed with the Company Registry show that some or all their directors are the founding family members of the Selected Companies even though none of those Hong Kong companies or their corporate owners correspond to the name of the purchasers involved in the Selected Family CTs. Such discrepancy is immaterial as companies may have complex ownership structures to conceal the identity of their true owners. It is argued that the identity of the directors is sufficient to deduce that the registered owners are controlled by the founding family members of the Selected Companies.

	Listed Company	Date of the connected transaction announcement	Identity of the property/ properties sold	Identity of the purchaser as disclosed in the announcement	Identity of the current registered owner of the property/ properties	If the registered owner is a natural person, whether he/she is a founding family member of the listed company	If the registered owner is a Hong Kong company, the identity of its owner(s) and director(s)		Whether some or all the directors of the current registered owner are founding family members of the listed company	Whether the transaction was exempt from the shareholders' approval requirement
							Owner(s)	Director(s)		

1	Henderson	20 June 2014	'AIA Financial Centre', 712 Prince Edward Road East	Rotech Investment Limited, a company and SPV wholly owned by Sunlight REIT, a unit trust in which Lee Shau Kee's discretionary family trust has unitholding	G/F[1]: Gain Global Development Limited	-	Main Champion Development Limited (99.9%) and Wealth (Nominees) Limited (0.1%)	Fung Lee Woon King (note: the sister of Lee Shau Kee); Lee King Yue; Lee Ka Shing; Kwok Ping Ho	Yes	Yes

2	Henderson	17 February 2017	'Newton Inn', 88 Chun Yeung Street, North Point	Houston Venture Limited, a company wholly owned by Shun Ho Property Investments Limited (SEHK: 219), which is majority-controlled and indirectly held by Cheng Kai Man, William, the son-in-law of Lee Shau Kee	Conradion Limited	-	Safco Investment Limited (100%)	Cheng Kai Man, William; Hui Wing Ho, Albert	Yes	Yes

3	NWD	24 August 2015	8/F, Chevalier Commercial Centre, Kowloon Bay	FSE Management Company Limited, a majority-controlled company of Doo Wai Hoi, William, the brother-in-law of Henry Cheng	Office unit no.1[1]: Power Estate Investments Limited	-	Dragon Merchant Limited (100%)	Doo William Junior Guilherme, a cousin of Henry Cheng; Lam Wai Hon, Patrick; Lee Kwok Bong	Yes	Yes

4	NWD	5 October 2016	17/F, Chevalier Commercial Centre, Kowloon Bay	Fortunate House Limited, a company wholly owned by FSE Engineering Holdings Limited (SEHK: 331), which is majority-controlled by Doo Wai Hoi, William	Ocean Front Investment Limited (note: not a Hong Kong company)	-	-	-	Unknown	Yes
5	Chinese Estates	19 February 2014	Flat A, 45/F, One WanChai, 1 Wan Chai Road, Wanchai	The father and elder brother of Lui Lai-kwan	Lui Lai Kwan	Yes	-	-	-	Yes

6	Chinese Estates	2 September 2014	All properties under the Moon Ocean SP Agreement are in Macau	-	-	-	-	-	-	No
			Under the Silvercord SP Agreement-s: Certain shops on the basement, lower G/F, G/F, 1/F, 2/F, etc., Silvercord, 30 Canton Road, Tsim Sha Tsui	Fly High Target limited, a company indirectly wholly owned by Joseph Lau	1/F (excluding shop no.38): Silvercord Limited[1]	-	Brass Ring Limited (100%)	Chan Hoi-wan; Chan Sze-wan; and Lau Ming Wai, the wife of Joseph Lau, sister of Chan Hoi-wan, and son of Joseph Lau, respectively	Yes	

7	Chinese Estates	12 December 2014	'The One', 100 Nathan Road, Tsim Sha Tsui	Market Victory Limited, a company indirectly wholly owned by Joseph Lau	The One Property Limited	-	Asian East Limited (100%)	Chan Hoi-wan; Chan Sze-wan; and Lau Ming Wai	Yes	No
8	Chinese Estates	21 December 2015	Flat A, 11/F, 55 Conduit Road, Mid-Levels	Amy Lau Yuk-wai, a sister-in-law of Chan Hoi-wan	Amy Lau Yuk-wai	Yes	-	-	-	Yes
9	Chinese Estates	23 December 2015	'Windsor House', 311 Gloucester Road, Causeway Bay	Magic Square Limited, a company indirectly wholly owned by Joseph Lau	Windsor House Limited	-	Jumbo Grace Limited (100%)	Chan Hoi-wan; Chan Sze-wan; and Lau Ming Wai	Yes	No

10	Chinese Estates	5 December 2016	The piece of land situated at No. 12 Shiu Fai Terrance, Mid-Levels East	Creative Dragon Ventures, a company wholly and beneficially owned by Chan Hoi-wan	Stable Castle Limited	-	Win Kings Holding Ltd. (100%)	Chan Hoi-wan	Yes	No

Table 2. Further information on the assets sold in the Selected Family CTs.

Note:

(1) As the property is a multi-story building with multiple co-owners, the author only randomly selected some parts of the property and proceeded with identifying the registered owner of those parts. Hence, there remains the possibility that other parts of the property may have been sold to outsiders. To confirm this would require further searches of those parts at the Land Registry and the Companies Registry.

Fourthly, 14 of the 18 Selected Family CTs were exempt from the circular and shareholders' approval requirements. All the remaining four transactions subject to such requirements were proposed by the same listed company, Chinese Estates, and each transaction was approved by over 98% of its independent shareholders. This is contrary to H4. One possible explanation is that in relation to each of the four transactions, the board promised to pay out dividends upon the transactions being approved and completed. The proposed dividends may have played an important role as sweeteners to incentivise the independent shareholders to vote in favour of the transactions.

Finally, there are only two residential units sold by the Selected Companies during the sample period. There is however inadequate information to test H5 as the consideration for both units included car and motorcycle parking spaces, the historical transaction prices of which are not available. Table 3 shows the information on the two residential units sold by Chinese Estates.

	Listed company	Date of the connected transaction announcement	Residential unit	Facilities	Completion date	Consideration (including the facilities) (HK$)
1	Chinese Estates	19 February 2014	Flat A, 45/F, One WanChai, 1 Wan Chai Road, Wanchai	Car parking space no.C23 and motorcycle parking space no. M2	22 April 2014	51,205,346
2	Chinese Estates	21 December 2015	Flat A, 11/F, 55 Conduit Road, Mid-Levels	Car parking space no. P3	5 March 2016	124,118,000

Table 3. Information on the two residential units sold by Chinese Estates.

IV. RECOMMENDATIONS

Contrary to the hypotheses, this study tends to suggest that asset tunnelling has not taken place under the Selected Family CTs. However, as the findings are primarily based on the disclosures made by the Selected Companies, there remains the possibility that the Selected Family CTs are only a tip of the iceberg.

To ensure adequate minority protection, Family CTs must be carefully scrutinised. This requires the independence and capability of the INEDs. Whilst INEDs are required to declare their independence, it has been noted that the controlling shareholders and the management are able to cherry-pick the INEDs.[53] Meanwhile, while the capability of the INEDs is equally crucial in safeguarding the minority interests, it is simply a matter too costly to monitor. The author opines that, in addition to requiring greater independence and expertise of the INEDs, enhancing their oversight power and imposing greater sanction for non-compliance of Chapter 14A are cost-effective measures which the regulatory bodies should actively consider.

A. Requiring Greater Independence and Expertise of the INEDs

One of the key measures in protecting the minority shareholders is to ensure that all Family CTs – unless exempt from the announcement requirement – are exposed to the regulatory radar. This requires, among others, the independence and capability of the INEDs. As the Exchange commented in a Listing Enforcement Notice dated 5 July 2018, '[t]he issuer should recognise the importance of internal controls and that the INEDs are primarily responsible for implementing and ensuring that the internal control system works and remains effective.'[54] The independence

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53 Jimmy Chow, 'Connected transactions - the compliance challenge' (*CSj*, 11 January 2016) <csj.hkics.org.hk/site/2016/01/11/connected-transactions-the-compliance-challenge/> accessed July 2019.

54 HKEx, 'Listing Enforcement Notice (*HKExnews*, 5 July 2018)' <https://www2.HKExnews.hk/exchange-reports/listing-enforcement-notices-and-announcements/2018/180705?sc_lang=en> accessed July 2019.

and expertise of the INEDs are therefore crucial in ensuring that the INEDs can perform their role effectively.

1. THE CURRENT INDEPENDENCE AND QUALIFICATION REQUIREMENTS

According to the Listing Rules, a listed company must have at least three INEDs and one of them must have appropriate professional qualifications or accounting or related financial management expertise.[55] The INEDs must satisfy the Exchange that they have the independence to fulfil the role effectively.[56] They must also submit to the Exchange a written confirmation of their independence.[57]

2. THE ISSUE OF INDEPENDENCE

Currently, a listed company's nomination committee must be chaired by the chairman of the board of directors or an INED and comprise a majority of INEDs.[58] There is no regulatory restriction that controlling shareholders and other directors cannot vote on the election of INEDs. Against this background, it has been noted that companies with high ownership concentration could usually decide who the INEDs should be.[59]

Although the rather radical proposal that all INEDs should be elected by independent shareholders was rejected by the SCCLR in the Corporate Governance Review, [60] a halfway proposal should be actively reconsidered. For example, the OECD Guide on Fighting Abusive Related Party Transactions in Asia suggests that non-controlling shareholders be given votes to influence the nomination and election of INEDs and their

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55 LR 3.10
56 LR 3.12.
57 LR 3.13
58 Appendix 14 A.5.1 to the Listing Rules.
59 Chow (n 61).
60 Jones (n 44) [10.23].

remuneration policy.[61] This not only allows non-controlling shareholders to appoint their ideal INED candidates directly to the nomination committee, but it also enables them to consider a wider pool of candidates beyond those screened out by the executive directors (EDs). Whether those candidates would be elected is another matter to be resolved in the shareholders' meetings.

Dr Bryan Michael, a fellow at the University of Hong Kong, suggested that the Corporate Governance Code (the CG Code) should provide for a voting scheme which allows shareholders other than the top 10% shareholders to nominate at least one INED.[62] However, in some family companies, the controlling or substantial shareholders may still fall within the remaining 90% group. Additionally, the CG Code only sets out principles which listed issuers are expected, but not obliged, to comply with so long as they give considered reasons.[63] Therefore, the author proposes that the Listing Rules should require one INED to be elected by the minority shareholders only. This may strike a fairer balance between minority protection and ownership rights of the controlling shareholders, who can influence the election of at least the two other INEDs and all the EDs.

3. THE ISSUE OF EXPERTISE

Low argues that notwithstanding that the INEDs have fully complied with the listing requirements of independence, in reality, no candidate could have been nominated had he not been supported by the controlling shareholders.[64] He also points out that many studies suggest no correlation between the number of INEDs and the financial performance of the company. In other words, a higher degree of board independence does not mean better financial performance. As a result, the focus should

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61 OECD, 'Guide on fighting abusive related party transactions in Asia' (2009) 39.

62 Chow (n 61).

63 Appendix 14 to the Listing Rules, A14-1.

64 Chee Keong Low, 'Rethinking independent non-executive directors' (*CSj,* 5 November 2014) <csj.hkics.org.hk/site/2014/11/05/rethinking-independent-non-executive-directors/> accessed July 2019.

realistically shift from enhancing board independence towards expertise and diversity.[65]

As regards expertise, it has been commented that few NEDs have enough domain knowledge and such is not a problem unique to the financial institutions but it has been observed in other companies as well.[66] It has been suggested that directors should be required to have up-to-date expertise in relevant areas and be subject to greater personal liability for company failure.[67] From the corporate governance perspective, the former suggestion is difficult to be enforced and monitored, as the meaning of 'up-to-date expertise' may be subjective, and the Exchange may not have sufficient knowledge to determine whether a director has satisfied this requirement. Instead of ensuring that the INEDs are capable, increasing their oversight power and the personal liability of all directors may be more cost-effective measures.

B. Enhancing the INEDs' Oversight Power

The INEDs' views on any proposed connected transactions are not binding on the board. This is so even in cases where the proposed transactions are exempt from shareholders' approval. Such a mechanism largely restricts the INEDs' oversight power as regards the company's conduct of connected transactions. For the INEDs to perform their role effectively, their power should be enhanced accordingly.

The author suggests that INEDs' approval be mandatorily required for any proposed transactions which are connected with the other EDs and/or the NEDs, such as Family CTs. After all, directors of all listed issuers are required to act honestly and in good faith in the interests of the company, act for proper purpose, and be answerable to the company for the

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65 Jones (n 44) [9.29].

66 S Das, 'Get only the financial experts on board' *South China Morning Post* (Hong Kong, 29 May 2012) <www.scmp.com/article/1002339/get-only-financial-experts-board> accessed July 2019.

67 ibid.

application or misapplication of its assets.[68] Since the INEDs are obliged to make decisions in the best interests of the company, connected transactions favourable to the company *as a whole* would be approved. In other words, the suggested requirement would only fetter the board in entering into harmful connected transactions. Such an enhanced power of the INEDs should cover connected transactions that are subject to shareholders' approval as well, thereby offering greater protection to the minority shareholders.

C. Imposing Greater Sanctions for Non-compliance of Chapter 14A

Finally, given that the Listing Rules are not statutorily backed and hence cannot be enforced by any person or entity except the Exchange, it is worth examining whether the current sanctions for non-compliance of Chapter 14A are adequate. As shown in the following section, all the six incidences of Chapter 14A breaches during 2017-2019 resulted in public censure and/or criticisms only.

1. HISTORY OF ENFORCEMENT ACTIONS

Table 4 below lists out the enforcement notices relating to the breaches of Chapter 14A during 2017-2019.[69] All the sanctions imposed are public censure and/or criticisms. No disciplinary actions were taken by the Exchange during that period.

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68 LRs 3.08(a)-(c).

69 HKEx Listing Enforcement Notices dated 17 May 2019, 20 June 2018, 5 Jul 2018, 15 November 2017 and 28 February 2017 <https://www.HKEx.com.hk/Listing/Rules-and-Guidance/Disciplinary-and-Enforcement/Enforcement-Notices-and-Announcements/Listing-Enforcement-Notices-Announcements?sc_lang=en> accessed July 2019.

	Date	Listed company	Conduct	Sanction(s) against the director(s)
1	17 May 2019	Weiqiao Textile Company Limited	Company's failure to comply with the disclosure and shareholders' approval requirements for certain connected transactions	Public censure of the EDs
2	20 July 2018	SRE Group Limited	Company's failure to comply with the announcement, circular and shareholders' approval requirements for certain connected transactions.	Public censure of a former ED
3	5 July 2018	Chengdu PUTIAN Telecommunications Cable Company Limited	Company's failure to comply with the reporting, announcement, annual review and independent shareholders' approval requirements in the identified conducting continuing connected transactions.	Public censure of the directors, including INEDs, with criticisms of one ED
4	15 November 2017	Han Tang International Holdings Limited	Company's failure to comply with the disclosure and shareholders' approval requirements for two connected transactions, etc. The INEDs' failure to apply such degree of skill, care and diligence required and expected of them to disclose and ensure the approval of the connected transactions.	Public censure of all directors, with criticism of one INED and one NED
5	28 February 2017	Datang International Power Generation Co., Ltd.	Company's failure to comply with the reporting, announcement, circular and independent shareholders' approval requirements for certain connected transactions.	Public censure and criticisms of the former Eds and NEDs

Table 4. List of notices of enforcements against Chapter 14A breaches during 2017-2019.

2. STATUTORY BACKING OF CHAPTER 14A RULES IS UNNECESSARY, BUT THE IMPOSITION OF FINES SHOULD BE CONSIDERED MORE OFTEN

Since the Listing Rules are a set of contractual terms entered into between the Exchange and the listed issuers, they are only enforceable by the Exchange. In the Consultation Paper on Proposals to Enhance the Regulation of Listing dated 3 October 2003, the HKEx stated that the dual filing system was intended to strengthen the Hong Kong stock market's regulatory regime by 'giving certain fundamental listing requirements more 'teeth', without revamping the existing structure…' [70] The same was repeated in the HKEx's response to the HKSAR and the SFC in 2005, emphasising the role of the HKEx as the frontline regulator. But is it necessary to give Chapter 14A more teeth?

The SFC is a statutory body empowered to carry out investigations and bring criminal proceedings against market participants. While there is currently no specific statutory provisions empowering the SFC to regulate connected transactions, it can by virtue of Section 214 of Securities and Futures Ordinance (SFO)[71] petition to the court for remedies in cases where the business or affairs of the limited company have been conducted in a manner oppressive, unfairly prejudicial, involving fraud or resulting in some or all of its members not having been given all the information with respect to its business or affairs. Mark Steward, Executive Director of Enforcement of the SFC, pointed out that the SFC is already enforcing various rules under Chapter 14A through the increasing use of Section 214. [72] In this light, statutory backing of Chapter 14A is unnecessary.

However, public censure and criticisms appear to be rather lenient sanctions. As the HKEx itself stated, 'administration

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70 FSTB, 'Consultation Paper on Proposals to Enhance the Regulation of Listing' (3 October 2003) [11(d)] <www.fstb.gov.hk/fsb/ppr/consult/doc/erl-e.pdf> accessed July 2019.

71 Cap 571 of the Laws of Hong Kong.

72 Jones (n 44) [3.186].

and enforcement of notifiable and disclosable transactions are important to the Exchange's statutory function of operating a fair, orderly and informed market and its commercial interest in protecting its brand as a well-regulated market.' Given the adverse impacts of connected transactions on firm value as identified by researchers,[73] in cases where Family CTs failed to comply with the Chapter 14A requirements, minority shareholders may have been appropriated by such defective transactions and suffered losses as a result. In this regard, more severe sanctions such as the imposition of fines on the responsible parties should be imposed.

CONCLUSION

This study finds that not all Hong Kong listed family property companies proposed Family CTs during 2014-2018. Additionally, most assets obtained under the Family CTs remained in the hands of the family members. However, since this study relied solely on the disclosures made by the listed companies, it would have omitted undisclosed connected transactions which expropriated minority shareholders. As such, recommendations relating to the INEDs and sanctions for non-compliance of Chapter 14A of the Listing Rules have been made, in the hope that better measures in scrutinising connected transactions can be put in place to better protect the minority shareholders of the Hong Kong listed companies.

[73] Refer to the evidence found by Cheung and co-authors and the interpretation made by Michael and Goo mentioned in section A2 of Part 1 of this paper above.

Appendix 1. A list of the 500 largest listed companies on the Main Board of the SEHK in terms of market capitalisation as of 3 July 2019 (after trading hours)

Stock Code	Name	Market Cap (HK$)
4338	MICROSOFT-T	4,597.69B
700	TENCENT	3,425.63B
4335	INTEL-T	1,790.80B
4333	CISCO-T	1,712.29B
939	CCB	1,507.41B
941	CHINA MOBILE	1,451.71B
5	HSBC HOLDINGS	1,345.80B
1299	AIA	1,042.58B
2318	PING AN	720.18B
4332	AMGEN-T	609.93B
883	CNOOC	595.59B
1398	ICBC	481.70B
2378	PRU	452.36B
3690	MEITUAN-W	399.18B
16	SHK PPT	395.81B
11	HANG SENG BANK	372.80B
388	HKEX	350.25B
66	MTR CORPORATION	330.42B
2388	BOC HONG KONG	327.75B
267	CITIC	323.48B
688	CHINA OVERSEAS	323.20B
1928	SANDS CHINA LTD	313.34B
3	HK & CHINA GAS	302.95B
1	CKH HOLDINGS	299.24B
3333	EVERGRANDE	292.74B
945	MANULIFE-S	282.80B
3988	BANK OF CHINA	274.28B
762	CHINA UNICOM	261.30B
4336	APPL MATERIAL-T	260.23B
2007	COUNTRY GARDEN	256.89B
1109	CHINA RES LAND	247.08B
27	GALAXY ENT	241.07B
1810	XIAOMI-W	239.19B

2888	STANCHART	233.06B
1113	CK ASSET	228.25B
2	CLP HOLDINGS	222.95B
12	HENDERSON LAND	213.02B
3328	BANKCOMM	209.37B
1972	SWIREPROPERTIES	185.15B
960	LONGFOR GROUP	181.13B
3968	CM BANK	177.20B
6862	HAIDILAO	175.96B
1038	CKI HOLDINGS	169.37B
1918	SUNAC	169.06B
1997	WHARF REIC	166.99B
384	CHINA GAS HOLD	164.64B
2313	SHENZHOU INTL	163.85B
2020	ANTA SPORTS	149.37B
2628	CHINA LIFE	148.22B
3692	HANSOH PHARMA	138.93B
386	SINOPEC CORP	133.69B
17	NEW WORLD DEV	129.21B
2319	MENGNIU DAIRY	124.99B
6	POWER ASSETS	122.72B
291	CHINA RES BEER	121.00B
288	WH GROUP	117.68B
20	WHEELOCK	116.46B
175	GEELY AUTO	115.54B
669	TECHTRONIC IND	112.60B
1177	SINO BIOPHARM	110.77B
270	GUANGDONG INV	104.21B
788	CHINA TOWER	100.32B
1288	ABC	99.90B
1128	WYNN MACAU	96.76B
6823	HKT-SS	94.79B
1658	PSBC	93.32B
2269	WUXI BIO	92.44B
83	SINO LAND	92.02B
2688	ENN ENERGY	91.63B
1193	CHINA RES GAS	91.62B
2382	SUNNY OPTICAL	91.31B

656	FOSUN INTL	89.70B
857	PETROCHINA	89.67B
19	SWIRE PACIFIC A	89.38B
241	ALI HEALTH	87.13B
101	HANG LUNG PPT	86.35B
2601	CPIC	85.75B
1929	CHOW TAI FOOK	84.00B
813	SHIMAO PROPERTY	80.39B
1093	CSPC PHARMA	80.19B
708	EVERG HEALTH	79.40B
151	WANT WANT CHINA	79.13B
966	CHINA TAIPING	77.27B
322	TINGYI	76.47B
992	LENOVO GROUP	74.37B
3380	LOGAN PPT	71.81B
6808	SUNART RETAIL	71.16B
2638	HKELECTRIC-SS	71.13B
3799	DALI FOODS	71.07B
4337	STARBUCKS-T	70.24B
1044	HENGAN INT'L	68.10B
998	CITIC BANK	66.07B
1913	PRADA	65.12B
23	BANK OF E ASIA	65.03B
914	CONCH CEMENT	64.52B
4	WHARF HOLDINGS	64.29B
659	NWS HOLDINGS	63.36B
1169	HAIER ELEC	60.97B
6160	BEIGENE-B	59.88B
2328	PICC P&C	58.91B
817	CHINA JINMAO	57.58B
1088	CHINA SHENHUA	56.00B
3320	CHINARES PHARMA	55.49B
2018	AAC TECH	54.74B
836	CHINA RES POWER	54.74B
135	KUNLUN ENERGY	54.48B
1313	CHINARES CEMENT	53.76B
728	CHINA TELECOM	53.70B
880	SJM HOLDINGS	53.12B

2282	MGM CHINA	53.12B
392	BEIJING ENT	51.23B
586	CONCH VENTURE	50.53B
2202	CHINA VANKE	49.46B
486	RUSAL	49.37B
683	KERRY PPT	49.22B
1378	CHINAHONGQIAO	49.19B
247	TST PROPERTIES	49.06B
881	ZHONGSHENG HLDG	48.38B
371	BJ ENT WATER	47.85B
6098	CG SERVICES	47.71B
257	CHINA EB INT'L	46.56B
293	CATHAY PAC AIR	46.10B
2588	BOC AVIATION	46.01B
1579	YIHAI INTL	45.95B
6818	CEB BANK	45.38B
1988	MINSHENG BANK	45.26B
144	CHINA MER PORT	44.88B
1114	BRILLIANCE CHI	44.75B
87	SWIRE PACIFIC B	44.54B
1060	ALI PICTURES	44.47B
1211	BYD COMPANY	43.73B
3383	AGILE GROUP	43.47B
884	CIFI HOLD GP	43.34B
14	HYSAN DEV	43.22B
3918	NAGACORP	43.06B
981	SMIC	42.73B
2331	LI NING	42.44B
3311	CHINA STATE CON	41.15B
53	GUOCO GROUP	39.97B
1336	NCI	39.65B
1030	FUTURE LAND	39.58B
345	VITASOY INT'L	39.56B
772	CHINA LIT	39.40B
220	U-PRESID CHINA	39.30B
467	UNITEDENERGY GP	39.14B
753	AIR CHINA	37.55B
551	YUE YUEN IND	36.75B

3808	SINOTRUK	36.72B
1548	GENSCRIPT BIO	36.26B
69	SHANGRI-LA ASIA	35.99B
1530	3SBIO	35.74B
6030	CITIC SEC	35.40B
8	PCCW	34.89B
868	XINYI GLASS	34.46B
2799	CHINA HUARONG	34.31B
1833	PA GOODDOCTOR	33.83B
152	SHENZHEN INT'L	33.62B
780	TONGCHENG-ELONG	32.93B
522	ASM PACIFIC	32.89B
2689	ND PAPER	32.79B
1099	SINOPHARM	32.38B
168	TSINGTAO BREW	32.03B
1066	WEIGAO GROUP	32.01B
3360	FE HORIZON	31.37B
3883	CHINA AOYUAN	31.20B
1801	INNOVENT BIO-B	31.11B
1800	CHINA COMM CONS	30.63B
10	HANG LUNG GROUP	30.22B
968	XINYI SOLAR	30.13B
1233	TIMES CHINA	29.90B
1112	H&H INTL HLDG	29.80B
1076	IMPERIAL PAC	29.31B
200	MELCO INT'L DEV	29.30B
123	YUEXIU PROPERTY	29.10B
Suspended1619	TIANHE CHEM	29.01B
3323	CNBM	28.78B
2357	AVICHINA	28.66B
6837	HAITONG SEC	28.64B
Suspended612	CHINA DYF	28.54B
1766	CRRC	28.45B
316	OOIL	27.66B
1339	PICC GROUP	27.05B
1813	KWG GROUP	26.97B
3908	CICC	26.71B
268	KINGDEE INT'L	26.41B

1717	AUSNUTRIA	26.40B
3998	BOSIDENG	26.10B
2238	GAC GROUP	26.09B
3377	SINO-OCEAN GP	25.81B
1910	SAMSONITE	25.52B
425	MINTH GROUP	25.45B
285	BYD ELECTRONIC	25.37B
1882	HAITIAN INT'L	25.21B
667	CHINA EAST EDU	25.05B
2338	WEICHAI POWER	25.02B
604	SHENZHEN INVEST	24.98B
1816	CGN POWER	24.67B
636	KERRY LOG NET	24.66B
390	CHINA RAILWAY	24.65B
1316	NEXTEER	24.64B
Suspended416	BANKOFJINZHOU	24.62B
1359	CHINA CINDA	24.42B
839	CHINA EDU GROUP	24.12B
3990	MIDEA REAL EST	23.98B
2314	LEE & MAN PAPER	23.91B
1199	COSCO SHIP PORT	23.75B
973	L'OCCITANE	23.66B
41	GREAT EAGLE H	23.57B
6288	FAST RETAIL-DRS	23.50B
148	KINGBOARD HLDG	23.39B
3888	KINGSOFT	23.39B
6886	HTSC	23.37B
3396	LEGENDHOLDING	23.14B
3898	CRRC TIMES ELEC	22.54B
670	CHINA EAST AIR	22.41B
1638	KAISA GROUP	22.36B
902	HUANENG POWER	22.27B
3668	YANCOAL AUS	22.20B
1951	JXR	22.14B
1031	KINGSTON FIN	22.05B
1888	KB LAMINATES	21.81B
6088	FIT HON TENG	21.60B
1333	CHINA ZHONGWANG	21.57B

2005	SSY GROUP	21.48B
1308	SITC	21.31B
6158	ZHENRO PPT	21.27B
1208	MMG	21.25B
1055	CHINA SOUTH AIR	20.89B
743	ASIA CEMENT CH	20.68B
1252	CHINA TIANRUI	20.42B
3633	ZHONGYU GAS	20.30B
165	CHINA EB LTD	20.08B
2128	CHINA LESSO	19.97B
2380	CHINA POWER	19.71B
2356	DAHSING BANKING	19.62B
1186	CHINA RAIL CONS	19.51B
570	TRAD CHI MED	19.33B
2611	GTJA	19.29B
489	DONGFENG GROUP	19.19B
2186	LUYE PHARMA	19.15B
2016	CZBANK	19.08B
1347	HUA HONG SEMI	18.97B
1628	YUZHOU PPT	18.96B
363	SHANGHAI IND H	18.96B
1310	HKBN	18.88B
754	HOPSON DEV HOLD	18.82B
2333	GREATWALL MOTOR	18.69B
867	CMS	18.62B
493	GOME RETAIL	18.53B
303	VTECH HOLDINGS	18.07B
2899	ZIJIN MINING	18.01B
1238	POWERLONG	17.58B
3301	RONSHINECHINA	17.57B
2869	GREENTOWN SER	17.49B
916	CHINA LONGYUAN	17.30B
1083	TOWNGAS CHINA	17.28B
763	ZTE	17.26B
1212	LIFESTYLE INT'L	17.21B
6881	CGS	16.97B
460	SIHUAN PHARM	16.94B
45	HK&S HOTELS	16.90B

43	C.P. POKPHAND	16.85B
1966	CHINA SCE GROUP	16.58B
581	CHINA ORIENTAL	16.45B
2777	R&F PROPERTIES	16.36B
530	GOLDIN FIN HOLD	16.28B
1686	SUNEVISION	15.86B
2039	CIMC	15.84B
3331	VINDA INT'L	15.82B
179	JOHNSON ELEC H	15.77B
696	TRAVELSKY TECH	15.66B
1776	GF SEC	15.65B
3868	XINYI ENERGY	15.64B
1992	FOSUN TOURISM	15.47B
512	CHINAGRANDPHARM	15.43B
1448	FU SHOU YUAN	15.41B
1243	WANG ON PPT	15.35B
3308	GOLDEN EAGLE	15.33B
Suspended933	BRIGHTOIL	15.26B
691	SHANSHUI CEMENT	15.23B
272	SHUI ON LAND	15.07B
535	GEMDALE PPT	14.93B
665	HAITONG INT'L	14.71B
2048	E-HOUSE ENT	14.68B
410	SOHO CHINA	14.55B
552	CHINACOMSERVICE	14.34B
173	K. WAH INT'L	14.34B
142	FIRST PACIFIC	14.33B
1337	RAZER	14.33B
1171	YANZHOU COAL	14.32B
590	LUK FOOK HOLD	14.23B
2607	SH PHARMA	14.09B
358	JIANGXI COPPER	14.09B
1896	MAOYAN ENT	13.85B
1999	MAN WAH HLDGS	13.84B
207	JOY CITY PPT	13.80B
2883	CHINA OILFIELD	13.78B
341	CAFE DE CORAL H	13.70B
2669	CHINA OVS PPT	13.67B

177	JIANGSU EXPRESS	13.56B
95	LVGEM CHINA	13.52B
127	CHINESE EST H	13.50B
376	YUNFENG FIN	13.50B
136	HENGTEN NET	13.43B
1111	CHONG HING BANK	13.40B
2196	FOSUN PHARMA	13.30B
3669	YONGDA AUTO	13.14B
1387	CHINA DILI	13.14B
1958	BAIC MOTOR	13.13B
606	CHINA AGRI	13.09B
699	CAR INC	13.05B
1898	CHINA COAL	13.01B
694	BEIJING AIRPORT	13.00B
3900	GREENTOWN CHINA	12.89B
34	KOWLOON DEV	12.87B
1098	ROAD KING INFRA	12.84B
737	BAY AREA DEV	12.81B
520	XIABUXIABU	12.69B
80737	BAY AREA DEV-R	12.67B*
1383	SUNCITY GROUP	12.66B
3606	FUYAO GLASS	12.61B
3899	CIMC ENRIC	12.58B
81	CH OVS G OCEANS	12.28B
1622	REDCO GROUP	12.28B
2616	CSTONE PHARMA-B	12.16B
2359	WUXI APPTEC	12.10B
3866	BQD	12.02B
1269	FIRST CAP GP	12.01B
3969	CHINA CRSC	12.00B
576	ZHEJIANGEXPRESS	11.98B
Suspended1228	SUPERB SUMMIT	11.95B
71	MIRAMAR HOTEL	11.92B
1368	XTEP INT'L	11.89B
1883	CITIC TELECOM	11.86B
991	DATANG POWER	11.85B
440	DAH SING	11.69B
6169	YUHUA EDU	11.62B

2858	YIXIN	11.59B
56	ALLIED PPT (HK)	11.58B
855	CHINA WATER	11.53B
6055	CTIHK	11.52B
Suspended846	MINGFA GROUP	11.51B
3613	TONGRENTANGCM	11.46B
1257	CEB GREENTECH	11.42B
958	HN RENEWABLES	11.32B
2666	UNI MEDICAL	10.89B
2013	WEIMOB INC	10.84B
1907	CHINA RISUN GP	10.83B
119	POLY PROPERTY	10.80B
336	HUABAO INTL	10.78B
546	FUFENG GROUP	10.75B
3698	HUISHANG BANK	10.67B
338	SHANGHAI PECHEM	10.65B
1052	YUEXIUTRANSPORT	10.60B
3618	CQRC BANK	10.60B
1458	ZHOU HEI YA	10.60B
1660	ZHAOBANGJI PPT	10.54B
1636	CMRU	10.53B
799	IGG	10.52B
6100	TALENT LIEPIN	10.52B
1788	GUOTAI JUNAN I	10.49B
832	CENTRAL CHINA	10.48B
2600	CHALCO	10.41B
777	NETDRAGON	10.36B
1905	HAITONG UT	10.31B
Suspended940	C ANIMAL HEALTH	10.22B
354	CHINASOFT INT'L	10.20B
62	TRANSPORT INT'L	10.18B
1610	COFCO MEAT	10.14B
51	HARBOUR CENTRE	10.13B
3813	POU SHENG INT'L	10.12B
494	LI & FUNG	10.12B
680	NAN HAI CORP	10.09B
1836	STELLA HOLDINGS	10.08B
1141	CMBC CAPITAL	10.06B

853	MICROPORT	10.03B
6060	ZA ONLINE	10.03B
2232	CRYSTAL INTL	10.01B
189	DONGYUE GROUP	9.98B
59	SKYFAME REALTY	9.67B
631	SANY INT'L	9.60B
1317	MAPLELEAF EDU	9.58B
1668	CHINASOUTHCITY	9.57B
1357	MEITU	9.56B
242	SHUN TAK HOLD	9.49B
806	VALUE PARTNERS	9.46B
1381	CANVEST ENV	9.42B
3993	CMOC	9.40B
639	SHOUGANG RES	9.33B
1558	HEC PHARM	9.31B
1589	CNLP	9.31B
2386	SINOPEC SEG	9.30B
1600	TIAN LUN GAS	9.30B
1565	VIRSCEND EDU	9.20B
1508	CHINA RE	9.15B
6099	CMSC	9.12B
1911	CR HOLDINGS	9.10B
2768	JIAYUAN INTL	9.09B
506	CHINA FOODS	9.09B
1818	ZHAOJIN MINING	9.07B
2299	BILLION IND	9.06B
2019	DEXIN CHINA	9.04B
1070	TCL ELECTRONICS	8.97B
1282	GLORY SUN FIN	8.90B
6139	JINMAO HOTEL-SS	8.90B
215	HUTCHTEL HK	8.86B
308	CHINA TRAVEL HK	8.83B
35	FE CONSORT INTL	8.79B
1382	PACIFICTEXTILES	8.79B
3339	LONKING	8.77B
1996	RSUN PPT	8.76B
2066	SHENGJINGBANK	8.75B
3800	GCL-POLY ENERGY	8.63B

1234	CHINA LILANG	8.62B
3996	CH ENERGY ENG	8.52B
678	GENTING HK	8.48B
1568	SUNDART HLDGS	8.48B
2362	JINCHUAN INTL	8.44B
315	SMARTONE TELE	8.40B
6068	WISDOM EDU INTL	8.33B
934	SINOPEC KANTONS	8.32B
6889	DYNAM JAPAN	8.27B
2727	SH ELECTRIC	8.26B
1797	KOOLEARN	8.23B
1176	ZHUGUANG HOLD	8.20B
105	ASSO INT HOTELS	8.19B
1777	FANTASIA	8.18B
496	KASEN	8.14B
337	GREENLAND HK	8.12B
1919	COSCO SHIP HOLD	8.07B
1573	SOUTHERN ENERGY	8.05B
1551	GRCB	8.00B
Suspended246	REALGOLD MINING	8.00B
1908	C&D INTL GROUP	7.99B
874	BAIYUNSHAN PH	7.90B
120	COSMOPOL INT'L	7.90B
2678	TEXHONG TEXTILE	7.84B
1578	BANK OF TIANJIN	7.79B
1728	ZHENGTONGAUTO	7.77B
658	C TRANSMISSION	7.76B
1787	SD GOLD	7.73B
116	CHOW SANG SANG	7.72B
1515	CR MEDICAL	7.71B
412	CHINA SDHS FIN	7.70B
256	CITYCHAMP	7.61B
861	DC HOLDINGS	7.60B
373	ALLIED GROUP	7.58B
2233	WESTCHINACEMENT	7.55B
697	SHOUGANG INT'L	7.54B
163	EMPEROR INT'L	7.53B
3306	JNBY	7.52B

1765	HOPE EDU	7.46B
8083	CHINA YOUZAN	7.42B
2199	REGINA MIRACLE	7.41B
563	SH IND URBAN	7.40B
1778	COLOUR LIFE	7.38B
2552	HUA MEDICINE-B	7.38B
1963	BCQ	7.37B
369	WING TAI PPT	7.37B
819	TIANNENG POWER	7.35B
289	WING ON CO	7.32B
1478	Q TECH	7.31B
86	SUN HUNG KAI CO	7.31B
1773	TIANLI EDU	7.30B
178	SA SA INT'L	7.24B
1250	BE CLEAN ENERGY	7.24B
2038	FIH	7.22B
6066	CSC	7.18B
1117	CH MODERN D	7.17B
1890	CHINA KEPEI	7.08B
548	SHENZHENEXPRESS	7.07B
3933	UNITED LAB	7.05B
488	LAI SUN DEV	7.04B
1521	FRONTAGE	7.04B
1608	VPOWER GROUP	7.04B
1224	C C LAND	7.02B
Suspended67	LUMENA NEWMAT	7.00B
1286	IMPRO PRECISION	6.96B
8137	HONBRIDGE	6.89B
2343	PACIFIC BASIN	6.89B
1680	MACAU LEGEND	6.85B
1293	GRAND BAOXIN	6.83B
2208	GOLDWIND	6.82B
1131	AGRITRADE RES	6.75B
1216	ZYBANK	6.75B
251	SEA HOLDINGS	6.75B
1916	JIANGXI BANK	6.74B
650	IDG ENERGY INV	6.72B
1585	YADEA	6.72B

8469	SHENGYE CAPITAL	6.71B
1672	ASCLETIS-B	6.70B
715	CHINA OCEANWIDE	6.69B
1970	IMAX CHINA	6.68B
1157	ZOOMLION	6.66B
1761	BABYTREE GROUP	6.65B
6806	SWHY	6.58B
751	SKYWORTHDIGITAL	6.58B
3709	EEKA FASHION	6.56B
2329	GUORUI PPT	6.53B
1196	REALORD GROUP	6.52B

Source: https://www.hkex.com.hk/Market-Data/Securities-Prices/Equities?sc_lang=en

DEREGULATION OF DRUG PRICES: THE DIRECTION FOR REGULATORY EVOLUTION IN CHINA? — COMPARATIVE RESEARCH ON MAINLAND CHINA AND THE UNITED STATES

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The current drug price level and the endless 'regulation-circumvention' loop have cast doubt on the justification and utility of pharmaceutical price regulation in Mainland China. Deregulation has thus been considered as an alternative. Yet the deregulated drug pricing regime of America has witnessed exploitations of patent law and violations of antitrust law leading to rising drug price level. The experience of both countries has indicated the mutual reinforcement of the self-interest and the exploitative practices of the pricing participants. Deregulation is not the solution to misregulation. China should adopt the conduct-based approach in drug price regulation rather than embracing deregulation.

INTRODUCTION

Drug price has long been the subject of heated debates in China for its significant implication on public health and pharmaceutical innovation. Excessive criticisms and complaints have been made on the soaring drug prices. The authorities of Mainland China, with a rich tradition of imposing state intervention, have been maintaining the stability and affordability of drug prices by regulation. Drug price control has been absorbed into the legal framework ever since the promulgation of the Price Law[1] and the

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1 The Price Law of the People's Republic of China (The Price Law), art 2.

Drug Administration Law.[2] In addition, the authorities also issued a gross number of pharmaceutical policies and administrative regulations, a type of secondary legislation, for price control such as placing price caps and setting up mark-up rates under the Price Law. Nevertheless, the expenditure of medicine still accounts for a considerable portion of the therapeutic cost, according to recent statistics.[3]

Ever-surging drug prices has drawn large scepticism on the utility of regulation. As such, economic liberalists are tempted to blame the regulation per se for the cause of increasing price levels. Consequently, deregulation has been called on to address this problem.[4] The United States, where the pharmaceutical pricing regime has been market-dominated,[5] seems to be an idealistic model for China's regulatory evolution.

How does the American model work? Is the drug price level in America lowered as a result of deregulation? What can China learn in light of its own circumstances? This article tries to answer these questions from a comparative law perspective. The first part illustrates the regulatory framework of pharmaceutical pricing in Mainland China. The second part then reflects on the deregulated drug pricing regime in the United States and points out its legal implications. The third part starts with a clear-cut rejection of drug price deregulation in Mainland China and offers a detailed analysis thereafter. Lastly, two prospects are presented as regards the future drug pricing regime in Mainland China.

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2 The Drug Administration Law of the People's Republic of China (The Drug Administration Law), ch 7.

3 Qiuhong Shen and Hongyan Liu, 'The Decrease of Pharmaceutical Price and The Protection of Health Rights' (2019) 1 Human Rights 95.

4 Hengpeng Zhu, 'Internality of Regulation: A Perspective from Pharmaceutical Price Regulation' (2011) 7 The Journal of World Economy 64.

5 Wei Shen, 'Regulatory Policies on Pharmaceutical Prices in Major Countries and Its Lessons to China' (2017) 3 Budget Management & Accounting 57, 61.

I. THE REGULATORY FRAMEWORK FOR PHARMACEUTICAL PRICING IN MAINLAND CHINA

A. The Price Law and The Drug Administration Law: The Regulatory Benchmark

Since 1978, China has been experiencing a transition from the command economy to the market economy. The regulatory framework had a corresponding change as well, that the law rather than administrative orders has gradually become the authority for the alternation of drug prices. The promulgation of the Price Law and the Drug Administration Law laid down the basic legal framework for drug price regulation. Goods can be subject to three categories of price-setting under the Price Law, including the government-set price which would be fixed unless altered by the central pricing authority, the government-guided price varying within a limited scope based on government-set prices and the market price.[6] Subject to the approval of the State Council, the central pricing authority shall issue pricing catalogues, categorising goods into the government-guided price section and the government-set price section. [7] The provincial pricing authorities may only issue the local pricing catalogues within the scope of the central pricing catalogue after the dual review by the provincial government and the central pricing authority. [8] Behaviours including but not limited to price discrimination, price fraud and pricing collusion are strictly proscribed and shall be subject to liabilities such as fine and the confiscation of licenses.[9] Meanwhile, the Drug Administration Law focuses on the general behavioural disciplines of drug pricing participants. The central pricing authority shall maintain price stability by monitoring drug prices and punishing unlawful acts,[10] while the manufacturers are obligated to report the prices and quantities of purchase and sale to the pricing departments.[11] The manufacturers, distributors and medical institutions shall set the price under the principles of

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6 The Price Law of the People's Republic of China (Price Law), art 3.
7 ibid, art 19.
8 ibid.
9 ibid, arts 14 and 40.
10 The Drug Administration Law of the People's Republic of China, art 84.
11 ibid, art 86.

fairness, rationality, good faith and the commensuration of price with quality.[12] Any illegitimate benefit rendered from the manufacturers to the hospital staff is not allowed.[13] Depending on the circumstances, the punishment may include fines, revocation of permits for production and operation, and disqualification for pharmaceutical practice for those who bribe government officials.[14] Overall, the Price Law particularly places the price per se under the regulatory regime while both laws regard pricing participants as the variables in the equation of pharmaceutical prices.

B. The Regulatory Reform: Does it work?

Pharmaceutical price regulation used to be in a muddle in Mainland. A turn from state control[15] to a large extent of market self-governance[16] was witnessed. A number of administrative orders were issued in the period of re-regulation with a view to striking the balance between the polarisation of state control and market autonomy.[17] The promulgation of the Price Law is not specifically intended for the pharmaceutical pricing regime given its generality. In 2009, the Central Government initiated a medical reform, issuing multiple administrative regulations involving pharmaceutical price control under the Price Law and the Drug Administration Law, which eventually led to the establishment of the following mechanism, along with previously established premises.[18] (Chart 1)

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12 ibid, art 85.
13 ibid, art 88.
14 ibid, art 141.
15 Sabirina Luk, 'The Politics of Drug Price Control Policy in China: Regulation, Deregulation and Re-regulation' (2015) 4 Journal of Contemporary East Asia Studies 41, 46. See also Yue Li, 'Legal Supervision of Drug Prices since the Founding of China for 70 years: Historical Achievement, Current Situation and Future Direction' (2019) 7 Chinese Health Economics 5.
16 Li (n 15) 6.
17 ibid.
18 ibid.

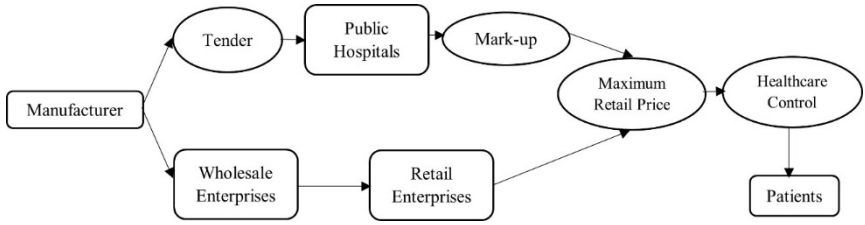

Chart 1: The Process of Distribution in the 2009 Medical Reform[19]

Most medicines were and are still being distributed through public hospitals.[20] In the first path of distribution, public hospitals shall purchase drugs through the tender organised by provincial health departments under the principle of 'Quality Prioritization, Reasonable Prices',[21] meaning that the accepted drug prices must be reasonable, on the basis that the quality shall be of supreme concern in the tender decisions. Afterwards, public hospitals may alter the drug prices, some of which would be subject to the maximum retail price control, at a rate within the regulatory limit.[22] Approximately 2000 types of medicines are within the categories of the government-set price and the government-guided price in this period.[23] In the end, the National Healthcare Programme would subsidise those drugs within its coverage on prescription.[24] In the second path, the medicine would

19 ibid.

20 ibid 7. See also Zhu (n 4) 66.

21 'Opinions for the Implementation on Establishing National Essential Medicine System' (*The State Council of the People's Republic of China*, 22 July 2010) <www.gov.cn/ztzl/ygzt/content_1661112.htm> accessed 10 October 2019.

22 'Announcement on Restoring the Order of Pricing Regarding Drugs and The Market of Medical Services' (*The State Council of the People's Republic of China*, 2 June 2006) <www.gov.cn/zwgk/2006-06/02/content_298610.htm> accessed 10 October 2019.

23 'Drug Price Catalogues by National Development and Reform Commission' (*National Development and Reform Commission of the People's Republic of China*, 2010) <www.ndrc.gov.cn/xxgk/zcfb/tz/201003/W020190905514261288600.xls> accessed 10 October 2019 (National Development and Reform Commission).

24 'Healthcare Security Policy Q&A' (*National Healthcare Security Administration of the People's Republic of China*, December 2019) <www.nhsa.gov.cn/module/download/downfile.jsp?classid=0&filename=fbe38345d503414684836f765430a763.pdf> accessed 12 January 2020 (National Healthcare

follow a marketised route in which drugs flow from manufacturers to wholesale enterprises, then to retail enterprises, and eventually to consumers.

The framework gradually underwent mutation as opposed to its initial purpose. Public hospitals were previously empowered to conduct drug procurement through tenders,[25] which induced alleged collusions between manufacturers and public hospitals.[26] But under the 2009 framework, the tenderer would merely have to target several government officials of the health department, who were in charge of the tender, rather than numerous hospital staff for the imposition of undue influence on the tendering process. The sense of social responsibility has largely diminished in the pursuit for profit.[27] For instance, a hospital in Henan Province was sanctioned for exceeding the mark-up rate in the drug sale.[28] But most of the violations tended not to be readily detectable, as the central pricing authority described.[29] Several approaches have been adopted to implement circumvention. The 'problem' of the maximum retail price was handled by the doctors with ease. Indeed, they only have rather limited control over the unit price due to the confinement of the mark-up rate. But no statutory limit has been set on the quantities. It is within a doctor's sole discretion regarding what prescriptions to make and how much dosage to prescribe. Hence, the problem of over-prescription emerged, that doctors would increase the dosage in the treatment to maintain the level of pharmaceutical expenditure, as if the unit price had not been changed.[30] As a

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Security Administration).

25 Zhu (n 4) 74.

26 ibid 71.

27 'Fixing the Public Hospital System in China' (*World Bank*, June 2010) <documents.worldbank.org/curated/en/947791468242107797/pdf/584110NWP0V20P10No21Hospital0Reform.pdf > accessed 15 October 2019.

28 'National Development and Reform Commission Announced Eight Typical Cases of Illegal Pricing in the Pharmaceutical Industry' (*The State Council of the People's Republic of China*, 25 August 2006) <www.gov.cn/govweb/gzdt/2006-08/25/content_369793.htm> accessed 12 April 2020.

29 'NDRC: Drug and medical service price violations tend to be hidden' (*China Consumers Association*, 4 April 2006) <www.cca.org.cn/zxsd/detail/3382.html> accessed 12 April 2020 (China Consumers Association).

30 Qingyue Meng, Gang Cheng and Xiaojie Sun, 'Research on the Impact of Drug Price Policy on the Control of Pharmaceutical Expenditure' [2004] Chinese Health Economics Magazine 50, 51.

reporter revealed from 100 criminal cases on bribery, even where the drug was legitimately purchased through tender by the hospital, the pharmaceutical enterprises offered doctors kick-backs for extra prescriptions on a particular type of drug.[31] Besides, the adoption of selective prescription, for the purpose of circumvention, also undermined the regulatory function of price control. The measures such as mark-up rate and maximum retail price could limit drug prices to a certain extent, but it could not compel doctors' prescription of certain types of drugs. In practice, the doctors were observed to prescribe the expensive drugs which usually included the imported drugs and the brand-name drugs of the same therapeutic function as the cheaper ones, for instance, in the treatment of the cold.[32] The basic principle of mark-up is that the post mark-up prices would be higher because of the higher base prices, the application of which led to the increasing prescription of costly drugs. In this way, the rising income from drug sale was cunningly legitimised under the regulatory measures of price control. Conversely, there was not as much for doctors to gain from the prescription of cheaper ones. Meanwhile, public hospitals transformed their strategy to reap profits from the patients through medical examinations, including utilising unnecessarily advanced equipment for routine inspections.[33] In short, the price-based regulation of this period was inherently flawed, as proved by the effortless exploitative practices such as over-prescription and selective prescription in the treatment.

The outcome of the 2009 medical reform has been considered less than satisfactory. In 2015, another round of reform specifically targeting drug prices was initiated by the National Development and Reform Commission.[34] Certain approaches were modified or removed from the previous regulatory framework. Public hospitals are no longer authorised to conduct

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31 Jun Tan, 'The Revelation from 100 Verdicts: Doctors Received 25% of Rebate from Drugs on Average' (*Morning Herald*, 21 May 2015) <www.xxcb.cn/depth/shendu/2015-05-21/8987504.html> accessed 15 April 2020.

32 Zhu (n 4) 83.

33 China Consumers Association (n 29).

34 'Opinions on Promoting Drug Prices Reform' (*National Development and Reform Commission of the People's Republic of China*, 5 May 2015) <www.ndrc.gov.cn/xxgk/zcfb/tz/201505/W020190905507443999584.pdf> accessed 10 October 2019 (National Development and Reform Commission).

drug tenders in which prices are ascertained. Rather, they are now organised and operated by the provincial institutions of drug procurement.[35] Afterwards, public hospitals would purchase the medicines at the tender prices. However, the application of drug tender only extends to the 'essential drugs and generic drugs produced by a large number of companies with large clinical usage and high purchase amount.' [36] As for the other types of pharmaceuticals, including 'the patented medicines and exclusively produced medicines', 'the clinically necessary medicines in small quantities, and are in short supply on the market', 'the narcotic drugs, psychotropic drugs' and 'the free medicines for the prevention and treatment of infectious diseases and parasitic diseases', they would enter the public hospitals via direct purchase, negotiation, and bidding.[37] Notably, a further reform was implemented four years after the issuance of the previous policy. Under the 2019 policy, several state departments organised a group procurement alliance which would be composed of the representatives from the public medical institutions in multiple regions,[38] on the basis that 'the low level of procurement and scattered usage leads to insufficient bargaining power and the differences in regional policies affect the formation of a unified market and weaken the market competition mechanism.' [39] Public hospitals are also now barred from imposing mark-up rates on medicines.[40] Maximum retail prices have been cancelled on most drugs, except for narcotic drugs and the drugs of category I in the Catalogue of Psychotropic Drugs[41]

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35 'Guiding Opinions of the General Office of the State Council on Improving the Centralized Procurement of Medicines in Public Hospitals' (*The State Council of the People's Republic of China*, 28 February 2015) <www.gov.cn/zhengce/content/2015-02/28/content_9502.htm> accessed 22 July 2020.

36 ibid.

37 ibid.

38 'Announcement of the General Office of the State Council on Issuing the Pilot Program for the Centralized Procurement and Use of Drugs Organized by the State' (*The State Council of the People's Republic of China*, 17 January 2019) <www.gov.cn/zhengce/content/2019-01/17/content_5358604.htm> accessed 22 July 2020.

39 Quan Zhang, 'Reducing the drug costs burden - the person in charge of the National Healthcare Security Administration answered the reporters' questions on the pilot program of centralized drug procurement and use organized by the state' (*National Healthcare Security Administration of the People's Republic of China,* 18 January 2019) <www.nhsa.gov.cn/art/2019/1/18/art_21_861.html> accessed 22 July 2020.

40 Li (n 15) 6.

41 National Development and Reform Commission (n 34). See also

which alters the mental state of humans by affecting the nervous system. They can only be acquired by patients through the physicians specifically qualified for the prescription of such drugs, under the strict Regulation on the Control of Narcotic Drugs and Psychotropic Drugs.[42] (Chart 2)

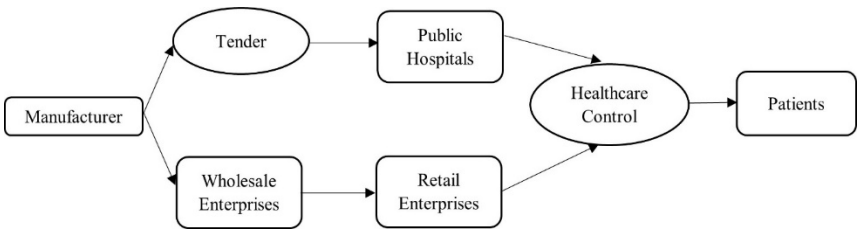

Chart 2: The Process of Distribution after the 2015 Drug Price Reform[43]

The current framework is not without challenges. To begin with, the pursuit for profit can be hard to modify, in that public hospitals and manufacturers have already enjoyed enormous benefits from drug price mark-up and prescription for years under the previous framework, where their pricing power was largely extended. Their urging desire for reaping excessive profit from drug sale through the exploitation of regulatory loopholes has been fostered and intensified through years of action as well as repetition. The transformation of the psychological and behavioural pattern as such cannot possibly be anticipated to happen overnight. Notwithstanding the removal of the mark-up rate, 30% of medicines have experienced a price increase since 2015.[44] Insufficient competition and vertical monopoly have been attributed as the cause by the National Healthcare Security

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'Catalogue of Psychotropic Drugs' (*National Medical Products Administration of the People's Republic of China*, 11 November 2013) <www.nmpa.gov.cn/directory/web/nmpa/images/yrPSqbzg0qm7r7zgobIyMDEzobMyMzC6xSC4vbz+LmRvYw==.doc> accessed 26 October 2019.

42 Regulation on the Control of Narcotic Drugs and Psychotropic Drugs, art 38.

43 Li (n 15) 7.

44 Danping Hu, 'How to ensure supply and keep the price stable as 30% of drugs experience a price increase? National Health Care Administration responded to multiple motions' (*The Paper*, 5 December 2019) <www.thepaper.cn/newsDetail_forward_5150031> accessed 11 October 2019.

Administration.[45] Besides, profits may be made elsewhere. It has been reported that the fees of medical services have risen by between 20% and 200% in multiple provinces.[46] Meanwhile, there is also the problem of regional differences. As the mark-up has been barred, the tendering price shall be the one undertaken by the hospitals and patients. Nonetheless, wide regional gap remains in Mainland despite the achieved economic accomplishment since 1978. Patients from various regions differ extraordinarily on the affordability. To burden them all with the pharmaceutical costs of the same level might neither be equitable nor reasonable. Can it be taken that the public hospitals would be entrusted to adjust the prices under different circumstances? The regional alternation of pharmaceutical prices would be another problem that would take lengthy examination, as regards its reasonableness and compliance with the current framework.

A considerable number of policy recommendations have been made, most of which have had regard to improve the existing framework or establish a new regulatory framework. One suggestion, however, has managed to distinguish itself from the rest, as it advocates for complete deregulation on drug prices (hereinafter referred to as 'The Deregulation Theory'), which is based on the following behavioural patterns.[47] The supervisory authorities would implement regulatory approaches to punish the unlawful acts and intimidate the potential ones.[48] New problems are created as the regulation proceeds. The supervised would detect the regulatory vulnerabilities and would come up with means of circumvention to nullify the regulatory approaches.[49] Then, the supervisory bodies would modify the existing approaches and draft new approaches, realising the shortcomings of the previous framework and the pattern of circumvention.[50] After that, regulatory exploitation would continue until the regulatory approaches are updated. [51] Basically, the new

45 ibid.

46 Xu Zi, 'The prices of medical service are expected to be more reasonable with the development of health care' (*CN-HEALTHCARE*, 25 September 2019) <www.cn-healthcare.com/article/20190925/content-524036.html> accessed 11 October 2019.

47 Zhu (n 4) 85.

48 ibid.

49 ibid.

50 ibid.

51 ibid.

regulations breed new problems. In this regard, the regulation would somehow engage the supervisor and the supervised in an endless 'regulation-circumvention' loop, which has cast doubt on the justification and utility of regulation. If the pharmaceutical price regulation not only fails its purpose, but also induces endless further problems, why would we need it at all?

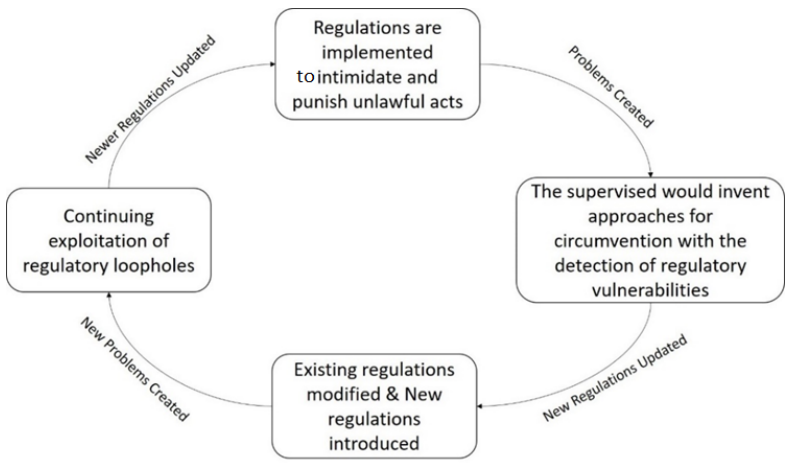

Chart 3: The 'Regulation-Circumvention' Loop

A common wisdom that state intervention should be introduced to deal with market failure such as information asymmetry, has also been rebutted by the 'The Deregulation Theory' which opines that 'information asymmetry in the medical industry would still remain after the introduction of state intervention'.[52] The supervisory authority may not necessarily possess the information advantage because of the limited human resources.[53] As such, it would be doubtful as to whether the supervisory authorities are capable of drafting and effectively implementing regulatory approaches to serve the policy goals. In addition, the classic 'principal-agent' problem would emerge with the introduction of regulation. There are two folds of information asymmetries, that are between the patients and the regulatory bodies and between the regulator and the patients.[54] As for the regulator, 'The Deregulation Theory' thinks that 'it might be

52 ibid 89.
53 ibid.
54 ibid.

duped by the doctors because of the information asymmetry, or it might conspire with them for self-interest at the expense of patients'.[55] In either case, the interest of the patients would be undermined.

The only logical deduction as to the deregulation of drug price would be leaving the whole pricing regime to the market. The U.S. is a case in point, for its thoroughly deregulated pharmaceutical pricing regime. But is it as desirable as it seems?

II. MARKET-DOMINATED REGIME OF DRUG PRICING AND ITS IMPLICATIONS: THE US PERSPECTIVE

A. The Soaring Price Level

The United States has been considered one of the most profitable markets of pharmaceutical industry in the world, for its market-dominated pharmaceutical pricing mechanism. The American drug price level is generally higher than that of European countries, as is evinced by research. For instance, statistics have shown that American citizens have to pay three times more for the 20 top-selling drugs than those in the U.K, where the authorities have imposed direct control on profit rate, mark-up rates and so on.[56] As for the developing countries, the gap would be even more astounding, such that the overall price level for medicine of the U.S. is six times higher than that of Brazil and sixteen times higher than that of India.[57] Domestically, according to the disclosed information, the Producer Price Index for prescription drugs has increased by 120% in the last two decades,[58] while the

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55 ibid 90.

56 Ben Hirschler, 'Exclusive - Transatlantic divide: how US pays three times more for drugs' (*Reuters*, 12 October 2015) <www.reuters.com/article/us-pharmaceuticals-usa-comparison/exclusive-transatlantic-divide-how-u-s-pays-three-times-more-for-drugs-idUSKCN0S61KU20151012> accessed 12 October 2019.

57 ibid.

58 US Bureau of Labor Statistics, 'Producer Price Index by Industry: Pharmacies and Drug Stores: Retailing of Prescription Drugs (PCU4461104461101]' (*Federal Reserve Bank of St Louis*, 2019) <fred.stlouisfed.org/series/PCU4461104461101> accessed 30 August 2019.

corresponding Consumer Price Index has increased by 83.5%.[59] From the macro perspective, the American expenditure on prescription drugs has raised by 197.8% from 2000 to 2019.[60] The Federal Trade Commission has also received increasing complaints from the consumers as to the rising drug expenses.[61]

Substantial attempts to place the drug pricing under regulation have been made, yet all ended up with nothing but strong opposition from the pharmaceutical industry.[62] Lobbyists took innovation as their defence, claiming that the invention of a new medicine is a tremendously risky process, where the success is of low probability despite the enormous resources poured in.[63] Therefore, profits should be guaranteed for the motivation of innovation and the recovery of the research and development (R&D) costs. A study has revealed that the imposition of regulatory control on the pharmaceutical industry would lead to a reduction in R&D investments by between 23.4% and 32.7% and would decrease the overall revenue of the pharmaceutical industry by 20.2%.[64] In this regard, it would seem that to regulate the drug prices is to stifle pharmaceutical innovation, which is going to undermine the public interest eventually.

Up to now, the United States has been a paradise for the

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59 US Bureau of Labor Statistics, 'United States Consumer Price Index for All Urban Consumers (CPI-U) 1970 – 2019 (in percents)' (*Rhode Island Department of Labor and Training*, 2019) <www.dlt.ri.gov/lmi/pdf/cpi.pdf> accessed 30 August 2019.

60 US Centers for Medicare and Medicaid Services, 'Prescription drug expenditure in the United States from 1960 to 2019' (*Statista*, 2019) <www.statista.com/statistics/184914/prescription-drug-expenditures-in-the-us-since-1960/> accessed 31 August 2019.

61 Amanda Hamilton, 'Navigating an FTC Drug Pricing Investigation' (*Food and Drug Law Institute*, February 2018) <www.fdli.org/2018/02/update-navigating-ftc-drug-pricing-investigation/> accessed 11 October 2019.

62 John Morgan, 'A Bitter Pill: How Big Pharma Lobbies to Keep Prescription Drug Prices High' (*Citizens for Responsibility and Ethics in Washington*, 2018) <www.citizensforethics.org/a-bitter-pill-how-big-pharma-lobbies-to-keep-prescription-drug-prices-high/> accessed 12 October 2019.

63 Liam Sigaud, 'Price Controls on Drugs Would Stifle Innovation, Reduce Access' (*Real Clear Health*, 11 July 2019) <www.realclearhealth.com/articles/2019/07/11/price_controls_on_drugs_would_stifle_innovation_reduce_access_110927.html> accessed 13 October 2019.

64 John A Vernon, 'Examining the Link between price regulation and pharmaceutical R&D investment' (2005) 14 Health Economics 1.

pharmaceutical industry because of the manufacturers' autonomy in pharmaceutical pricing. The ex parte pleasure of the manufacturers, however, has severe legal implications.

B. The Mutation of Patent Law and The Rise of Reverse Payment

Patent law is originally regarded as a sword for innovation protection and motivation. The Incentive Theory, one of the justifications for intellectual property protection, opines that the creators should be allowed to acquire reasonable incentives for their creation, to further stimulate innovation.[65] Indeed, 90% of pharmaceutical innovation would not have come into existence without patent protection, as an empirical research shows.[66] Unfortunately, the patent law, in the hands of the pharmaceutical manufacturers, has transformed into a tool to reap enormous profit from the consumers and to eliminate competition.

A distinctive feature of patents would be its exclusion of unauthorised use. Each drug corresponds with a patent or a bundle of patents. The manufacturer, when acting as a patentee, would profit from licensing the use of such patents or simply benefit from the price gap from drug sale. As mentioned before, America has adopted the market-dominated pricing mechanism, where the government refrains from interfering with drug prices. Pharmaceutical enterprises have displayed a tendency of patent abuse. One third of drugs have experienced price hikes since 2012.[67] For example, a cancer drug manufacturer was reported to raise the price by 5000% overnight.[68] Meanwhile, the patent system has also been gamed and exploited to the fullest extent by

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65 Seana Valentine Shiffrin, 'The Incentives Argument for Intellectual Property Protection' (2009) 4 Journal of Law, Philosophy and Culture 49. See also Jeanne C Fromer, 'Expressive Incentives in Intellectual Property' (2012) 98 Virginia Law Review 1745, 1751.

66 Edwin Mansfield, 'Patents and Innovation: An Empirical Study' (1986) 32 Management Science 173, 174.

67 I-MAK, 'Overpatented, Overpriced: How Excessive Pharmaceutical Patenting is Extending Monopolies and Driving up Drug Prices' (*I-MAK*, 2018) <www.i-mak.org/wp-content/uploads/2018/08/I-MAK-Overpatented-Overpriced-Report.pdf> accessed 22 October 2019.

68 Matt Egan, 'Sticker shock: Drugs with price hikes of up to 1,200%' (*CNN*, 20 October 2015) <money.cnn.com/2015/10/20/investing/drug-price-hikes-martin-shkreli-valeant/index.html?iid=hp-grid-dom> accessed 2 September 2019.

the 'big pharmas' with well-designed strategic patenting to extend the 20-year protection period and delay competition.[69] For instance, one approach to prolong the patent protection period is 'to obtain additional patents covering new formulations of the known compound clinically superior to the previous drug formulation'.[70] Besides, 'additional patent protection can also be obtained for new formulations that permit new routes of administration for known drugs'.[71]

However, the drug patentees' exclusivity does not always remain unchallenged. Actions or challenges might be brought to invalidate the pharmaceutical patents. In the US, generic competitors are entitled to file applications to the Food and Drugs Administration for the issuance of generic drugs under the Drug Price Competition and Patent Term Restoration Act (also known as the Hatch-Waxman Act) prior to the expiration of original patents.[72] Reverse payment, through which the original manufacturer would pay its generic competitor for the withdrawal of the challenge or litigation of the pharmaceutical patents, has thus been implemented for the maintenance of market dominance. *In re Ciprofloxacin (2001)* is a classic illustration. A class action brought against Bayer A.G, a German pharmaceutical enterprise, and its subsidiary in America, targeted on the patent settlement agreement between Bayer and several generic producers.[73] From 1987 to 2000, Ciprofloxacin approximately generated a revenue of 1 billion dollars for Bayer in 13 years, as the 11th top-selling drug in the United States.[74] Barr Laboratory filed an application to challenge the patent of Ciprofloxacin. This challenge, however, ended up with an agreement between Bayer and Barr Laboratory, in which Bayer would share part of its profit and had to pay the

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69 I-MAK (n 67).

70 Himanshu Gupta and others, 'Patents protection strategies' (2010) 2(1) Journal of Pharmacy & BioAllied Sciences <www.ncbi.nlm.nih.gov/pmc/articles/PMC3146086/#> accessed 22 October 2019.

71 ibid.

72 US Drug Price Competition and Patent Term Restoration Act, s101(4)(B)(iv).

73 *In Re Ciprofloxacin Hydrochloride Antitrust Lit* 166 F Supp 2d 740 (EDNY 2001).

74 Prabodh Chander Sharma and others, 'Ciprofloxacin: review on developments in synthetic, analytical, and medicinal aspects' (2010) 25(4) Journal of Enzyme and Inhibition Medicinal Chemistry 577.

latter 100 million dollars for the challenge withdrawal.[75] Other pharmacies and generic drugs manufacturers thus complained the agreement of restraining competition and that the consumers would be harmed as they are deprived of the access to a lower or competitive market price.[76] This case ended with a settlement of 225 million dollars of payment to the plaintiffs in 2013.[77] In the very same year, the US Supreme Court held in *FTC v Actavis*, that the reverse payment is not immune from antitrust review by the Rule of Reason,[78] which further implied its potential anti-competitive effect on the pharmaceutical industry.

C. Antitrust Law: A Substitute for Pharmaceutical Price Control?

Along with *In re Ciprofloxacin*, numerous antitrust litigations have been brought against pharmaceutical manufacturers. The antitrust authorities have also taken multiple enforcements against the big pharmaceutical enterprises as to their anti-competitive acts. Antitrust law is somehow perceived as an ostensible alternative for pharmaceutical price regulation in a deregulated market.[79] Nonetheless, it would be questionable as to the extent of 'regulatory' impact that antitrust law has on drug prices.

Empowered by the Clayton Act, the injured parties are entitled to bring civil antitrust litigations on the anti-competitive acts of pharmaceutical enterprises that implicate drug prices, such as price fixing.[80] Though inevitably thrown on the role of price monitors and regulators, the American courts have surprisingly

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75 James T Gathii, 'Balancing Patent Rights and Affordability of Prescription Drugs in Addressing Bio-Terrorism: An Analysis of In Re Ciprofloxacin Hydrochloride Antitrust Litigation' (2003) 13 Albany Law Journal of Science and Technology 651, 653.

76 ibid.

77 Komal Khettry, 'Teva's Barr Labs settles Cipro antitrust case for $225 million' (*Reuters*, 27 January 2017) <www.reuters.com/article/us-barr-laboratories-settlement-idUSKBN15B08N> accessed 15 October 2019.

78 Federal Trade Commission, 'Watson Pharmaceuticals, Inc, et al (FTC v Actavis)' (*Federal Trade Commission,* 28 February 2019) <www.ftc.gov/enforcement/cases-proceedings/071-0060/watson-pharmaceuticals-inc-et-al-ftc-v-actavis> accessed 16 October 2019.

79 Herbert Hovenkamp, 'Sensible Antitrust Rules for Pharmaceutical Competition' (2004) 39 University of San Francisco Law Review 11, 15.

80 The Clayton Antitrust Act (1914), s 15(a).

demonstrated a pattern of restraint when attributing monopolistic pricing to the Section 2 of the Sherman Act where the abuse of market power shall be deemed a felony.[81] Namely, it appears that the American courts are less prone to deal with monopolistic pricing in the antitrust law regime. The stand is based on the ideas that judicial intervention is no better alternative than market entry itself; that to remedy monopolistic pricing in an antitrust court is unduly; and that the qualification of excessive pricing remains a great challenge for the courts to tackle.[82] It would seem that the American courts are reluctant to act as the price regulators in this regard.

However, even if the courts are open to deal with the monopolistic or excessive pricing in the regime of antitrust law, there would still be practical obstacles awaiting. Private litigations of antitrust have always been faced with conundrums on account of the imbalanced economic status between the consumers and the pharmaceutical enterprises. Compared with regular civil proceedings, the antitrust cases are usually considered as one of the most expensive types, the costs of which mostly stem from the examination of complicated facts and economic analysis.[83] Contrary to the common wisdom, it would be equally costly for pharmaceutical enterprises to engage in antitrust litigation on account of the induced costs including but not limited to the time spent on preparation for deposition and at trial, as well as the rising budgets for attorneys and in-house lawyers.[84] Meanwhile, it should be noted that the American public enforcement of antitrust law adopts an adversarial mechanism, where the authorities bring actions against the pharmaceutical manufacturers that are allegedly in violation of antitrust law in front of courts,[85] which

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81 Harry First, 'Excessive Drug Pricing as An Antitrust Violation' (2019) 82 Antitrust Law Journal 701, 737.

82 ibid.

83 Jonathan M Jacobson, 'Tackling the Time and Cost of Antitrust Litigation' (2017) 32 Antitrust 3.

84 International Bar Association, 'Excessive Private Litigation: The Impact on Business and Consumers' (2005) <www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwi8ge7y1PTqAhVQMd4KHWPOCfsQFjAAegQIAxAB&url=https%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3D323EA4B5-105C-4AD5-9EBC-1F13CFE81979&usg=AOvVaw2JXR-rJNf8oNJ4leEoVJVH> accessed 3 January 2020.

85 J Thomas Rosch, 'Observations on Evidentiary Issues in Antitrust Cases' (*Federal Trade Commission*, 19 June 2009)

may turn out to be just as costly.

Besides, the regulatory effect might be set off by settlement in civil proceedings, which might function as an approach for a pharmaceutical enterprise to relieve itself with a trivial portion of payment from legal troubles. In 2019, Celgene, a leading cancer drug manufacturer, settled a long-running antitrust class action with 55 million dollars,[86] which appears that the consumers managed to force the big pharmaceutical enterprise to surrender a substantial amount of profit stemming from its abuse of market dominance. What might be neglected is that Celgene obtained over 6 billion dollars of profit from the drug sale in the previous year.[87] Even if antitrust law does have a potential regulatory function on pharmaceutical pricing, it is likely that it would be largely set off by the settlement in litigation given the disproportional consideration. Conversely, there is another circumstance where the pharmaceutical enterprise settles the case with a substantial amount of payment. Together with the mountain-high litigation costs, chances are that the settlement would force the manufacturer to raise its production costs, which are bound to be transferred to the consumers in finality.

D. Generic Drug Manufacturers: A New Source of Risk

Generic pharmaceutical production is often viewed as an effective way of relieving patients' medical expenditure by allowing faster access to lower-priced medicines. As mentioned above, a type of drug may correspond with a patent or a bundle of patents. Initially, the drug would generate a huge volume of income for the manufacturers during the period of patent protection. Prior to the

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<www.ftc.gov/sites/default/files/documents/public_statements/observations-evidentiary-issues-antitrust-cases/090619antitrustcases.pdf> accessed 29 October 2019.

86 Saman Javed, 'Celgene settles antitrust class-action for $55m' (*Life Sciences Preview*, 25 July 2019) <www.lifesciencesipreview.com/news/celgene-settles-antitrust-class-action-for-55m-3620> accessed 16 October 2019.

87 'Celgene Reports Fourth Quarter and Full Year 2018 Operating and Financial Results' (*Celgene*, 31 January 2019) <ir.celgene.com/press-releases-archive/press-release-details/2019/Celgene-Reports-Fourth-Quarter-and-Full-Year-2018-Operating-and-Financial-Results/default.aspx> accessed 20 October 2019.

expiration of the patent, other research institutes or competitors, under the Hatch-Waxman Act, can file an application to the Food and Drugs Administration for the approval of issuing the equivalent drugs and would obtain a 180-day period of exclusivity if granted, when no other generic manufacturers will be allowed in the market.[88] The original patentee may choose to sue its generic counterparts for infringement within 45 days.[89] Counterclaims might be made by the generic manufacturers in the litigation to invalidate the original patents. Eventually, as more generic manufacturers enter the market, the price would be expected to decrease. The basic idea of promoting generic drug manufacturing is to introduce more competition, so that the drug price level can be expected to lower in the rise of quantities.

Nonetheless, the principle of supply and demand can fail in the regime of generic competition. A series of antitrust litigations have risen doubts as to the effectiveness of introducing generic competition, in that the generic manufacturers have been witnessed to engage in anti-competitive collusion. The one between Mylan and Heritage is a case in point. Heritage, a generic manufacturer of the drug for the treatment of a type of severe acne, planned to enter the relevant market and approached Mylan, an existent counterpart, with a proposal to divide the market and retain the current price level, which was accepted by the latter.[90] It appears that the generic manufacturer may tempt its counterparts with market share and profit for the extension of market dominance. Some might argue that the implementation of collusion would amount to an impossible mission as the number of generic competitors grows. However, the scale does not seem to matter when it comes to the pursuit for profit. In 2019, an antitrust class action of a massive scale was brought by a 44-state coalition led by the Attorney General of Connecticut. Twenty large generic pharmaceutical enterprises were accused of price-fixing of generic drugs, bid rigging for more than one hundred types of drugs and trade restraint.[91] As such, the scale of competitors does

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88 US Drug Price Competition and Patent Term Restoration Act, s 101(4)(B)(iv).

89 ibid, s 101(4)(B)(iii).

90 Dylan Scott, 'A groundbreaking antitrust lawsuit is ensnaring the generic drug industry' (*Vox*, 10 December 2018) <www.vox.com/policy-and-politics/2018/12/10/18134654/generic-drugs-antitrust-lawsuit> accessed 1 November 2019.

91 Gina Kokosky, 'Antitrust Lawsuit Targets 20 Generic Drug

not necessarily preclude collusion or manipulation.

Recently, another type of generic manufacturers, also known as the 'Authorised Generics', have gained increasing attention. Unlike the regular ones, the 'Authorised Generics' would file an application to the Food and Drug Administration under the authorisation of the original manufacturers prior to the rest of generic counterparts. The 180-day period of market exclusivity guaranteed by the Hatch-Waxman act would be acquired by the 'Authorised Generics' who contracted with the original manufacturers to maintain the previous price level after the expiration of the patents.[92] The well-orchestrated generic competition of this sort, with the sole purpose of maintaining the previous price level and extending the market force, is of anti-competitive nature for being the product of collusion and cannot be expected to lower the drug prices.

E. Private Healthcare Programme and Pharmacy Benefit Managers

Private healthcare programmes have been used to curb the pharmaceutical expenditure in the deregulated regime of drug pricing in America.[93] Nonetheless, none of these programmes have ample countervailing power against pharmaceutical enterprises as regards drug prices.[94] As such, Pharmacy Benefit Managers (hereinafter referred to as PBMs) are contracted to 'negotiate discounts and steer usage to lower priced drugs'.[95] On one hand, they 'create tiered formularies of reimbursed drugs with

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Manufacturers, 15 Industry Executives Over Medication Pricing' (*Pharmacy Times*, 14 May 2019) <www.pharmacytimes.com/resource-centers/reimbursement/antitrust-lawsuit-targets-20-generic-drug-manufacturers-15-industry-executives-over-medication-pricing> accessed 3 November 2019.

92 Mari Edlin, 'What Are Authorized Generics?' (*Managed Healthcare Executive*, 4 October 2019) <www.managedhealthcareexecutive.com/pharmacy-strategy/what-are-authorized-generics> accessed 3 November 2019.

93 Patricia Danzon, 'Competition and Antitrust Issues in the Pharmaceutical Industry' 2014 The Wharton School Faculty Paper 7 <faculty.wharton.upenn.edu/wp-content/uploads/2017/06/Competition-and-Antitrust-Issues-in-the-Pharmaceutical-IndustryFinal7.2.14.pdf> accessed 9 October 2019.

94 ibid.

95 ibid.

associated tiered co-payments, to provide financial incentives for patients/physicians to choose drugs that are on preferred tiers with lower co-payments'.[96] On the other hand, the power of PBMs to delegate market share equips them with heavier leverage to negotiate discounts with the drug companies, given the large scale of participants PBMs represent, which is expected to benefit the patients and the pharmacies.[97] However, it would be equally risky to place confidence on PBMs for the questionable transparency. A researcher commented that 'because the negotiated discount is kept secret, we have no idea how large PBMs' profit margins are for the fees they charge'.[98] Doubts would thus be inevitably cast on the integrity of their services. Actual payment for the drugs has exceeded the negotiated price.[99] Patients are not aware of the above facts, as the contracts with PBMs forbid the parties from disclosing such information.[100] The information asymmetry between patients and PBMs is thus likely to invite exploitation. Without the issue of transparency being properly addressed, PBMs might degrade from cost-savers to self-interesting devils seeking to retain the excessive rebates or discounts, or to collude with the pharmaceutical enterprises, both of which would eventually jeopardise the very basic function of private health care programme.

III. China's Choice: A Comparative Analysis

As the American experience shows, there is a tendency for the domestic drug prices to display a relatively high level in the deregulated pricing regime. From the legal perspective, pharmaceutical pricing is not an isolated regime for its cross relation with patent law, antitrust law and so on, with or without regulation. It is the opinion of this article that the self-interest of pricing participants and legal exploitation are mutually reinforced, which has caused the undue increase of drug prices. Competition law cannot be relied upon as regards the effective modification on

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96 ibid.

97 ibid.

98 'Pharmacy Benefit Managers Are Driving Up Drug Costs for Patients' (*The American College of Rheumatology*, 2019) <www.rheumatology.org/Portals/0/Files/Issue-Brief-Pharmacy-Benefit-Manager-Transparency.pdf> accessed 15 November 2019.

99 ibid.

100 ibid.

drug prices. Without conduct-based regulation capable of directly targeting on pricing behaviours, the self-interest agenda in the core of pharmaceutical enterprises would tempt them to reap excessive profits from consumers through pricing, which is precisely why legal exploitation and abuse have been constantly witnessed on these enterprises. Conversely, the patent law, with unintended underlying 'loopholes', has also rendered pharmaceutical enterprises possibilities to indulge in self-interest behaviours in the deregulated pricing regime. Therefore, China should not opt for deregulation of drug prices despite its imperfect regulatory regime. Rather, the focus of regulatory reform should be placed on the conduct-based approach.

A. The Horizon of Pharmaceutical Patenting in Mainland China

The period of patent protection, a leverage to strike the balance between innovation and public interest, has been utilised to extend market dominance where excessive pricing is readily available. Doubt might arise as regards its relevance with the circumstance of Mainland China where the majority of drugs are not within the coverage of patent protection.[101] The status quo, however, is changing. In 2017, the Central Government initiated a policy encouraging the research of innovative drugs.[102] It also issued a comprehensive guideline for intellectual property protection covering the reduction on research costs, the liabilities of infringement, the technological measures for infringement detection and the gaps-bridging between judicial and administrative regime.[103] All these pro-innovation measures have gradually received positive responses. According to the statistics,

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101 Qizhi Zhan and Guoli Zhao, 'Research on the Conflict between Patent Protection and Public Health' (2019) 15 Henan Science and Technology 15, 21.

102 Xinhua Agency, 'The General Office of the CPC Central Committee and the General Office of the State Council on Issuing the Opinions on Deepening the Reform of the Evaluation and Approval Systems and Encouraging Innovation on Drugs and Medical Devices' (*The State Council of the People's Republic of China*, 8 October 2017) <www.gov.cn/zhengce/2017-10/08/content_5230105.htm> accessed 12 November 2019.

103 Xinhua Agency, 'The Guideline on Strengthening Intellectual Property Rights Protection' (*The State Council of the People's Republic of China*, 24 November 2019) <www.gov.cn/zhengce/2019-11/24/content_5455070.htm> accessed 25 November 2019.

the research expenditure on originator drugs and the approval of domestic pharmaceutical patents have experienced a steady increase in recent years.[104] Cases of pharmaceutical patent abuse during the period of protection started to emerge, which led to several administrative investigations.[105] Indeed, the regulatory regimes may differ between the two countries, but the behavioural pattern of exploiting patent system for the maximised profit has been consistent given the self-interest of pharmaceutical enterprises, regardless of whether there is regulation or not. It is neither feasible nor desirable to amend the existing patent law for the very purpose of drug price control, in that the corporate instinct for the pursuit of profit is inevitable in the operation of private law which focuses on the rights of individuals. Yet, the public interest is not something to be overlooked. Admittedly, patent law is not indifferent to the public interest as evinced by the compulsory licensing. Nonetheless, no practice as such has been found in Mainland China, most likely on account of the high legislative threshold of application and the sophisticated interest structure.[106] It is not practicable or reasonable to expect the institution which is designed for the extreme and rare scenarios, to address the problem of drug price through routine application. Therefore, in the rise of patents in the pharmaceutical regime, there should be reasonable and adequate regulation for the avoidance of unrestrained expansion of patenting power at the expense of public health.

B. Competition Law: A Supplement, Not the Substitute

Competition law can be resorted to where patent law fails. Certain acts as to pharmaceutical patents would trigger the enforcement of antitrust law, as the American experience shows. Meanwhile, there

104 Wanhuida Intellectual Property, 'Analysis of the development of Chinese originator drugs' (*Lexology*, 24 October 2018) <www.lexology.com/library/detail.aspx?g=d19712a5-acd3-4bc9-a0d5-53c3e8201c54> accessed 1 November 2019.

105 Commerce & Finance Law Offices, 'Pharmaceutical Companies were Punished in Antitrust Enforcements' (*Tong Shang*, 2019) <www.tongshang.com/index/research/detail?id=133> accessed 12 November 2019.

106 Sanqiang Qu, 'On the Compulsory License of Patented Medicine and Public Health' (2006) 1 Academic Exploration 56, 60-62.

are also anticompetitive conducts which are not related to patents. But it is also observed that antitrust law has failed to effectively alter the drug prices in the U.S. given the judicial conservativeness, the sheer costs of litigations and enforcements as well as the offsetting impact of settlements. A pattern of resemblance has also been witnessed in China. In antitrust civil litigations, which have also proved costly and inefficient, the plaintiffs have rarely received desirable outcomes.[107] The caseload of antitrust litigations has been trivial in proportion. To illustrate, 700 cases have been brought in ten years ever since the promulgation of the Anti-Monopoly Law,[108] while four million first-instance commercial cases were closed in 2016 alone.[109] Among all the antitrust cases that have been closed and revealed, only 6 concern the pharmaceutical industry.[110] Besides, the high threshold of evidence also barricades the protection of the plaintiff's legitimate interest through litigation, because the claimant is placed with burden to produce evidence to support his claim,[111] in contrast with the mechanism of discovery in the civil procedure of America, where the defendant must disclose all the relevant proof.[112] It is thus unrealistic to expect that antitrust civil litigations would have tremendous controlling effect on drug prices.

Nonetheless, competition law cannot be perceived to be worthless for the deterrence of the excessive drug pricing in China, given its mechanism of public enforcement of purely administrative nature, as is adopted under the civil law system. The competition authority is empowered to initiate investigation on pharmaceutical enterprises by complaints or ex officio[113] rather than bringing costly and time-consuming charges in court. The

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107 Li Zhu, 'Ten Years of Antitrust Litigations: Retrospect & Prospect' (*People*, 28 August 2018) <ip.people.com.cn/n1/2018/0828/c179663-30255146.html> accessed 12 November 2019.

108 ibid.

109 The Supreme People's Court of People's Republic of China, 'The Work Report of The Supreme People's Court' (*China Court*, 20 March 2017) < www.chinacourt.org/article/detail/2017/03/id/2627702.shtml> accessed 21 July 2020.

110 Aiwu Du and Yunkai Chen, 'Data Analysis Report of China's Anti-Monopoly Civil Litigation Cases (2008-2018)' (2019) 5 Competition Law and Policy Review 331, 347.

111 Guohai Li, 'Review of the Burden of Proof in Anti-monopoly Civil Litigation in China – Sampling the Typical Cases' (2019) 40 Journal of Jishou University (Social Science) 12, 13.

112 US Federal Rules of Civil Procedure, r 26.

113 The Anti-Monopoly Law of the People's Republic of China, art 38.

competition authority possesses the investigative power, by which it may conduct inspection on the venue of operation, seize evidence from the enterprises and so on.[114] Where violation is found, the competition authority may impose liabilities on the pharmaceutical enterprises, including but not limited to confiscation of revenue, fines, withdrawal of the license for operation.[115] The 2015 Drug Prices Reform has induced some anticompetitive risks in the regime of competition law that might implicate drug prices. The Group Purchasing Organisations that are in charge of the drug procurement, have been found to engage in anticompetitive conducts such as exclusive dealing and refusal to deal in some regions.[116] The concentration of market power caused by the removal of distributary sections also implies potential anticompetitive risks. The robust enforcement of competition law would thus be required to avoid deviation from the agenda of the reform.

The public enforcement, however, is not without challenges in Mainland China notwithstanding its ostensible efficiency in the normative sense. As a matter of operation, punishment does not seem proportional compared with profit[117] and the authorities are short on manpower for investigation and execution.[118] From the macroscope, the conflict from the overlap between the industrial regulatory bodies and the antitrust authority can also undercut the efficiency of the public enforcement.[119] The former has developed its own regulatory strategy in compliance with the specified industrial policy while the latter prioritises the competitive effect of industrial conducts in regulation, which may well induce jurisdictional disputes if a misconduct implicates both regimes. With a resembling mechanism of public enforcement, the European Union might shed some light in an operational sense. The department for competition (DG-COMP) in European

114 ibid, art 39.

115 ibid, art 46.

116 Jin Wan, 'Why GPO reform can't bypass the Anti-Monopoly law?' (*Legal Daily*, 10 February 2018) <www.legaldaily.com.cn/index/content/2018-02/10/content_7473132.htm?node=20908> accessed 2 January 2020.

117 Xu Liu, 'Ten Conundrums in Ten Years of Anti-Monopoly' (*The Paper*, 11 September 2018) <www.thepaper.cn/newsDetail_forward_2424911> accessed 31 October 2019.

118 ibid.

119 Xiaoye Wang, 'The Application of Antitrust Law on the Regulated Industries' (2014) 9 China Price 29, 34.

Commission, as the competition authority in the European Union, has been entrusted with powers to conduct unannounced investigations, issue decisions of prohibition, impose fines, etc.[120] Over 100 cases as to the pharmaceutical sector were investigated by DG-COMP from 2009 to 2017,[121] while mere 85 cases of all types were concluded from 2015 to 2019 by the Chinese competition authority, 12 of which have had regard to the pharmaceutical sector.[122] The difference can be largely justified by the gap in the manpower. In the central/union level, the staff number of DG-COMP approximately equalled that of the State Administration of Market Regulation of China, where the antitrust division is among the 27 subdivisions, as of 2018.[123] No rules can be self-executory. In this regard, there is a dire need for the expansion of human resources in the Chinese central competition authority. Another aspect would be the organisational structure. The DG-COMP is composed of nine departments, each of which has its specified duties,[124] so as to improve the efficiency in aggregate. No publicly disclosed information can be found on the internal structure of the Chinese competition authority. However, the establishment of internal structure should be premised on sufficient investigative human resources because there would be no point of specifying the organisational structure if the existing human resources are limited such that the need for enforcement

120 'Background paper: Enforcement of EU competition policy' (*European Court of Auditors*, 12 September 2018) <www.eca.europa.eu/Lists/ECADocuments/BP_COMPETITION/BP_COMPETITION_EN.pdf> accessed 15 March 2020.

121 'Competition Enforcement in the Pharmaceutical Sector (2009-2017)' (*European Commission*, 2019) <ec.europa.eu/competition/sectors/pharmaceuticals/report2019/execsumm_en.pdf> accessed 16 March 2020.

122 Yi Xue and others, 'Analysis of the Enforcement by Competition Agencies in the Past Five Years' (*Zhong Lun*, 10 March 2020) <www.zhonglun.com/Content/2020/03-10/1721341809.html> accessed 16 April 2020.

123 'Regulations of the State Administration of Market Administration on the Function Configuration, Internal Organizations and Staffing' (*The Council of the People's Republic of China*, 10 September 2018) <www.gov.cn/zhengce/2018-09/10/content_5320813.htm> accessed 17 April 2020. See also 'European Commission HR Key Figures 2018' (*European Commission*, 2019) <ec.europa.eu/info/sites/info/files/european-commission-hr-key-figures_2018_en.pdf > accessed 11 March 2020.

124 'European Comission – Directorate–General For Competition' (*European Commission*, 2019) <ec.europa.eu/dgs/competition/directory/organi_en.pdf> accessed 11 March 2020.

cannot be amply covered.

The emphasis on drug price regulation certainly cannot be read as disregarding competition law in totality as to drug pricing, given the intersection of the both regimes. But it should also be noted that competition law, in an objective sense, at best serves as the supplement of pharmaceutical price regulation instead of the substitute. There are pricing conducts which fall outside of the jurisdiction of competition law, including misleading and false pricing, maliciously driving up prices, forging and spreading untruthful pricing information and so on,[125] which equally implicate the order of pharmaceutical pricing. The distinction stems from the different policy concerns between the two regimes. The competition law prioritises the maintenance of competition and economic efficiency,[126] while the pharmaceutical price regulation focuses on the stability of the gross level of drug price, the reasonable allocation of resources through price,[127] and most importantly, 'the satisfaction of people's surging medical needs and the alleviation of unreasonable burden of pharmaceutical costs for patients'.[128] In this regard, competition law alone would not seem sufficiently capable of maintaining the order in the pharmaceutical pricing regime given its confined scope and particular policy concerns. A specified regulatory framework targeted on drug prices would still be of necessity.

C. Prospects for the Drug Price Control in China: An Integrated View

Drug price, on one hand, delegates the allocation and use of resources and affects the profit of pharmaceutical enterprises. On the other hand, it concerns public health. In this regard, drug prices are not regulated for the sake of regulation. The adopted regulatory framework must contribute to the reasonable affordability of drugs while must not mislead the allocation of resources or disregard the

125 'The Guide for Pricing Behavior for Enterprises of Medicines in Shortage and The Originator Drugs' (*National Development and Reform Commission*, 2017) <www.ndrc.gov.cn/xxgk/zcfb/gg/201711/W020190905485749561348.pdf> accessed 18 April 2020.

126 The Anti-Monopoly Law of the People's Republic of China, art 1.

127 The Price Law of the People's Republic of China, art 1.

128 National Development and Reform Commission (n 34) 1.

legitimate self-interest of pharmaceutical enterprises. As Adam Smith pointed out, 'It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.'[129] Meanwhile, a uniform public health care programme can act as a supplement in striking the balance between the interest of patients and pharmaceutical enterprises, and can also help preclude the public hospitals from deviating from its original social functions.

1. REGULATION: FROM PRICE-BASED TO CONDUCT-BASED

The suspicion may still remain, that whether the drug price regulation has truly been justified given that the pharmaceutical pricing participants in China also share the behavioural pattern of legal exploitation notwithstanding the robust regulation. In the theoretical perspective, admittedly, almost no business comes into existence simply on account of altruism.[130] Nonetheless, where the business decision has impact on others, the conflicts between the corporate self-interest of profit making and the public interest may arise.[131] The resolution of such conflicts, if placed at the mercy of the enterprises, is bound to generate favourable results for the business, while may neglect or even injure the benefit of the public,[132] especially in a deregulated market. The Deterrence Theory postulates, premised on the corporate self-interest, that the financial penalty 'will internalise the cost of the external harm created by the infringement of law, on the basis that this would deter future wrongdoing'.[133] Nonetheless, the deterrence should not be narrowly construed as a mere 'financial penalty'. The theory itself 'is deeply embedded in both liability law and public criminal and regulatory law'.[134] It can thus be certain that

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129 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776, Pennsylvania State University 2005) 19. See also Salvör Nordal, 'Self-interest, deregulation and trust' (2019) 3 Nordic Journal of Applied Ethics 53, 55.

130 Nordal (n 129).

131 ibid.

132 ibid.

133 Christopher Hodges, 'Corporate Behavior: Enforcement, Support or Ethical Culture' (2015) University of Oxford Legal Research Paper Series <papers.ssrn.com/sol3/papers.cfm?abstract_id=2599961> accessed 20 April 2020.

134 ibid.

deterrence is not confined to financial penalties, as numerous approaches of punishment have been instituted in the aforementioned legal regimes. As regards the corporate behavioural regulation, the deterrence is materialised in two ways. The regulation is to be taken account in business decisions as a potential source of risk and cost, which would largely prompt the enterprises to exercise compliance on their behaviours pursuant to the regulatory regimes. Meanwhile, a proscribed conduct, if occurred, shall be subject to corresponding punishment, so as to daunt any future violation. Conversely, the American drug manufacturers have thus enjoyed the pricing autonomy as they are capable of disregarding the regulatory costs in the deregulated regime, which has been indicated by the soaring drug price level.

As such, the regulation is not something to be ditched, especially in respect of the matter of drug prices, which vastly concerns the public health. In response to the scepticism, it is vital to understand that misguided regulation, rather than regulation per se is to blame. The regulatory deterrence ultimately rests on corporate behaviours, as The Deterrence Theory so suggests in its basic logic that the proscribed conduct, once committed, shall be punished. It is through the punishment of conduct that the deterrence comes into play. To be specific, the previously adopted price-based regulation in China misallocated regulatory resources, as it largely neglected the basic principle that all self-interest agendas are materialised through conducts. The issuance of the official price catalogues under the Price Law precisely reflects the price-based regulatory mindset. As mentioned before, about 2000 types of drugs used to be within the coverage of the official price catalogues where the government-set price and the government-guided price were applied, [135] indicating that the authorities attempted to regulate the drug prices through setting a bright-line restriction where the drug prices shall not vary or at least fluctuate within the regulatory limit, while largely disregarded the exploitative conducts resulted from the corporate self-interest of the pricing participants in the distributary chain. This approach was originally deemed capable of stabilising drug prices level under the cognition that the price level can be controlled if the unit price is controlled, but only led to a massive scale of

[135] National Development and Reform Commission (n 23).

circumvention.[136]

It was then realised that the control on price per se was not capable of stabilising the price level in substance or maintaining pharmaceutical affordability because the self-interest would invite exploitative conducts in the price-based regulatory framework. The majority of drugs have been removed from the official price catalogues and are now subject to market price, in response to the official strategy toward the marketisation of drug price. [137] In an institutional reform in 2018, the State Administration for Market Regulation, absorbed the powers to conduct antitrust enforcement and price regulation, which is now assigned to the internal division of pricing and the division of antitrust respectively.[138] It can be anticipated that the two divisions can reach better cooperation on the enforcement as regards the drug pricing regime, especially with the coordination from their common superior, so as to deal with the proscribed pricing in a more timely and efficient manner. The self-interest agenda must be realised by behaviours, which is precisely what the conduct-based approach focuses on through the interim and ex post supervision in which the pricing conducts and the conducts implicating pricing shall be under constant scrutiny. For instance, in light of the outbreak of Coronavirus, some retail stores have been punished for releasing false advertisements as their grounds for price increase and removing the price tags from the drugs for discretionary pricing.[139] Psychologically, the fear of punishment and disgrace accounts for the law-abidingness of human-being.[140] The engagement of proscribed pricing conducts, surfaced by the investigation, shall suffer from the regulatory liabilities and the deterioration of public image,[141] which would further implicate the future business practice in the sense of regulatory compliance. Compared with the setting of clear-cut price limits, the conduct-

136 Meng, Cheng and Sun (n 30) 51.

137 National Development and Reform Commission (n 34).

138 'Institutional Reform Plan of The State Council' (*The State Council of the People's Republic of China*, 17 March 2018) <www.gov.cn/xinwen/2018-03/17/content_5275116.htm> accessed 2 February 2020.

139 'Investigation of typical cases of illegal prices of medicines, epidemic prevention supplies and food throughout the country' (*China Quality News*, 5 February 2020) <www.cqn.com.cn/zj/content/2020-02/05/content_8136360.htm> accessed 1 March 2020.

140 Hodges (n 133) 16.

141 ibid.

based approach may prove more effective as regards the maintenance of the affordable and reasonable drug price level as well as the termination of the 'regulation-circumvention' loop. On the contrary, the full autonomy of pricing by deregulation is equivalent of leaving corporate self-interesting conducts unsupervised, which is bound to induce exploitative and abusive conducts for lack of deterrence, and would eventually heighten the drug price level, as the American experience has demonstrated.

2. THE COUNTERVAILING POWER OF PUBLIC HEALTHCARE PROGRAMME AND GROUP PROCUREMENT

The public healthcare programme and the policy of procurement are two quasi-marketised approaches to leverage the market power of pharmaceutical suppliers. The reason why 'quasi' is used in the description is that the countervailing buyer power has been centralised through governmental endeavours. But the essential tactic has been the same, which is to affect the drug price through the expansion of demand. It reflects the marketised mindset of controlling the drug price level as opposed to the command and order.

Unlike America, there is a uniform and powerful public healthcare programme organised by the National Healthcare Security Administration in Mainland China,[142] which has begun to demonstrate its potential in striking the balance between the multiple policy concerns. The National Healthcare Security Administration would negotiate with pharmaceutical enterprises as to the unit price of the medicines. Those whose prices are agreed upon shall be listed in a catalogue that entitles the reimbursement to the patients in drug prescriptions.[143] Given the massive scale of patients covered by the public healthcare programme in Mainland China, the National Healthcare Security Administration has in fact been equipped with the substantial capability to affect the market demand. In this regard, the interest of patients and pharmaceutical enterprises would be both reflected on the settled drug prices, as the product of negotiation. Under the

142 National Healthcare Security Administration (n 24).
143 ibid 61.

existing regulatory framework, public hospitals shall not be empowered to alter the prices.[144] As such, their self-interest can be suppressed to a certain extent.

However, as the American experience indicates, information asymmetry may obstruct the original function of healthcare programme. It should thus be required of the National Healthcare Security Administration to implement necessary supervisory approaches to secure transparency and integrity. Under the negotiation procedure, the representatives of the healthcare programme should firstly collect the relevant data, through which the reserve price is calculated.[145] After that, they shall communicate with the pharmaceutical enterprises as regards the rules of negotiation and the criteria to be considered in the final decision.[146] The official negotiation would be conducted thereafter, which will result in a final agreement.[147] On behalf of the interest of patients, who are absent from the negotiation, the representatives are not immune from the agent-principal problem. To ensure integrity and transparency, it should be required by regulation that the rules of negotiation and the determinative factors be disclosed to the public, and also that the process of negotiation be recorded and released for supervision in a reasonable manner. Meanwhile, although the programme does not really purchase drugs, the vast market power factually possessed by the National Healthcare Programme per se implies anti-competitive risks, as the reimbursement would delegate the demand of drugs. The manufacturers are inevitably faced with a conundrum of whether to seek to place their drugs under the catalogue or not. The refusal of admission into the catalogue, to a large extent, is equivalent of surrendering the opportunities to boost market share.[148] As such, the outcome of the negotiation for reimbursement has the potential to alter the landscape of

144 National Development and Reform Commission (n 34).

145 Yixian Zhai, 'National Healthcare Security Administration answered 13 Questions regarding the healthcare negotiation' (*EEO*, 28 November 2019) < www.eeo.com.cn/2019/1128/370551.shtml> accessed 20 January 2020.

146 ibid.

147 ibid.

148 'The new version of the medical insurance catalog is released, and many listed pharmaceutical companies are shortlisted' (*China Securities Journal*, 29 November 2019) <www.cs.com.cn/ssgs/gsxw/201911/t20191129_6003587.html> accessed 21 July 2020.

pharmaceutical competition.

Group procurement is a prevalent approach used domestically and abroad to control pharmaceutical expenditure through the centralisation of buyer power. Take the pharmaceutical tendering as an example. It has been covered that a company would venture a 97% price reduction to secure the bid, according to a report, as the unsuccessful bidders 'will find it hard to enter the market and may gradually withdraw from the market, which will constantly reconstruct the structure of the industry'.[149] Meanwhile, the outcome of the tender may well suggest the fall of other counterparts or competitors in the relevant market as the unsuccessful bidders. In this regard, the decisions as to the admissibility of drugs in the bidding would largely implicate the market structure, through which the competition is affected. It is, however, not the purpose of the drug group procurement to squeeze the pharmaceutical enterprises to the fullest extent in the name of public health or to twist the order of competition. As such, supervision from the competition authority is necessary in the process of group procurement. Besides, there should also be regulation which places the conducts of the representatives under constant scrutiny for avoidance of corruption which would mutate the function of group procurement.

CONCLUSION

The American experience has revealed that the deregulation on drug price would induce behaviours of legal exploitation and abuse, which would be mutually reinforced with the corporate self-interest. The pricing behaviours cannot be subject to the effective modification of the competition law for its confined scope and inherent deficiency. These patterns are echoed in Mainland China, where the public hospitals and domestic pharmaceutical enterprises have also engaged in exploitative pricing conducts notwithstanding regulation. The final choice is not one to be made between regulation and deregulation.

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149 Xiaohe Dai and Suying Fu, 'The largest drop in the second round of centralized drug collection exceeds 97%' (*China Securities Journal*, 18 January 2020) <epaper.cs.com.cn/zgzqb/html/2020-01/18/nw.D110000zgzqb_20200118_2-A03.htm> accessed 1 February 2020.

Corporate self-interest is inevitable. But as all exploitation and abuse are realised through behaviours, the conduct-based approach should be adopted in the regulatory regime of drug prices, serving as the reminder and deterrence for the pricing participants through robust regulation. Other than regulation, the uniform healthcare system and procurement scheme in Mainland China, as quasi-marketised efforts, have the potential to strike the balance of interest between the pharmaceutical enterprises and the patients.

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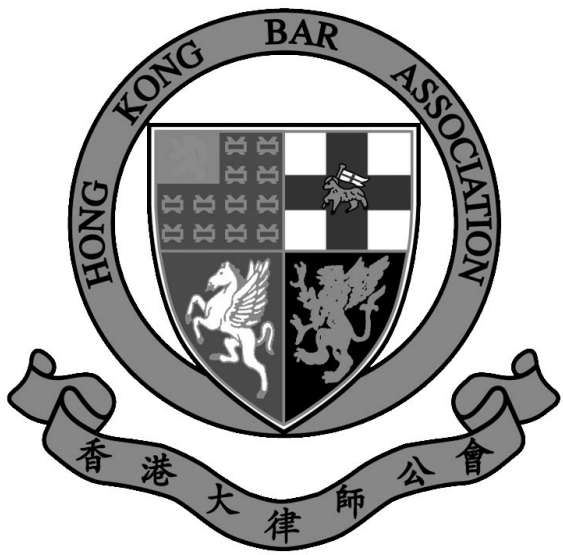

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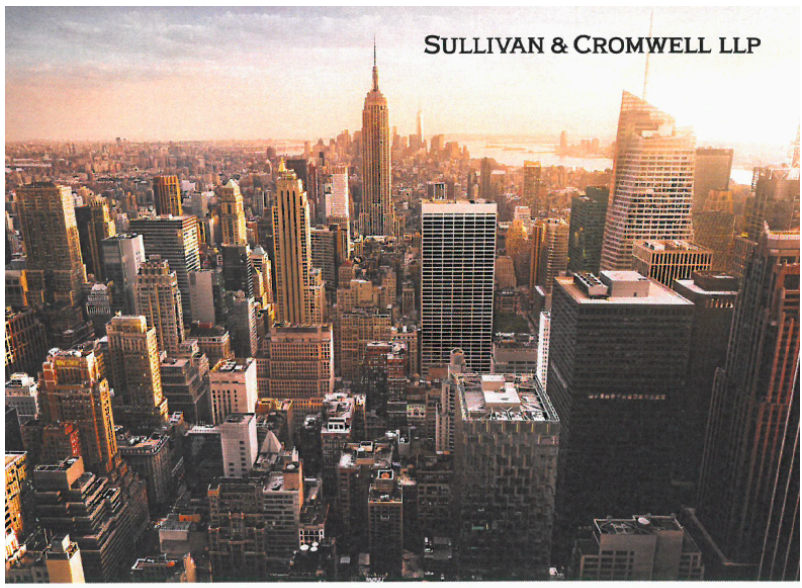

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