HONG KONG JOURNAL OF LEGAL STUDIES

Volume 13

Selected and edited by

Christina Fong Wilson Lui
Lucien van Romburg Yukiko Kobayashi Lui Hermia Wong
Phoebe Woo Lillie Lam Ruvini Katugaha Vanessa Leigh
Jamie Choy Xiaobin Huo Amanada Liu Brian Fung
Jacky Tam Joshua Ng Clement Cheung Alvin Yu
June Ho Lok Man Hung Florence Li Joyce Lui
Marco Ngan Xavier Huang Dennis Lui
Alex Chan Chloe Chan Wesley Ding

2019

Hong Kong Journal of Legal Studies
Address: Room 403, Cheng Yu Tung Tower, Centennial Campus, The University of Hong Kong, Pokfulam Road, Hong Kong
Email: hkjls@hku.hk
Website: www.law.hku.hk/hkjls/

This publication may be cited as (2019) 13 HKJLS

CONTENTS

FOREWORD

There used to be an old rule that academic writings cannot be cited in court until the author passed away,[1] and the usual reason for the rule is that until one's death one may still change one's mind. This rule is now (happily) buried in the sands of time, but the underlying rationale remains to hold some truth. An ability and willingness to review and revise one's own position is essential to progress, and this applies to everyone including judges.

One way to help judges in this regard is to offer comments on their decisions. Compared to academic texts which have a longer editorial and publication timeline, journal articles provide a platform for relatively prompt responses to judicial decisions. Unlike judges who need to deal with the dispute before them within a relatively short time frame, article writers have the advantage of time and enjoy the freedom to go beyond the confines of the facts and arguments of the case and look at the issues from a broader perspective or some other viewpoint. This is one of the important functions of legal journal articles. I appreciate and encourage the efforts made by writers in expressing their views through academic platforms, which would hopefully assist the bench to arrive at better informed decisions.

The current volume of the Hong Kong Journal of Legal Studies is a good example that covers a wide range of subjects. There are articles covering topics of interest for more traditional black letter lawyers, such as the article on the recent developments on penalty clauses in contracts, another on the double actionality rule applicable for torts, and two articles which consider European jurisprudence on comparative advertising and the right of explanation in data protection law recently applied in Hong Kong respectively. At the same time, there are articles which tend to legal issues arising from local current affairs – one on national security legislation and the other on the co-location arrangement.

---

[1] *Knight v Boughton* (1844) 8 ER 1195, approved by Vaughan Williams LJ in *Greenlands Ltd v Wilmshurst* (1913) 29 TLR 685, 687.

I congratulate the authors and the editors for their achievement in producing this issue and am honoured to write this foreword. I wish this journal every continued success.

Andrew Cheung
Permanent Judge
Court of Final Appeal

PREFACE

We are very honoured to present you with the thirteenth volume of the Hong Kong Journal of Legal Studies. In the years since the Journal's founding, we remain the leading student-run academic law journal in Hong Kong fully edited, managed and published by students at the University of Hong Kong. In addition to an established reputation in the local legal community, we strive to expand our readership by making our copies available in all local university libraries, overseas university partners, the High Court and District Court Libraries as well as on Westlaw and HeinOnline.

In the past year, we saw new legal developments in Hong Kong and beyond. Hong Kong's common law system and rule of law face one of the hardest challenges in recent months. In the midst of the changing situation, delivering diverse insights in publication is vital in encouraging growing awareness in local, multi-jurisdictional and global legal issues among law students.

The copy you now hold continues the strong and proud tradition of influential scholarship associated with the Journal. This thirteenth volume contains six engaging and thought-provoking articles, covering a broad range of public and private law subjects. Two of the articles provide creative views on some recent legal developments pertaining to PRC-Hong Kong relationship, one considers the co-location arrangement of the Guangzhou-Shenzhen-Hong Kong Express Rail Link while the other analyses the national security legislation. Local and overseas jurisprudence are also examined: one article discusses a recent Hong Kong court decision in relation to comparative advertising and further explores English and European jurisprudence; another makes a comparative analysis of data protection laws, particularly the right to explainability, in Europe and Hong Kong. Two articles offer fresh perspectives on the traditional legal rules of double actionability rule in international tort claim and the Cavendish penalty rule in contract law.

We sincerely thank the Hon Mr Justice Cheung, Permanent Judge of the Hong Kong Court of Final Appeal, for writing the foreword, which succinctly and powerfully outlined the importance of legal scholarship to the development of law and the features of this volume. We would like to also express our deep appreciation to the contributors: with their articles reflecting various perspectives in the local and global legal development, we are privileged to work as editors. Last but not least, we thank our diligent board of Senior and Associate Editors for their hard work over the past year in making this volume possible.

Finally, we hope you will enjoy this volume and support the Journal in the many years to come.

Christina Fong and Wilson Lui
Chief Editors

‘EUROPEAN JURISPRUDENCE’ ON COMPARATIVE ADVERTISING NOT FOLLOWED IN HONG KONG

Santos T S Cheung*

In the recent decision of the Court of First Instance in PCCW-HKT Datacom Services Ltd v Hong Kong Broadband Network Ltd,[1] *Mimmie Chan J reviewed the English authorities on comparative advertising and provided helpful guidance on the interpretation of section 21 of the Trade Marks Ordinance (Cap 559) in the local context. More importantly, it was held that the latest English cases on comparative advertising should not be followed so that the court would not enforce through the back door any ‘European jurisprudence’ in Hong Kong. This case note examines Mimmie Chan J’s reasoning in this case and argues that the approach Her Ladyship adopted in considering ‘European jurisprudence’ for the interpretation of the TMO should be welcomed.*

INTRODUCTION

Trademarks, as a fundamental branch of intellectual property rights, have been protected by local legislation in Hong Kong since 1843. In April 2003, the legislature enacted the current Trade Marks Ordinance (Cap 559) (TMO) in replacement of the old Trade Marks Ordinance (Cap 43). The TMO has re-drawn the boundaries of the permissible uses of trademarks in Hong Kong.

---

* BSocSc (The University of Hong Kong); LLB (The University of Hong Kong); PCLL (The University of Hong Kong). The author would like to express his sincerest gratitude to Associate Professor Alice Lee for her support and encouragement, as well as the Hong Kong Journal of Legal Studies team for their helpful comments and editorial effort. All errors remain the author’s own.

1 [2018] HKCFI 2037; [2018] 4 HKLRD 575.

In particular, s 21 of the TMO provides that uses of others' registered trademarks would be permissible in advertising if they were 'in accordance with honest practices in industrial or commercial matters',[2] which has been popularly referred to as 'comparative advertising'.

Despite the long history of trademark legislation in Hong Kong, comparative advertising has not been judicially considered by the local courts until the recent decision of the Court of First Instance in *PCCW-HKT Datacom Services Ltd v Hong Kong Broadband Network Ltd.*[3] In this case, Mimmie Chan J reviewed the English and European authorities on comparative advertising and provided helpful guidance on the interpretation of s 21 of the TMO in the local context. More importantly, it was held that the latest English cases on comparative advertising should not be followed so that the court would not enforce through the back door any 'European jurisprudence' in Hong Kong. This case note scrutinises Mimmie Chan J's reasoning in this case and argues that the approach Her Ladyship adopted in considering 'European jurisprudence' for the interpretation of the TMO should be welcomed.

I. FACTS

The Plaintiffs, representing one of the most well-established group of telecom companies in Hong Kong, have been competing with the Defendant, another well-known local telecom company, in the business of provision of telephone and internet services. From February to April 2015, the Defendant used the Plaintiffs' trademarks 'HKT', 'eye', 'PCCW' and '電訊盈科' (the Marks) in some of its advertisements published to the users of home telephone services provided by the Plaintiffs (the Advertisements). In addition, the Advertisements contained the following straplines:

(a) HKT 家居電話用戶 轉軚是時候 ('HKT Home Telephone Service customers – it's time for a U-turn')

(b) PCCW Home Telephone Service customers say goodbye to bloated monthly fees!

---

2 Trade Marks Ordinance (Cap 559) (TMO), s 21(1).

3 *PCCW-HKT Datacom* (n 1).

(c) PCCW Home Telephone and eye Communications Service customers Say goodbye to bloated monthly fees

(d) 電訊盈科家居電話及eye用戶唔駛再忍受咁大食嘅家居電話用費 ('PCCW Home Telephone Service and 'EYE' (ie eye Communications Service) customers no longer have to bear such bloated home telephone fees')

(e) 電訊盈科家居電話用戶唔駛再忍受咁大食嘅家居電話用費 ('PCCW Home Telephone Service customers no longer have to bear such bloated home telephone fees').

The Plaintiffs claimed that the Defendant infringed their trademarks under ss 18(1) and 18(4) of the TMO. In defence, the Defendant did not dispute the use of the Marks in its Advertisements but relied on the doctrine of 'comparative advertising' under s 21 of the TMO.

II. SECTION 21 OF THE TMO

Section 21 of the TMO reads as follows:

(1) Nothing in s 18 (infringement of registered trade mark) shall be construed as preventing the use by any person of a registered trade mark for the purpose of identifying goods or services as those of the owner of the registered trade mark or a licensee, but any such use which is otherwise than **in accordance with honest practices in industrial or commercial matters** shall be treated as infringing the registered trade mark.

(2) In determining for the purposes of ss (1) whether the use is in accordance with honest practices in industrial or commercial matters, the court may consider such factors as it considers relevant including, in particular, whether –

(a) the use takes unfair advantage of the trade mark;

(b) the use is detrimental to the distinctive character or repute of the trade mark; or

(c) the use is such as to deceive the public.[4]

---

4 TMO (n 2), s 21 (emphasis added).

As the court correctly acknowledged, s 10(6) of the Trade Marks Act 1994 of the United Kingdom (the 1994 Act)[5] is largely in similar terms as and can be regarded as the English equivalent of s 21 of the TMO of Hong Kong.[6] Under both provisions, uses of registered trademarks belonging to others would not be an infringement if they were 'in accordance with honest practices in industrial or commercial matters'. As succinctly summarised by Mimmie Chan J, the primary issue was therefore whether the Defendant's use of the Marks could be said to be 'in accordance with honest practices with industrial or commercial matters' so as to afford the Defendant a defence under s 21 of the TMO.[7]

III. THE DEVELOPMENT OF THE ENGLISH APPROACH

Given the lack of local authorities on s 21 of the TMO, Counsel on both sides relied extensively on English cases that were decided under s 10(6) of the 1994 Act to assist the court with the interpretation of the TMO provision.

Counsel for the Defendant relied on several pre-2003 English cases including *Barclays Bank Plc v RBS Advanta*,[8] *Vodafone Group Plc v Orange Personal Communications Services Ltd*,[9] *Cable and Wireless Plc v British Telecommunications Plc*[10] and *British Airways Plc v Ryanair*

---

5 Trade Marks Act 1994 (UK) (the 1994 Act), s 10(6) provides that:

> 'Nothing in the preceding provisions of this section shall be construed as preventing the use of a registered trade mark by any person for the purpose of identifying goods or services as those of the proprietor or a licensee.
>
> But any such use otherwise than in accordance with honest practices in industrial or commercial matters shall be treated as infringing the registered trade mark if the use without due cause takes unfair advantage of, or is detrimental to, the distinctive character or repute of the trade mark.'

6 *PCCW-HKT Datacom* (n 1) [12]–[13].

7 ibid [1].

8 [1996] RPC 307.

9 [1997] FSR 34.

10 [1998] FSR 383.

Ltd[11] (the Defendant's Authorities). The approach of English courts in these cases have been helpfully summarised in the judgment as follows:

(a) The primary objective of s 10(6) of the 1994 Act (being the equivalent of s 21 of the TMO) is to permit comparative advertising;

(b) The advertisement in question should be considered as a whole and, if applying an objective test, a reasonable reader, upon being given the full facts, would likely say that the advertisement is not honest, then there is infringement; and

(c) If the average consumer, who is used to hyperbole and puff in advertising, considers that in substance, the advertisements were sufficiently true, or there is no reasonable likelihood of a significant number of people being misled to any significant degree, the proviso in s 10(6) of the 1994 Act (being the equivalent of s 21 of the TMO) would be satisfied.[12]

As has been seen, the English approach as reflected by the Defendant's Authorities attaches considerable weight to the notions of truth and honesty. According to those cases, uses of others' registered trademarks in advertisements would not constitute infringement if such advertisements were honestly made and the contents therein were substantially true.

There was, however, a radical change in the latest English approach following the case of *Pippig Augenoptik v Hartlauer* in 2003, where the European Court of Justice (ECJ) held that the lawfulness of comparative advertising throughout the European Union (EU) should be assessed *solely* in the light of the criteria laid down by the EU legislature.[13] In subsequent cases, therefore, English courts, as national courts, were duty-bound to base their decisions not on the 'home-grown' s 10(6) of the 1994 Act but on all the European directives on comparative advertising,

---

11 (2000) EWHC Ch 55, [2001] FSR 541.

12 *PCCW-HKT Datacom* (n 1) [12].

13 Case C–44/01 *Pippig Augenoptik GmbH & Co KG v Hartlauer* [2003] ECR I–3095.

which include Directive 89/104 EEC of 21 December 1988 (the TM Directive), Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (the 97 Directive), and Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (the CAD).

As a result, the roles of s 10(6) of the 1994 Act and any English decisions based thereon (including the Defendant's Authorities) have then become 'of very limited relevance'[14] to the latest English approach to comparative advertising. For instance, in 2001, Jacob J once held in *British Airways* that the 97 Directive was 'not intended to amend or affect the interpretation of any national law'.[15] Nevertheless, after the ECJ's decision in *Pippig*, Lewison J held in *O2 Holdings Ltd v Hutchison 3G UK Ltd*[16] that Jacob J's decision in *British Airways* above should not be followed in light of the ECJ's ruling in *Pippig* in 2003 and the introduction of the CAD in 2006. His Lordship further affirmed that the lawfulness of comparative advertising in the UK should be judged solely by the exhaustive criteria set out in the European directives.[17] On appeal, Jacob LJ even expressly overruled his own decision in *British Airways* above and commented on the redundancy of s 10(6) of the 1994 Act in the English trademark law:

> I would only add that, insofar as part of my first instance decision in *British Airways Plc v Ryanair Ltd* … is at variance with my present conclusion, I reject it. By way of mitigation I would point out that the argument was different from that here, based as it was around the 'home-grown' s 10(6) of the Trade Marks Act. The judge held that **this provision adds nothing to the CAD** … **It is a pointless provision** … **It should be repealed as an**

14 David Keeling and David Llewelyn (eds), *Kerly's Law of Trade Marks and Trade Names* (16th edn, Sweet & Maxwell 2017) [17–071].
15 *British Airways* (n 11) [26].
16 [2005] EWHC 344 (Ch), [2006] RPC 29 [154].
17 ibid [153].

> **unnecessary distraction in an already complicated branch of the law.**[18]

As can be seen from the remarks of Lewison J and Jacob LJ above, the European directives on comparative advertising have, since then, played a more dominant role than (or even effectively replaced)[19] s 10(6) of the 1994 Act in the English law in relation to the defence of comparative advertising. It follows that in subsequent cases of comparative advertising, English courts have only given little, if any, weight to their local legislative provision. This can be seen in the cases that were relied upon by Counsel for the Plaintiffs in the present case, including *Gillette v LA-laboratories Ltd*,[20] *Anheuser-Busch v Budejovicky Budvar*,[21] *Celine SARL v Celine SA*[22] and *Hotel Cipriani SRL v Cipriani (Grosvenor Street) Limited* [23] (the Plaintiffs' Authorities). Applying the aforesaid European directives including the CAD, these English cases have, as conveniently summarised by the court in the present case, established the following principles:

> [T]he concept of 'honest practices in industrial or commercial matters' constitutes 'in substance **the expression of a duty to act fairly in relation to the legitimate interest of the trademark proprietor**', such that the use of a trade mark will not be in accordance with honest practices if:
>
> (1) it is done in such a manner as to give the impression that there is a commercial connection between the third-party and the trade mark owner;

---

18 *O2 Holdings Limited v Hutchison 3G Limited* [2006] EWCA Civ 1656, [2007] ETMR 19 [58] (Jacob LJ) (emphasis added).

19 It is noted that, by virtue of the new Trade Marks Regulation 2018 (SI 2018/825) that came into effect on 14 January 2019, section 10(6) of the 1994 Act was finally repealed. Instead, section 10(4)(e) was added to the 1994 Act to the effect that uses of a trademark 'in comparative advertising in a manner that is contrary to the Business Protection from Misleading Marketing Regulations 2008' would fall within the ambit of 'uses' in cases of trademark infringement.

20 Case C–228/03 *Gillette Co v LA-Laboratories Ltd Oy* [2005] ECR I–2337.

21 Case C–245/02 *Anheuser-Busch Inc v Budejovicky Budvar narodni podnik* [2004] ECR I–10989.

22 Case C–17/06 *Celine SARL v Celine SA* [2007] ECR I–7041.

23 [2008] EWHC 3032 (Ch), [2009] RPC 9.

(2) it affects the value of the trade mark by taking unfair advantage of its distinctive character or repute;
(3) it entails the discrediting or denigration of the mark; or
(4) where the third-party presents its product as an imitation or replica of the product bearing the trade mark of which it is not the owner.[24]

Due to the changing role of European directives in relation to English jurisprudence on comparative advertising, English courts provided two different tests for the interpretation of the phrase 'honest practices in industrial or commercial matters' referred to in the Plaintiffs' Authorities and the Defendant's Authorities, with the former emphasising the principle of fairness which arises from one's duty to act fairly in relation to the legitimate interest of the trademark proprietor and the latter focussing on the notion of honesty of users of those registered trademarks. Given the striking difference in the English courts' approaches in these two groups of cases, an attempt to reconcile them may render the existing law more confusing and unprincipled than ever. It was therefore incumbent upon the court in the present case to decide whether either of them (and, if yes, which of them) should be followed in Hong Kong.

IV. SHOULD THE HONG KONG COURTS FOLLOW 'EUROPEAN JURISPRUDENCE'?

As seen, the difference in the English courts' approaches in the two groups of cases above in fact roots in the different levels of reliance they had on the European directives. While s 10(6) of the 1994 Act was the primary basis for the English courts' decisions in the Defendant's Authorities, the same provision was regarded as a 'pointless provision'[25] in the Plaintiffs' Authorities. Instead, prevailing European directives including the CAD provided the sole foundation for the new approach taken by English courts in

[24] *PCCW-HKT Datacom* (n 1) [16] (emphasis added).
[25] *Gillette Co* (n 20).

the Plaintiffs' Authorities. The issue before the court here may therefore be boiled down to the simple question of whether Hong Kong courts should follow the relevant European directives.

The Honourable Mr Justice Henry Litton, the former judge of the Court of Final Appeal, criticised in his recent extrajudicial publication the recent trend of Hong Kong courts to transplant 'European jurisprudence' into the local legal system in seeming ignorance of the traditional common law principles.[26] In particular, he pointed out that it would go against the local constitution if local courts treated 'European jurisprudence' as part of the received law of Hong Kong.[27]

Although Mr Justice Henry Litton based his discussions primarily on the area of public law, this case note avers that his observations may be equally instructive in the area of intellectual property law. For example, in *Christie Manson & Woods Ltd v Chritrs (Group) Ltd*,[28] the Court of First Instance was tasked to interpret s 18(4) of the TMO. In doing so, the court held that, following the ECJ's decision in *Adidas-Salomon AG v Fitnessworld Trading Ltd*,[29] the words 'not identical or similar' in the provision should be taken to mean 'whether or not identical or similar'. Despite the obvious difference in the literal meanings of these two phrases, the court apparently did not provide any justification as to why the phrase above should be read into the unambiguous TMO provision in question except that it has been 'authoritatively decided' so by the ECJ.[30] The court's treatment of European authorities above has attracted serious criticism.[31]

While European cases or directives have been frequently referred to by English courts or even by the Trade Marks Registry in Hong Kong, European authorities, by their nature, are not

---

26 Henry Litton, *Is the Hong Kong Judiciary Sleepwalking to 2047?* (Sheriff Books 2019) 134–37.

27 ibid 140.

28 [2012] HKCFI 1790, [2012] 5 HKLRD 829.

29 Case C–408/01 *Adidas-Salomon AG v Fitnessworld Trading Ltd* [2003] ECR I–12537.

30 *Christie Manson* (n 28) [51].

31 See Tom Ka Cheung Ng, 'Protection of Well-Known Trade Marks in Hong Kong: An Evaluation of the Usefulness of European Authorities' (2013) 43 HKLJ 435; Alice Lee, 'Well-Known Trade Marks and Dissimilar Goods: HK, UK and EU Law' (2017) 47 HKLJ 89.

binding in Hong Kong and should be carefully considered on a case-by-case basis before they are applied by Hong Kong courts. On the one hand, given the relatively limited size of local cases on the TMO, European authorities may be helpful to the local courts in ascertaining the scope of the legislation. On the other hand, foreign authorities such as the European authorities should not be automatically considered as part of the context for statutory interpretation, as in the case of *Christie Manson*,[32] unless there are compelling reasons to do so.

In the present case, Counsel for the Plaintiffs submitted that since both s 10(6) of the 1994 Act and s 21 of the TMO borrowed the phrase 'in accordance with honest practices in industrial and commercial matters' from art 6(1) of the TM Directive, the ECJ's interpretation of art 6(1) should be applicable in the interpretation exercise of the English and Hong Kong provisions.[33] English courts in the Defendant's Authorities failed to give effect to the relevant directives and therefore put a wrong focus on the idea of honesty. Hence, the Plaintiffs argued that the Defendant's Authorities should not be followed by Hong Kong courts.[34]

Accepting that the ECJ's decisions and interpretation of the European directives may be 'guidance and useful reference' on the meaning of s 21 of TMO, Mimmie Chan J correctly highlighted that they have no binding effect in Hong Kong.[35] Her Ladyship further adopted Gummow NPJ's approach in *Tsit Wing (Hong Kong) Co Ltd v TWG Tea Co Pte Ltd (No 2)*,[36] that is, if there are several reasonably possible interpretations of a TMO provision, Hong Kong courts will favour the interpretation that is consistent with the international obligation under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), [37] an international legal agreement on intellectual property law to which Hong Kong has acceded since 1 January 1995.

---

32 *Christie Manson* (n 28).
33 *PCCW-HKT Datacom* (n 1) [15] and [21].
34 ibid [16].
35 ibid [22].
36 [2016] HKCFA 2, (2016) 19 HKCFAR 20 [57].
37 *PCCW-HKT Datacom* (n 1) [18].

Having considered the relevant articles in TRIPS, the court then swiftly rejected the Plaintiffs' case for the following two main reasons:

(a) Bearing in mind that regulations of comparative advertising should be a matter for the legislature, the courts should not enforce, through the back door, any of the European directives which have no effect in Hong Kong by interpreting the proviso in s 21 of the TMO to mean the incorporation of all the requirements and conditions specified in the European directives for comparative advertising;[38] and

(b) It would be highly unfair and inequitable to hold anyone liable for trademark infringement by reason of its non-compliance with standards specified in the European directives which have never been publicised as being applicable to the market in Hong Kong.[39]

Given the nature of 'European jurisprudence' as discussed above, this case note avers that these two reasons succinctly explain why the court should be cautious when considering the persuasiveness of the European directives and case laws on comparative advertising. Furthermore, the cautious approach Her Ladyship adopted in examining those directives and case laws represents the correct approach that Hong Kong courts should take towards the use of 'European jurisprudence' when they interpret local statutory provisions.

In contrast to 'European jurisprudence', Hong Kong courts are duty-bound to follow TRIPS despite its 'foreign nature' and, as suggested above, the Court of Final Appeal maintained that the interpretation of any TMO provision should be consistent with the articles in TRIPS. Here, a side issue might arise in relation to art 17 of TRIPS, which provides:

> **Members may provide limited exceptions** to the rights conferred by a trademark, such as fair use of descriptive terms, **provided that such exceptions take account of the legitimate**

38 ibid [23].
39 ibid [24].

> **interests of the owner of the trademark and of third parties**.[40]

One may note that the reference to the 'legitimate interests of the owner of the trademark' above seems to support the Plaintiffs' case since it resembles the phrase 'a duty to act fairly in relation to the legitimate interest of the trademark proprietor' in the Plaintiffs' Authorities. Hence, it appears to be arguable that when interpreting s 21 of the TMO in light of art 17 of TRIPS, the court may be duty-bound to take into account 'the legitimate interest of the trademark proprietor', as contained in both TRIPS and the Plaintiffs' Authorities.

Instead of comparing TRIPS and the principles in the Plaintiffs' Authorities literally, Mimmie Chan J approached this issue from a wider perspective:

(a) In relation to the legitimate interest of the trademark proprietor, art 17 of TRIPS requires any exception to take into account not only the legitimate interest of the owners of the trademarks but also that of the third parties, which include consumers and other traders or competitors of the trademark owners;[41] and

(b) Broadly speaking, the trademark law itself has always involved a balancing of the different competing interests of interested and affected parties, of which s 21 of the TMO is a clear example.[42]

In other words, the object of s 21 of the TMO is to permit comparative advertising in the interest of competitors in any given market while the interest of the owners of trademarks will also be protected by, inter alia, the factors listed in s 21(2) of the TMO. Therefore, the design of the provision itself has already taken into account 'the legitimate interests of the owner of the trademark and of third parties' and has complied with art 17 of TRIPS even if the interpretation favoured by the Plaintiffs' Authorities is not adopted. It follows that the court's duty to comply with art 17 of

---

40 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), art 17 (emphasis added).

41 *PCCW-HKT Datacom* (n 1) [27].

42 ibid [28]–[29].

TRIPS should not preclude the court from rejecting the Plaintiffs' Authorities. Based on the analysis above, the court had no difficulty in refusing to follow the Plaintiffs' Authorities. Instead, the court found the pre-2003 English cases (i.e. the Defendant's Authorities) 'relevant and helpful' to the court's analysis of s 21 of the TMO.[43]

This case note avers that Mimmie Chan J's reasoning in this case should be welcomed for several reasons:

(a) Her Ladyship provided compelling reasons why the court should not treat 'European jurisprudence' as accepted law when interpreting the TMO and correctly refused to rely on any European directives as applied in the Plaintiffs' Authorities in ascertaining the ambit of section 21 of the TMO. It is averred that Her Ladyship's judgment clarified the proper approach as to the use of 'European jurisprudence' in the context of trademark laws in Hong Kong after the case of *Christie Manson* in 2012;[44]

(b) On the other hand, by refraining from imposing a blanket ban of European authorities, Her Ladyship preserved feasibility in the court's future reference to European authorities. As a result, it is still open to the courts or the Trade Marks Registry to consult European authorities as long as there are strong reasons to do so;

(c) By adopting Gummow NPJ's approach in *Tsit Wing*,[45] Her Ladyship also rightfully reinforced the role of TRIPS as one of the primary factors that the court must consider when interpreting the TMO, thus ensuring that the international obligations under TRIPS are always complied with;

(d) As it was held that advertisers should not be held liable for trademark infringements due to their failure to follow any European directives that were unknown to them, no unfairness has been caused to the Defendant or any

---

43 ibid [25].
44 *Christie Manson* (n 28).
45 *PCCW-HKT Datacom* (n 1) [24].

advertisers in Hong Kong. Hence, the local courts were able to balance the interests of both the trademark owners and their competitors under the existing statutory framework in Hong Kong; and

(e) Finally, the court also drew clear distinctions between the respective roles of the legislature and the court by ensuring that no 'European jurisprudence' would be enforced through the back door by the courts.

Although the court in the present case refused to adopt the 'European jurisprudence' about comparative advertising, it does not follow that the European approach (as reflected in the Plaintiffs' Authorities) is less satisfactory per se. As to the future development of the law, the present case also calls into question whether the local legislature should follow the English legislature in replacing the existing statutory provisions on comparative advertising with the relevant European directives.[46] While it is impossible to embark on a comprehensive review on the existing European approach to regulate comparative advertising here, one may appreciate the controversy behind from Jacob LJ's brief comments in *L'Oréal SA v Bellure NV*:

> I believe the consequence of the ECJ decision is that the EU has a more 'protective' approach to trade mark law than other major trading areas or blocs. I have not of course studied in detail the laws of other countries, but my general understanding is, for instance, that countries with a healthy attitude to competition law, such as the US, would not keep a perfectly lawful product off the market by the use of trade mark law to suppress truthful advertising. [47]

There seems to be, therefore, no universally accepted answer as to the best way to regulate comparative advertising. More in-depth cross-jurisdictional research is needed before we can assess the desirability of the EU's 'protective' approach. For the time being, this case note avers that, in line with Mimmie Chan J's decision in the present case, local courts should not rely on the

---

46 *Anheuser-Busch Inc* (n 21).

47 [2010] EWCA Civ 535, [2010] RPC 23 (CA) [20].

European directives and the tests laid down in the Plaintiffs' Authorities when interpreting section 21 of the TMO, unless and until those directives are incorporated into the TMO in the future.

V. APPLYING THE LAW TO THE ADVERTISEMENTS

Proceeding on the basis that the Defendant's Authorities were to be followed, Mimmie Chan J properly adopted the tests laid down in those cases. In other words, Mimmie Chan J based Her Ladyship's decisions on the assessment of truthfulness and honesty of the Advertisements.

First, Her Ladyship found that to the average consumers in Hong Kong, who are used to hyperbole and exaggeration in advertising, the words 'bloated' and '大食' in the Advertisements would be taken to be a mere expression of 'expensive' in a sensational and coloured manner.[48] Her Ladyship continued to note that it would be unlikely for the average reasonable readers to take the straplines in the Advertisements seriously or to consider them as carrying any derogatory or sinister meaning.[49] Furthermore, the court gave heavy weight to the evidence showing that the Plaintiffs' price for fixed line telephone services were indeed more expensive than that of the Defendant (and even any other local service providers) in most cases at the material times.[50]

Accepting that the Advertisements were substantially true, the court then had no difficulty in finding that the three tests set out in section 21(2) of the TMO were passed:

(a) The Advertisements did not deceive or mislead the public under section 21(2)(c) of the TMO as the evidence at trial has proved that the straplines in the Advertisements were substantially true;[51]

(b) Even if the Advertisements did take advantage of the Marks, such advantage was not 'unfair' under section

48 *PCCW-HKT Datacom* (n 1) [41].
49 ibid [42].
50 ibid [45]–[47].
51 ibid [52].

21(2)(a) of the TMO because the message conveyed in the Advertisements was substantially true,[52] and

(c) A statement of truth cannot be detrimental to the reputation of the Marks under section 21(2)(b) of the TMO even if the Plaintiffs find it uncomfortable to be confronted with a substantial truth.[53]

It is, however, interesting to note that, in relation to (b) (ie the test of 'unfair advantage'), Mimmie Chan J referred to the ECJ's decision in *L'Oréal SA*, where the notion of 'unfair advantage' was essentially understood as 'exploitation on the coat-tails of the mark with a reputation'.[54]

It should be noted at the outset that, under Mimmie Chan J's reasoning as discussed above, it is not objectionable in principle for the court to refer to European cases on trademark law. However, due to the lack of binding effect of those cases in Hong Kong, the court should provide compelling reasons for referring to those cases and ensure that any interpretation with reference to those cases would be consistent with the articles in TRIPS.

Here, in relation to the notion of 'unfair advantage', the ECJ's definition above does not sit easily with the notion of honesty under the Defendant's Authorities, which was plainly reflected in the subsequent development of *L'Oréal SA* itself. After the ECJ's decision above, the case was sent back to the English Court of Appeal. On the facts, Jacob LJ opined that the statements in the defendants' advertisements were in fact honestly made. Nevertheless, since such truthful advertisements involved 'clear exploitation on the coat-tails' of another mark with a reputation, His Lordship reluctantly followed the ECJ's ruling and held accordingly that the defence of 'comparative advertising' was not established. By way of obiter, His Lordship expressed that his strong predilection, free from the opinion of the ECJ, would be to hold that traders should not be prevented from telling the truth.[55] Therefore, Jacob LJ's comments seem to suggest that the ECJ's

---

52 ibid [57].
53 ibid [61].
54 ibid [54]; Case C–487/07 *L'Oréal SA v Bellure NV* [2009] ECR I–05185 (ECJ) [41].
55 *L'Oréal SA* (CA) (n 47) [7]–[8].

definition of 'unfair advantage' was in fact inconsistent with regulatory approaches that permit truthful advertising, which, it is averred, include the English courts' approach to comparative advertising as laid down in the Defendant's Authorities and adopted by Mimmie Chan J in the present case. Otherwise, the defence of comparative advertising would have been found to have established in the case of *L'Oréal SA*. It should also be noted that, given Jacob LJ's obiter dictum above, the ECJ's decision has stirred controversy among the academics.[56] It follows that there seems to be no reason why the court in the present case should apply the ECJ's definition which was not only apparently incompatible with the rest of her judgment but also so controversial per se.

In any event, Mimmie Chan J based Her Ladyship's decision on the truthfulness of the contents of the Advertisements and thus found that, despite the ECJ's definition of 'unfair advantage', any advantage arguably taken by the Marks in the present case is not 'unfair'.[57] In other words, the ECJ's definition above eventually had no actual impact on Mimmie Chan J's decision. It is however recommended that, to avoid any possible incoherence in her reasoning, Her Ladyship should have at least addressed Jacob LJ's comments above and clarified the proper test to be taken if the court wishes to adopt the ECJ's controversial definition of 'unfair advantage'. At the very least, Her Ladyship should have explained why such a definition would have been helpful in the present case. Alternatively, given that the ECJ's definition was not applied at last, Her Ladyship may consider applying other English cases (such as the Defendant's Authorities) but not the ECJ's decisions so that no inconsistency may arise in her reasoning.

---

56 The ECJ's decision and Jacob LJ's comments have been critically discussed by academics. See, for instance, Audrey Horton, 'The Implications of *L'Oréal v Bellure* – A Retrospective and a Looking Forward: The Essential Functions of a Trade Mark and when is an Advantage Unfair' (2011) 33 EIPR 550; Christopher Morcom, '*L'Oréal v Bellure* – The Court of Appeal Reluctantly Applies the ECJ Ruling: *L'Oréal SA v Bellure NV* [2010] EWCA Civ 535' (2010) 32 EIPR 530; Dev Gangjee and Robert Burrell, 'Because You're Worth It: *L'Oréal* and the Prohibition on Free Riding' (2010) 73 MLR 282.

57 *PCCW-HKT Datacom* (n 1) [57].

CONCLUSION

Despite the prevalence of European authorities in trademark cases recently, the Court of First Instance in this landmark case has clarified the proper approach towards the use of 'European jurisprudence' in Hong Kong under our legal system and our international obligations contained in TRIPS. The court rightfully refused to adopt English decisions that were based on European directives that have never been adopted in Hong Kong. Furthermore, while emphasising that European cases have no binding effect in Hong Kong, the court was correct in refraining from imposing a blanket ban on the use of all European cases so that the local courts can be flexible in the future in deciding whether to draw support from 'European jurisprudence'. In the future, Hong Kong court must endeavour to ensure that the articles in TRIPS are properly observed when interpreting TMO provisions and that compelling reasons should be present when it decides to follow European cases, thus preventing itself from enforcing, through the back door, any European directives or authorities in Hong Kong.

REVISITING INTERNATIONAL TORT ACTIONS IN HONG KONG

Edward K H Ng*

Hong Kong courts currently use the double actionability rule to determine whether a party has an international tort claim — the double actionability rule is lagging behind many common law jurisdictions. The purpose of this article is to argue why the double actionability rule must be abolished. The article then explores the three approaches in international tort actions, namely (a) the 'proper law' of tort; (b) lex loci deliciti commissi; and (c) the 'most favourable law' approach. All three approaches to international torts have their shortcomings, and there is no fast solution in solving choice of law issues in international torts. However, it is suggested that Hong Kong should adopt the 'most favourable law' approach, as all of the drawbacks with this approach have been attended to in this article.

INTRODUCTION

Traditionally, the double actionability rule governs the choice of law question in determining tortious liabilities of overseas act in many common law jurisdictions.[1] Gradually, however, some common law jurisdictions have realised that the double actionability rule is not without problems and have since replaced

* LLB (The University of Hong Kong), PCLL (The University of Hong Kong), LLM (The London School of Economics and Political Science), CEDR Accredited Mediator, MCIArb, AHKIArb. I thank Martin KY Lau and Flora YL Chan for their helpful and insightful comments. All mistakes in this article are mine.

1 See, for example, Carlos Manuel Vázquez, 'Jurisdiction and Choice of Law for Non-Contractual Obligations Part I: Hemispheric Approaches to Jurisdiction and Applicable Law for Non-Contractual Civil Liability' (Organization of American States Permanent Council 62nd Regular Session, Rio de Janeiro, 10–21 March 2003).

the rule. For example, the double actionability rule is gradually being judicially replaced in Canada[2] and Australia.[3] In the United Kingdom (UK), double-actionability has been largely abolished since the enactment of the Rome II Regulation,[4] which applies across the European Union (EU). How should Hong Kong answer to the double actionability rule's shortcomings? Should Hong Kong abolish the double actionability rule?

This article is divided into two parts. The first part is an explanation as to why the current double actionability rule in Hong Kong must be abolished. The second part explores three different possibilities which Hong Kong could adopt to replace the double actionability rule, namely:

(a) The 'proper law' of tort;

(b) *Lex loci deliciti commissi*; and

(c) The 'most favourable law' approach.

All of the above three approaches have their own advantages and shortcomings. While the first two approaches are considered to be the more popular options, it is the author's view that neither approach should be adopted in Hong Kong. Instead, Hong Kong should, for reasons stated below, adopt the 'most favourable law' approach to international torts.

For the avoidance of doubt, the tort of defamation will not be discussed in this article since it involves the complexities of freedom of speech that should be more appropriately dealt with in a separate article. Suffice it to say that it is not uncommon for

---

2 The double actionability rule was judicially rejected in *Tolofson v Jensen* [1994] 3 SCR 1022 and replaced with a rule requiring application of the *lex loci*, which could be subject to a flexible exception in international cases but not in interprovincial cases; Lord Collins and Jonathan Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws*, vol 2 (15th edn, Sweet & Maxwell 2012) 2203.

3 The High Court of Australia rejected the double actionability rule in respect of torts committed in interstate Australia in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503. In respect of torts committed in a foreign country, the case *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 also rejected the application of the actionability rule.

4 Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

any legislative reform to 'hive off' the issue of defamation. By way of example, Article 1(2)(g) of the Rome II Regulation excludes defamation and privacy claims from the scope of the Rome II Regulation. Consequently, Member States of the EU are free to adopt their own rules in relation to defamation.[5]

I. ORIGINS OF THE DOUBLE ACTIONABILITY RULE

I will first begin by explaining what the double actionability rule is. The double actionability rule is a general doctrine that determines whether courts have the power of adjudication over tortious acts committed overseas. The double actionability rule was first formulated in the English case of *Phillips v Eyre*,[6] where Willes J stated that:

> As a general rule, in order to found a suit in [the local jurisdiction] for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in [the local jurisdiction] ... Secondly, the act must not have been justifiable by the law of the place where it was done.[7]

From this passage, one can see that there are two limbs to the double actionability rule. First, the tort must be actionable in the country in which the action was brought. In other words, if the case was brought in Hong Kong, then the tortious act must be capable of being a cause of action under Hong Kong law. Second, the act must not have been justifiable under the law of the place in which the tort was committed.

As one would readily anticipate, what is 'not justifiable' under the law of the place is rather ambiguous, for it could mean

---

5 Therefore, the double actionability rule still applies in the UK insofar as defamation claims are concerned. See Jonathan Hill and Máire Ní Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (5th edn, OUP 2016) 303–07.

6 (1870) LR 6 QB 1.

7 ibid 28–29.

that the conduct must be a tort under the law in the place where the 'wrong' was committed, or that the claim must be in some way civilly actionable thereby, or that though the claim is not civilly actionable, the conduct is 'wrong' by that foreign law.[8] Two cases are noteworthy in shedding light as to how the double actionability rule is to be applied practically in the context of Hong Kong law, namely *Red Sea Insurance Co Ltd v Bouygues SA*,[9] a Privy Council appeal from Hong Kong, and *Boys v Chaplin*,[10] a case decided by the House of Lords.

In *Red Sea*, the appellant was an insurance company of construction works incorporated in Hong Kong with its head office in Saudi Arabia.[11] The respondents, none of whom were from Hong Kong, were engaged in a construction project in Saudi Arabia.[12] The respondents began proceedings against the appellant seeking to be indemnified for loss and expenses under the terms of an insurance policy issued by the appellant. The appellant denied liability and counterclaimed against the respondents in tort.[13]

At first instance, Jones J applied the law of double actionability and held that under Hong Kong law, there was no cause of action and the law of Saudi Arabia alone could not be relied on to determine the issue of tortious liability in Hong Kong courts. Accordingly, the judge ordered that the counterclaim be struck out. The Hong Kong Court of Appeal, although allowing the appeal, acknowledged the application of the double actionability rule. The appellant then appealed to the Privy Council.

The central issue of the appeal in *Red Sea* was therefore whether the parties were bound by the double actionability rule, or whether the appellant could rely solely on the *lex loci* (Saudi Arabian law) to establish direct liability in tort when the *lex fori* (Hong Kong law) does not recognise such liability. Lord Slynn took the opportunity to clarify the double actionability rule,

---

8 See J G Collier, *Conflict of Laws* (3rd edn, CUP 2001) 222–23.
9 [1995] 1 AC 190.
10 [1971] AC 356.
11 *Red Sea* (n 9) 194G.
12 ibid 194G–195A.
13 ibid 195A–195C.

explaining that 'justifiable' means actionable in civil proceedings in the *lex loci* even if the act was not characterised as a 'tort' under the foreign law.[14]

In short, therefore, where a wrong is committed overseas, one has to show that the wrong is actionable in both Hong Kong and the place where the wrong was committed to be able to bring a tort claim in Hong Kong. Only after both limbs have been satisfied will the courts proceed to trial under Hong Kong law.

Strangely, however, the double actionability rule is not fixed. In certain situations, courts may derogate from the general rule. In fact, in *Red Sea*, even after making a clarification of the double actionability rule, the court did not apply the double actionability rule. The Privy Council held that since the facts were overwhelmingly connected with Saudi Arabia, only Saudi Arabian law should be applied to the case. According to *Red Sea*, to invoke the exceptions of the double actionability rule, one needs to show that there exists an element of injustice, and on evidence that in all the circumstances, another set of laws has the most significant relationship with the occurrence and the parties.[15] 'The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred.'[16]

Similarly, in *Boys v Chaplin,* the court decided that the *lex fori* had a much closer connection with the dispute, and hence, decided to derogate from the double actionability rule and only applied the *lex fori*.

Red Sea and *Boys v Chaplin* demonstrate that the double actionability rule is merely of general applicability. When needed, the courts can and will deviate from the rule. There is a great degree of uncertainty in the applicability of the rule. Moreover, for the reasons below, the double actionability rule has been criticised by both foreign judiciaries and academics.

---

14 ibid 199E.

15 *Kwok Yu Keung v Yeung Pang Cheung* [2005] HKCFI 779, [2006] 1 HKC 107 [16] (Suffiad J).

16 *Red Sea* (n 9) 201A–201B.

A. Problems with Double Actionability

The inherent problem with the double actionability rule is that it 'presupposes that it is inherently just for the rules of the [Hong Kong] domestic law of tort to be indiscriminately applied regardless of the foreign character of the circumstances and the parties.' [17] This presumption does not comply with the international principle of comity. Even though the foreign law on civil wrongs may be substantially different from that of Hong Kong, it does not necessarily follow that the foreign law is unjust. In fact, there may well be multiple 'just' responses to a tort issue. Such a presumption shows a lack of respect for the foreign law.

Furthermore, where the two limbs of the double actionability rule as enunciated in *Philips v Eyre* are satisfied, there is no reason why Hong Kong tort law should be applied in all cases involving a tort or delict regardless of the foreign complexion of the factual situation[18] or when there is a total lack of factual connection with Hong Kong.[19] The blind application of the double actionability rule may lead to injustice to the parties.

Consider the Scottish case of *McElroy v McAllister*.[20] In *McElroy*, both the plaintiff and the defendant were from Scotland. The plaintiff's late husband was injured in an accident in England. All factual connections, except the geographical location of the accident, were with Scotland. The plaintiff sought to claim for, inter alia, solatium[21] under Scottish law. The court, in applying double actionability, held that since solatium was unrecoverable under English law, the test of double actionability was not passed. This left the plaintiff undercompensated. To this end, the decision in *McElroy* presents a clear illustration that double actionability causes injustice when there may be situations where the wrong caused to the plaintiff is not considered to be a civil wrong in either

---

17 Law Commission, *Private International Law: Choice of Law in Tort and Delict* (Law Com No 193, 1990) para 2.7.

18 ibid.

19 See, for example, *Szalatnay-Stacho v Fink* [1947] KB 1 (note, however, that this is a defamation case).

20 1949 SC 1110.

21 Solatium means 'damages allowed for hurt feelings or grief, as distinguished from damages for physical injury.' See, 'solatium', *Black's Law Dictionary* (10th edn, Thomson Reuters 2014).

jurisdiction.[22] In these situations, even where common sense dictates that the plaintiff ought to receive some form of monetary compensation, the application of the double actionability rule effectively bars the plaintiff from any remedy.

In addition, the double actionability rule gives an advantage to the defendant because the plaintiff could not succeed in any claim unless both the *lex fori* and the *lex loci* make provision for it, whereas the defendant could escape liability by taking advantage of any defence available under either of these laws.[23] As Adrian Briggs pointed out, 'in principle the requirement of double actionability means that the claimant must in principle win twice in order to win once.'[24]

It is true that *Boys v Chaplin* and *Red Sea* apply the exception to the double actionability rule to minimise injustice. However, how the exception should be applied was not precisely formulated,[25] if not wholly undefined. It is simply not clear what circumstances will justify the use of the exception.[26] This has led to great uncertainty and unpredictability to the outcome of the action.

The judges in *Red Sea* actually had a great opportunity to clarify how the exception to the double actionability rule can be applied. However, the Privy Council failed to grab hold of the opportunity to satisfactorily clarify this area of law. The Privy Council in *Red Sea* only held that (i) courts have the power to avoid injustice by introducing exceptions to the rule; and that (ii) public policy may be a justification to admit or exclude claims.[27] Subsequent cases such as *Kwok Yu Keung v Yeung Pang Cheung*[28] have followed *Red Sea*, but only explained that the exception can be applied when there is evidence that, in all the circumstances, a foreign law has the most significant relationship with the occurrence and the parties.

---

22 Alan Reed, 'The Anglo-American Revolution in Tort Choice of Law Principles: Paradigm Shift or Pandora's Box' (2001) 18 Arizona Journal of International and Comparative Law 867, 914.
23 Collins and Harris (n 2) 2201.
24 Adrian Briggs, *The Conflict of Laws* (3rd edn, OUP 2013) 295.
25 ibid.
26 Law Commission (n 17) para 2.9.
27 *Red Sea* (n 9) 206.
28 *Kwok Yu Keung* (n 15).

Explanations by judges after *Red Sea* are still largely unclear and provide almost no guidance as to what evidence parties should look for in order to persuade courts to apply the exception. It is also unclear when courts should exclude the first limb or the second limb of the double actionability rule. For instance, questions such as to what extent injustice will warrant the application of the exception, or what are the examples of public policy considerations? These concepts are malleable and capable of being manipulated.[29] Additionally, it remains uncertain as to whether both limbs of the double actionability rule can be displaced in favour of the law of a third country.[30] The manner of the application of the exception in future cases, even after some clarification in past cases, is still a matter of speculation.[31]

An illustration of such uncertainty is *McElroy*.[32] As explained above, common sense would dictate that the exception ought to be invoked in order to do justice to the plaintiff. However, at the end of the day, the exception was not invoked in *McElroy*, leaving the plaintiff undercompensated. *McElroy* demonstrates the unpredictability of courts in invoking the exception to the double actionability rule.

Finally, in every other area of civil actions in Hong Kong (apart from certain aspects of family law),[33] Hong Kong courts are prepared to apply a foreign law in an appropriate case and to allow the exclusive application of the foreign law rather than concurrent application with the local law.[34] There is simply no reason for the Hong Kong common law to have such an anomaly as the one brought by the double actionability rule.

The double actionability rule is problematic as it has a potential of causing injustice and uncertainty. There is, therefore, a clear case that Hong Kong ought to follow overseas common law jurisdictions and abolish the double actionability rule.

---

29 For instance, it is difficult to explain why the issue of damages and that issue *alone* is to be treated as English law in *Boys v Chaplin* (n 10).

30 Collins and Harris (n 2) 2201.

31 Law Commission (n 17) para 2.9.

32 *McElroy* (n 20).

33 Law Commission (n 17) para 2.6.

34 ibid.

II. ALTERNATIVE APPROACHES TO INTERNATIONAL TORTS

It follows that an alternative approach must be found in order to substitute the double actionability rule. There are three possible alternatives to the double actionability rule, namely:

(a) The 'proper law' of tort;

(b) *Lex loci delicti commissi*; and

(c) The 'most favourable' law approach.

Each approach will be discussed in turn.

A. The 'Proper Law' of Tort

1. PROPONENTS

To understand what is meant by the 'proper law' of tort, it is helpful to take reference to the conflict of laws approach to resolving choice of law in contractual disputes.

The 'proper law' in contract refers to the law that is of the closest and most real connection to the contract.[35] JHC Morris was the first academic to suggest the adoption of the 'proper law' in torts, which would enable the courts to choose 'the law which, on policy grounds, seems to have the most significant connection with the chain of acts and consequences in the particular situation.'[36] Morris has, in his article, proposed three arguments for this approach.

First, a 'proper law' of tort gives greater flexibility for Hong Kong courts to determine the correct set of laws to adjudicate and give a just result. In most cases, the 'proper law' would be the law of the place of the wrong, so long as there is no

---

35 *John Lavington Bonython v The Commonwealth of Australia* [1951] AC 201.

36 JHC Morris, 'The Proper Law of a Tort' (1951) 64 Harvard Law Review 881, 888.

doubt as to where the place of the wrong is, but in situations where there is simply no reason to apply *lex loci*, the 'proper law' approach can accommodate for the applications of laws of other jurisdictions, otherwise the results might begin to offend our common sense.[37] Injustice may occur if one applies Hong Kong law to a case which in substance has little to do with Hong Kong.[38]

Secondly, Morris argues that the 'proper law' approach allows a better analysis of the case itself. It enables 'the problems [in tort] to be broken down into smaller groups and thus facilitate a more adequate analysis of the social factors involved.'[39] The mechanical application of a 'single formula' (*lex loci*) or even double actionability, without the consideration of social factors, cannot possibly produce socially adequate results.[40]

The third argument is a critique of the last event doctrine as applied to United States international or interstate tort cases. The last event doctrine has not been adopted by Hong Kong before, and hence will not be relevant to the present argument.

2. Problems with the 'Proper Law' of Tort Approach

However, the 'proper law' of tort approach was expressly rejected by Lord Slynn in *Red Sea*. The Court in *Red Sea* stated that the resulting complexities and uncertainty in the 'proper law' of tort approach were considered to militate against the adoption of the 'proper law' of tort approach.[41] It is not difficult to see why.

The main problem associated with Morris's arguments, even acknowledged by Morris himself,[42] is the concern of predictability. The parties will not know what their liabilities or remedies would be, unless and until the courts determine which set of laws has the most significant connection with the tort. The

37 ibid 884–85.
38 Graeme Johnston and Paul Harris, *The Conflict of Laws in Hong Kong* (3rd edn, Sweet & Maxwell 2017) 52.
39 Reed (n 22) 892.
40 ibid.
41 *Red Sea* (n 9) 199H–200A.
42 Morris (n 36) 895.

'proper law' of tort approach as propounded by Morris is academically ideal, but impractical.

In relation to Morris's second argument, if we have to separate each tort and decide what law is applicable, it becomes unduly complicated and renders the law uncertain. In theory, a different set of laws could apply to each separate tort in one single case. Hence, the 'proper law' of tort approach has been described as 'a law professor's delight but a practitioner's and judge's nightmare'.[43]

Finally, Morris's second argument in favour of the 'proper law' of tort approach is more academic than practical. Indeed, taking social factors into account and a mechanical application of a single formula are not mutually exclusive. In fact, it may be argued that the mere application of the law by lawyers and judges already entails taking social factors into account.

B. *Lex Loci Delicti Commissi*

1. PROPONENTS

Lex loci deliciti commissi simply means applying the law of the location where the wrong is committed. The *lex loci* approach is perhaps the most widely adopted approach in the world. It has been adopted by civil law jurisdictions including China[44] and Japan,[45] as well as common law jurisdictions such as Canada and Australia. Clearly, there is a certain degree of attractiveness in adopting this approach.

---

43 Russell J Weintraub, 'The Future of Choice of Law for Torts: What Principles Should be Preferred?' (1977) 41 Law & Contemporary Problems 146, 148.

44 See《中華人民共和國涉外民事關係法律適用法》主席令第三十六號第四十四條 ('Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships, Decree of the President of the People's Republic of China No 36, art 44').

45 See「法の適用に関する通則法」（平成十八年六月二十一日法律第 78 号）20 条 ('Act on General Rules for Application of Laws, art 20').

First, the *lex loci* approach accords with the concept of the law of obligation or of a vested right, by which the tortious liability is regarded as travelling from State to State.[46] It 'promotes the idea that law follows an individual and may be enforced wherever the individual is located'.[47]

Lex loci also accords the saying 'when in Rome do as the Romans do'.[48] It accords with the legitimate expectations of the parties in the sense that individuals are expected to alter their conduct to comply with the law of the jurisdiction in which they are located.[49] Finally, *lex loci* gives certain, uniform and predictable results and discourages forum shopping by the parties of the tort.[50]

2. PROBLEMS WITH THE *LEX LOCI* APPROACH

However, there are problems with this approach, two of which were listed by Lord Slynn in *Red Sea*:

(a) There may be doubts as to where the location of the tort occurred; and

(b) The rigidity of the *lex loci* approach may, in certain circumstances, cause injustice.[51]

For example, 'cases involving economic torts such as negligent misrepresentation, inducement of breach of contracts, intellectual property infringement, international torts involving the Internet or cases involving multistate defamation, the precise locus may be wholly ambiguous.'[52] These economic torts are more sophisticated and there may be more than one *loci*.

---

46 *Red Sea* (n 9) 199.
47 Reed (n 22) 872.
48 ibid 873.
49 ibid.
50 ibid.
51 *Red Sea* (n 9) 199.
52 Reed (n 22) 873–74.

Let us consider a factual matrix similar to that of *Alcock v Chief Constable of South Yorkshire*.[53] Suppose that a plaintiff's close relative was at the Hillsborough football stadium in 1989, and the plaintiff watched a live television broadcast of the human crush accident in Hong Kong. The plaintiff suffered indirect psychiatric harm due to nervous shock. The point is that there is considerable difficulty in determining where the 'location' of the tort occurred. Did it occur in the UK, being the place where the news was broadcasted from (and indeed where the primary victims suffered physical injuries), or in Hong Kong, being the place where the plaintiff witnessed the horrific scenes?

In these situations, courts may have difficulties in determining which set of laws is to be used to rule on the dispute. There may be litigation on a preliminary issue on where the tort took place, which may be costly and inefficient.

As to the rigidity problem as contemplated by Lord Slynn, it can be illustrated by an example provided by Morris: students from a school in Ontario goes to Quebec for camping. A student then gets into an accident caused by another student. Both students are residents of Ontario. Since all factual connections, except for the geographical location, are in Ontario, does it make sense to apply *lex loci* here (ie Quebec civil law)? The answer seems to be a resounding no. Hence the mechanical application of the common law *lex loci* approach is problematic at times. Indeed, some comparisons can be made with respect to Article 4 of the Rome II Regulation adopted by the EU. Whilst Article 4(1) of the Rome II Regulation makes it a general rule that the law of the country where the damages occurred shall apply in respect of a tort and delict, this is subject to an exception in Article 4(2): if the person claiming to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

In summary, both the 'proper law' approach and the *lex loci* approach, while popular, because of their various shortcomings, are unsatisfactory. It is suggested that a third approach should be adopted – the 'most favourable law' approach.

---

[53] [1992] AC 310.

C. The 'Most Favourable Law' Approach

1. PROPONENTS

The 'most favourable law' approach is an approach once adopted by Germany regarding torts committed overseas. This approach has been abolished by Germany since May 1999, in lieu of the Rome II Regulation.[54] However, it does not, in and of itself, mean that the 'most favourable law' approach is unmeritorious. Particular analysis as to its merits is needed.

This 'most favourable law' approach is based on the German principle of favourability (*günstigkeitsprinzip*): the law of the place that is more favourable to the injured party.[55] The word 'favourable' here means the balance of interests is tilted towards the plaintiff rather than the defendant by the use of value-based criteria.[56] The plaintiff can consider the following two factors in determining what is 'favourable': firstly, the amount of damages that the plaintiff may possibly obtain; and secondly, the likelihood of success in obtaining such remedy, taking into account the available defences for the defendant. In effect, this means that the set of laws is, prima facie, the set of laws that is chosen by the plaintiff.[57]

The rationale for the 'most favourable law' approach is that the law should be more sympathetic towards the injured party, particularly where the damage done to the party, such as the loss of a limb or loss of life, cannot be adequately compensated by money alone. Moreover, as compared to double actionability or 'proper law', the 'most favourable law' approach provides greater

---

54 Deutscher Bundestag, *Entwurf eines Gesetzes zum Internationalen Privatrecht für außervertragliche Schuldverhältnisse und für Sachen* ('Draft Law on Private International Law on Non-contractual Obligations and Property'), Deutscher Bundestag 14 Wahlperiode 14/343.

55 ibid.

56 Peter Kincaid, 'Justice in Tort Choice of Law' (1996) 18 Adelaide Law Review 191.

57 Of course, the 'most favourable law' approach should not bar the plaintiff from choosing the set of laws that is less favourable to himself/herself. Caution must be exercised by the defendant, however, as one cannot help but wonder what the motive is behind the plaintiff's choice of a less favourable set of laws.

certainty and predictability as parties will be able to, without second guessing the mindsets of the judge, determine which set of laws can be applied. This is because the parties will be able to identify the set of laws used at the early stage of legal proceedings.

2. DISADVANTAGES?

While the 'most favourable law' approach is not without its problems, these shortcomings can be countered one by one, or by implementation of certain simple procedural safeguards.

First, as the plaintiff will choose the set of laws that is most favourable, an issue one might have is that it may cause injustice to the defendant as he/she might have to 'overcompensate' for a wrong which he/she might not have reasonably expected. [58] In response to the issue of overcompensation, the law of tort, in addition to distributive and corrective justice, has the purpose of deterrence requiring the wrongdoers to take reasonable care,[59] and to some extent, acting as a means to achieve retributive justice.[60] The consequence of requiring the defendant to overcompensate under the laws more favourable to the plaintiff merely has the effect of greater deterrence, making the defendant take greater care and responsibility in their actions. Policy-wise, the fact that people take greater care would be beneficial to the international community as a whole. Therefore, the fact that injustice may be

---

58 Indeed, in the UK, under the case of *Harding v Wealands* (2006) UKHL 32, [2007] 2 AC 1, heads of recoverable loss and quantum of damages can be governed by different sets of laws. However, the reasoning in *Harding* appears inapplicable to Hong Kong. 'This is because the decision was based upon the legislative intervention by the [Private International Law (Miscellaneous Provisions) Act 1995], to which there is no equivalent in Hong Kong.' In other words, in Hong Kong, heads of damages and the quantum of damages should be determined and calculated using the same set of laws. See Martin Hiu Tin Kok, 'Substance and Procedure in the Hong Kong Conflicts of Laws: Redrawing the Boundaries and Affording Substance to "Substance"' (2011) 5 HKJLS 109, 116.

59 Rick Glofcheski, *Tort Law in Hong Kong* (4th edn, Sweet & Maxwell 2017) para 1.4.

60 Ronen Perry, 'The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory' (2006) 73 Tennessee Law Review 177, 179.

caused to the defendant should be justifiable on the basis of the inherent purpose of tort law.

Of course, it does not follow that the greater the damages, the better the deterrent effect. What is argued here is not that we should increase the damages available to the plaintiff as much as possible, but that there are multiple 'just' answers to a tort claim. One cannot assume that it is unjust because the plaintiff will be compensated more favourably in one set of laws than the other. It must be understood that, from a modern-day perspective, the more favourable set of laws may very likely be made by the foreign legislature or judiciary through serious, rational and reasonable discussion or consideration. This method also accords with the international law principle of comity, whereby jurisdictions ought to respect the laws of other jurisdictions.

The second problem is that, taking the word 'favourability' at face value, the plaintiff will be entitled to choose whatever set of laws in the world, including ones that have no connection to the case whatsoever. Of course, the plaintiff is not allowed to choose any set of laws, as it would lead to absurd outcomes. The choice of 'substantive' law is limited to the place where the law must have a legitimate connection with the case in question. There must be a limit to the choices of law available to the parties. The choices may be limited to the jurisdictions that have some legitimate connection with the case in question. For example, the parties may choose to apply between *lex loci*, or the law in which the parties are domicile in.

To prevent the situation stipulated by Morris, ie where all factual connections, except for the geographical location, are from one jurisdiction, it seems unreasonable and contrary to common sense to allow the plaintiff to take advantage of the law of the *lex loci*. In these situations, the law of which the factual connections are connected to should apply. In other words, the plaintiff will not be entitled to freely choose the set of laws. This is a narrow exception and is akin to the exception in international tort disputes in the EU under Article 4(3) of the Rome II Regulation. At the end of the day, in order to determine the limits of choice of law options, the court should take a common sense approach and briefly explore the reasons behind the plaintiff's choice.

Finally, and most crucially, the favourability approach was abolished in Germany in May 1999 because it was considered to be too time-consuming.[61] It is conceded that it may potentially be problematic if the parties appeal as to which set of law is more favourable. Parties may stay the proceedings and appeal on the interlocutory choice of law matters, thus making the proceedings extremely costly and time-consuming.

This problem is not likely to arise under Hong Kong civil procedure, as Hong Kong law adequately prevents the plaintiff from unlimited forum shopping. Under Order 11 of the Rules of the High Court (Cap 4A), leave from an appropriate court is required if a plaintiff wishes to initiate a claim against a party outside of a Hong Kong court's jurisdiction.[62] Thus, a plaintiff will not be doubly entitled to 'freely' choose the choice of law as well as the forum to sue.

In addition, under current Hong Kong law, there is an obstacle to stop this from happening: a right of appeal in Hong Kong is not as of right, leave from a higher court is generally required.[63] The appropriate court in Hong Kong will scrutinise applications for appeals more carefully and apply adverse cost orders where appropriate. In the alternative to the current appeal system, it is proposed that the appeals for choice of law may not be allowed unless and until the final judgment is drawn up at first instance.

In any case, if the plaintiff appeals on the choice of law, adverse cost order must follow, since it is the plaintiff who first chooses the set of law. Changing minds at a late stage may amount to an abuse of process. Similarly, where it is the plaintiff who decides to appeal, Hong Kong courts should be cautious to and scrutinise the plaintiff's true intentions. After all, why would the plaintiff try to argue for another set of laws that is less favourable to themselves (and more favourable to the defendant)? Thus, to

---

61 Deutscher Bundestag (n 54).

62 Conversely, a defendant may also dispute the Hong Kong court's jurisdiction if he/she thinks that Hong Kong is not the proper forum. See The Rules of the High Court (Cap 4A) (RHC), Ord 12, r 8.

63 For a summary requirement of leave in different courts in Hong Kong, see Michael Wilkinson, Eric T M Cheung and Gary Meggitt, *A Guide to Civil Procedure in Hong Kong* (6th edn, LexisNexis 2017) ch 20.

further minimise the issue of time costs, it is also advised that courts should not allow the plaintiff to change his mind as to the choice of law during the proceedings, for it is a waste of court expenditure and it affects the defendant's expectations of the judgment outcome.

Finally, where it is shown that the remedy is 'extremely similar' (*de minimis*) or equal in both set of laws (ie Hong Kong law versus another set of laws), it is advised that Hong Kong courts should rule on Hong Kong law. This is because Hong Kong courts have its expertise in Hong Kong law, thus increasing the likelihood of a 'just' application of laws. Parties (or at least one of the parties) can save costs as they will not need to engage in foreign law experts to prove the validity and authenticity of the foreign law.

In short, having examined the various approaches to international torts, using the 'most favourable law' approach in international tort actions leads to a more just outcome, as it readily complies with common sense and leads to a greater degree of certainty. The 'most favourable law' approach is the most preferable of the three. While the 'most favourable law' approach has its shortcomings, they can be rebutted logically or resolved by implementation. However, because of the fact that these appeal procedures and exceptions are complex, it is advised that legislation, or at least a change in the civil procedural rules, would be required to clearly map out these rules to provide enforcement powers to Hong Kong courts.

CONCLUSION

There is no fast solution in solving choice of law issues in international torts. Nevertheless, as can be seen from the analysis above, given that double actionability creates grave uncertainty and may cause injustice, it is strongly advised that the double actionability rule should be abolished in Hong Kong.

All three alternatives to the choice of law in international torts have their drawbacks. It is suggested that Hong Kong should adopt the 'most favourable law' approach, of which all drawbacks

have been addressed. The final hurdle, however, is that the whole new account presented hereunder requires statutory reform in light of the precedential problems as a matter of stare decisis in common law.[64] It is hoped that Hong Kong law will improve and reform international tort actions and will someday adopt the approach as proposed above.

[64] See *A Solicitor (24/07) v Law Society of Hong Kong* [2008] HKCFA 15, (2008) 11 HKCFAR 117 [8] (Li CJ). After the handover on 1st July 1997, Privy Council appellate decisions from Hong Kong remain to be binding on Hong Kong courts, which include the *Red Sea* decision discussed above. Meanwhile, House of Lords precedents (such as *Boys v Chaplin* (n 10)) are merely of persuasive value.

SHOULD THERE BE A RIGHT TO EXPLANATION IN HONG KONG? A COMPARATIVE APPROACH BETWEEN DATA PROTECTION LAWS IN EUROPE AND HONG KONG

Kayley Chan*

The widespread usage of decision-making systems using Artificial Intelligence (AI) has an increasing influence in our society. Algorithms have been used to make predictions such as market fluctuations or business decisions through consolidating information. However, it is important to explore whether data privacy is being infringed and whether individuals in Hong Kong should be legally granted a right to an explanation for decisions and algorithms that significantly affect the society. Through this analysis, it is also important to explore whether data protection laws in Hong Kong are sufficient in protecting rights of individuals. A comparative approach will be used to draw parallels between the General Data Protection Regulation (GDPR) in Europe and the Personal Data (Privacy) Ordinance (Cap 486) (PDPO) in Hong Kong.

INTRODUCTION

The development of big data analytics and artificial intelligence (AI) has resulted in significant changes as to how personal data is being processed and used.[1] Specifically, AI has been developed to

---

* The author was a Master of Laws student from the Faculty of Law from the University of Hong Kong and achieved a distinction mark. The author thanks Dr Marcelo Thompson and Dr Shahla Ali for their never-ending support throughout her course of writing this essay.

1 Hong Kong Privacy Commissioner for Personal Data, 'Data Stewardship Accountability, Data Impact Assessments and Oversight

gain knowledge and predict trends by combining huge volumes of personal data and statistics.[2] Since the 2000s, the widespread usage of AI decision-making systems has an increasing influence in our society and drive in economic growth.[3] From predicting market fluctuations to assisting the US National Security Agency (NSA) in interpreting massive amounts of data from international telecommunications,[4] algorithms in AI decision-making are being used to predict the future. In Hong Kong, businesses have been using algorithms and the latest AI trends to predict movements of stock prices and trading volumes.[5] Since personal data is the key element that fuels this learning mechanism by AI, it is important to consider whether machine learning by AI is being used in a fair and ethical manner towards individuals and data subjects. It is also important to explore whether such extensive usage would infringe data privacy. In particular, it should be examined whether data subjects should be legally granted a right to an explanation for decisions and algorithms that are the result of machine learning using their personal data.[6] Nevertheless, it is important to also recognise that imposing such regulations that govern these rights might potentially hinder the development and the use of AI for developers.

The objective of this essay is three-fold. Firstly, it critically assesses whether Hong Kong citizens should be granted a 'right to explanation' of automated decisions made by artificial intelligence. Secondly, it aims to explore to what extent the Europe's General Data Protection Regulation (GDPR)[7] serves to

---

Models' (24 October 2018) <www.pcpd.org.hk/misc/files/Ethical_Accountability_Framework_Detailed_Support.pdf> accessed 26 July 2019.

2 Daniel Shu, 'Artificial Intelligence and Deep Learning in Ophthalmology' (2018) 3(2) British Journal of Ophthalmology 168.

3 Royal Academy of Engineering, 'Algorithms in Decision-Making' (April 2017) <www.raeng.org.uk/publications/responses/algorithms-in-decision-making> accessed 3 October 2018.

4 Leo Hickman, 'How Algorithms Rule the World' *The Guardian* (1 July 2013) <www.theguardian.com/science/2013/jul/01/how-algorithms-rule-world-nsa> accessed 2 October 2018.

5 Haitong International, 'Haitong International Makes Waves in Artificial Intelligence' (*Finance Asia*, 27 March 2018) <www.financeasia.com/News/443571,haitong-international-makes-waves-in-artificial-intelligence.aspx> accessed 10 November 2019.

6 Hong Kong Privacy Commissioner for Personal Data (n 1).

7 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with

promote it in order to make the use of AI fair, transparent and accountable. Thirdly, it makes comparisons between the European and the Hong Kong data protection laws.

I. BACKGROUND

Before analysing the status of the right to explanation, it is necessary to explore the concept of explainability in AI decision-making. As Watcher puts it,[8] AI decision-making is a combination of system functionality and machine learning, which draws logical and envisaged inferences together with individual circumstances of specific automated decisions like consolidating information about reference or profile groups to make decisions. For instance, individuals' use of smart devices and social media networks may lead to the release of their personal data into the public domain or into the hands of the government or corporate entities without their permission. These personal data, in turn, would be consolidated and utilised by AI to make informed decisions. Hence, this leads to the question of whether certain automated decisions should be explained to individuals. Today, the GDPR sets out protection of data subjects belonging to the latter group, where Articles 13 to 15 list out requirements when personal data are being used. Hong Kong, on the other hand, has yet to develop any laws governing the area of the right to explanation.

II. DECISION-MAKING OF AI SYSTEMS AND GDPR

The GDPR does not contain an independent and clear statutory provision labelled the 'right to explanation'. However, this right is not an illusory one.[9] According to Articles 13 to 15 of the GDPR, there should be rights to 'meaningful information about

---

regard to the processing of personal data and on the free movement of such data [2016] OJ L119/1 (GDPR).

8 Sandra Watcher, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2016) 7(2) International Data Privacy Law 76.

9 Andrew Selbst, 'Meaningful Information and the Right to Explanation' (2017) 7(4) International Data Privacy Law 233.

the logic involved' in automatic decisions as well as the significance and the envisaged consequences of such processing of the data subject.[10]

Unfortunately, these articles do not give a direct or straightforward meaning to the right to explanation, as they do not provide much elaboration on this right.[11] For instance, Articles 13 to 15 create a requirement of 'meaningful information' but does not explain what the test for 'meaningful information' should be. Moreover, Articles 13 to 15 only require data subjects to receive such 'meaningful information' about the logic involved in the automated decisions instead of providing a right to explanation of specific automated decisions. These suggest that the GDPR lacks precise language and does not provide well-defined rights and safeguards.[12] This could be particularly difficult for an individual consumer who requests information explaining why his loan application was rejected due to an AI decision-making on his creditworthiness. It is difficult to establish how he should be granted meaningful information, or how specific the information should be given to him regarding the assessment of his creditworthiness. Hence, academics such as Selbts posit that there is an ongoing fierce debate on whether the GDPR provisions do confer such rights.[13]

When examining whether GDPR establishes such right, it is important to interpret the GDPR as a whole. Referring to the interpretation at Article 5,[14] which requires that data processing must be lawful, fair and transparent to the data subject, as well as the emphasis of Article 12 on the data's comprehensibility, it can be construed that the purpose of GDPR is to confer a right to explanation to the data user. Additionally, it is worth noting that the right to explanation is expressly mentioned in the non-binding decision of Recital 71, which explains that a person subject to automated decision-making should have the 'right to obtain an explanation of the decision reached after such assessment and to

---

10 GDPR (n 7), art 13.

11 Bryce Goodman, 'European Union Regulations on Algorithmic Decision Making and a 'Right to Explanation'' (2017) 38(3) AI Magazine 50.

12 Hickman (n 4).

13 Selbst (n 9).

14 GDPR (n 7), art 5.

challenge the decision'.[15] It is however, important to note that in principle, the purpose of recitals is to explain the intent behind legislative provisions. They can play a crucial part to resolve ambiguities in primary laws and legislations, although they do not have autonomous legal effect.[16] Nevertheless, they should be used to infer the purpose of the GDPR. The purpose of the broadly drafted terms in Articles 13 to 15 is to ensure that the standard of explainability imposed by the GDPR is not unnecessarily stringent and rigorous to algorithm research and AI developers.[17] Moreover, Watcher and others suggested that Articles 13 to 15 provide a right to a 'more general form of oversight' rather than the 'right to an explanation of a particular decision'.[18]

The drafting of the GDPR seems to serve a particular purpose. According to Yavorsky, the GDPR definitely '… lacks specificity on a number of different points, but part of its intention … it wants to leave room for technology to evolve'.[19] Moreover, she suggested that the European lawmakers aim to regulate technology by deploying high-level guiding principles, as opposed to using specific regulatory rules. Her position on the right to explanation is logical because AI and machine learning are still at the stage of development, and it is crucial for them to evolve so that they can have a greater impact on society. Watcher, however, is sceptical about the structure of the GDPR as he stated that 'at some point somebody will sue … the [European Court of Justice] will make a decision and say how the framework will be interpreted. We will have clarity at that point'.[20] Hence, although the GDPR sets out to balance the interests of AI developers and data subjects, it lacks certainty, which may result in future litigations. Nevertheless, it is difficult to explain complex and technical concepts to data subjects, who may not understand the intrinsic meaning of how AI made certain decisions.

---

15 GDPR (n 7), recital 71.

16 Tadas Klimas and Jurate Vaiciukaite, 'The Law of Recitals in EC Legislation' (2008) 15 Journal of International and Comparative Law 32.

17 GDPR (n 7), arts 13–15.

18 Watcher (n 8).

19 JM Porup, 'What does the GDPR and the "right of explanation" mean?' (CSO, 9 February 2018) <www.cso.com.au/article/633230/what-does-gdpr-right-explanation-mean-ai> accessed 4 November 2018.

20 Watcher (n 8).

Hence, the GDPR gives individuals, the data subjects in particular, the right to explanation. However, the requirement in the GDPR is deliberately high and it is especially difficult to ascertain what is meant by meaningful requirement and how much explanation should data subjects be given. It is important for GDPR not to set draconian rules to prevent the development and research of AI. As such, the GDPR is drafted in this form.

III. SHOULD THERE BE RIGHTS TO EXPLANATION?

Individual data users have been long troubled by the idea that machines are now making decisions on impactful matters, such as their personal loans or credit-worthiness, which they could not comprehend or understand.[21] Hence, the law should strike a balance in promoting AI research and development and protecting the interests of data subjects, allowing them to know how AI decision-making has made certain decisions with their data. According to Watcher, the right to explanation should be to 'balance the interests of data controllers with the interests of data subjects'.[22]

Firstly, the right to explanation would increase transparency in AI decision-making. Reservations against algorithms are usually due to the opacity of the procedures.[23] Thus, it is important to uphold transparency when protecting interests of data subjects. For instance, the right to explanation can potentially prevent intentional concealment by corporations or other institutions during their decision-making procedures and increase transparency in the company's internal policies. This can be achieved when information regarding these procedures are divulged to data subjects or the public, allowing public scrutiny.[24] There are two benefits when decision-making procedures are open to scrutiny. Firstly, it engages a wider audience which means that

---

21 Lilian Edwards, 'Slave to The Algorithm?' (2015) 16(3) Duke Law & Technology Review 46.

22 Watcher (n 8).

23 Council of Europe, 'Algorithms and Human Rights' DGI (2017) 12 (March 2018) <rm.coe.int/algorithms-and-human-rights-en-rev/16807956b5> accessed 10 October 2018.

24 Goodman (n 11).

third parties can probe and audit the algorithms.[25] Meaningful explanations about the procedures can reduce uncertainty and help quantify their accuracy.

Secondly, it can also prevent unfair treatment of certain groups when these procedures are explained to the data subjects.[26] As algorithms may have inbuilt biases that may be difficult to detect or correct, the transparency of the process may help data subjects or corporations to identify and correct these defects.[27] When personal data is collected for automated decision-making in vital areas such as eligibility for mortgage, insurance coverage, welfare benefits, job prospects and credit ratings, there may be unfair prejudice based on the socio-economic status of the data subjects. This may impact fundamental human rights beyond the intrusion of privacy.[28] Moreover, as explained by the US Defense Advanced Research Projects Agency, when the decision-making process is transparent, it can 'enable human users to understand, appropriately trust and effectively manage the emerging generation of artificially intelligent partners'.[29] As such, the Council of Europe Study DGI (2017) 12[30] argues that individuals should be given the right to understand the logic behind automated decisions which may potentially put them in unfavourable or biased positions. Hence, transparency is critical for data subjects to understand and trust the AI process. It can help develop these systems in a fair manner. It can also ensure accountability and build public trust in AI and machine learning and allow businesses to make innovative use of personal data responsibility and ethically.

---

25 Adi Gaskell, 'Do We Need Public Scrutiny of Automated Decisions?' (*Forbes*, 2 March 2018) <www.forbes.com/sites/adigaskell/2018/03/02/do-we-need-public-scrutiny-of-automated-decisions/#1477117c53b1> accessed 10 October 2018.

26 ibid.

27 Christian Sandvig, 'Auditing algorithms: Research methods for detecting discrimination on internet platforms' (64th Annual Meeting of the International Communication Association, 22 May 2014).

28 Ira S Rubinstein, 'Big Data: The End of Privacy or a New Beginning?' (2013) 3(2) International Data Privacy Law 74.

29 Sherif Ali, 'The Tangled Relationship Between AI and Human Rights' (*Venture Beat*, 1 June 2018) <venturebeat.com/2018/06/01/the-tangled-relationship-between-ai-and-human-rights/> accessed 11 October 2018.

30 Council of Europe (n 23).

It is important to realise that imposing this requirement to explanation however, might serve several disadvantages to AI developers and data users. Researches have also suggested that algorithmic accountability is not practical because developers themselves cannot fully understand how the automated systems process information.[31] Hence, developers may not be able to explain the procedures to data subjects in the most accurate manner, leading to misconceptions. Moreover, it may be time-consuming and costly, as it requires the people with the right expertise to breakdown and interpret complex algorithms.[32] Nevertheless, although algorithmic decision-making comes with a price, it is worth noting that imposing this right could allow developers to comprehend how these procedures work. By doing so, it will allow them to develop AI systems more fairly and more accurately while eliminating biases.

IV. RIGHTS TO EXPLANATION IN HONG KONG AND THE DATA PROTECTION ORDINANCE

The right to privacy includes the right to data protection[33] and the Personal Data (Privacy) Ordinance (Cap 486) (PDPO) remains as the only regulatory regime that governs the protection of personal data in Hong Kong. In the PDPO, personal data does not only include personal data in recorded form, but may also include indirect data such as IP addresses. As evinced in *Cineploy Records Co Ltd v Hong Kong Broadband Network Ltd*,[34] IP addresses which contain personal information held by internet service providers could be held as personal data. They are being used to facilitate AI decision-making and algorithm in the Hong Kong society and businesses are beginning to use them widely in making corporate decisions. However, the law governing the right to

---

31 Joshua Kroll, 'Accountable Algorithms' (2016) 165 University of Pennsylvania Law Review 633.

32 William Spangler, 'The Role of Artificial Intelligence in Understanding the Strategic Decision-Making Process' (1991) 3(2) IEEE Transactions on Knowledge and Data Engineering 149.

33 Stefan Lo, The Annotated Ordinances of Hong Kong: Personal Data (Privacy) Ordinance (Cap 486) (LexisNexis 2006), para 6.

34 [2006] 1 HKLRD 255.

explanation in AI decision-making using personal data in Hong Kong remain to be enforced.

The advancement of data-processing mechanisms, however, is an extension of the underlying data protection principles enshrined in the PDPO such as 'notice and consent', 'use limitation' and 'transparency'.[35] Even though the PDPO has not expressed or referred to the right to explanation, this right should be enforced in Hong Kong because this right is intricately connected to the right of privacy which is protected under the Basic Law[36] and the Hong Kong Bill of Rights.[37] It is important to note Hartmann J's quote in *Leung TC William Roy v Secretary for Justice*, where he approved the words of Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[38] that the right to privacy is the 'right to get on with your life, express your personality and make fundamental decisions about your intimate, relationships without penalisation'.[39] It is arguable that if individuals' data are being used to make decisions against their interests and they are not informed of how these decisions are formed, they are being put at an unfair disadvantage, and therefore penalised when decisions are against them.[40] Furthermore, the data that is usually procured to facilitate AI decision-making processes are not utilised with the consent of data subjects. This would contravene the underlying objective of the PDPO, which is essentially to require personal data to be used at the consent of the data subjects.[41] Hence, how a datum could be used should be subject to the data subjects' express agreement on a voluntary basis. Hence, the privacy rights of individuals in Hong Kong could be infringed in two situations. The first situation is when they are not given the right to explanation when AI decision-making places them in a disadvantageous position; and the second situation

35 'Ethical Accountability Framework for Hong Kong, China' <www.pcpd.org.hk/misc/files/Ethical_Accountability_Framework.pdf > accessed 11 October 2018.

36 Basic Law of the HKSAR, art 30.

37 Hong Kong Bills of Rights Ordinance (Cap 383), art 14.

38 (1998) 6 BHRC 127 (Constitutional Court of South Africa).

39 *Leung TC William Roy v Secretary for Justice* [2005] 3 HKLRD 657 [116].

40 Edwards (n 21).

41 Privacy Commissioner for Personal Data, 'Data Protection Principles in the Personal Data (Privacy) Ordinance' <www.pcpd.org.hk/english/publications/files/Perspective_2nd.pdf> accessed 10 November 2018.

occurs when their personal data is being used to facilitate AI decision-making without prior informed consent.

In addition, under the six principles of the PDPO, the fifth principle of 'openness' requires that a 'data user must take practicable steps to make personal data policies and practices known to the public regarding the types of personal data it holds and how the data is used'.[42] Although this principle derived from the Organisation for Economic Co-operation and Development (OECD) mainly serves to ensure that data users publish the privacy policy statement,[43] this principle could be potentially construed to ensure openness relating to how data procured from individuals are being used to derive certain conclusions. Machine learning heavily involves the processing of data.[44] Hence, it is in line with the openness principle to explain to individuals of how their data is being used.

However, establishing the right to explanation to ensure transparency of AI decision-making in Hong Kong could be a challenge, especially because the Hong Kong government is more risk-averse and may not easily legislate the right to explanation. It is seen in the PDPO that the personal data privacy rights are protected at the most minimal level. This could be due to political reasons such as the government wanting to ensure that individual basic privacy rights are ensured, without establishing further rights that may put unnecessary hindrances to technological development and overseas technology companies from investing in the market.[45] The PDPO is limited to protecting basic data rights privacy rights and enforces certain requirements for data users such as having to take specific action before using personal data in direct marketing as established in section 35.[46] This statement relates to the gaining of consent from data subjects and the

---

42 Privacy Commissioner for Personal Data, 'The Ordinance at a Glance' <www.pcpd.org.hk/english/data_privacy_law/ordinance_at_a_Glance/ordinance.html> accessed 1 November 2018.

43 Graham Greenleaf, Asian Data Privacy Laws: Trade & Human Rights Perspectives (OUP 2014) Chapter 4, 76.

44 Watcher (n 8).

45 'Cyberport catalyses Hong Kong's vibrant digital tech investment ecosystem' *South China Morning Post* (8 October 2018) <www.scmp.com/presented/business/topics/asias-digital-innovations-boost-vc-investment/article/2166973/cyberport> accessed 2 November 2018.

46 PDPO, s 35.

explaining of how their data would be used. The data user has the obligation to explain what kinds of data are being used and the types of marketing platforms that are using the data. This may potentially serve as a foundation or a stepping-stone towards achieving the right to explanation regarding AI decision-making in the future.

In addition, the personal data protection laws in Hong Kong impose a requirement of 'collection of data' before data subjects can be protected by the PDPO. As illustrated in *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data*,[47] the Court of Appeal laid down two necessary conditions for the 'collection of data', that:[48]

(a) the collecting party must thereby compile information about an individual; and

(b) the individual must be the one whom the collector of information has identified or intends or seeks to identify.

The Court of Appeal held that there was no collection of personal data because the publisher remained completely indifferent and ignorant of the claimant's identity and did not seek to identify her. Hence, the claimant was not protected by the PDPO. It should be emphasised that this case happened more than 20 years ago, and it is undeniable that the way data is processed and collected have undergone revolutionary developments. Hence, the Privacy Commissioner for Personal Data should revisit this requirement as defined in *Eastweek*, which may potentially deprive individuals of the PDPO protection and allow prejudice against data subjects due to the collection of their personal data that is used for AI decision-making.

Hence, in the context of Hong Kong data protection laws, the right to explanation should be expressly established in the PDPO to be harmonious with Hartmann J's statement of right to life without penalisation. If individuals are prejudiced from AI decision-making, data users might be at risk of contravening the two abovementioned principles. Nevertheless, it is evident that

---

47 [2000] 2 HKLRD 83.

48 ibid [14], [55].

Hong Kong still has a long way to go when it comes to the right of explanation.[49]

V. HOW SHOULD HONG KONG IMPLEMENT THE RIGHT TO EXPLANATION?

To prevent the risk of letting individuals being put at a disadvantageous position from AI decision-making without being explained about how their data has been used, it is recommended that the Office of the Privacy Commissioner for Personal Data (Privacy Commission) could undertake the following two steps. Firstly, the PDPO could state the right for a data subject to ask for realistic and meaningful explanation when an algorithmic decision has significantly put him at a disadvantage. This is similar to Article 15 of the GDPR, except that it should add the criteria that the data subject must have suffered a disadvantage from an AI decision. When the data subject is penalised, they should have the right to understand the reason behind the decision which was made against him. Secondly, it is proposed that the PDPO requires that as long as data subjects have acted with reasonable efforts to explain the processes, they will not be in breach of the PDPO. This is important to prevent draconian requirements from being imposed to regulate data users.

Furthermore, it is also recommended that the PDPO provides for the requirement that the voluntary consent of data subjects must be given for their personal data to be used for assisting with any AI decision-making processes. As explained above, individuals in Hong Kong have the right to be aware of how their personal data is being used. Hence, it is important for them to have the knowledge that their information would influence machine learning and for any future AI decision-making purposes.

---

[49] Austin Chiu, 'Data protection law needs to evolve to tackle privacy challenges, say experts' *South China Morning Post* (25 November 2013) <www.scmp.com/news/hong-kong/article/1365113/data-protection-law-needs-evolve-tackle-privacy-challenges-say> accessed 2 November 2018.

Additionally, there is an increase of data journalism and open data advocacy groups in Hong Kong such as 'Open Data Hong Kong'.[50] These journalists and advocacy groups have been lobbying for transparency in data usage. The right to explanation is a part of transparency in data usage, as data subjects should be granted the right to understand how their personal data has been processed or used. Developing the right to explanation is not only consistent with the laws of privacy in Hong Kong, but it is also in the public's interests for data users to be held accountable as to how they are using personal data of the data subjects.

Through the active lobbying by advocacy groups in Hong Kong, the Privacy Commissioner, Stephen Wong, has recognised that innovative developments like big data analytics and AI are beginning to challenge the regulatory strengths and effectiveness of the PDPO and other data protection regulations.[51] He also acknowledged that these fast developments are compelling data protection regulators to 'come up with novel regulatory solutions, including the expansion of the scope of data protection laws'.[52] It is encouraging to see that the public is working together to persuade the government and privacy commissioners to enforce stricter data protection rights in Hong Kong through the PDPO and that regulators are beginning to see the need for regulatory innovations and developments. Education efforts and cultivating data accountability awareness could further be implemented Hong Kong in order to allow the public to understand their potential rights and to propound the Privacy Commission to take actions to meet the appropriate needs of data subjects.

Through the proposals, it is submitted that Hong Kong should strengthen privacy rights under the PDPO by extending such right to allow individuals to understand how AI decisions

---

50 Scott Edmunds, 'Why Hong Kong's proposed freedom of information law must face public scrutiny' *South China Morning Post* (23 February 2019) <www.scmp.com/comment/insight-opinion/hong-kong/article/2187435/why-hong-kongs-proposed-freedom-information-law> accessed 23 February 2019.

51 Office of the Privacy Commissioner for Personal Data, Media Statement 'Privacy Commissioner Released Research Report to Advocate Respect, Beneficial and Fair Data Ethics Stewardship Management Value and Morals' <www.pcpd.org.hk/english/news_events/media_statements/press_20181024.html> accessed 8 November 2018.

52 ibid.

were made against them. The rapid technological developments in how data is being processed would inevitably compel regulators to catch up with the data protection regulations. Regulators should begin to recognise these advancements and changes and adjust the laws accordingly to prevent the current regulatory regimes from being too robust and outmoded. On the other hand, it is also important to maintain the balance the competing interests between data subjects and ensure that AI development is not hindered by imposing draconian regulations on data users and developers. One suggestion is thus to follow the regimes of the GDPR where the right to explanation is provided but is broadly phrased so as to maintain flexibility in the law. Data protection regulators around the world are working to keep up with the revolutionary developments with how data is being processed in the information technology age. Hence, the Hong Kong Privacy Commission should also innovate and modify the PDPO in order to keep up with the progress of the data regulatory laws together with the fast-paced technological developments.

CONCLUSION

The challenges explored in this paper emphasise the importance of ensuring that algorithms are not merely efficient, but transparent and fair in the era of digitalisation.[53] As analysed throughout the essay, overseas jurisdictions have extended the principles of their data regulations to regulating privacy threats from profiling and automated decision-making. The right to explanation is recognised in the GDPR. Nevertheless, the GDPR has been criticised by some commentaries as imposing unclear standards to data subjects such as what can constitute as 'meaningful information'. However, this is structured to maintain flexibility to developers. Hong Kong, on the other hand, is recommended to establish the right to explanation in order to achieve consistency and uniformity between Hartmann J's principle and the openness rule. The personal data privacy law should not be a static concept, but should be one that develops with technological and sociological advancements over time. As such, it is important that the PDPO develops itself to cater to the

[53] Goodman (n 11).

needs of and protect the rights of data subjects. The PDPO could possibly follow the regime of the GDPR to ensure the right to explanation and to preserve flexibility for AI developers. Hence, the Commission should carefully draft the criteria in the proposed way so as to leave room for flexibility for developers. Therefore, the balance between promoting the progress of algorithm decision-making and human rights are fundamentally dependent on policy-makers. It is examined and argued in this essay that, in order to achieve this balance, policy-makers should enhance transparency in AI decision-making, so that researchers understand the processes and exercise reasonable and adequate control over how AI developers and researchers develop the functions and programs. By exercising such control, they can develop AI in a way that could prevent biases and ensure human rights, while at the same time improve these systems. Hence, as Stephen Wong aptly suggested, the law relating to data protection should provide a comprehensive, flexible, innovative and accountable framework to strike a balance between data protection and facilitation of business and innovation yet observing the ethical standards and respecting the data of individuals.[54]

[54] Edmunds (n 50).

IN DEFENCE OF THE HALFWAY HOUSE – THE *CAVENDISH* PENALTY RULE SINCE 2015

Raphael Lok Hin Leung*

Three years have passed since the United Kingdom Supreme Court's reformulation of the equitable rule on penalties (the penalty rule) in the conjoined appeals of Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Ltd v Beavis *[2015] UKSC 67. Despite the continued academic and judicial polarisation resembling views before 2015, the trajectory of the law is being gradually navigated towards a more certain, workable and welcomed position illustrated by the post-Cavendish cases on agreed damages clauses. Upon analysing the historical development of the penalty rule, divided post-Cavendish academic opinions, as well as subsequent applications of the Cavendish rule in drafting and in court, this article aims at dispelling the genuine yet unsubstantiated concerns against the Cavendish rule. In concluding this article by highlighting the indispensability of the penalty rule as part of the cohesive regime that upholds the integrity of the law of contract in its entirety, it is suggested that the long overdue judicial analysis of the Hong Kong appellate courts are to be anticipated.*

INTRODUCTION

Recently, Lord Hope[1] slapped his former colleagues at the UK Supreme Court (UKSC) in their faces by criticising the wasted

* BSocSc, Juris Doctor candidate, Faculty of Law, The University of Hong Kong. The author is particularly grateful to Professor Mindy Chen-Wishart of Oxford University, Percy Wu, Phoenix Chiu and Michelle Cheng of the University of Hong Kong for their helpful comments, as well as Mr Kevin Tang and Mr Kelvin Lai of counsel in

opportunity of abolishing the equitable rule on penalty (the penalty rule), or rendering it inapplicable to contracts between parties of arm's length under commercial contexts in the infamous conjoined appeals of *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Limited v Beavis*.[2]

Under English contract law, liquidated damages clauses are pivotal in facilitating recovery of damages and minimising litigation costs[3] by reflecting parties' consent as to a specified sum payable upon breach of contract.[4] Nevertheless, the penalty rule intervenes when clauses are penal in nature to render them unenforceable.[5] Being left largely untouched for over a century ever since *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*,[6] the penalty rule was eventually reformed in *Cavendish*, with a view to address criticisms as to the inroads it has made towards freedom of contract, the uncertainty arising thereof and on public policy grounds.[7]

Thus, academia has since then been trapped within the trichotomy of possible pathways in furtherance of developing a framework that governs agreed damages upon breach – ranging from complete abolition,[8] retention with refinement ('the halfway house')[9] to the partial retention option advocated by Lord Hope.[10]

---

cultivating the author's research know-how in law. The author is responsible for the remaining errors.

1 Lord David Hope, 'The Law on Penalties – A Wasted Opportunity?' (2016) 33 Journal of Contract Law 103.

2 [2015] UKSC 67, [2016] AC 1172. The appeals compendiously referred to as *Cavendish* unless otherwise indicated.

3 J Chitty and HG Beale, *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2015) [26–192].

4 *Chitty* (n 3) [26–190].

5 Sam Cathro and Simon Connell, 'Radical change to the rule against penalties in England' [2016] New Zealand Law Journal 271.

6 [1915] AC 79 (HL).

7 Jonathan Morgan, 'The Penalty Clause Doctrine: Unlovable but Untouchable' (2016) 75 CLJ 11.

8 Morgan (n 7) 14.

9 Nick McBride, 'Cavendish Square Holding BV v Makdessi ParkingEye Ltd v Beavis [2015] UKSC 67' (*McBrideguides*, August 2016) <http://mcbridesguides.com/wp-content/uploads/2016/08/cavendish-square-holding-v-makdessi-parkingeye-v-beavis.pdf> accessed 17 March 2019.

10 Hope (n 1) 98. See also Lord Hope's suggestion at 98 that the penalty rule should not apply to commercial contracts where both parties are of equal bargaining power.

Three years have passed since the reformulation of the penalty rule. Despite the continued academic and judicial polarisation resembling debates pre-2015, the trajectory of the law is being gradually navigated towards a more certain, workable and welcomed position as illustrated by post-*Cavendish* cases on agreed damages clauses. Upon analysing the historical development of the penalty rule, divided academic opinions post-*Cavendish*, as well as subsequent applications of the *Cavendish* rule in drafting and in court, this article aims at defending the UKSC's decision of adopting the halfway house option by dispelling the bona fide yet unsubstantiated concerns against the *Cavendish* rule in light of its recent development judicially and in practice. In describing the concerns as 'bona fide yet unsubstantiated', it is the author's contention that concerns as to the penalty rule, whilst bona fide in the sense that it was justifiable for critics of the post-*Cavendish* rule to be concerned with the rule's effectiveness in addressing the deficiencies of the *Dunlop* rule given its lack of judicial and commercial scrutiny at the immediate aftermath of the UKSC's decision, upon experiencing three years of such scrutiny, have been proven to be unsubstantiated as manifested by the smooth and untroubled application of the post-*Cavendish* rule as to be demonstrated in this analysis.

With the absence of any judicial or academic analysis as to the applicability of the *Cavendish* rule in Hong Kong, following the argument in defence of it by highlighting the indispensability of the penalty rule as part of the cohesive regime upholding the integrity of the law of contract in its entirety, this article is concluded by shedding light on the long overdue judicial opinions of the Hong Kong appellate courts as well as anticipating its eventual adoption domestically.

I. HISTORICAL ACCOUNT OF THE DEVELOPMENT OF THE PENALTY RULE

A. PRE-*CAVENDISH* POSITION

Since the 18th century, the position on agreed damages remained stable, though highly unsatisfactory and was subject to intense criticism for being 'indiscriminate in effect and uncertain in application'.[11] According to Furmston, it consisted of the four-limbs formulated by Lord Dunedin in *Dunlop*, [12] which provides:[13]

(a) The conventional sum is a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could possible follow from the breach.

(b) If the obligation of the promisor under the contract is to pay a certain sum of money, and it is agreed that if he fails to do so he shall pay a larger sum, this larger sum is a penalty.

(c) Subject to the preceding rules, it is a canon of construction that, if there is only one event upon which the conventional sum is to be paid, the sum is liquidated damages.

(d) If a single lump sum is made payable upon the occurrence of one or more or all of several events, some of which may occasion serious and others mere trifling damage, there is a presumption (but no more) that it is a penalty.

In gist, the *Dunlop* rule has sharply distinguished between the enforceable liquidated damages clauses and the unenforceable penalty clauses on the basis that the former gives rise to a sum representing the genuine pre-estimate of loss whereas the latter conveys a sum out of all proportion to any

---

11 Kal KC Leung, 'The Penalty Rule: A Modern Interpretation' (2017) 29 Denning Law Journal 41.

12 *Dunlop* (n 6) [87]–[88].

13 Michael Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (17th edn, OUP 2017) 783–784.

damages likely to be suffered and is used for the purpose of deterring the other party from breaching.

The *Dunlop* test (as opposed to the penalty rule per se)[14] is infamously susceptible to three main criticisms.

The first criticism concerns the absence of consideration appropriated to commercial realities[15] – a problem that was addressed in *Lordsvale Finance v Bank of Zambia.*[16] The facts of *Lordsvale* represent the epitome of the hitherto tension between the then rigid application of the *Dunlop*-based penalty rule and the flexibility contemporary commerce requires. In *Lordsvale*, the impugned clauses concerned the well-adopted practice of requiring the default party to be liable to higher interest rates in a loan agreement. Acknowledging its 'importance for English banking law'[17] as well as the commercial justification the clauses entail (ie a debtor with poor credit might incur higher costs for the creditor than one with good credit) as manifested by the clauses' wide acceptance by courts of international banking centres like New York,[18] the impugned clauses were held to be valid on the ground that they were 'commercially justifiable' and there was no basis to find that the dominant purpose of their existence was deterrence. Nevertheless, concerns remained, and this issue will be further discussed in Section II.A(1) 'Analysis of Pre-*Cavendish* Precedents' below.

The second criticism relates to the test's inapplicability in marginal and complicated cases that concern seemingly valid commercial justifications with the impugned clauses nevertheless declared invalid due to the inherent vagueness of the penalty rule,[19] thus causing judicial inconsistency in application post-*Lordsvale* and pre-*Cavendish* – as to be further discussed in the 'Analysis of Pre-*Cavendish* Precedents' below.[20]

---

14 Note that the criticisms towards the *Dunlop* test and the penalty rule per se do not necessarily overlap – see further discussion in Section II below.

15 See Section II.A(1) 'Analysis of Pre-*Cavendish* Precedents' below.

16 [1996] QB 752 (CA).

17 ibid 761.

18 *Lordsvale* (n 16) 767.

19 *Lordsvale* (n 16) 763–764.

20 Leung (n 11) 57–61.

Another opprobrium lies in the rigid dichotomy created under its second limb,[21] which rendered the emphasis of the test upon the question of whether the clause concerns with a 'genuine pre-estimate of loss' – under which a clause would be considered as *in terrorem* if it goes beyond such pre-estimate.[22] Strongly criticised for being a form of 'artificial categorisation' due to the court's inevitable employment of a de jure 'objective' yet de facto subjective perception whilst drawing the boundary between 'genuine' and 'non-genuine' pre-estimate of loss, such seemingly arbitrary way of categorisation was once considered 'misleading'[23] – a problem that has been well-recognised in *Cavendish*.[24]

B. THE CASES OF *CAVENDISH* AND *PARKINGEYE*

A decade later, the opportunity of reformulating the *Dunlop* rule arose in light of the conjoined appeals of *Cavendish* and *ParkingEye*, the facts of which are briefly summarised as follows:

1. CAVENDISH

This case features a contract for the sale of Mr Makdessi's shares in one of the largest advertising and marketing communications groups in the Middle East to Cavendish Holdings – a subsidiary of another major advertising firm. The said transaction was subject to restrictive, non-compete covenants (clause 11), which provide, inter alia, that Mr Makdessi shall observe the good will of not starting or helping a competing business for a specified period – the breach of which would, pursuant to clauses 5.1 and 5.6, disentitle Mr Makdessi from future payment of consideration and would also compel him to sell his remaining shares to Cavendish at a substantially lower price. Upon accepting his

---

21 cf *Cine Bes Filmcilik v UIP* [2003] EWCA Civ 1669 [15].

22 *Chitty* (n 3) [26–199].

23 Lucinda Miller, 'Penalty Clauses in England And France: A Comparative Study' (2008) 53 ICLQ 79, 82.

24 *Cavendish* (n 2) [31].

breach, Mr Makdessi argued that clauses 5.1 and 5.6 were penal in nature, hence unenforceable.[25]

2. PARKINGEYE

Having exceeded the time limit of parking in a car park under ParkingEye's management, at which 'legible' signs providing that '2 hour max stay … Failure to comply … will result in Parking Charge of £85' were erected throughout. Mr Beavis incurred the said charge and argued that this charge (and thus the clause itself) constituted a penalty, and was therefore unenforceable.[26]

C. THE STATUS QUO – *CAVENDISH* AND BEYOND

The current position of the law governing penalty clauses is formulated under *Cavendish*. Following the facts of the case illustrated above, the UKSC unanimously agreed that the pre-*Cavendish* position requires further refinement whilst rejecting counsel's suggestion as to its abolition. In view of this, upon confining its application to clauses that amount to secondary obligation that are imposed upon the contract-breaker;[27] the reformed test provides:[28]

(a) Whether there is any legitimate business-interest protected by the clause (First Limb);

(b) If so, is the provision made in the clause extravagant, exorbitant or unconscionable or is there some wider commercial or socio-economic justification for the clause? (Second Limb)

---

25 *Cavendish* (n 2) 1172.
26 ibid [152].
27 ibid.
28 ibid.

In a nutshell, contrary to the rigid bar against all agreed damages clauses of a deterrent nature under the *Dunlop* test, the *Cavendish* test provides that deterrence may not necessarily be regarded as penal in the event where the contract drafter can demonstrate the existence of 'legitimate interest' in ensuring the performance of contract that goes beyond the right to recover damages.[29] In practice, this test provides an additional safeguard to clauses that would be otherwise regarded as penal under the *Dunlop* test but are deemed commercially justifiable in view of the rapid development of contemporary commerce.

The court further held that this rule is applicable to clauses requiring the contract-breaker to transfer property to the 'injured party',[30] and those providing that monies that would have been payable to the contract-breaker but for the breach.[31] Nevertheless, it remains unsettled as to whether the rule is equally applicable to different types of forfeiture clauses.[32]

To illustrate the operation of the *Cavendish* test, its application in *Cavendish* and *ParkingEye* are briefly summarised as follows:

1. CAVENDISH

Both impugned clauses were held to be non-penal in nature, with the majority regarding clause 5.1 as merely a price adjustment clause that concerned primary obligation and going beyond the jurisdiction of the penalty rule;[33] and clause 5.6 was not a penalty given (a) the existence of legitimate interest arising from the cessation of Mr Makdessi's efforts and connections to the company and thus his good will of offering assistance to other competitors in the market, and (b) the consequences of breach was in no way extravagant or unconscionable.[34]

---

29 ibid [99].
30 ibid [79].
31 ibid [73].
32 ibid [17]–[18]; cf opposing views at [160], [291], [294], [227].
33 ibid [73]–[74].
34 ibid [82].

2. PARKINGEYE

The impugned clause that gave rise to the charge of £85 was held to be non-penal in nature, for Lord Neuberger and Lord Sumption deemed the existence of a legitimate interest to ParkingEye in charging an overstaying fee with the view to ensure a regular turnover of patrons of the retail outlets as well as to generate profits and to cover the costs arising from managing the car park.[35] By making reference to similar fees charged by other car park management companies, the UKSC further held that the impugned clause was not 'out of all proportion to its interests' and was therefore, enforceable.[36]

To highlight the safeguard the *Cavendish* test brings about in upholding parties' intention, it is worthwhile to note that the impugned clauses in *Cavendish* and *ParkingEye* would likely be held as penal in nature and thus render invalidated under the *Dunlop* test on the respective grounds that the $40 million for which Mr Makdessi was liable for was clearly out of all proportion to the loss attributable to the breach and in place for deterring breach whereas the charge of £85 was clearly not a pre-estimate of ParkingEye's loss since there was nil, and was unequivocally designed to deter breach. The safeguard against uncertain and rigid judicial intervention under the *Cavendish* test is therefore, as submitted, self-explanatory.

In any event, whilst the pro-retention scholars perceive the status quo to be a strong indication of the court's willingness to uphold parties' autonomy through giving green light to clauses that are breach-deterring in nature – which is now subject to a more confined scope of potential judicial interference given the safeguard created by way of proving 'legitimate interest',[37] critics remain unconvinced as to the lack of compelling justifications over the three problems mentioned above.[38]

---

35 *Cavendish* (n 2) [100].

36 ibid.

37 McBride (n 9).

38 See for example Morgan (n 7); Sarah Worthington, 'Common Law Values: The Role of Party Autonomy in Private Law' in A Robertson and M Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing 2015) 302.

Being intuitive as to the criticisms the *Cavendish* test would attract (and indeed attracted), the UKSC attempted to justify the test with three reasons, namely (a) the penalty rule is essential in affording protection to parties unprotected by statutes;[39] (b) the potential inconsistency with common law jurisprudence globally on this area of law upon its abolition;[40] and (c) the coherence of the penalty rule with other relevant doctrines in the law of contract.[41]

Admittedly, these three justifications remain uncompelling, with Chuah criticising the purported aim of affording protection to parties unprotected by statutes to be more a myth than actual practice for the Second Limb remains a high threshold to be attained for a clause to be held penal in nature, particularly viewed against the backdrop of judicial reluctance in finding a clause to be penal even prior to the status quo where judicial discretion was less confined.[42]

Similarly, Leung rejected the court's second justification as to the potential inconsistency with international jurisprudence on this area of law upon its abolition for being unacceptably under-elaborated[43] – indeed it is common for the UKSC to depart from other common law jurisdictions as to various legal doctrines, a recent example would be that of the abolishment of 'foresight' as a plausible way of establishing liability on the part of a secondary party in a joint enterprise situation by way of rejecting the rule in *Chan Wing-Siu v The Queen*[44] in *R v Jogee*,[45] a decision that shocks the common law world as manifested by its disapproval in Australia[46] and Hong Kong.[47] Thus, it is submitted that this ground per se is unconvincing.

---

39 *Cavendish* (n 2) [38].
40 *Cavendish* (n 2) [37].
41 *Cavendish* (n 2) [36].
42 Leung (n 11); Jason Chuah, 'Penalty Clauses – A Clarification of Principle' (2016) 77 Student Law Review 42, 48.
43 ibid.
44 [1985] AC 168 (PC).
45 [2016] UKSC 8, [2017] AC 387.
46 *Miller v The Queen* [2016] HCA 30, [2016] 259 CLR 380 (HC) [39].
47 *HKSAR v Chan Kam Shing* (2016) 19 HKCFAR 640 [98].

As regards the third justification over the coherence of the penalty rule with other relevant doctrines in the law of contract,[48] albeit having some force, remains insufficient as a justification in itself.

In this connection, the ensuing analysis shall then review contesting opinions amongst scholars to further justifications in defending the UKSC's loosely-reasoned decision.

II. ANALYSIS

A. FREEDOM OF CONTRACT

Freedom of contract and *pacta sunt servanda* are fundamental doctrines underpinning the law of contract,[49] and are equally pivotal to the functioning of the laissez-faire capitalist system practised by common law jurisdictions worldwide. Such freedom concerns contracting parties' autonomy to bargain and insert clauses as to agreed remedies in the event of breach, as well as its enforceability with a view to ensuring certainty.[50]

The judicial treatment of penalty clauses has hence given rise to the inevitable tension between freedom of contract and the practice of striking down penalty clauses both before and after the *Cavendish* case, albeit with varying degree of judicial scope of power. This is also the most irreconcilable line dividing academia.

Solène Rowan and Sarah Worthington are amongst those most fierce critics against retaining the penalty rule. Central to their arguments is the ideal that common law, contrary to its civilian law counterparts, is founded upon the premise that everything is allowed unless restricted by law.[51] This line of

---

48 *Cavendish* (n 2) [36].

49 Roy Goode, *Commercial Law in the Next Millennium* (The Hamlyn Lectures Series, Sweet & Maxwell 1998) [31].

50 Edwin Peel, *Treitel on the Law of Contract* (14th edn, Sweet & Maxwell 2015) [1–002].

51 Worthington (n 38) [302].

reasoning is similarly pursued by counsel for *Cavendish* before the UKSC, albeit to no avail, to either abolish the rule or have it 'restricted to non-commercial cases'.[52]

Both scholars rely on scattered authorities ranging from Lord Diplock's comments in *Photo Production Ltd v Securicor Transport Ltd*[53] to that of Lord Denning in *Bridge v Campbell Discount Co Ltd*[54] in suggesting judicial inclination towards upholding terms finalised upon parties' bargain and autonomy generally. Such reasoning is further buttressed by Hatzis's suggestion that parties in commercial settings should be presumed to have weighed the benefits and detriments of the clause prior to signing the contract,[55] and that judicial refusal in enforcing agreed terms, penal or not, shall be regarded as 'paternalistic'.

Worthington further asserted that such controversy involves value judgment, and Prince Saprai even described the penalty rule as the judicial assumption of a sense of 'moral outrage' against the weaker party.[56]

With respect to the above learned opinion, it shall be noted that differences certainly exist between absolute and relative autonomy. As relatively liberal societies, neither Hong Kong nor England are fully committed to absolute *laissez-faire*, nor should the judiciary uphold unfettered freedom of contract, as famously noted by Butler-Sloss LJ in *Quadrant Visual Communications v Hutchison Telephone*[57] that 'it is not the function of the court to be a rubber stamp'[58] notwithstanding parties agreeing to specific performance in the contract upon breach. There exists various forms of judicial interference as to freedom of contract with a view to upholding the integrity of the

---

52 *Cavendish* (n 2) [162].

53 [1980] AC 827 (HL) 848.

54 [1962] AC 600 (HL) 628.

55 Aristides N Hatzis, 'Having the Cake and Eating it Too: Efficient Penalty Clauses in Common and Civil Contract Law' (2003) 22 Int Rev L and Economics 381.

56 Prince Saprai, 'The Penalties Rule and the Promise Theory of Contract' (2013) 26 Canadian Journal of Law and Jurisprudence 443, 447, 451, 453, taking as self-evident the unfairness in enforcing a £1million penalty clause in a £50 contract with a builder.

57 [1993] BCLC 442 (CA) 452.

58 ibid.

law,[59] from unjust enrichment to specific performance – and rule governing penalty clauses is of no exception.

Be that as it may, concerns as to autonomy, enforceability and thus certainty of contract are to be recognised. Nevertheless, any such discussion shall focus predominantly on the current state of law (ie post-*Cavendish*) as opposed to the law pre-*Cavendish*. In this connection, I shall first examine and reconcile judicial treatment of penalty clauses pre-*Cavendish* with a view to understanding the *modus operandi* of the previous position of the law, followed by the elucidation of the way in which *Cavendish* has dispelled any concerns as to unjustified inroads made into the said freedom.

1. ANALYSIS OF PRE-*CAVENDISH* PRECEDENTS

In a recent commentary, Leung concisely analysed the highly-limited instances where judicial discretion has been exercised in striking down the penalty rule – with a total of merely five cases post-*Lordsvale,* whereby pre-*Lordsvale* precedents [60] were neglected on the ground that *Lordsvale* had significantly amended the penalty rule by introducing commercial justification as part of the judicial consideration of the relevant clauses,[61] and amongst which two further authorities[62] that concern forfeiture were also ignored as its legal position under the penalty rule remains unsettled.[63]

Upon analysing the three cases of *Jeancharm v Barnet Football Club*,[64] *County Leasing v East*[65] and *Unaoil v Leighton Offshore*,[66] Leung concluded that whereas both *Jeancharm* and *Unaoil* are to be considered as the courts' failure to give effect to justifications arising from commercial realities and thus subject

---

59 See further discussion in Section II.D 'Coherence of the Law' below.
60 See for example *Bridge* (n 54).
61 Leung (n 11).
62 *Jobson v Johnson* [1989] 1 WLR 1026 (CA); *Workers Trust v Dojap* [1993] AC 573 (PC).
63 *Cavendish* (n 2) [17]–[18], [87].
64 [2003] EWCA Civ 58 (CA).
65 [2007] EWHC 2907 (QB).
66 [2014] EWHC 2965 (Comm) (QB).

to heavy criticism across academia for being 'trap for the wary',[67] *County* is in effect a quasi-commercial case that shall not be compared directly with purely commercial cases[68] and thus, concerns as to the court's failure in giving effect to 'commercial justifications' can be easily dismissed in light of the safeguard provided by the first limb of the *Cavendish* test.

With reference to the post-*Cavendish* position, Leung submitted that the clauses of all these cases a fortiori would be upheld[69] and the current rule has rendered harder invocation of the penalty rule.

Prior to addressing the validity of Leung's observation, I shall first examine the *Cavendish* test itself as well as its potential implications as to the freedom of contract.

2. THE CURRENT POSITION – *CAVENDISH*

Separate analyses shall be conducted on the two limbs and the distinction between 'primary' and 'secondary' obligations as laid down in the *Cavendish* test.

The First Limb reflects the judicial acknowledgment that contracting parties are best positioned in safeguarding their commercial and non-pecuniary interests that go beyond pre-estimate losses – this is particularly so in the event where the breached contract constitutes merely part of a web of contracts or a transaction of bigger scale with far-reaching effect should that one contract be breached.[70] This understanding aligns with the UKSC's suggestion that determination as to 'legitimate interests' requires the court to go beyond express terms and examine the relevant circumstances as a whole to solicit thorough

---

67 See for example Hamish Lai, 'Liquidated Damages' (2009) 25 Construction Law Journal 569 and Vijay Bange, 'Reducing Risk with Liquidated Damages' (2015) Construction Law 6, 7.

68 Leung (n 11).

69 ibid.

70 See Yihan Goh and Man Yip, 'English Reformulation of the Penalty Rule – Relevance in Singapore?' [2017] Singapore Academy of Law Journal 257.

understanding of the purportedly-compromised interests.[71] In effect, such an approach has signified judicial inclination of affording, in public law terms, a wide margin of appreciation to parties' autonomy.

The Second Limb concerns proportionality, despite its alleged vagueness[72] as manifested in the wordings 'extravagant, exorbitant or unconscionable', its further limitation of the previous rule would only be indicative that courts would be even more reluctant in finding a clause 'disproportionate', as to be further elaborated below.

Additionally, the confined jurisdiction of penalty rule with regard to secondary obligation reduces the leeway available for judicial intervention and upholds parties' autonomy. Indeed, Professor Yihan Goh and Professor Man Yip observed that the mere reliance of the Second Limb might be considered an inefficient safeguard against judicial scrutiny[73] as satisfaction of both limbs are regardless a matter of value-judgment.[74] Therefore, ousting court's jurisdiction through this prerequisite (ie the First Limb) would be determinatively effective in mitigating the inroads made to the freedom of contract. Underpinning such confinement points to the court's recognition that parties are placed in a better position in negotiating contractual obligations – be it primary or secondary.

Pausing here, it shall be noted that the UKSC Justices in *Cavendish* hinted at a potential distinction of judicial treatment between contracts made under commercial and non-commercial contexts. As Morgan observes, apart from emphasising that the penalty rule shall not be easily invoked as evidenced by its significant limitation in scope, the endorsement of judicial inclination towards affording a 'strong initial presumption of enforceability' for contracts made in a commercial context for presuming parties to be well-advised and are thus empowered to safeguard their interests, amounts to relative reluctance in striking down agreed damages clauses in such context.[75]

---

71 *Cavendish* (n 2) [32].
72 See Section II.B 'Certainty' below.
73 Goh and Yip (n 70) [34].
74 ibid.
75 Morgan (n 7) 13.

Morgan's observation is particularly relevant when one considers Lord Hodge's suggestion that 'inequality of bargaining power', especially in cases that involve small-to-medium businesses, shall also be taken into account by courts in exercising its discretion,[76] albeit being limited by Lords Neuberger and Sumption that 'the modern rule is substantive not procedural. It does not normally depend for its operation on a finding that advantage was taken of one party'.[77] Regardless, for their Lordships further recognised that 'the circumstances in which the contract was made are not entirely irrelevant',[78] it is submitted that it becomes indicative that parties' autonomy would presumptively be upheld for contracts made under commercial context between parties at arm's length.

As *Chitty* observes, freedom of contract, based upon the 'will theory' of contract and the emergence of neo-liberal ideal,[79] was regarded by courts and philosophers as an end in itself, whereby contracting parties were afforded significant autonomy and the court's function was merely an enforcer of the contract in the absence of impropriety such as involuntariness.[80] Such attitude prevails even in judicial treatment of penalty clauses – as courts remained reluctant to strike down agreed clauses unless and only when proven to be penal in nature.[81] Under current jurisprudence, *Chitty* contends that the courts have differentiated between the nature of control against remedies and the hitherto undesired control over primary obligations on the ground of fairness whilst remaining bold in safeguarding such freedom,[82] particularly for those made under commercial context.[83] Viewed in this light, the corollary of judicial inclination to uphold commercial contracts concluded between parties at arm's length would be its tighter scrutiny of contracts concluded between

---

76 *Cavendish* (n 2) [262].

77 *Cavendish* (n 2) [34].

78 ibid.

79 AV Dicey, *Law and Opinion in England* (2nd edn, Greenwood Press 1914) 150–158.

80 *Chitty* (n 3) [1–031].

81 ibid.

82 *Chitty* (n 3) [1–032], citing *Cavendish* (n 2) [13].

83 *Chitty* (n 3) [1–032], citing *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2019] AC 119 [11] to illustrate the court's attitude as manifested by holding that 'party autonomy' justifies the binding nature of 'no oral modification' clause in a contract.

parties of unequal bargaining powers and/or under non-commercial contexts. As observed (albeit objected to) by Worthington,[84] the courts now incline towards striking proper balance between upholding parties' autonomy and promoting social values ranging from justice to equality.

Apart from these, the alternative statutory claim in *ParkingEye* has epitomised the way in which law and society are now collaboratively upholding these values. Whilst statutes like the Unfair Contract Terms Act 1977[85] focuses on safeguarding consumers' interest through codifying protections which are habitually done so only in common law or equity, the common law (through the penalty rule) has now assumed a supplementary role in upholding such values in areas with insufficient statutory protection.[86] In light of this, freedom of contract is no longer considered as an end in itself, but a means of attaining justice. Moreover, contrary to being a 'moral outrage', judicial treatment of penalty clauses shall be understood as a feasible *modus vivendi* that addresses the inevitable tension between freedom of contract and parties' autonomy whilst protecting unfairly treated parties by way of adopting a halfway house option.

Thus, Leung's submission above shall stand upon understanding the shift in judicial attitude. Equally obviously, any concern as to freedom of contract shall be dispelled given the court's pledge in exercising even greater restraints in striking down clauses, particularly in the light of its history of the same despite its wider discretion under the previous state of law.

Hence, whereas scholars have been describing the *Cavendish* test to be 'de facto extinct'[87] and '[surviving] only in name',[88] with Worthington even arguing that the creation of

---

84 Worthington (n 38) 303.

85 Hong Kong does not have a statutory equivalent of the Unfair Contract Terms Act 1977 (UK). Its closest counterpart is the Unconscionable Contracts Ordinance (Cap 458) – an ordinance with a higher threshold to be invoked than its English counterpart.

86 *Cavendish* (n 2) [38], [260].

87 William Day, 'A Pyrrhic Victory for the Doctrine against Penalties: *Makdessi v Cavendish Square Holding BV*' [2016] JBL 115.

88 Shivprasad Swaminathan, 'A Centennial Refurbishment of Dunlop's Emporium of Contractual Concepts: *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Limited v Beavis* [2015] UKSC 67' (2016) 45 Common Law World Review 248.

enormous vagueness under such test has rendered it de facto abolished without having the need to further campaign for its de jure abolition,[89] I shall proceed to discuss the controversy arising from the question of certainty under this test.

B. CERTAINTY

As famously remarked by Lord Scott in *The Golden Victory*[90] that 'certainty is a desideratum and a very important one, particularly in commercial contracts', certainty of the law is of utmost importance for businesses.[91] Given that liquidated damages clauses are commonly employed in virtually all commercial contracts across common law jurisdictions worldwide, sufficient certainty of any doctrine that might render such clauses unenforceable is therefore particularly susceptible to academic and societal scrutiny.

Nevertheless, both limbs of the *Cavendish* test have been subject to criticisms for their ambiguity. Whilst critics like Morgan has left the First Limb largely untouched, New Zealand-based scholars have been placing it under particularly stringent judicial scrutiny by contending that the test of 'legitimate interest' is inherently vague and depends largely upon judges' construction.[92]

This is particularly so in light of the decision in *Paciocco v Australia and New Zealand Banking Group Limited*,[93] which features a different construction towards issues

---

89 Sarah Worthington, 'The Death of Penalties in Two Legal Cultures?' (2016) 7 The United Kingdom Supreme Court Yearbook 129, 151.

90 *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* (*The Golden Victory*) [2007] UKHL 57, [2007] 2 AC 353 (HL) [38].

91 See further Alan Galbraith, 'Facilitating and Regulating Commerce – the Court Process' (2002) 33 Victoria University Wellington Law Review 419, 420.

92 Oliver Barron, 'The Penalty Doctrine: Reformulating New Zealand's Regime Against Penalty Clauses' (2018) Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No 30/2018, 15.

93 (2016) 258 CLR 525.

the arbitrariness of the First Limb[94] and its potential circularity according to Barron.[95]

The Second Limb is susceptible to even more severe criticisms, with Morgan arguing that 'unconscionability' is an inherently ambiguous standard as it 'does not bear its usual meaning' [96] (ie of procedural impropriety) as Lord Mance dictates.[97] Other scholars further contended that given the wide discretion afforded to judges in deciding whether a clause is 'disproportionate' has rendered such test purely a matter of value judgment. [98] Thus, the lack of certainty arising thereof has severely jeopardised commercial certainty.

With respect, criticisms as to uncertainty are untenable – the law in this area has never been clearer. It shall be noted that perfect certainty is unattainable as the common law evolves over time, whereby relative certainty (as to be measured by relative predictability of the law) is fundamentally distinct from perfect certainty. In addition, as with my argument on freedom of contract, it is submitted that any criticism against uncertainty shall not be premised upon the previous state of law, but instead, that post-*Cavendish*.

On a careful construction of the entire *Cavendish* test, it is submitted that the new penalty rule has offered a feasible and clear standard for contracting parties – whereas evaluation as to the clarity of the standard per se shall not be conducted in isolation from the judgment in its entirety.

To commence, notwithstanding being relatively abstract, one should have been well-aware of the existence of a robust presumption of enforceability for commercial contracts concluded between parties at arm's length.[99] Thus, question as to

---

94 Barron (n 92) 15 observed that the majority gave a wider construction of what falls under the ambit of 'legitimate interest' than the minority.

95 Barron (n 92) 15 highlighted Keane J's observation that 'an innocent party will always have a legitimate interest in using liquidated damages to avoid the common law damages regime'.

96 Morgan (n 7) 13.

97 *Cavendish* (n 2) [16].

98 Barron (n 92) 16.

99 See Section II.A 'Freedom of Contract' above.

uncertainty has been significantly narrowed down. A limb-based analysis shall then follow.

In fact, judges have been afforded wide discretion in ascertaining what falls under the ambit of the first limb – yet such discretion is well-guided by Lords Neuberger and Sumption's requirement of soliciting thorough understanding of the purportedly-compromised commercial and non-pecuniary interests. Therefore, narrowly constructed and superficial findings without due regard to such interests must be erroneous in law. In addition, juxtaposing the standard of 'legitimate aim' under the commonly adopted structured proportionality test that operates in the realm of public law,[100] it is submitted that on top of the aforesaid guidance, construction as to the requisite standard in satisfying the First Limb is more a matter of common sense that functions equally well in public law arena.

Concerns as to the Second Limb are equally unfounded. Subsequent to the decision in *Vivienne Westwood Ltd v Conduit Street Development Ltd* [101] as well as the aforementioned corollary as to the court's robust stance in upholding commercial contracts concluded by parties at arm's length, it is clear that the more unequal the parties had been, the more generous the court would be in applying the 'unconscionability' test. [102] As reasonableness serves as the overarching yardstick in guiding the court's application of the 'unconscionability' test that is alike to that of the proportionality test, its relatively stable application in public law cases can perhaps be indicative as to the similarly stable and predictable application in contract law given the existence of lengthy precedents in guiding future courts as to the common law standard of 'reasonableness'. [103] In addition, the adoption of comparable parking fees as an aid in determining the proportionality of the clause in *ParkEye* might be equally

---

100 See for the guiding case of *Hysan Development Co Ltd v Town Planning Board* [2016] HKCFA 66, (2016) 19 HKCFAR 372 [134].

101 [2017] EWHC 350 (Ch).

102 *Chitty* (n 3) [26–227], citing the factual pattern of *Vivienne Westwood* in suggesting that 'if the sum is payable for any one of many different possible breaches, some of which may be comparatively minor, it is likely to be disproportionate'.

103 ibid.

indicative as to the court's approach of referencing extrinsic guidelines in assisting its determination.[104]

As Morgan further canvassed arguments as to the legal uncertainty arising from the court's inconsistent approach of giving effect to commercial justification,[105] it is submitted that resolution of this ostensible problem has been rendered unnecessary since cases relied upon by Morgan are predominantly those pre-*Cavendish* as concisely addressed by Leung with the post-*Cavendish* case of *Vivienne Westwood*, being an convincing example in rebutting any uncertainty as to the rule's application. Moreover, the fact that *Cavendish* has clarified the court's position in affording proper weight to commercial justifications has rendered this concern self-explanatorily untenable.

As a matter of practical usage, it is essential to note that the recently published Scottish Law Commission Report has observed that the *Cavendish* test is well-received by commercial law firms and professional bodies for being highly flexible and workable in terms of providing clear guidance as to future contract drafting.[106] Whilst the Scottish stance of adhering to the status quo subject to observing its future development is clear, the legitimacy of the *Cavendish* test is further buttressed by the opinion of its long-time critic Rowan, who commented that 'short term uncertainty is to be expected and tolerated following any new development in the law … [and] will quickly be replaced by a corpus of jurisprudence providing guidance to aid the application of the new test of validity'.[107]

In sum, any concerns as to certainty should have been rendered unsubstantiated and that leaves as with the final divided line along public policy.

---

104 Goh and Yip (n 70) [35].

105 Morgan (n 7) 13.

106 Scottish Law Commission, *Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (Scot Law Com No 252, 2018) [19.26].

107 ibid [19.28].

C. PUBLIC POLICY

Academia is equally divided along the line of public policy in respect of whether the existence of the penalty rule itself might give rise to economic inefficiency from both macro- and micro-economic dimensions.

1. THE MICROECONOMIC DIMENSION

At the micro-level, economically-rational scholars rely heavily on the efficient breach theory to resist against abolition of the penalty rule, claiming that economically-efficient breach would be deterred should penalty clauses be enforced in increasing the costs of breach.[108]

To the contrary, Goetz and Scott resisted any suggestion as to the deterrence of efficient breach without the penalty rule, as they claim penalty clauses merely amend the price-level for attaining efficient breach instead of prohibiting such breach upon conducting an economic analysis to review the pre-*Cavendish* penalty rule,[109] with Worthington further arguing the status quo as being overtly-paternalistic for failing to recognise the fact that the altered price-level (as agreed by parties) is entirely within parties' autonomy and increasing the costs of breach is essential in protecting their commercial and non-pecuniary interests.[110]

With respect, any reliance upon such contention post-*Cavendish* fails *in limine* as it fails to consider the current state of law, which allows contract-drafters to include clauses that protect parties' legitimate interests (the First Limb of *Cavendish*), provided that the damages arising thereof are not 'extravagant, exorbitant or unconscionable' (the Second Limb of *Cavendish*) – a nearly-unattainable threshold high enough to give effect to parties' intention[111] – as was the case in *Cavendish* and

---

108 Saprai (n 56) 444–445.

109 CJ Goetz and RE Scott, 'Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach' (1977) 77 CLR 593–594.

110 Worthington (n 38) 319.

111 See Section II.A 'Freedom of Contract' and Section II.B 'Certainty' above for discussion as to the Second Limb.

ParkingEye. In practice, in the event where such threshold is met and a clause is rendered unenforceable, one can hardly assert that there remain any further unprotected interests. Accordingly, one can hardly conceive any potential deterrence as to efficient breach.

2. THE MACROECONOMIC DIMENSION

Going beyond the micro-level, Nick McBride sheds light to the often-missed macro-economic dimension of arguments against abolition by referring to Gordon Tullock's theory of 'rent-seeking',[112] which refers to the act of seeking to gain from existing wealth by charging others' access to certain invaluable resources by virtue of that person's social status or his right over those resources.[113] Highly notorious for being economically-inefficient for hampering creation of actual wealth, economic productivity and ultimately leading to human hardship, inserting a penalty clause is deemed to be an epitome of 'rent-seeking' act. As McBride argues, when the 'injured' party seeks the court's assistance to enforce a penalty clause in an action of breach, that party is in effect asking the State (with courts being its proxy) to grant him access to the contract-breaker's pocket without pursuing any legitimate interests.[114]

It is well-conceived that liberal-minded scholars would canvass suggestions as to its interference with freedom of contract, and thus penalty clauses negotiated by parties at arm's length under commercial context shall be upheld as parties should be well-informed of their rights and obligations arising thereof[115] – amongst which granting the other party access to the contract-breaker's pocket is a salient example.

---

112 Gordon Tullock, 'Efficient Rent Seeking' in James Buchanan, Robert Tollison and Gordon Tullock (eds), *Toward a Theory of the Rent-seeking Society (No 4)* (Texas A & M UP 1980) 3–4.

113 ibid.

114 McBride (n 9) 5.

115 Edwin Peel, 'Unjustified penalties or an unjustified rule against penalties?' (2014) 130 LQR 365, 370.

However, I respectfully agree with the opinion of McBride in the sense that any loss incurring from the breach should have been well-covered should there be legitimate interest to protect. In the event where a clause is rendered unenforceable, there would logically be no undesirable impact at all on bona fide wealth-creating commercial activities whilst curtailing the desire of 'acquiring something for nothing'.

Moreover, any contention that the rule underpins an undue intervention with freedom of contract and shall hence be obliterated lies upon the premise that insofar as privately made agreement as to penalty or coercion are consensual, the court's jurisdiction shall be ousted. This cannot be right as this is the case where a claimant is seeking the state's assistance to injure the contract-breaker pursuant to a clause that is drafted for the sole purpose of punishing the latter party,[116] as opposed to a situation where there exists legitimate interest for the claimant to protect – indeed one can hardly have any interest that goes beyond legitimate interest and/or performance that goes beyond default damages.

Given the heavyweight that courts have been placing upon public policy in virtually all areas of law,[117] any call for the rule's abolition would contradict the court's hitherto position of ensuring the law of contract does not imbue with a purpose of punishing any wrongdoings[118] – a stance that is integral to the economic foundations and other fundamentals of the law of contract in its entirety – and this leads us to the final justification of the rule, namely coherence of the law.

D. COHERENCE OF THE LAW

Amongst UKSC's three justifications for retaining the penalty rule, the legal coherence justification which provides, inter alia, the penalty rule being 'consistent with other well-established

---

116 See *Cavendish* (n 2) [32]: 'The innocent party can have no proper interest in simply punishing the defaulter.

117 See for example the tort case of *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, [2018] AC 736 [84].

118 *Co-operative Insurance Society v Argyll Stores* (*Argyll*) [1998] AC 1 (HL) 15G–H.

principles which have been developed by judges'[119] warrants further examination.

As aforementioned, Morgan remains unconvinced by this justification whilst confining his discussion in the scope of the penalty rule, and argues that common law has no further role to play insofar as terms are genuinely agreed by parties (including penalty clauses).[120]

Nevertheless, albeit suggested under the context of penalty rule and recognising the UKSC Justices' failure to go further in connecting the dots,[121] this justification shall not be read (as Morgan did) in isolation from other equitable and common law rules developed throughout English legal history. Indeed, it remains undisputed that both the chancery and common law courts have been working steadfastly to resist against any attempt by parties to seek the court's assistance in upholding unfair, oppressive and punishment-aimed clauses whilst hiding under the shield of 'freedom of contract'. As Leung argued,[122] the underlying rationale of the present English stance on punitive damages, specific performance and unjust enrichment echoes with that in supporting the continued existence of penalty rule, and the destruction of either doctrine would significantly reduce the effectiveness of a strong legal regime against the said acts. Therefore, instead of being impossible to rationalise,[123] it is submitted that this rule fits squarely well within the said rules, and can be rationalised for being an integral and coherent part of the law upon examining their relationship.

1. UNJUST ENRICHMENT

It is trite that parties, albeit being injured by contract-breakers, would not be allowed to enrich themselves unfairly by whatsoever means, and hence the development of claims under

---

119 *Cavendish* (n 2) [39].
120 Morgan (n 7) 14.
121 Leung (n 11) 62–66.
122 ibid 62.
123 *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 (CA) 1446.

quantum valebant or *quantum meruit* in the absence of an express consideration,[124] or in invalidated contract.[125] In fact, the current position against unjust enrichment is formulated upon the premise of curtailing the desire of 'acquiring something for nothing' – thus the reluctance of courts in rejecting claims that amount to rent-seeking activities as resonates with the nature of penalty clauses.

2. SPECIFIC PERFORMANCE

Defined as 'the remedy available in equity to compel a person actually to perform a contractual obligation',[126] the courts often refrain from awarding such remedy as the loss suffered by the contract-breaker should he be compelled for specific performance would outweigh the loss suffered by the 'party entitled to performance',[127] and such remedy would amount to a form of oppression.[128]

3. PUNITIVE DAMAGES

Another area of law with comparable treatment by the court related to punitive damages – a form of damages that that has been effectively rendered irrecoverable ever since the declaration in *Addis v Gramophone Co Ltd*[129] save in two rare situations[130] as one would have no interest in penalising others. Clearly the UKSC shared the same concern by suggesting clauses that fail the First Limb of *Cavendish* deserve similar treatment.

Hence, the case of abolition as fiercely advocated by scholars like Worthington could only stand should they simultaneously advocate for ousting the court's jurisdiction over punitive damages, specific performance and unjust enrichment –

---

124 *Lampleigh v Braithwait* [1615] EWHC KB J17 (KB).
125 See for example *Mohammed v Alaga* [1999] 3 All ER 699 (CA).
126 *Chitty* (n 3) [27–013].
127 *Argyll* (n 118) [15].
128 Michael H Whincup, *Contract Law and Practice* (5th edn, Kluwer Law International 2006) 37.
129 [1909] AC 488 (HL).
130 See further *Rookes v Barnard* [1964] AC 1129 (QB) 1227.

without which their contentions must fail as perceptively acknowledged by Rowan.[131]

Simply put, whereas the pre-*Cavendish* position might be considered 'a recipe for disaster',[132] the post-*Cavendish* position seems to suggest otherwise by addressing the exact concerns canvassed by critics, and has thereafter formed part of the coherent legal regime against unfair, oppressive and punishment-aimed acts.

III. THE UNSETTELED POSITION OF HONG KONG

Following the major development by the English courts in *Cavendish*, the Australian position has become relatively settled in light of the High Court of Australia's decision in *Paciocco*[133] in adopting an generous approach juxtaposing that of *Cavendish*, whereby a clause would only be held as penal if the sum imposed was 'out of all proportion to the interests of the part which it is the purpose of the provision to protect'.[134] The only distinction between the two jurisdictions is whether the penalty rule covers contractual provisions invoked other than by breach of contract, with the Australian court affirming such an extension[135] contrary to its English counterpart.[136]

On the contrary, the position in Hong Kong remains less settled. At present, the Hong Kong courts remain faithful in applying the *Dunlop* test, as recently affirmed by the Court of Appeal in *Brio Electronic Commerce Limited v Tradelink Electronic Commerce Limited.*[137] Throughout the years of developing its own jurisprudence, the Hong Kong appellate courts have effected various safeguards in confining the scope of judicial encroachments to contracting parties' freedom of

131 S Rowan, 'Reflections on the Introduction of Punitive Damages for Breach of Contract' [2010] OJLS 509.
132 Worthington (n 38) 318.
133 *Paciocco* (n 93).
134 ibid [29].
135 ibid [10].
136 *Cavendish* (n 2) [42].
137 [2016] 2 HKLRD 1449 (CA) [20].

contract. On top of the Privy Council's (acting as the highest appellate court of Hong Kong before 1997) acknowledgment in *Philips Hong Kong Ltd v Attorney General of Hong Kong* that contracting parties at arm's length shall be given deference over negotiating a fixed sum payment clause,[138] Waugh J (as he then was) also commented in the subsequent case of *Re Mandarin Container*[139] that 'the court should be slow to find terms agreed by the parties to be "in terrorem" rather than "genuine agreement providing for fixed formula of loss"'.[140] The court's reluctance in interfering with parties' intention is further illustrated by its treatment of a clause governing an additional default interest rate, in which the court held that it was not penal in nature as that increase in sum payable upon default was reasonably foreseeable as forming part of the 'range of losses'.[141] Similarly, in determining whether a clause giving rise to a $5 million sum payable upon breaching a non-solicitation clause is penal in nature in the more recent case of *Brio Electronic Commerce Limited*,[142] the Court of Appeal affirmed[143] the broader and more flexible approach adopted in *Ip Ming Kin v Wong Siu Lan*[144] instead of the restrictive one preferred by Arden LJ in *Murray v Leisureplay Plc,*[145] whereby the impugned clause was held as a liquidated damages clause and was enforceable.[146]

Albeit demonstrating the courts' commitment in upholding parties' intention by virtue of the weight attached to commercial convenience arising from agreed damages clauses and its reluctance in striking down a clause by holding it as penal in nature, the Court in *Brio* has nevertheless affirmed the century old and severely criticised *Dunlop* test[147] whilst deciding not to express its opinions on the then recent decisions in *Cavendish*. From there, it remains unclear as to whether in adopting a broader approach of *Dunlop* test by virtue of its refinement

---

138 *Philips Hong Kong Ltd. v Attorney General of Hong Kong* [1993] 1 LRC 775 (PC) 785C.
139 [2004] 3 HKLRD 554 (CFI).
140 *Philips* (n 138).
141 ibid [11].
142 *Brio* (n 137).
143 ibid [16]–[17].
144 (CACV 201/2012, 28 May 2013) (CA).
145 [2005] EWCA Civ 963 (CA).
146 *Brio* (n 137) [25].
147 *Brio* (n 137) [20].

through cases like *Philips* the court would broaden it further to render it on par with its English counterpart. On the one hand, the Court of Appeal's neglect of *Cavendish* (whether deliberate) in *Brio* might be indicative of its inclination towards a mildly board approach that is situated in between *Dunlop* and *Cavendish*. On the other hand, the exercise of caution against any blind-eye adoption of the English position can also be justified by uncertainties over the practical application of the *Cavendish* test – after all *Brio* was decided only seven months after the UKSC laid down the new test which had yet to be tested by courts and by commercial lawyers in drafting.

As an equally robust international banking hub, commercial certainty, freedom of contract, integrity and coherence of the law form part of the pillars of Hong Kong's legal regime – which, inter alia, lays down the foundation for Hong Kong's competitiveness whilst constituting the cornerstone of the city's success. Three years have passed and as of today, apart from being well-received by its Australian counterpart, the *Cavendish* test has not only withstood the challenge in court via *Vivienne Westwood,*[148] but also received preliminary acclaim from Scottish commercial law practitioners for being seemingly flexible and certain.[149]

Indeed, the Court of Appeal's approval of the dictum of Lord Mance in *Cavendish*[150] in the more recent decision of *Bank of China (Hong Kong) Ltd v Eddy Technology Co Ltd*[151] is instructive as to the local court's willingness to align with its English counterpart on this fine area of law. *Eddy Technology* concerns a debtor that entered into an agreement with the plaintiff creditor for a conditional suspension of default interest arising from various loan agreements. On further default of the said agreement, the clause provided therein stipulates that there shall be a retrospective charging of default interest. In rejecting a factually misconceived submission that the said clause constitutes a penalty, the Court of Appeal relied on the dictum of Lord Mance in approving *Cine Bes Filmcilik*[152] and *Lordsvale*.[153]

148 *Vivienne Westwood* (n 101).
149 Scottish Law Commission (n 106) [19.26].
150 *Cavendish* (n 2) [149]–[152].
151 [2019] 2 HKLRD 493.
152 *Cine Bes Filmcilik* (n 21).

In doing so, however, the Court of Appeal expressed no opinion as to whether the *Cavendish* test as propounded at paragraph 152 is applicable in Hong Kong, despite ostensibly asking itself questions similar to the test.[154]

In light of the continued existence of criticisms against the issue of uncertainty surrounding the *Dunlop* test, the recent developments in common law jurisdictions worldwide as well as Hong Kong court's inclination towards upholding the freedom of contact as part of its commitment in favouring the creation of a legal regime that fosters commercial convenience, it is submitted that the trajectory of Hong Kong law in relation to the penalty rule would gradually gear towards a broader approach adopted by its English counterpart, and thus aligning itself with the common law jurisprudence globally. Hence, the courts' attitude in forthcoming cases post-*Brio* and *Eddy Technology* is to be highly anticipated.

CONCLUSION

Conclusively, it is submitted that concerns canvassed by critics against the current rule have either unfairly considered the interplay between pre- and post-*Cavendish* precedents or failed to understand the supplementary yet significant role the rule plays in forming the foundations of contract law—and shall hence be considered bona fide yet unsubstantiated concerns.

The penalty rule, despite its pre-*Cavendish* deficiency, has been reformulated as a feasible *modus vivendi* that addresses the inevitable tension between freedom of contract and parties' autonomy whilst ensuring certainty, aligning with public policy and safeguarding coherence of the law. On a practical level, the rule confines the court's rarely exercised jurisdiction over agreed damages clauses by maintaining a multi-fold safeguard, by which judicial paternalism and concerns as to uncertainties have been squarely addressed without compromising its mission of upholding justice.

---

153 *Lordsvale* (n 16).

154 *Eddy Technology* (n 151) [38].

As of today, the UKSC's decision is correct – for there is no basis for an opportunity to abolish the rule to exist at all, but to refine – and thus the current halfway house option gives effect to commercial convenience whilst guarding against clauses that are penal in nature.

Regardless, given its preliminary endorsement in Scotland [155] and untroubled application in England, [156] any suggestion as to the creation of an absolute laissez-faire regime governing penalty clauses without observing and evaluating the direction in which the post-*Cavendish* state of law gears toward would only amount to a truly 'haphazardly constructed edifice'[157] that critics of the penalty rule strive to guard against. For the foregoing reasons, it remains to be seen when the Hong Kong appellate courts deem fit to abolish the century-old test, and embrace a truly workable and certain regime.

---

155 Scottish Law Commission (n 106) [19.26].

156 *Vivienne Westwood* (n 101).

157 The description of the pre-*Cavendish* penalty rule that Lord Neuberger and Lord Sumption gave at *Cavendish* (n 2) [3].

A NEW APPROACH TO THE CONSTITUTIONALITY OF THE CO-LOCATION ARRANGEMENT

Tony Ju Liu*

This article will attempt to explore a new dimension for the constitutionality of the co-location arrangement between the Hong Kong Special Administrative Region and the Guangdong Province. By doing so, this article will first critically analyse several existing defensive approaches to the co-location arrangement, especially the two mentioned in the judgment of the judicial review on the matter. Thereafter, the new approach will be introduced based upon clear reference to the Basic Law text. The differences between the new and existing arguments will then be noted and reasonable concerns are to be responded to. At the final stage, the article will summarise the new approach and look beyond the co-location arrangement itself.

I. EXISTING APPROACHES TO THE CONSTITUTIONALITY OF THE CO-LOCATION ARRANGEMENT

Before the analysis of the existing approaches, the exact nature of the co-location arrangement should be briefly introduced. The co-location arrangement refers to the joint check at the boundary between Hong Kong Special Administrative Region (Hong Kong SAR) and the Mainland of China (Co-location Arrangement). Some similar precedents have been in practice in Futian Port,

* Candidate for LLB, School of International Law, East China University of Political Science and Law. The author is grateful to Professor Johannes Chan and Professor Simon Young of the University of Hong Kong for their extensive and helpful comments. Any remaining errors are the author's own.

Shenzhen as Hong Kong officers perform their checking duties in the Mainland. Nevertheless, there would be some legal problems if Mainland officers were to carry out duties in the West Kowloon Station, which is a newly built high-speed railway station located in Hong Kong. Article 18 of the Basic Law (Article 18) clearly stipulates that no Mainland law shall be enforced in Hong Kong unless stated in Annex III.[1] Therefore, the Hong Kong SAR Government and the Government of Guangdong have ratified an agreement in relation to the Co-location Arrangement, which was later affirmed by the Standing Committee of the National People's Congress (NPCSC). In June 2018, the local legislation of the Co-location Arrangement, namely the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance (the Co-location Ordinance),[2] was passed by the Legislative Council of Hong Kong SAR, which has symbolised the last stage of the legislative process of the Co-location Arrangement. Notably, all Mainland laws, instead of only those laws and regulations concerning Customs, Immigration and Quarantine (CIQ), will be in force in the Mainland Port Area (MPA) where checks by Mainland officers will be carried out. This has led to questions over the constitutionality of the Co-location Arrangement for its obvious clash with Article 18.

Notably, almost all arguments for the constitutionality of the Co-location Arrangement target the decision issued by the NPCSC (the Decision)[3] – which affirms, or 'reaffirms' as it claims, that the Co-location Arrangement is constitutional – save for one proposed by Professor Po Jen Yap and Professor Albert Chen. Since there have been various proposals arguing for the constitutionality of the Co-location Arrangement, it is therefore necessary to critically look into them before presenting the new one. For the sake of the length of this article, those existing

---

1 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law), art 18(2); Annex III.

2 Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance (Cap 632).

3 Decision of the Standing Committee of the National People's Congress on Approving the Co-operation Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement (27 December 2017) <www.thb.gov.hk/eng/policy/transport/policy/colocation/EN%20Decision%20(2%20Jan).pdf> accessed 22 February 2019 (the Decision).

arguments are to be summarised as effective legislation, effective interpretation of the Basic Law, exercise of high degree of autonomy and enforcement of the supervisory power by the NPCSC.

A. Effective Legislation

This proposal of 'Effective Legislation' was put forward and approved of by Mr Li Fei, the then chairman of the Basic Law Committee. After the NPCSC voted in favour of the Co-location Arrangement by issuing the Decision, Mr Li 'comprehensively' answered questions raised by the media.[4] He claimed that the Decision of the NPCSC which, from his point of view, had removed all obstacles in the way, is 'unchallengeable' and enjoys 'the highest status'.[5] He avoided referring to certain provisions of the Basic Law as the legal basis, but asked to look at it 'in a more general way'.[6]

Briefly, Mr Li in concert with the NPCSC has regarded the Decision as a de facto piece of legislation. As the NPCSC is an institution of the supreme state authority, namely the National People's Congress, the legislation thereby enjoys the supreme status. His argument might be endorsed by the text of the Constitution of People's Republic of China (the Constitution) and the Legislative Law. According to the Constitution, and more specifically the Legislative Law, the NPCSC is empowered to legislate when the National People's Congress is not in session.[7] It is undeniable that legislation enacted by the NPCSC, as long as it is in conformity with the Constitution, indeed enjoys supremacy in relation to other laws around the country.

---

4 Phila Siu and Kimmy Chung, 'Controversial Joint Checkpoint Plan Approved for High-Speed Rail Link as Hong Kong Officials Dismiss Concerns over Legality' *South China Morning Post* (Hong Kong, 27 December 2017) <www.scmp.com/news/hong-kong/politics/article/2125820/chinas-top-body-approves-plan-enforce-mainland-laws-joint> accessed 24 February 2019.

5 ibid.

6 ibid.

7 The Constitution of the People's Republic of China (PRC Constitution), art 67(3); Legislative Law (China), art 7(3).

Nevertheless, this proposal is defective and unlikely to be widely recognised. Even though the Decision issued by the NPCSC could be regarded as, to some extent, a piece of legislation,[8] the legal basis for the Decision's *enforcement* in Hong Kong courts remains unresolved. The Basic Law unequivocally promulgates the range of national laws which are enforced in the Hong Kong SAR.[9] No matter what supremacy the Decision by the NPCSC might enjoy, as long as it has not been listed in Annex III of the Basic Law, it would be legally impossible to be implemented and enforced by any Hong Kong court. This deficiency is determining, and thereupon this proposal favoured by Mr Li is not persuasive and convincing enough.

B. Effective Interpretation

The Decision is a piece of legislation according to the Constitution and the Legislative Law of the People's Republic of China (PRC). However, it might also be viewed as an effective interpretation of the Basic Law. The proposal of 'Effective Interpretation' was raised in the expert evidence of Professor Hualing Fu from the University of Hong Kong[10] and adopted by Mr Justice Chow at the Court of First Instance.

In the judgment, Mr Justice Chow summarised the salient points of the expert evidence from Professor Fu, whose fourth point is noticeable. He was of the view that the Decision was not an interpretation on the Basic Law in *formality* but in *substance*, and the Decision has the 'function' of an interpretation on the Basic Law.[11] Professor Fu, however, instantly pointed out that it was inappropriate for the NPCSC to issue an interpretation in such manner. Mr Justice Chow held the view that it matters more whether the NPCSC is empowered to do so, rather than whether

---

8 Hualing Fu, 'Guide to Legislative Interpretation in China' (*HKU Legal Scholarship Blog*, 19 July 2017) <researchblog.law.hku.hk/2017/07/guide-to-legislative-interpretation-in.html> accessed 24 February 2019.

9 ibid.

10 *Kwok Cheuk Kin v Chief Executive of the Hong Kong Special Administrative Region* [2018] HKCFI 2657 [67].

11 ibid [54(4)].

or not it is appropriate.[12] Mr Justice Chow accepted Professor Fu's proposal that the Decision is in substance an interpretation of the Basic Law, which, in turn, means the Decision becomes legally binding in Hong Kong.[13]

The deficiency of this theory is obvious in that it overrides the fixed procedure promulgated in the Basic Law concerning the interpretation of the provisions in question.[14] Although there have been several deciding cases in Hong Kong which delineate the boundary of the power to interpret the Basic Law more clearly, it has been gradually accepted that the NPCSC is vested with the power to interpret the Basic Law without any request from the Court of Final Appeal or the Chief Executive,[15] it is still legally expected that the NPCSC will interpret the Basic Law through the procedure according to the text contained therein. As part of several essential legal procedures for interpretation of the Basic Law, the NPCSC must consult its Hong Kong Basic Law Committee before interpreting. As argued in the expert evidence, Professor Fu believed that the Basic Law is 'exclusive',[16] and therefore the breach of its clear wording by reference to outside legal documents may set up some very alarming and dangerous precedents. One might argue that the Decision by the NPCSC being regarded as interpretation is an occasional type of exception, but the certainty and predictability of any legislation shall be prioritised, otherwise the law will not be a guidebook for the public, officials or lawmakers. It could be risky to approach the Decision as interpretation in substance, as it might open a back door or Pandora's box.

C. Exercise of High Degree of Autonomy

Soon after the issuance of the Decision, there has arisen an approach to the constitutionality of the Co-location Arrangement in Hong Kong by reference to the 'Exercise of High Degree of Autonomy'. It was favoured by Professor Po Jen Yap and Professor Albert Chen.

---

12 ibid [56].
13 ibid [56], [58], [62], [74(2)].
14 Basic Law (n 1), art 158.
15 *Lau Kong Yung v The Director of Immigration* (1999) 2 HKCFAR 300.
16 *Kwok Cheuk Kin* (n 10) [57(1)].

1. Approach by Professor Albert Chen

In his article on Ming Pao,[17] Professor Chen was of the view that Article 20 of the Basic Law (Article 20), which leaves room for the Hong Kong Government to enjoy more power granted by the Central Authorities, does not need to be referred to when the Co-location Arrangement is concerned, as Article 7 of the Basic Law (Article 7) should be sufficient to justify the relinquishment of the MPA in West Kowloon Station by the Hong Kong Government. His induction was that it was legal for the Hong Kong Government to yield the jurisdiction of the MPA to the Mainland in accordance with Article 7, due to high degree of autonomy enjoyed by the SAR. Nevertheless, as admitted by Professor Chen himself, this exercise of high degree of autonomy shall be in conformity with other provisions in the Basic Law. Article 18 and Annex III have, therefore, become difficulties. He then argued that it should not be restricted to the literal interpretation of the text, as drafters of the Basic Law could not foresee the construction of high-speed railways. Provided that the NPCSC is the interpreter of the legislation in the sense of the Constitution, it could be highly likely that the NPCSC had taken the legislative purpose of Article 18 into consideration.

Professor Chen's demonstration seems, prima facie, convincing and persuasive. Nonetheless, many major questions have remained unanswered as before. The first to come is the application of the proportionality test. Professor Chen utilised the proportionality test to argue that the exercise of high degree of autonomy falls within the range of Article 7. It is somewhat confusing as the proportionality test has been widely accepted as a legal method concerning probable human rights violations, such as the *Belmarsh* case[18] in which the House of Lords questioned the

---

17 Albert Chen, '人大常委會一地兩檢決定的法理分析（上）' ('Legal Analysis of the NPCSC's Decision on Co-location Arrangement (Part I)' (*Mingpao*, 8 January 2018) <news.mingpao.com/ins/%E6%96%87%E6%91%98/article/20180108/s00022/1515331760664/%E4%BA%BA%E5%A4%A7%E5%B8%B8%E5%A7%94%E6%9C%83%E4%B8%80%E5%9C%B0%E5%85%A9%E6%AA%A2%E6%B1%BA%E5%AE%9A%E7%9A%84%E6%B3%95%E7%90%86%E5%88%86%E6%9E%90%EF%BC%88%E4%B8%8A%EF%BC%89%EF%BC%88%E6%96%87-%E9%99%B3%E5%BC%98%E6%AF%85%EF%BC%89> accessed 2 April 2019.

18 *A v Secretary of State for the Home Department* [2004] UKHL 56 (HL).

legal basis of the 'contemporary detention' by the UK Government. However, as Mr Justice Chow pointed out in the Court of First Instance, the Hong Kong Government has instead referred to the proportionality test as a justification for the relinquishment of jurisdiction.[19] Fundamentally, such a test could not be referred to when justifying the expansion of governmental power.[20]

The second is Professor Chen's approach to the status of the Decision issued by the NPCSC. He argued that even if the text of the provisions is crystal clear, the NPCSC or Hong Kong courts could still construe the provisions in the way of teleological explanation, as authorised by the Basic Law. In other words, the NPCSC, as part of the institution enacting the Basic Law, must have taken the legislative purpose of Article 18 into account when issuing the Decision. Therefore, as an indication of compliance of the Co-location Arrangement with Article 18, the Decision has provided some legal affirmation to the Co-location Arrangement.

The deficiency is that Professor Chen may have established some convincing arguments by delineating the function of the Decision, namely some category of confirmation to the compliance of the Co-location Agreement with Article 18. Nevertheless, it remains unresolved what legal status the Decision could enjoy within the Hong Kong SAR. Unquestionably, the Decision will be respected, enforced and defended in Mainland courts, although that does not necessarily mean that Hong Kong courts should duplicate this attitude. The teleology itself is controversial, as on one hand, the text of Article 18 is undisputed and clear, which renders it difficult to vest it with additional authorisations, whilst on the other hand, then Chief Justice Andrew Li has reiterated the stance to interpret the Basic Law adopted by the Court of Final Appeal (the CFA) in the *Chong Fung Yuen* case,[21] in which he said that the courts' role under the

---

19 *Kwok Cheuk Kin* (n 10) [80].

20 Jasmine Siu, 'Hong Kong Government Damaged "One Country, Two Systems" with "Monster" Co-Location Plan at Express Rail Terminus, Court Told' *South China Morning Post* (Hong Kong, 30 October 2018) <www.scmp.com/news/hong-kong/law-and-crime/article/2170842/hong-kong-government-damaged-one-country-two-systems> accessed 23 June 2019.

21 *The Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211.

common law in interpreting the Basic Law is to construe the language used in the text of the instrument in order to ascertain "the legislative intent as expressed in the language". Once the legislation is published, it leaves to the public and, for instance, judges to approach the legislative intent of the text, which could ensure the general and common comprehension of the words and expressions used by the legislation, to help unify comprehension of the law. Therefore, Professor Chen's proposal of teleology might not be appreciated by the CFA and other courts in Hong Kong. Furthermore, Professor Chen more or less intended to direct the legal basis of the Decision to the interpretation by the NPCSC. As he said, it was highly likely for the NPCSC to take Article 18 into account (when issuing the Decision).[22] Suppose the NPCSC was indeed interpreting the Basic Law, the form which it undertook, precisely a Decision, would still not be legally practicable in Hong Kong SAR as it is not an interpretation following the fixed procedure required by the Basic Law.

2. Approach by Professor Po Jen Yap

Similarly, Professor Po Jen Yap has also proposed that the Co-location Arrangement could be justified within the Basic Law, specifically Article 7, to lease the land to the Mainland. Professor Yap is of the view that the Article 7 has vested the Hong Kong Government with 'implied power' to relinquish the jurisdiction over the MPA in the West Kowloon Station.[23] He has set up a four-stage test to back up his theory. Firstly, the implied power has to be based upon an express article in the Basic Law, which is Article 7. Secondly, the implied power has to be exercised for a good aim, as the Co-location Arrangement could abundantly reduce the length of checking time. Then, the Government's measure has to be reasonably adapted to the aim, given that the Co-location Arrangement is to serve the Guangzhou-Shenzhen-Hong Kong Express Rail Link (the Express Rail Link) and the checks at the boundary. Finally, the exercise of the implied power shall not contradict any other provisions elsewhere in the Basic Law.[24] As

---

22 Chen (n 17).

23 Po Jen Yap and Zixin Jiang, 'Co-location is Constitutional' (2018) 48(1) HKLJ 37, 42–47.

24 ibid 47–50.

for this last point, where many have cast their doubt over the probable dispute with Article 18, Professor Yap has simply presented them with his answer that the land has been transferred to the Mainland, therefore there would be no conflict with Article 18.[25]

Professor Yap's approach has confined the reasoning to the range of the Basic Law, which should always be appreciated. However, his argument is undeniably circular and indefensible thereby. The most problematic point is his fourth test, namely: the implied power shall not contradict any other provisions in the Basic Law. He argues that the MPA has been leased to the Mainland, therefore there would be no contradiction with Article 18. Professor Yap's target is to demonstrate that the Hong Kong Government indeed has an implied power arising from Article 7 to lease the land, but it has to go through the four-stage test. The fourth, however, has been explained by Professor Yap upon assuming that the land had already been legally leased whilst his article and the implied power theory argues that the government could legally lease the land. It is obviously a circular argument where Professor Yap has attempted to demonstrate his aim by assuming it is already right.

Professor Yap's article is plausible in the sense of defending the Co-location Arrangement within the Basic Law, contrary to Professor Fu's 'Effective Interpretation' approach which has breached the clear and fixed procedure promulgated in the Basic Law itself. Professor Yap also pointed out that there exist some circumstances where the lands in concert with the jurisdiction could be leased, for instance, the consular.[26] He has also differentiated the consular scenario with the Co-location Arrangement as the legal source of the former is more about the international conventions and treaties. In summary, the theory of implied power is not alien to many common law scholars, as many similar precedents have been set up in other common law jurisdictions such as the United Kingdom and the United States. It is, nevertheless, flawed in Professor Yap's article, as his four-stage test has not been met by his own demonstration, which was effectively circular.

---

25 ibid 40, 49–50.

26 ibid 41–42.

D. Enforcement of Supervision Power by the NPCSC

The last theory to be introduced, 'Enforcement of Supervision Power by the NPCSC', was proposed by Professor Lei Wang of Peking University as part of his expert evidence, which approached the Decision as an enforcement of supervision power over the Constitution enjoyed by the NPCSC.[27]

It is stipulated in the Constitution that the NPCSC enjoys the power to supervise the enforcement of the Constitution, and the NPCSC is de jure the sole institution in China to initiate any constitutional review on the legislation.[28] As Professor Wang stated in his evidence, (1) the NPCSC could supervise the enforcement of the Constitution, which includes Article 31 of the Basic Law (establishing the Hong Kong SAR); (2) the NPCSC also enjoys the supervising power under the Basic Law, in order to determine whether the legislation is compatible with the Basic Law;[29] (3) the manner in which such supervision is implemented is through the Decision; and (4) most importantly, the Decision is legally binding in Hong Kong as the NPCSC is part of the supreme authority which represents the will of the state.

The reasoning given by Professor Wang is partly convincing, such as the supervising power enjoyed by the NPCSC. However, the last and most significant reason, which connects the legal status of the Decision and its enforceability in Hong Kong, failed to be established convincingly. The fourth part of his reasoning was nevertheless an argument of political nature, rather than legal. The Decision issued by the NPCSC indeed, might contain the will of the state, but political supremacy cannot necessarily compensate for the legal vacuum.

Underneath the surface of the argument, the deeper logic given by Professor Wang is, at least to a certain extent, the direct implementation of the Constitution in Hong Kong. The relevant articles in the Constitution will not magically sweep away the

---

27 *Kwok Cheuk Kin* (n 10) [53(1)–(5)].
28 PRC Constitution (n 7), art 67(1).
29 Basic Law (n 1), arts 2, 17(2)–(3), 158(1).

legal obstacles in the way, precisely Annex III of the Basic Law. Although it is inappropriate to draw such a conclusion that since the Constitution is not listed in the Annex III, it is thereby not enforceable in Hong Kong SAR, the exclusiveness of the Basic Law still manifests that the supervision power vested with the NPCSC shall only be referred to via the Basic Law rather than by other outside legal documents. Otherwise, the overlapping powers granted to the NPCSC would be redundant, provided that they are separately placed in the Constitution and the Basic Law. In brief, Professor Wang attempted to demonstrate the constitutionality of the Co-location Arrangement by introducing the implementation of the Constitution, but the broader issue in relation to the Basic Law and Constitution remains unresolved, and thus deserves further discussion.

II. NEW APPROACH: 'IMPLIED APPROVAL' VIA THE FILING AND REVIEW MECHANISM

A. Introduction

After the analysis of the existing approaches, it seems clear that if the case reached the CFA, it would be likely that the CFA might rule against the judgment of the Court of First Instance, since the 'Effective Interpretation' approach adopted by Mr Justice Chow is controversial. The new proposal to be introduced by this article will bypass any defence for the Decision by the NPCSC, and instead focus on the Co-location Ordinance. Moreover, the approach will clearly refer to the provisions of the Basic Law. The following section will refer to Articles 17(2) and (3) as the legal basis for the Co-location Arrangement, precisely speaking, the 'Filing and Review Mechanism'.

B. Reasoning for the 'Implied Approval'

First, Mr Benjamin Yu SC, representing the government, referred to the expert evidence of Professor Fu at the Court of First Instance that the controversy around the Co-location Arrangement is more

about the 'One Country' in 'One Country, Two Systems'.[30] This general statement more or less leads to a more significant fact, that the Co-location Arrangement, concerning CIQ, requires co-operation between both the Hong Kong SAR and the Guangdong Province – effectively the Central People's Government. It is the bilateral relationship that matters in the Co-location Arrangement. Provided that it is the bilateral relationship that is concerned, it could not be concluded that the Co-location Arrangement is entirely an 'internal' issue of the Hong Kong SAR. Some may argue that, suppose the Hong Kong SAR were to set some pre-clearance procedures at the Hong Kong airport, the decision of whether to establish such a pre-clearance area would be an internal affair, rather than that concerning the Central Authorities. Therefore, the Co-location Arrangement would fall entirely within the internal affairs of the Hong Kong SAR. It is undeniably accurate in that pre-clearance case, but not necessarily in the scenario of the Co-location Arrangement. A large deal of Mainland citizens commute between Guangdong and Hong Kong every day. More importantly, it is a type of internal movement within one country with some national laws and regulations in question. After all, the CIQ arrangements of the Express Rail Link, especially that between the Hong Kong SAR and its only land neighbour, could only be decided by negotiation and collaboration by the authorities of the Hong Kong SAR and the Guangdong Province, effectively the Central Authorities.

Then, it shall be noted that the NPCSC is vested with the power to return, or to put it in another way, veto any legislation passed and enacted by the Hong Kong SAR if found not to be in conformity with the provisions concerning the affairs of the Central Authority or the relationship between the Central Authority and Hong Kong SAR.[31] Articles 17(2) and (3) of the Basic Law stipulate that Hong Kong legislation should be reported to the NPCSC for records, and after consulting the Basic Committee ancillary to it, the NPCSC should return it without any

---

30 Jasmine Siu, 'Mainland Chinese Port Area in Guangzhou-Shenzhen-Hong Kong Express Rail Link Terminus Embodies "One Country, Two Systems," City's Lawyer Says' *South China Morning Post* (Hong Kong, 31 October 2018) <www.scmp.com/news/hong-kong/law-and-crime/article/2171045/mainland-chinese-port-area-hong-kong-high-speed-rail> accessed 23 June 2019.

31 Basic Law (n 1), art 17(3).

amendment if the legislation is incompatible with provisions mentioned above (the Filing and Review Mechanism). This Filing and Review Mechanism empowers the NPCSC to look into the constitutionality of the legislation from Hong Kong as it plays the role of the final adjudicator in certain affairs.

Therefore, the Filing and Review Mechanism, or more precisely, legislations being 'recorded rather than returned', ensures that the NPCSC is of the view that certain legislation from Hong Kong are compatible with provisions of the Basic Law that concern the Central Authorities' affairs and relationship between Hong Kong and the Central Authorities. The negative proscription of Article 17(2) and (3) could be approached from the opposite way: suppose the NPCSC recorded the legislation without any returning; at the very least, that certain legislation would be constitutional in the sense of the Central Authorities-related issues. Obviously, the Co-location Ordinance was reported to the NPCSC and there was no return. This decision of 'not returning' should be interpreted as an implied approval or endorsement by the NPCSC to the Co-location Arrangement over Central Authorities-related issues.

III. DIFFERENCES WITH THE EXISTING APPROACHES

There are several distinct and notable differences between 'Implied Approval' via the Filing and Review Mechanism and existing approaches mentioned earlier.

A. Which Law to Rely On?

The first to come is which law to rely on. Both 'Effective Legislation' and 'Enforcement of Supervision Power by the NPCSC' are based upon the Constitution. The former relies on the legislative power of the NPCSC, whilst the latter relies on its supervising power. Nevertheless, it is the implementation of the Constitution that could not be easily bypassed. Although there has been an increasing number of articles and journals in the Mainland that argue for the implementation of the Constitution in Hong

Kong, especially after the release of the White Paper on 'One Country, Two Systems',[32] it still remains controversial with regard to the range of implementation.

Some scholars in Hong Kong accept this stance,[33] whilst others may have expressed concerns. If the strict manner were to be adopted, Annex III would not allow the Decision, a normal piece of legislation of the NPCSC, to become legally binding in Hong Kong, even though the supervision power of the NPCSC in the Constitution and the Basic Law have overlapped to some degree. If the supervision power was designed to be invoked through the Constitution, what could be the legislative purposes to stipulate similar provisions inside the Basic Law? The 'Implied Approval' is, on the contrary, based upon the Basic Law, specifically the Filing and Review Mechanism prescribed in Articles 17(2) and (3). It is therefore free from the controversy of the implementation of the Constitution.

B. How to Approach the Text of the Basic Law?

The second difference is that the 'Implied Approval' adopts a much stricter understanding of the text in the Basic Law. In comparison with (1) 'Effective Interpretation', which effectively broadens the power of the NPCSC to interpret the Basic Law; and (2) 'Effective Legislation', which asks one to 'look beyond certain provisions in the Basic Law' instead of looking at the Basic Law 'in general',[34] the 'Implied Approval' would not breach the boundaries of the Basic Law or the widely accepted understanding of the text.

---

32 The State Council Information Office of the People's Republic of China, '"一國兩制"在香港特別行政區的實踐白皮書' ('White Paper on The Practice of the "One Country, Two System" in the Hong Kong Special Administrative Region') (*The State Council Information Office of the People's Republic of China*, 10 June 2014) <www.scio.gov.cn/tt/Document/1372801/1372801.htm> accessed 8 June 2019.

33 Danny Gittings, *Introduction to the Hong Kong Basic Law* (2nd edn, Hong Kong UP 2016) 73.

34 The Decision (n 3).

It is particularly important here to recognise and understand the argument that the Basic Law is a living document. The Secretary for Justice, Teresa Cheng, made use of the Hong Kong Legal Year Opening Ceremony 2018 as an opportunity to convey her message to the judiciary and the public after assuming office, especially in relation to the issue of the Co-location Arrangement.[35] It is impressive that she noted that the Basic Law is living and developing with the times. This is sensible as the Basic Law drafters would not have been able to foresee the building of the Express Rail Link, or (potentially) same-sex marriage in the future. Therefore, a relatively rigid Basic Law may be jeopardising in the long term. The drafters have left some room for moderation, but the breach of a clear boundary will be another issue.

What Professor Fu's expert evidence has put forward is to set aside those existing procedures to interpret the Basic Law. The reason is simple, because there is no ambiguity of the procedures of how to interpret the Basic Law, unlike the once controversial initiators of the process. The Basic Law stipulates that the CFA could submit the provision to the NPCSC for interpretation,[36] but the provision is not expressed in an exclusive way. Judgments later on reaffirmed the point that the NPCSC enjoys unrestricted power to interpret the Basic Law without any request from the Hong Kong SAR.[37] In conclusion, if there was no ambiguity over the text of the Basic Law, for instance the procedure of interpretation, then the understanding of the text shall not be casually expanded or there would be no need to refer to external legal documents.

---

35 Teresa Cheng, 'SJ's speech at Ceremonial Opening of the Legal Year 2018' (Hong Kong, 8 January 2018) <www.info.gov.hk/gia/general/201801/08/P2018010800954.htm> accessed 23 June 2019.

36 Basic Law (n 1), art 158(3).

37 *Yau Wai Ching v Chief Executive of The Hong Kong Special Administrative Region, Secretary For Justice* [2017] HKCFA 57, [2017] 20 HKCFAR 390; *Kwok Cheuk Kin* (n 10).

C. Interpreting or Amending the Basic Law?

Additionally, Professor Cora Chan has once proposed a distinction between 'interpreting' and 'de facto amending' the Basic Law.[38] From her point of view, as long as the interpretation by the NPCSC has effectively gone beyond the text of the Basic Law, the courts in Hong Kong could refuse to enforce it. Similarly, if Professor Fu's proposal were to be accepted, it would effectively broaden the interpretation power of the NPCSC, which would amount to amending the Basic Law, despite its promulgation of a strict and clear procedure to interpret the provisions once in doubt. In conclusion, the ambiguous provisions need to be interpreted with the development of time, but if the provision remains clear and the procedure is fixed, to broaden its understanding might be equal to amending it, which is not legally permissible.

IV. CONCERNS ON AND RESPONSE TO THE 'IMPLIED APPROVAL'

It is fully appreciated that there might exist some concerns over the proposal of the Implied Approval as it refers to Articles 17(2) and (3) of the Basic Law. However, the concerns around the Filing and Review Mechanism could be considerably relieved by unveiling more of the background of the mechanism, comparing it with similar systems elsewhere in China and tracing back to the colonial period for clarification.

A. The Minimum Level of Scrutiny

The concern lies mainly on the content of the mechanism, which empowers the NPCSC to scrutinise legislation from the Hong Kong SAR. It might trigger some suspicions that it is hampering 'One Country, Two Systems', or leaves the NPCSC with an unlimited channel to influence the legislative process of Hong

---

38 Cora Chan, 'The Legal Limits on Beijing's Powers to Interpret Hong Kong's Basic Law' (*HKU Legal Scholarship Blog*, 3 November 2016) <researchblog.law.hku.hk/2016/11/cora-chan-on-legal-limits-of-beijings.html> accessed 24 February 2019.

Kong SAR. The original drafting of Article 17 indeed included the scrutiny on all types of legislation sent from Hong Kong SAR.[39] This drafting concerned many members of the Basic Law Drafting Committee, and eventually, the provision restricts the range of the legislation which could be returned to those within the affairs of the Central Authorities or Central Authorities–Hong Kong relationship. This concession has relieved many members of the committee with their concerns and eased the tensions about the involvement from Beijing over the legislative process after 1997. Therefore, it should be noted that the Central Authorities have conveyed the goodwill to Hong Kong and the range of the legislation for scrutiny has been limited to the minimum level.

The minimum level here refers to the affairs of the Central Authorities and the Central Authorities-Hong Kong relationship. It is hereby necessary to point out that in most jurisdictions, autonomous or self-autonomous areas cannot enjoy the power to legislate against principles of the Constitution or retained affairs by its Central or Federal Government. For instance, the devolution in the United Kingdom is quite advanced amongst unitary states, but the Scottish Parliament could not set its own immigration standard or unilaterally join the Schengen Area.[40] Those affairs are still retained in London, namely the UK Parliament and government. Notably, Westminster could still legislate for Scotland even though the Scottish Parliament does not extend the invitation to it. The Sewel Convention[41] is more of a political tradition, but no matter how important it might be politically, Westminster remains the supreme legislature for all parts of the United Kingdom.[42] Similarly, the autonomy of Hong Kong is not unlimited, and those affairs scrutinised by the NPCSC when receiving the reports from Hong Kong SAR are requested

---

39 Yuantao Ye (葉遠濤), 'A Study on the Power of Legislative Record Review of the NPC Standing Committee from the Perspective of Universal Suffrage' ('"雙普選"視角下對香港立法備案審查權研究') (2016) 28(2) *Academic Journal of One Country Two Systems* (一國兩制研究) 121–22.

40 Scotland Act 1998, s 7, sch 5 pt II s B6.

41 The Sewel Convention refers to the political convention that the British Parliament would not normally legislate for devolved issues unless it is invited to do so by the Scottish Parliament, but it remains a political convention, not a legally binding one.

42 Scotland Act 2016, s 28.

by the very nature of the unitary state, not from some personal will of any politician.

B. Filing and Review Mechanism Elsewhere in China

1. Introduction to the Filing and Review Mechanism in China

The Filing and Review Mechanism was not specially designed for Hong Kong, but instead originated from the Constitution.[43] It has been a constitutional practice since the Constitution was comprehensively amended in 1982. The local legislation at all levels with the remit of local legislative powers should be sent to the NPCSC for filing and review. Once found incompatible with the Constitution, national laws or legislations at higher status, the local legislation would become invalidated.[44] Therefore, when Articles 17(2) and (3) were drafted, they were designed to incorporate the legal system in Hong Kong, a local one, into the national level. The legislation from Hong Kong is scrutinised by the NPCSC just as other local legislations from elsewhere in China.

2. How the Filing and Review Mechanism Functions in China?

It seems evident to many observers that the Filing and Review Mechanism of China, not only concerning Hong Kong SAR, but also elsewhere in China is de facto a zombie clause, as it has never been publicly triggered yet. However, this mechanism has indeed played a rather active role in scrutinising local legislation in China for a certain period of time.

Since December 2017, it has become a convention for the Director of the Regulations Filing and Review Department of the NPCSC to report to the NPCSC about the implementation of the

43 PRC Constitution (n 7), art 100.
44 Legislative Law (n 7), art 97.

Filing and Review System. Most recently, Director Shen Chunyao has addressed the 7th Session of the 13th NPCSC on 24th December 2018.[45] In accordance with Director Shen's report, there have been 1238 pieces of legislations or regulations that had been filed and reviewed by the Legislative Affairs Commission of the NPCSC. By exchanging viewpoints with the enacting institutes or issuing a formal written filing and review paper to the institute concerned, many legislations or regulations in question have been modified. Most notably, one recommendation to initiate the Filing and Review Mechanism made by a Representative of the Chinese People's Political Consultative Conference (CPPCC), namely Mr Jianfu Zhu, has been heatedly discussed across the nation as it has proposed to trigger a *constitutional review* on the rehabilitation system. Although the Legislative Affairs Commission of the NPCSC eventually found the system compatible with the Constitution,[46] it is still, however, regarded by the press as tremendous progress provided that the recommendation has set up a symbolic precedent to look into the legality of one system via constitutional review by the NPCSC.

We could come to the conclusion on the general functioning system in China to file and review the regulations or legislation. The institution carrying out the filing and review is the NPCSC, or more precisely, the Regulations Filing and Review Department of the Legislative Affairs Commission of the NPCSC, which is also a unique organ in China to start the constitutional review. The ways to start filing and review are basically reports from the relevant authorities, such as local governments or legislature, the Supreme People's Court of China or the Supreme People's Procuratorate. Citizens like representatives from the NPC or CPPCC could also recommend the NPCSC to start some constitutional reviews if rational and reasonable. The remedies to modify the legislations or regulations in question could be exchanging opinions with the organs concerned or issuing a paper,

---

45 Chunyao Shen, Report of the Legislative Commission of the NPCSC at the 7th Session of the 13th NPCSC on the Implementation of the Filing and Review Mechanism' (*dffyw.com*, 24 December 2018) <www.dffyw.com/fazhixinwen/lifa/201901/45527.html> accessed 19 August 2019.

46 Ying Liang, 'Comment on the Report of the NPCSC on the Regulations Filing and Review Implementation 2018' (2009) 1 China Legal Review 151.

with the former being more mild and polite, whilst the latter more formal and reprimanding. According to the comment by Director Liang,[47] the Supreme People's Procuratorate has once modified its regulation on civil case supervision procedure following advice from the Legislative Affairs Commission of the NPCSC. It is also noteworthy that the Regulations Filing and Review Department has already been established in 2003.

3. SUMMARY OF THE FILING AND REVIEW MECHANISM

In summary, the Filing and Review Mechanism has been effectively functioning in China for more than a decade, and simultaneously, constitutional review by the very same institute, namely the Legislative Affairs Commission of the NPCSC has also been carried out in recent years. The legal subject to conduct the Filing and Review Mechanism is, most concretely, the Regulations Filing and Review Department whilst the object of such review is substantive, precisely the legality and the constitutionality of those regulations or legislations. Some precedents have been set up and the convention to report the implementation of this mechanism to the NPCSC has also been confirmed. When it comes to the Filing and Review Mechanism for the Hong Kong SAR in particular, as 'One Country, Two Systems' or the special status of the Hong Kong SAR is to be taken into consideration, it is the range or the scope of the legislation that could greatly manifest that special status, given that the NPCSC might merely look into legislation from the Hong Kong SAR to determine whether they are in conformity with the Basic Law. Specifically, the NPCSC might look into the relative provisions concerning the Central Authorities, not any other laws even the Constitution, nor other irrelevant provisions inside the Basic Law.

---

47 ibid.

C. Mechanism Before 1997

This current mechanism also echoes with that during the colonial period. Before 1997, legislation from British Hong Kong could be vetoed by not only the Governor of Hong Kong, but also the British Government in the name of Her Majesty, the Queen. One of the legislative purposes of the drafting of the Basic Law was to create a relatively stable transition for Hong Kong, as many mechanisms in the old days remained the same or similar in general in the Basic Law. For instance, it is only the Hong Kong Government that could motion the financial bill for the next financial calendar year, which is not only a heritage from the British Hong Kong period, but also echoes with the Westminster system.[48]

D. Article 17(3): Never Invoked Yet?

Finally, one may argue that since 1997, Article 17(3) has never been invoked and it is thereby a formality rather than substantive scrutiny. The Filing and Review System could even be compared with that of Royal Assent in the United Kingdom, a political tradition rather than a substantive legal process. As argued above, the mechanism is the fruit of the nature of the unitary state, and it does not allow scrutiny of Hong Kong legislation more than the British Government did before 1997. As a matter of fact, the Basic Law has already made concessions on the scope and range of the scrutiny.

As for the fact that Article 17(3) has never been publicly invoked, on the one hand it does not necessarily transform a substantive procedure to a total formality, on the other hand, it manifests that all legislation sent from the Hong Kong SAR are fortunately, constitutional and compatible with relevant provisions in the Basic Law since 1997. It could be concluded that the NPCSC, probably the Legislative Affairs Commission, has been looking into the legislations sent from the Hong Kong SAR for years since the Central Authorities and the Hong Kong Government have recently started to co-operate on establishing

[48] Basic Law (n 1), art 74.

some electronic databases of Hong Kong SAR laws.[49] Whether or not the NPCSC has veto power on certain legislations shall only be decided by the text which the drafting carries and expresses, not by personal understandings of the Basic Law or political wills.[50]

Undoubtedly, either the wording adopted by the Basic Law or the legislative background indicated between the lines shows exactly that the NPCSC de jure enjoys the power to scrutinise the legislation from the Hong Kong SAR concerning certain affairs. It is requested by the very nature of the unitary state, streamlined by the similar Filing and Review Mechanism elsewhere in China and unshakable even by a long period time of shelving, in other words that no legislation has been vetoed yet.

CONCLUSION

This article has gone through several existing approaches to the constitutionality of the Co-location Arrangement, namely 'Effective Legislation', 'Effective Interpretation', 'Exercise of High Degree of Autonomy', and 'Enforcement of Supervision Power by the NPCSC'. The first approach cannot explain how the Decision could be in force in Hong Kong whilst the second has breached the clear boundary of the Basic Law. The third approach has not been thoroughly demonstrated and the argument by Professor Yap is circular. The final approach is based upon the enforcement of the Constitution, but still remains highly controversial. Therefore, their various deficiencies and flaws have called for some new proposals. The 'Implied Approval' is thereby established upon the consensus that the controversy around the Co-location Arrangement is more about the Central Authorities-Hong Kong relationship. This issue falls exactly within the scope of scrutiny by the NPCSC. In accordance with Article 17 of the Basic Law, as approached from the opposite, the result of legislations being 'recorded rather than returned' has manifested

---

49 Shen (n 45).

50 Dennis Kwok, '人大常委有權監督香港立法會立法？' ('Does NPCSC Has the Power to Supervise Legislation by the Hong Kong Legislative Council?') (*Civic Party*, 10 December 2012) <www.civicparty.hk/?q=node/4516> accessed 3 April 2019.

the endorsement by the NPCSC on the constitutionality of the Co-location Ordinance and the Co-location Arrangement behind it in the sense of the Central Authorities-Hong Kong relationship. The Decision issued by the NPCSC may not enjoy the legal status in Hong Kong SAR, but it could still be referred to when approaching the real intent of the NPCSC during the period of filing and review.

The merits of 'Implied Approval' are obvious that it is legally enforceable in Hong Kong, especially when in comparison with the 'Effective Legislation' or 'Enforcement of Supervision Power by the NPCSC'. Furthermore, it has avoided breaching the current common understanding of the Basic Law as 'Effective Interpretation' might broaden the interpretation power of the NPCSC. Last but not least, the 'Implied Approval' will help overcome the judicial controversy inside Hong Kong as it refers to the Basic Law and focuses on local legislation. It is vital to prevent Beijing from issuing another interpretation on the Basic Law as the fifth interpretation has already triggered much discontentment. It should be appreciated that approaching the Co-location Arrangement within the Basic Law must be prioritised, otherwise once it was to be justified by some external legal documents, some new but rather dangerous precedents could thereupon be established.

All in all, it should be borne in mind that the legal deficiency could not be compensated by economic benefits, and even though the constitutionality of the Co-location Arrangement could be approached in various ways, the best one with the least negative consequences still needs to be demonstrated. The high-speed trains have already arrived at the West-Kowloon Station as of last September, but the legal controversy deserves further discussion and clarification. Only by insisting to take every legal controversy seriously could the beautiful flower of Hong Kong continue to bloom.

REBUILDING BEIJING-HONG KONG TRUSTS: NATIONAL SECURITY LEGISLATION IN POST-OCCUPY CENTRAL ERA

Fan Xiang*

Article 23 of the Basic Law remains an unresolved issue. This paper contends that article 23 legislation could be a connecting bridge to rebuild mutual trust between Beijing and Hong Kong in the post-2014 era. As for the proposals to legislate, the author argues that applying the mainland's national security laws to Hong Kong will bring several constitutional challenges, and thus it is more feasible to focus on the local level to legislate. The paper naturally explores the experience of the last attempt, illustrating that unclear contents of the 2003 National Security (Legislative Provisions) Bill and the disingenuous consultation process jointly led to the failure in 2003, which would hence require improvement in the future. The author further proposes that solely employing the 2003 National Security (Legislative Provisions) Bill as a starting point to legislate cannot respond to the new situation, because in the post-Occupy Central era, whether calls for independence should be criminalised is yet to be answered. The author draws the conclusion to prohibit the advocacy for 'Hong Kong Independence' but, considering the different levels of harmfulness between calls involving violence and peaceful advocacy, suggests a proper distinction to be made.

* PhD Candidate (The University of Hong Kong). The author would like to thank Professor Albert Chen and Associate Professor Cora Chan of The University of Hong Kong for introducing detailed documentations and providing constructive comments on this topic. The author would also like to thank the editorial board of the HKJLS for their works and suggestions. All errors remain mine.

INTRODUCTION

The year of 1997 witnessed Hong Kong's reunification with China. To maintain Hong Kong's 'prosperity and stability', Beijing, after a long negotiation with the United Kingdom (UK), established the Hong Kong Special Administrative Region (HKSAR or SAR) and then put the 'One Country, Two Systems' formula into practice. To implement this blueprint, the Basic Law – generally regarded as the mini-constitution of Hong Kong – was enacted by excluding the practice of most legislations and policies of mainland China in the HKSAR. National security law was not an exception. The power to enact a national security law – commonly in the hands of a sovereign country – was delegated to the local city in the Basic Law. Article 23 provides that Hong Kong should enact laws 'on its own' to prohibit up to seven categories of acts which will pose a threat to domestic security.[1]

It was not until in 2002 that the Hong Kong government (Government) released the consultation document for public opinion to implement article 23 (Consultation Document).[2] After consultation, the Government published its National Security (Legislative Provisions) Bill (Bill) in February 2003. Actions by the Government sparked a heated controversy, culminating on 1st July 2003 when around half a million people marched across the city against the Bill. Consequently, the Government was compelled to withdraw the Bill. Since then, the Government has not made a second attempt. This inevitably led to the Central Government's distrust in the local region. In 2014, in order to speed up Hong Kong's democracy development process, the 'Occupy Central' movement was launched. The Central Government strongly criticised the occupation of Hong Kong's

---

1 It is provided under article 23 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law) that the HKSAR shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organisations or bodies from conducting political activities in the Region, and to prohibit political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies.

2 HKSAR Security Bureau, 'Proposals to Implement Article 23 of the Basic Law: Summary of Consultation Document' (September 2002) <www.legco.gov.hk/yr01-02/english/panels/se/papers/ajlsse0926cb2-sb-e.pdf> accessed 5 September 2019.

financial centre as 'illegal'.[3] After 79 days of occupation, the movement ended with an even deeper distrust between Beijing and Hong Kong. The Central Government might doubt the assurance of national security in Hong Kong. Meanwhile, some individuals in the HKSAR complained that 'democratic development has ground to a halt'.[4] In terms of security and democracy, it is asserted that both sides are not the winner.

The author contends that article 23 legislation could be a connecting bridge to rebuild and promote mutual trusts in post-Occupy Central era. To further illustrate, this paper is divided into several parts. This section first introduces the background of the national security legislation and pro-democracy movements in the HKSAR. This is followed by the re-evaluation, in part I, of the necessity of national security legislation in post-2014 era. In part II, taking into account various proposals, especially those presented after 2014, the paper will demonstrate the potential constitutional challenge if Chinese national security laws are listed in Annex III of the Basic Law and then applied in the HKSAR. Part III will examine how it would be possible, politically and legally, to defer to the local level for implementation of article 23, and thus lessons learnt from the 2003 experience would be illustrated. Finally, part IV will review the new political environment after 2014, arguing that solely employing the 2003 Bill as the starting point for legislation of article 23 cannot respond to the new rising calls for independence. Thus, the Government should do more to explore the rationales and methods regarding the prohibitions of the advocacies for independence.

---

3 Malcolm Moore and Tom Phillips, 'Xi Jinping Declares Hong Kong Protests are "Illegal"' *The Telegraph* (Beijing, 12 November 2014).

4 Chris Lau, 'Top Hong Kong Judge Calls for Urgent Reboot of Democracy Movement in City at Forum on Rule of Law' *South China Morning Post* (Hong Kong, 8 December 2018).

I. THE NECESSITY OF NATIONAL SECURITY LEGISLATION AFTER 2014

A. Improving Beijing-Hong Kong Relations

The tension across the border escalates from time to time. At the very beginning of Hong Kong's reunification, it was generally believed that China's policy towards the city was quite 'laissez faire'.[5] Beijing and Hong Kong's relationship was thus defined by top Chinese leaders as 'well water does not interfere with river water'.[6] It had also been stressed many times by Beijing that 'Hong Kong People can run Hong Kong successfully'[7] even during the economic crisis period in 1997 and 1998. After five years of peaceful coexistence, there was, however, a 'turning point' in 2003 when the Government tried to pass the Bill to implement article 23.[8] The proposed Bill sparked an unprecedented criticism, culminating in a demonstration of up to 500,000 protestors against it on 1st July 2003. Finally, the Government was forced to withdraw the Bill. Having noted the large impact of political organisations and foreign influences during the confrontation, coupled with the fear of its own political security, Beijing was believed to decide to change its attitude towards 'activism' over Hong Kong to respond to the new changing environment after 2003.[9] The interpretation issued by the National People's Congress Standing Committee (NPCSC) in 2004 regarding the election of the Chief Executive (CE) (2004 Interpretation), for instance, was identified to be the first step by adding two new rules. Under it, the NPCSC has the final say with regard to Hong Kong's democracy development process, as whether it is 'necessary' to make an amendment all depends on the Central Government's decision.[10] Since then, relations across the border shifted to 'a new

---

5 Jie Cheng, 'The Story of a New Policy' (2009) 15 Hong Kong Journal <www.hkbasiclaw.com/Hong%20Kong%20Journal/Cheng%20Jie%20article.htm> accessed 4 September 2019.

6 ibid.

7 ibid.

8 ibid.

9 ibid.

10 The 2004 interpretation says that the CE must first report to the NPCSC about any amendment to the method of election, and then the NPCSC can decide whether it is necessary to make an amendment.

paradigm'.[11] The decision made by the NPCSC in 2007 – that the election of the CE and members of the Legislative Council (Legco) in 2012 would not take the method of universal suffrage – could also be understood as a reflection of the activism. As control over Hong Kong tightened, mutual distrusts have inevitably deepened. To speed up Hong Kong's democracy development process, a large number of individuals launched the 'Occupy Central' movement in 2014. The Central Government criticised the movement as 'illegal' and 'contraven[ing] the Basic Law'. Closely following the end of this movement, an unprecedented White Paper[12] was issued by the State Council, bringing up the concept of 'complete jurisdiction'. Mutual distrust has reached a new climax and serious challenge arose. It was estimated that the rate of people's distrusts in Beijing reached at 52% in 2014, which was the lowest point since the reunification.[13]

To the Central Government, even the pro-establishment camp could not be completely trusted because of the incident of 2003, let alone the pro-democracy camp and the general public. The 'executive-led' administration that Beijing has long been advocated for still could not be genuinely constructed, and thus the Central Government found it hard to exert influences through the Government. Feeling insecure and outcast, Beijing was compelled to do something to show its 'new master' position and naturally, tightening control was the preference. Separately in Hong Kong, as there was no timetable to honour the universal suffrage entrenched in the Basic Law, citizens felt betrayed and were encouraged to take more radical actions against Beijing. To conclude, both sides were displeased with each other. Against the backdrop of Occupy Central in 2014, the author contends that article 23 legislation could be a proper way to diffuse the tension.

---

11 Cheng (n 5).

12 The State Council Information Office of the People's Republic of China, '"一國兩制"在香港特別行政區的實踐白皮書' ('White Paper on The Practice of the "One Country, Two Systems" in the Hong Kong Special Administrative Region') (*The State Council Information Office of the People's Republic of China*, 10 June 2014) <www.scio.gov.cn/tt/Document/1372801/1372801.htm> accessed 8 June 2019.

13 'People's Trust in the Beijing Central Government (per poll) (12/1992 – 3/2019)' (*HKU Pop Site*, 2019) <www.hkupop.hku.hk/english/popexpress/trust/trustchigov/poll/trustchigov_poll_chart.html> accessed 27 January 2019.

On the one hand, national security legislation is Hong Kong's constitutional obligation. While the attempt in 2003 was thwarted by the triumph of collective actions, the responsibility to reattempt has never been waived. Once individuals in Hong Kong take the Basic Law as their 'weapon' to fight for freedom and autonomy, article 23 legislation would be an insurmountable obstacle. On the other hand, the unresolved article 23 issue actually provides Hong Kong with an opportunity to improve mutual relations and to strive for Beijing's concession regarding democracy development. One may have to acknowledge that although the 'ultimate aim' of selecting the CE and forming the Legco is to be conducted by universal suffrage, the Basic Law does not prescribe any timetable. Along with the 2004 Interpretation, the process of democratic development solely relies on the NPCSC. In the post-Occupy Central era, the elements to re-start political reform seem even more complicated than before and the time to do so is unknown. However, it is believed that once the consensus on implementing article 23 is reached, 'a new plateau of trust' would be possible.[14] Democracy development afterwards may not be too difficult.

B. Improving the Existing Provisions

While some observers propose that there is no need to enact a new law to protect national security, some argue that old provisions such as the offences of treason and sedition prescribed in existing laws should be modernised to protect fundamental rights to a maximum.[15] Apart from those offences, this paper contends that the existing provisions about the theft of national secrets were also harsh, especially for the media, thus deserving to be improved in the future.

It was revealed that from the enactment of the Basic Law in 1990 to its implementation in 1997, to minimise the uncertainty after the reunification, one of the colonial government's strategies

---

14 Simon NM Young, 'Guide to Basic Law Article 23: Hong Kong's Unresolved National Security Issue' (*HKU Legal Scholarship Blog*, 15 March 2015) <http://researchblog.law.hku.hk/2015/03/guide-to-basic-law-article-23-hong.html> accessed 27 January 2019.

15 Bob Hu, 'The Future of Article 23' (2011) 41 HKLJ 431, 434.

in relation to article 23 was to reach an agreement with the Chinese government by first legislating and then transiting the provisions after 1997.[16] With regard to the offences of theft of national secrets, Beijing allowed the colonial government to extend the UK's Official Secrets Act 1989 (the Act) to Hong Kong. While some Legco members suggested adding the public interest excuse into the Act to better protect information freedom, the colonial government denied to do so, saying that any significant amendment to the Sino-British agreement regarding article 23 would not be recongised after 1997.[17] However, this compromise sowed the seeds of the conflicts in 2002 to 2003. When concluding the experience of the 2003 attempt, a commentator from Ming Pao precisely pointed out that neither the provisions about treason and secession nor that about sedition caused the failure of the 2003 effort; instead, it was the lack of arrangement of the public interest defence that constituted one of the most essential but unexpected reasons.[18] To better protect information freedom and further improve the Government's accountability, the flaw of the old Bill must be corrected in the future.

II. ANNEX III: A POLITICALLY AND LEGALLY UNWISE WAY TO RESOLVE ARTICLE 23 ISSUE

As analysed above, even in the post-2014 era, there is still a necessity to implement article 23 for the sake of improving mutual relations and the existing out-of-date provisions. Therefore, the central question raised here is to ask how to fulfil this objective. After the 'Occupy Central' movement, some observers from both the mainland China and Hong Kong drew our attention to Annex III to the Basic Law, proposing that the mainland's national security laws could be applied in this city through Annex III before

---

16 吳靄儀, *23 條立法日誌* ('A Record of Enacting Article 23') (壹出版有限公司 2004) 5.

17 Legislative Council, *Official Record of Proceedings* (4 June 1997), 115–16.

18 Kevin Lau (劉進圖), '二十三條演義' ('The Stories of Article 23') (4 July 2003) <www.oocities.org/chinacomment/hotspot/article23.htm> accessed 28 January 2019.

enactment of the local version.[19] This part will demonstrate the constitutional challenges that may result, if this proposed suggestion were to be adopted.

A. National Security Does Not Mean National 'Defence'

Article 18 of the Basic Law unequivocally provides that China's national laws shall not be applied in the HKSAR except for those listed in Annex III, with the proviso that any laws added to the Annex are confined to affairs like defence and diplomacy. As national security is irrelevant to diplomacy, there is a need to review whether it belongs to the category of national defence. Indeed, even from the literal understanding, national security does not equate to national defence. The latter remains to have a connection with military affairs and military activity targeting at external foreign forces. National security, however, concerns more about internal safety. Admittedly, with the development of modern technology, a country may be threatened by different kinds of forces from home and abroad, and thus the meaning of defence could be broader than before. But this expansion does not mean that the broader perception should be arbitrary. The understanding of a specific term should confine to the meaning that the language can bear. This is also the practice of Hong Kong's common law. In *Chong Fung Yuen*, the Court of Final Appeal (CFA) laid down the principle to literally read the law.[20] While the decision in *Chong* put the CFA in a difficult situation at that time, the principle to literally interpret laws has not been overturned. Therefore, considering that the language of national defence is literally unable to bear the meaning of national security, the interpretation cannot be made as proposed.

---

19 Jeffie Lam, 'NPC Deputy Stanley Ng Renews Calls to Enact Hong Kong National Security Law' *South China Morning Post* (Hong Kong, 22 January 2015) <www.scmp.com/news/hong-kong/article/1689031/npc-deputy-stanley-ng-renews-calls-enact-hong-kong-national-security> accessed 28 January 2019; Xiaozhuang Song (宋小莊), '對基本法附件三的再認識' ('Re-familiarising with Annex III of the Basic Law') *Takungpao* (Hong Kong, 2 March 2015) <news.takungpao.com/opinion/highlights/2015-03/2930920.html> accessed 28 January 2019.

20 *The Director of Immigration v Chong Fung-Yuen* [2001] HKCFA 48, (2001) 4 HKCFAR 211.

B. NPCSC's Interpretation: Any Limitations?

It is demonstrated above that common law jurisdictions follow a literal approach in understanding legal provisions. However, Hong Kong is not a country but a special administrative region under China's sovereignty. Thus this may be not the end of the story. Article 158 of the Basic Law also entrusts the NPCSC with the power to interpret the Basic Law. Furthermore, based on the clarification of the CFA in *Ng Ka Ling*,[21] and the judgment of *Lau Kung Yung*,[22] it is argued that the NPCSC has the final say on the interpretation.[23] In other words, the NPCSC is, on theory, vested with the power to interpret the meaning of 'defence' as it prefers. And regardless of the NPCSC's explanation, the CFA is obliged to abide by that due to the sovereign nature of the interpretation. Even so, does the NPCSC's interpretation have any limitations?

Indeed, when the NPCSC interprets, it must consider the political effect in order not to be criticised to have damaged the promise of 'One Country, Two Systems'. From previous experience, the NPCSC has kept the deference principle in its mind when it comes to interpretation. This is evidenced from the disputes in *Chong Fung Yuen* in which while high-ranking officials from the mainland criticised the judgment of the CFA as being inconsistent with the 'legislative intent', it did not further make an interpretation.[24] As for the Central Government, it would be politically unwise to arbitrarily make a broader interpretation on the sensitive article 23 issue, especially when the meaning of national 'defence' cannot bear that of national security literally.

Apart from the deference principle, it is also argued that the NPCSC's authority to supplement laws through the means of the interpretation has been narrowed down after the

---

21 *Ng Ka Ling v The Director of Immigration*[1999] HKCFA 81, (1999) 2 HKCFAR 141.

22 *Lau Kong Yung v Director of Immigration* [1999] HKCFA 4, (1999) 2 HKCFAR 300.

23 PY Lo, 'Rethinking Judicial Reference: Barricades at the Gateway' in Hualing Fu, Lison Harris and Simon NM Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan 2007) 157–81.

24 '立法原意：父母至少一方需是港人' ('Legislative Intent: At Least One Parent Must Be Hong Kong Citizen') *Wenweipo* (Hong Kong, 30 January 2012) <paper.wenweipo.com/2012/01/30/HK1201300003.htm> accessed 29 January 2019.

implementation of China's Legislation Law.[25] To paraphrase, the scope of interpretation may be narrowed. Before the enactment of China's Legislation Law in 2000, how the NPCSC exercised its power to interpret national laws was regulated by the Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law issued in 1981 (1981 Resolution). It states that where there is a need to 'further define' or where 'additional stipulations need to be made' with regard to the provisions of laws and decrees, the NPCSC can give an interpretation or provide stipulations employing decrees. This was commonly understood by Chinese scholars before 2000, proposing that the NPCSC could perform its authority to conduct legislative interpretation on the ground of 'defining clearly the contents' and 'supplementing the existing provisions' of the legislation.[26] But with the Legislation Law being implemented in 2000, things seem to have changed. Paragraph 2 of article 42 of the Legislation Law 2000 provides two occasions where the power of legislative interpretation could be activated: one is when the meaning of legal provisions needs 'further clarification', the another is when 'the application of law' requires clarification as new circumstances appear after the promulgation of a specific law. Obviously, the new provision removes the statement of 'supplement'. Therefore, it is natural to ask whether the new regulation means that the NPCSC is no longer vested with the power to interpret laws by supplementing them. Lin, after comprehensively reviewing Chinese literature, reasonably concluded that while the new law remains silent on whether the NPCSC could supplement laws through interpretations like before, the NPCSC's power to make legislative interpretation has at least been narrowed down based on the literal principle of the new law.[27]

The Basic Law is not only Hong Kong's mini-constitution, but a national law of China. The interpretation regulation provided in the Legislation Law is also binding on the

---

25 Feng Lin, 'The Duty of Hong Kong Courts to Follow the NPCSC's Interpretation of the Basic Law: Are There Any Limits?' (2018) 48 HKLJ 167.

26 Laifan Lin, Minkang Gu and Guobin Zhu, 'An Analysis of the Legislative Interpretation System in the PRC' (August 1999) Hong Kong Lawyer 56.

27 Lin (n 25) 2.

NPCSC when it interprets the Basic Law. Before explaining the meaning of the 'defence', the NPCSC should refer to article 42 of the Legislation law and think twice. This is because interpreting 'defence' to bear the meaning of national security has exceeded the scope of 'clarification'; it is more likely to be a 'supplement'.

C. An Unsurmountable Obstacle: The Provision of 'On Its Own'

It is provided in article 23 of the Basic Law that the HKSAR shall enact laws 'on its own' to prohibit seven categories of acts posing a threat to national security.[28] Again, based on the literal understanding, 'on its own' represents that Hong Kong could decide the contents of the law and the time to legislate by itself. As long as there exists a specific law and the content of which complies with the requirement prescribed in article 23 in the future, the SAR should be considered to have fulfilled its obligation. In other words, the time of legislating matters less. However, some commentators in mainland China point out that considering the Government is reluctant to restart article 23 consultation yet the national security situation has become 'more serious' than before, the Central Government is suggested to withdraw its authorisation to Hong Kong.[29]

Indeed, according to the conventional theory about authorisation, when a specific official body is authorised to do a certain act under the constitution, it should duly perform its duty. Otherwise, the inaction may result in side effects. For example, the authorised body may be ordered to act within a time limit or the authorisation may even be withdrawn.[30] However, the problem

---

28 Basic Law (n 1), art 23.

29 For instance, some propose that where Hong Kong is unpleased to legislate a specific law, the offences regarding national security provided in the PRC Criminal Code should be applied in Hong Kong through Annex III. See Bao-yu Liu (劉保鈺), '香港基本法第二十三條實現權宜路徑探析' ('An Analysis of the Path to Realise Article 23 of the Basic Law of Hong Kong') (2018) 8 社科縱橫 (Social Sciences Review) 56.

30 One may also find evidence about the authorisation theory from John Locke's assertion in *Two Treaties of Government*, in which he explains

at present is that article 23 legislation has not reached a consensus within the Hong Kong community.[31] Therefore, forcing the local government to legislate within a specific time limit will not resolve the problem but instead lead to social splits.

Furthermore, article 23 remains silent with regard to the feasibility and procedure of withdrawing the authorisation, which means that the NPCSC may face constitutional challenges if the authorisation is withdrawn.[32] The author contends that to achieve the effect of withdrawing the authorisation, the interpretation needs to clearly stipulate that, for instance, if legislation is not enacted by a certain date, the authorisation will be withdrawn. In this regard, the above analysis about limits on NPCSC's interpretation power should again be taken into consideration. In other words, the NPCSC cannot interpret arbitrarily.

Apart from this, the author also argues that there was no signal showing the NPCSC's willingness to substitute for Hong Kong to enact the national security law based on the drafting process of the Basic Law. It is illustrated that while article 23 had been changed for several versions before its promulgation, the language of 'on its own' has existed in different documents and finally vested in the Basic Law.[33] Even after the incident of Tiananmen Square, when the Central Government at that time was extremely worried that Hong Kong would be an anti-Communist

---

that the reason why people are pleased to empower some particular individuals and let them construct a government is that they need their safety secured to a maximum with the help of the government. Once the authorised government fails to do so, then its 'legitimacy' and authorisation may be challenged and thus the government would be overthrown. Similarly, where the authorised local city fails to perform its authorisation under article 23 of the Basic Law, this power may be recalled on the ground of John Locke's theory. See John Locke, *Locke: Two Treatises of Government* (Peter Laslett ed, CUP 2012).

31 The CE Carrie Lam Cheng Yuet-Ngor says national security legislation is something that must be done but she still 'awaits conditions'. This implies that the Hong Kong community lacks favourable consensus at the moment. See Amy Nip and Jeffrey Lee, 'Wait for Right Time, Says Lam of Article 23' *The Standard* (Hong Kong, 17 August 2018) <www.thestandard.com.hk/section-news.php?id=199169> accessed 30 January 2019.

32 The author would like to thank Cora Chan, The University of Hong Kong, for giving constructive suggestion on the argument of this paragraph.

33 Simon Hoey Lee (李浩然), *香港基本法起草過程概覽* ('Overview of the Drafting Process of the Hong Kong Basic Law') (Joint Publishing Hong Kong 2012) 191–96.

base, Beijing left the provision of 'on its own' unchanged.[34] Therefore, it is fair to conclude that the Central Government is more willing to let the SAR exercise the power as long as no imminent threat shows. Admittedly, in the post-2014 era, the relationship between Hong Kong and Beijing has been suffering a challenge. But as far as Beijing is concerned, this threat is not as severe as that of the June 4th incident. Also, the Government could rely on and resort to the law when facing situations that, from Beijing's perspective, touch a nerve. For instance, the Hong Kong National Party was banned recently by the Government for 'national security' concerns.[35] Therefore, it is unnecessary and disproportionate for the Central Government to leave its original legislative intent aside.

III. RETURNING BACK TO THE LOCAL LEVEL: THE 2003 EXPERIENCE

As the proposed way to implement article 23 through Annex III may lead to constitutional challenges, it is more rational, politically and legally, to focus on the local level. Therefore, the 2003 experience is worth exploring. Some observers have noted that the key to successfully enact article 23 lies on the 'content of legislation' and 'the legitimacy of the process'.[36] This part will evaluate the proposed Bill's substances and the legislative procedure, learning a lesson from the 2003 attempt.

---

34 Carole J Peterson, 'Hong Kong's Spring of Discontent: The Rise and Fall of the National Security Bill in 2003' in Hualing Fu, Carole J Peterson and Simon NM Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (Hong Kong UP 2005) 15.

35 'HK Pro-Independence Party Banned by Government on Grounds of National Security' *South China Morning Post Young Post* (Hong Kong, 24 September 2018) <http://yp.scmp.com/news/hong-kong/article/110557/hk-pro-independence-party-banned-government-grounds-national-security> accessed 30 January 2019.

36 Hu (n 15) 443.

A. Unequivocal Content is the Must-Have

Looking back to the process of the legislation in 2003, one may easily find that almost every provision proposed in the Bill was extensively discussed and even criticised. Among the criticism, two main aspects, the proscription of an organisation and the unlawful disclosure of official secrets, deserve to be particularly noted as they were even stressed by foreign countries.[37] While the unexpected criticisms by other countries could fairly be argued as an interference in internal affairs, it was also, to some extent, a reflection of the Bill's controversy.

As for the proscription of a local organisation linked to mainland's banned organisations on the grounds of national security, critics believe that such a provision may be a 'connecting door', making China's will applicable in Hong Kong and thus letting the 'Two Systems' promise exist in name only.[38] However, some suggested that one should not only keep 'Two Systems' in mind. Protection of China's interest also remains important to reflect 'One Country'. It is understandable that the provision regarding proscription aims to keep Hong Kong from 'being a base' against national security and territorial integrity.[39] The author contends that the protection of the government's interest

---

37 For example, the US Congress House of Representatives passed a Resolution in 2004, urging Beijing to withdraw article 23 legislation as proposed. Also, before the release of the Resolution, the White House in 2003 criticised the Bill, especially expressing its concerns about the provision of proscription of a local organisation and the lack of 'public interest' defence regarding the damaging disclosure of the protected information. See 'HKSAR Government Responds to US Congress House of Representatives' Resolution' (*Constitutional and Mainland Affairs Bureau*, 14 September 2004) <www.cmab.gov.hk/en/archives/press/press_256.htm> accessed 17 February 2019.

38 The Bill proposed that any local organisation which is subordinate to a mainland organisation the operation of which has been prohibited on the ground of protecting the security of the People's Republic of China, as officially proclaimed by means of an open decree by the Central Authorities under the law of the People's Republic of China, it could be banned in Hong Kong. Also see Lison Harris, Lily Ma and CB Fung, 'A Connecting Door: The Proscription of Local Organizations' in Hualing Fu, Carole J Peterson and Simon NM Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (Hong Kong UP 2005) 303.

39 Albert HY Chen, 'The Consultation Document and the Bill: An Overview' in Hualing Fu, Carole J Peterson and Simon NM Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (Hong Kong UP 2005) 93, 113.

should not be at the expense of the disproportionate violation of citizens' freedom of association. It is almost a common sense that the prerequisite for criminal punishment is a proof that the suspected individual or organisation has committed an actual act, or at least there exists a criminal intent. Proscribing an organisation not because it has violated local laws but because of its subordinating relation with other jurisdictions seems to be harsh, making it difficult to pass the proportionality test. Furthermore, the existing Societies Ordinance actually provides for the proscription of a local organisation on the grounds of national security.[40] If the Bill detailed the provisions of the Societies Ordinance, for instance, to explicitly define what is national security, it would be justifiable. However, the proposed Bill did not detail relevant provisions. Instead, it amplified the existing clauses, obviously exceeding the requirement of article 23 itself which merely prohibits Hong Kong's political organisations from 'establishing ties with foreign political organisations or bodies'. Indeed, according to article 23, political bodies from the mainland and Hong Kong could keep ties because they do not fall into the category of 'foreign organisation' as prohibited in article 23. Even if Hong Kong's organisation is subordinated to that of the mainland, it is still regarded as lawful under article 23 of the Basic Law. In the next attempt, the Government is suggested to legislate what is required of to the minimum extent. As for those items unprescribed by article 23, it is wiser to not add new offences.

Another problematic aspect of the Bill was the provision of damaging disclosure of official information. Before the introduction of the Bill, the Official Secrets Ordinance[41] only prohibited the damaging disclosure of four categories of information, ie those related to security and intelligence information, defence, international relations as well as the commission of offences and criminal investigations. The

---

40 Article 8(1)(a) of the Societies Ordinance (Cap 151) provides that if the Societies Officer reasonably believes that the prohibition of the operation or continued operation of a society or a branch is necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others, he may recommend to the Secretary for Security to make an order prohibiting the operation or continued operation of the society or the branch.

41 Cap 521.

Government proposed to add the protection of the information about Beijing. Admittedly, this was necessary as the Official Secrets Ordinance was silent in this regard yet some information or document regarding the Central Government did require particular protection after the handover. The Bill further defined that 'information related to Hong Kong affairs within the responsibility of the Central Authorities' should not be disclosed. While many thought that this proposal 'was not in principle objectionable' considering that the affairs which fell into Beijing's responsibility were mainly those related to defence and foreign affairs,[42] the author contends that this provision was still relevantly unclear. For example, the proposed Bill did not answer whether the damaging disclosure of Beijing's willingness regarding the candidate of the CE should be criminalised. The Basic Law does stipulate that the ultimate goal of the CE election is to be conducted by universal suffrage.[43] However at the moment, admittedly, it is the Central Government's opinion but not that of Hong Kong people that matters a lot in this regard. Against this backdrop, the media will be trying its best to pry into relevant information in the election period. Once such information is uncovered by the media, obviously this would bring embarrassment to Beijing. According to the proposed Bill, the Government seemed to be able to ascertain the media's criminal responsibility because the Central Government would be empowered to appoint the CE under the Basic Law.[44] And thus the appointment information arguably falls into that relating to 'the central authorities'. If so, there is no doubt that this would excessively violate the public's rights to know. Furthermore, even if such information was unveiled, it is hard to say that it would bring national security concerns. Therefore, in the next attempt, the Government is suggested to define the terms and provisions more explicitly.

The most controversial point regarding official secrets was that it lacked the public interest defence. The original Official Secrets Ordinance only prohibited public servants from voluntarily making damaging disclosure.[45] In other words, anyone

---

42 ibid.
43 Basic Law (n 1), art 45.
44 ibid.
45 Official Secrets Ordinance (n 41), s 13(1).

who acquired the protected information through the means of computer hacking or bribery and then sold them to the publisher for profit would not be criminalised under the said Ordinance. The Government thought this was a 'loophole' and thus needed to be corrected.[46] Correspondingly, the Bill proposed to add a provision criminalising the illegal access through the means of theft, robbery, burglary, bribery and computer hacking. This meant that not only the public servant, but also the general public or the media, would be potential criminals under the proposed Bill. Considering the extended categories of illegal access, the community suggested adding a defence when the unauthorised disclosure was in the interests of the public to protect freedom of the press. However, the Government denied so, claiming that public interest is hard to define and this would render the law uncertain.[47] It was argued that while one may find it difficult to give a clear definition to public interest, the existing Prevention of Bribery Ordinance could actually provide a proper reference.[48] Under section 30, it provides that 'lawful authority or reasonable excuse' could be an argument to disclose details in the process of ICAC investigation.[49] Moreover, according to the past cases in common law jurisdictions, application of public interest defence in this regard was not completely denied.[50] The author contends that freedom of the press is a core value of Hong Kong and constructs one of the most important aspects of 'Two Systems', thus deserves particular protection. While it is justifiable to add new offences to protect national security, the interest of the public should never be ignored as both of them are essential in preserving social order. What the Government should do is to find a proper balance between them.

---

46 Security Bureau (n 2).

47 Societies Ordinance (n 40).

48 Johannes Chan, 'National Security and the Unauthorized and Damaging Disclosure of Protected Information' in Hualing Fu, Carole J Peterson and Simon NM Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (Hong Kong UP 2005) 251, 273.

49 Prevention of Bribery Ordinance (Cap 201), s 30.

50 ibid. For instance, in the case of *R v Shayler* [2001] EWCA Crim 1977, [2001] 1 WLR 2206, the court ruled that people from the Department of Security or intelligence services would be imposed the highest duty of confidentiality. However, as far as those from other state departments are concerned, they may be able to disclose the protected information based on certain reasons. To conclude, it is incorrect to say that in no circumstances would the public interest defence be denied.

B. Inclusion of Public Opinion is the Key

It has been noted that the consultation process is by no means a 'ceremonial formality',[51] but requires the Government to take public opinion seriously. To some extent, the genuineness level of the consultation decides the fate of the legislation.

At the very beginning of the consultation period in the previous attempt, the Government announced that the Consultation Document had received broad support from the public and professional practitioners.[52] Yet it was believed to be 'inappropriate' for officials to predict the outcome of the consultation so early as the community needed the time to digest the content of the proposed amendments.[53] Only when people genuinely understood what the proposed Consultation Document meant to them would they be able to make suggestions. It was apparent that the Government was reluctant to give the public the time to do research. Ironically, when people came up with recommendations regarding the substances of the Consultation Document, the Government promptly denied them. The public hence suspected whether the officials had any sincerity to incorporate opinion from the community. For example, Oriental Daily News issued an editorial on 25 September 2002, arguing that the police was so extensively empowered that human rights and freedom of the press may be in danger.[54] Accordingly to the proposed Consultation Document, when the police investigated certain national security offences, they would be provided with an emergency entry, search and seizure power without a search warrant issued by courts. However, the Commissioner of Police, Yam Pui Tsang, showed his tough stance just the next day and stressed that the newly added police power was '[a] must'.[55]

---

51 Francis Ho Chai Chung, 'Navigation between Autonomy and Authority: Some Suggestions on the Future Legislation under Article 23' (2013) 7 HKJLS 1, 8.

52 Ravina Shamdasani, 'Tung Praises "Support" for Anti-Subversion Law' *South China Morning Post* (Hong Kong, 2 October 2002) <www.scmp.com/article/393144/tung-praises-support-anti-subversion-law> accessed 18 February 2019.

53 Peterson (n 34).

54 Legislative Council Secretariat, 'Summary of Press Reports on Article 23 of the Basic Law (25 September 2002 to 16 October 2002)' Information Note No IN25/12-13 (16 October 2002).

55 ibid.

Moreover, at the end of the three-month consultation period, the Government started to compile all the comments. But to everyone's surprise, the Government took quite an odd method to categorise public submissions, dividing them into three classifications: 'support', 'oppose' and 'unclear'. Indeed, it was argued that most submissions were partly supportive of the proposed Consultation Document but opposed other parts due to the complexity involved. But those submissions were found to be simply categorised as 'unclear'.[56] In other words, the public's attitude towards the Consultation Document, as alleged by the Government, was somehow inconsistent with the truth. Furthermore, before the Government introduced the Bill to the Legco, the community strongly urged the Government to first issue a white paper in order to allow for more time for consultation. Professor Albert Chen, sitting on the Basic Law Committee of the NPCSC, also suggested that a white paper would be essential to 'heal the division' and 're-establish public trust'.[57] Even so, the Secretary for Security denied by saying that the community would still be able to come up with suggestions when the blue bill had been introduced to the legislature. In fact, there was no doubt that once the blue bill was issued, it would be even more difficult to make revisions.

Based on the analysis above, it is safely asserted that the Government lacked the patience to listen to the public in the last attempt. What the officials were chasing after was to pass the Bill as scheduled. To conclude, the ignorance of public opinion directly led to the failure of the previous attempt. This may be one of the most important lessons learnt from the 2003 experience.

---

56 Peterson (n 34).

57 Albert Chen, 'Don't Ignore the Case for a White Bill' *South China Moring Post* (Hong Kong, 28 December 2003).

IV. RESPONDING TO THE NEW SITUATION: RECOMMENDATIONS ON THE PROHIBITION OF THE ADVOCACY OF 'HONG KONG INDEPENDENCE'

Compared to the societal situation in 2003, Hong Kong has changed a lot. Especially with the shift of Beijing's governance method over this region, 'localism' has developed gradually in Hong Kong in these years.[58] While one could obtain experience and inspiration from the 2003 Bill, solely employing it as a starting point to implement article 23 cannot respond to the changing circumstance. When it comes to the legislation of article 23 at present, some suggest that the real issue at the moment is to discuss whether the calls for independence, especially those peaceful advocacies, should be criminalised or not.[59]

On the one hand, admittedly, freedom of expression remains one of the most essential parts of a liberal democratic society, being an efficient and effective way to supervise the government and improve its accountability.[60] On the other hand, freedom of speech should never be expected to be exercised without any limitations. Indeed, article 1 of the Basic Law explicitly provides that the HKSAR is 'an inalienable part' of China. This means any acts or advocacies aiming to have Hong Kong divorced from China's actual governance would be inconsistent with the requirement of the mini-constitution. Moreover, local courts in *Chow Yong Kang Alex* have decided that inciting expressions involving violence will not be supported for the purpose of 'emphasis[ing] deterrence and punishment'.[61] This also indicates that in the future, where someone incites others to conduct violent acts for the sake of Hong Kong independence, he

---

58 Philipp Kaeding Malte, 'The Rise of "Localism" in Hong Kong' (2017) 28 Journal of Democracy 157.

59 Jeffie Lam, 'Peacefully Advocating Hong Kong Independence Does Not Pose Threat to National Security, Law Expert Says' *South China Morning Post* (Hong Kong, 4 December 2017) <www.scmp.com/news/hong-kong/politics/article/2122845/peacefully-advocating-hong-kong-independence-does-not-pose> accessed 19 February 2019.

60 In landmark case of *Abrams v the United States* 250 US 616 (1919), Judge Holmes came up with the 'marketplace of ideas' theory, explicitly expressing his concerns about the importance of freedom of speech in our society.

61 *Secretary for Justice v Chow Yong Kang Alex* [2018] HKCFA 4 [120].

or she will be convicted by the courts. Furthermore, while the International Covenant on Civil and Political Rights protects individuals' right to express opinion without interference, the exercise of such rights would also be restricted for the reason of national security.

As both freedom of expression and national security are of importance, the problem is how to balance them appropriately. At the moment, what the Government could do is to first invite the Law Reform Commission (the Commission) to conduct research to explore the rationales of punishing inciting calls for independence thoroughly. Indeed, some observers have noted the importance of this Commission. When concluding the experience of the 2003 attempt, Peterson precisely points out that one of the most glaring 'flaws' of the Government was the lack of consultation with the Commission, an organisation that is commonly thought to not have its own special interests.[62] Thus, suggestions from the Commission are persuasive. As far as the advocacy of independence is concerned, the Commission is still expected to do a thorough research to justify prohibitions of such calls.

Meanwhile, considering the complexity of calls for independence, this paper proposes to make an appropriate distinction towards different advocacies. It is noted that the harmfulness of those advocates for independence involving violence is much more servere than that those of peaceful advocacy. If these two offences are treated equally, it may be unpersuadable to the legal and press circles. At least, the Government should refer to other jurisdictions' practices, with the aim of exploring whether the counterparts have relevant punishing provisions on peaceful advocacy. When the Government finds out similar provisions or practices from other jurisdictions, it is believed that this would spark less controversy when so applying in Hong Kong in the future.

Alternatively, the officials could consider setting different elements of each crime. Those advocacies involving violence should be absolutely prohibited. However, peaceful calls

---

62 Peterson (n 34).

for independence could only be criminalised if such expression would very likely cause the occurrence of a harmful result. For instance, if someone's peaceful advocacy may lead to discrimination or hatred of the mainland people, it should still be banned. Actually, in the last attempt, this standard has been seriously taken into consideration by the Government. When it comes to the offence of sedition, the Government originally proposed that as long as someone has the intent of incitement, regardless of the actual effect, he or she would be punished.[63] Critics opposed, arguing that such proposed provisions would not be consistent with the Johannesburg Principles.[64] Under the Principles, expression may be identified to be a threat to national security only when it is proved to aim at inciting and is likely to 'incite imminent violence'. Furthermore, the expression must have 'a direct and immediate connection' with such violence. The Secretary for Security rebutted that the imminent danger test originates from the United States, but it has been abolished in recent decades. Finally, the Secretary for Security agreed to incorporate the result test of the Principles, prescribing that only when someone's expression is 'very likely' to incite others to commit relevant offences, he or she may be punished.[65] In terms of the punishment for inciting calls for independence, the Government could still consider the compromise of the last attempt, distinguishing expressions based on their harmfulness and the possible results.

CONCLUSION

As far as article 23 legislation is concerned, it is still a relatively sensitive issue. Even if Hong Kong and Beijing officials merely deliver a speech relating to article 23, many individuals will strongly oppose it, let alone the controversy of re-starting the consultation or the actual legislation. But what is always ignored is that article 23 legislation is Hong Kong's constitutional obligation, which has never been waived and hence shall be performed. More importantly, this paper argues that article 23

63 Security Bureau (n 2).

64 The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1995).

65 Lau (n 18).

actually could be a good opportunity for Hong Kong to rebuild trust with Beijing, paving the way to win universal suffrage as enshrined in the Basic Law. While there is a need to legislate national security law, one should not focus on Annex III. This is because applying mainland's national security law to Hong Kong through Annex III may bring constitutional challenges, and it is also inconsistent with the provision of enacting one 'on its own' as prescribed in the Basic Law. Therefore, it is better to draw our attention to the local level, and naturally, lessons learnt from the 2003 experience could be explored. This paper illustrates that unclear contents of the Bill and the disingenuous consultation process jointly led to the failure of last attempt, and these problems deserve to be improved in the future. Apart from such analysis, the paper also notices that the sole employment of the 2003 Bill as a starting point to enact article 23 cannot respond to the new situation, especially the calls for independence. Therefore, the Government is suggested to invite the Law Reform Commission to study the rationale of prohibiting the advocacy of Hong Kong independence. Also, considering the different levels of harmfulness of calls involving violence vis-à-vis peaceful advocacy, the Government should strike a proper balance between them.

ACKNOWLEDGMENTS

Premium Patrons

Holman Fenwick Willan

Hong Kong Bar Association

Kao, Lee & Yip

Sir Oswald Cheung's Chambers

Reynolds Porter Chamberlain

The Law Society of Hong Kong

Patrons

ONC Lawyers

Mr Alan Leong, SC

We would also like to thank the following members of the Judiciary for their generous support:

The Hon Chief Justice Geoffrey Ma, GBM

The Hon Madam Justice Kwan, V-P

The Hon Madam Justice Carlye Chu, JA

The Hon Mr Justice Louis Chan

The Hon Mr Justice Godfrey Lam

With the Compliments of

LG2, High Court
38 Queensway
Hong Kong
Tel: 2869 0210 Fax: 2869 0189
Website: www.hkba.org

THE LAW SOCIETY OF HONG KONG 香港律師會

CONNECT WITH THE LEGAL PROFESSION

THROUGH JOINING AS A STUDENT MEMBER OF THE LAW SOCIETY OF HONG KONG

ELIGIBILITY

- any law student at City University of Hong Kong, Hong Kong Shue Yan University, The Chinese University of Hong Kong, The University of Hong Kong or at any other institution prescribed from time to time by the Council of The Law Society of Hong Kong
- any trainee solicitor including a trainee solicitor seconded to Hong Kong from another common law jurisdiction under the terms of a trainee solicitor contract

BENEFITS

Student Members are entitled to

a) receive The Law Society's weekly circulars;
b) have access to the Members' Zone of The Law Society's website;
c) have use of The Law Society's online library; and
d) be eligible to participate in the events of The Law Society.

Student members do not have the right to vote in The Law Society elections or to stand for election to the Council.

MEMBER BENEFIT ACTIVITIES

TEEN TALK

ANNUAL SPORTS AND RECREATIONAL NIGHT

MEMBERSHIP FEE

The membership year for Student Members runs from 1 January to 31 December. Annual membership fee of HK$50 for 2020 has been waived.

APPLICATION PROCEDURES

Download the application form from the website of The Law Society of Hong Kong:
http://www.hklawsoc.org.hk/pub_e/admission/associatestudent.asp

If you have any further questions concerning student membership including eligibility, please contact:

REGISTRATION SECTION
THE LAW SOCIETY OF HONG KONG

3/F., Wing On House
71 Des Voeux Road Central, Hong Kong

Tel : 2846 0500
Fax : 2845 0387

E-mail: regist@hklawsoc.org.hk

With the Compliments of

高李葉律師行

KAO, LEE & YIP

Solicitors & Notaries

17/F, Gloucester Tower
The Landmark, Central
Hong Kong
Tel: 2844 4888 Fax: 2810 0620
Email: law@kly.com.hk

With the Compliments of

Sir Oswald Cheung's Chambers

10/F New Henry House
10 Ice House Street
Hong Kong
Tel: 2524 2156 Fax: 2810 5656
Email: info@siroswald.com
Website: www.siroswald.com

With the Compliments of

Mr Alan Leong, SC

1323A-1328 Prince's Building
10 Chater Road
Central, Hong Kong
Tel: 2526 6182 Fax: 2868 1730