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**CONTENTS**

# FOREWORD

I am very pleased to have the opportunity to write a foreword for the exceptional work of our students in the field of academic publication, which demonstrate a spirit of passion and commitment that is truly inspiring. Our students are known for their active engagement in a wide range of extracurricular activities, from community service to mooting and advocacy.

Their consistent pursuit for academic excellence is equally well known. The Hong Kong Journal of Legal Studies (HKJLS) is a prime example of this excellence, showcasing the scholarly achievements of our students in the field of law and serving as a testament to the intellectual curiosity and dedication of our students.

Student-edited journals serve a vital purpose in fostering a culture of academic research and critical thinking among our student body. By incentivising students to pursue high-quality research and offering a platform for sharing their ideas, these journals help to cultivate the next generation of scholars and thought leaders. Moreover, the editing process is an invaluable learning experience, providing students with the skills and knowledge necessary to succeed in any field.

The journal is a valuable resource not only for legal practitioners, policymakers, and academics in Hong Kong but also for students who are interested in pursuing a career in law. It provides an opportunity for students to develop and showcase their research skills, engage with the legal community, and contribute to ongoing conversations about important legal issues.

The current volume of the HKJLS covers a diverse range of legal issues with significant implications for Hong Kong and beyond. The articles cover topics such as LGBT equality protection and the importance of considering dignity, a comparative study between civil and common law jurisdictions on legal consequences of the change of circumstances and the doctrine of frustration, the need for flexibility in 'presumption of similarity' and sole reliance on expert evidence, the test for sexual harassment under the Sex Discrimination Ordinance with

potential reform suggestions, the debate about granting legal personhood to artificial intelligence, and the justifiability of offences for possession of offensive weapons in Hong Kong.

These articles demonstrate the intellectual depth and diversity of legal research being conducted by students from the University of Hong Kong, and the important contributions that they are making to legal scholarship. The current volume is another example to show that the HKJLS serves as an important platform for students to share their ideas and engage in critical discussions on pressing legal issues.

In closing, I offer my heartfelt congratulations to the editors of the HKJLS for a job well done. I look forward to reading future issues and to witnessing the continued growth and success of this remarkable publication.

Professor Yun ZHAO
Henry Cheng Professor in International Law
The University of Hong Kong
18 July 2023

# PREFACE

It is our honour to present to you Volume 17 of the Hong Kong Journal of Legal Studies.

Since the Journal's founding in 1994, it has consistently held a unique position as the only student-run academic law journal in Hong Kong. The Journal is distinctively edited and published entirely by law students at the University of Hong Kong. This year's editorial board continues this tradition, consisting of highly talented individuals with diverse backgrounds enrolled in various law programmes.

In line with the traditions set by our predecessors, we aim to further academic discussion on contemporary issues and contribute to existing legal scholarship through hard work and cooperation. Our goal is to broaden the Journal's readership and build onto its reputation within the legal community. As such, we are committed to making our publications accessible in various locations, including all local university libraries, overseas university partners, the High Court and District Court Libraries, as well as on Westlaw and HeinOnline.

In this year's Volume, our authors have once again demonstrated their meticulous endeavours in researching and addressing intricate legal issues in Hong Kong, Mainland China, and other regions. This Volume proudly contains a diverse range of topics in public and private law, ranging from gender equality, sexual harassment, change of circumstances in Mainland China and evidence, to highly contentious issues like artificial intelligence and the possession of offensive weapons in Hong Kong.

We are extremely grateful towards Professor Yun Zhao for writing the foreword this year, and for expressing his support for our Journal as a valuable contributor to legal scholarship in Hong Kong. We would also like to sincerely thank all contributors and our editorial team for their hard work and collaboration throughout the past year, which has led to the successful publication of this Volume. Finally, we would like to

express heartfelt thanks to our patrons for their generous contributions and continuous support towards the Journal.

We hope that you will enjoy reading this Volume and continue to support the Journal's future volumes.

Christine Chau and Brandon Sien
Editors-in-Chief

# THE PROTECTION OF TRADITIONAL MARRIAGE AND LGBT EQUALITY – THE ROLE OF DIGNITY IN THE RIGHT TO EQUALITY

Ho Lun Thomas Lam*

*Hong Kong saw a significant development in LGBT equality rights in judicial developments starting with the watershed case of QT v Director of Immigration. In the cases concerning equal protection and non-discrimination, such as the Leung Chun Kwong case, it is rather uncontroversial that the courts rightly vindicated the applicants' legal rights under the right to equality in Article 25 of the Basic Law. On the other hand, in cases concerning marriage equality, the courts have rejected constitutional reviews for marriage equality or formal recognition of same-sex unions. Despite the difference in the outcome of these two categories of cases, the court's treatment of the right to equality and, specifically, the notion of 'protection of the traditional institution of marriage' being a justification is dubious as a matter of law. The questionable reasoning in these cases illustrates the failure to consider an important facet of the right to equality – dignity. This failure renders the guarantee of equal rights for sexual orientation minorities perfunctory and arbitrary, and contradicts the underlying principle and ideals of equal protection. Dignity is not only a fundamental moral underpinning of the right to equality, but it also serves a real and effective purpose as a guiding principle and factor in considering the application of equality rights. Therefore, it is argued that the Hong Kong courts should, aligning with overseas jurisprudence, give weighty consideration to dignity in assessing the right to equality cases to ensure that the constitutional guarantee of equality is given full effect.*

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# INTRODUCTION

The right to equality is universally recognised as a cornerstone in the protection of human rights in modern human rights theories, as enshrined in international human rights law and most modern constitutional documents. At the same time, it has been regarded as the most difficult right to interpret and apply.[1] The vagueness and elusiveness of equality rights produced endless debate on the appropriate jurisprudential approach towards equality rights. While most modern jurisdictions and scholars have recognised the significant shortcomings in a formal concept of equality,[2] judicial practices diverge on the application of substantive equality. Recent international and foreign jurisprudence indicate an increasing emphasis on the concept of dignity in adjudicating equality rights as a measure to better safeguard the right of minorities.

The right to equality is enshrined in Article 25 of the Hong Kong Basic Law (BL25), which guarantees that 'all Hong Kong residents shall be equal before the law'.[3] The recent series of cases concerning equality of sexual orientation called into question whether the courts fully reflected the high principles and spirits underpinning the right to equality. While *QT v Director of Immigration* was lauded as a progressive move towards greater equal protection for the LGBT community, the analytical framework in *QT* and subsequent cases glossed over the important aspect of dignity. The cases concerning LGBT equality rights reflect shortcomings in their approach, attributable to the failure to appreciate dignity as an essential element of equality rights. This essay primarily focuses on the 'protection of the traditional institution of marriage' as a legal justification and its relationship with the concept of dignity for the two categories of LGBT equality cases: (1) the equal protection cases[4] and (2) the marriage

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1 Beverley McLachlin P.C., 'Equality: The Most Difficult Right'(2001) 14 SCLR (2d) 19.

2 Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) ICON 712.

3 Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (BL).

4 Referring to *QT v Director of Immigration* [2018] HKCFA 28, (2018) 21 HKCFAR 324; *Leung Chun Kwong v Secretary for Civil Service* [2019] HKCFA 19, (2019) 22 HKCFAR 127; *Nick Infinger v Hong*

equality cases[5].

The 'protection of traditional marriage' justification is a cliched and banal argument that is raised in almost all LGBT cases. Yet, the court seems to have adopted an inconsistent and problematic approach toward accepting 'protection of the traditional institution of marriage' as a legitimate justification in both categories of cases. For the equal protection cases, the courts' unquestioning acceptance of the legitimate aim of 'protection of traditional marriage' is legally unsound and indicates the failure to accord importance to dignity. For marriage equality cases, the court evaded the real debate between the 'protection of traditional marriage' and same-sex marriage, which should have been properly addressed under BL25. The judicial attitude in both categories of cases is not only harmful and counterintuitive to the spirit of equality rights, but it reflects a deeper misunderstanding of human dignity as the cornerstone of modern equality theory. Comparative analysis also shows that judicial attitudes in other jurisdictions and international human rights law are moving towards a more comprehensive, unrestricted recognition of equality based on respect for human dignity, which is a preferable approach to be adopted in Hong Kong courts moving forward.

## I. JUDICIAL APPROACHES TO EQUALITY RIGHTS AND THE DIGNITY APPROACH

Before considering the Hong Kong cases, it is necessary to first identify the various equality theories and approaches. The

*Kong Housing Authority* [2020] HKCFI 329, [2020] 1 HKLRD 1188; *Ng Hon Lam Edgar v Secretary for Justice* [2020] HKCFI 2412, [2020] 4 HKLRD 908; *Ng Hon Lam Edgar v Hong Kong Housing Authority* [2021] HKCFI 1812, [2021] 3 HKLRD 427.

5 Referring to *MK v Government of HKSAR* [2019] HKCFI 2518, [2019] 5 HKLRD 259; *Sham Tsz Kit v Secretary for Justice* [2020] HKCFI 2411, [2020] 4 HKLRD 930 (*Sham Tsz Kit* CFI); *Sham Tsz Kit v Secretary for Justice* [2022] HKCA 1247, [2022] HKCA 1247 (*Sham Tsz Kit* CA); *Sham Tsz Kit v Secretary for Justice* [2023] HKCFA 28 (*Sham Tsz Kit* CFA).

following analysis also explores the possibility of implementing a dignity-based approach to Hong Kong's judicial framework in applying equality rights.

## A. Substantive Equality and Dignity

Formal equality of treating likes alike has long been rejected for many of its deficiencies that need no elaboration. Certain variations of substantive equality, such as 'equality of results' and 'equality of opportunity', are more relevant to policy-making and structural changes, but this essay focuses on the judicial application of equality rights.

Scholars consider 'dignity' to be another branch or a significant element of substantive equality. However, the role of 'dignity' is undetermined and subject to varying applications in practice. The normative basis for a dignity-based approach stems from the origins of equality rights. The notion of individualism and dignity is arguably rooted in Kantian ethics. Kant's second categorical imperative provides:

> 'act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end'.[6]

The respect for the individual's humanity as a person in him/herself entails respect for their dignity based on the intrinsic worth of persons that deserves (equal) respect as autonomous agents. The Kantian categorical imperative was most notably applied in international human rights law in the Universal Declaration of Human Rights (UDHR). The preamble provides:

> 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world…'[7]

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6 Immanuel Kant, *Groundwork of the Metaphysics of Morals* (CUP 1998) xxii.

7 Universal Declaration on Human Rights (adopted 10 December 1948) 217 A(III) (UNGA), preamble.

Article 1 of UDHR also provides that, 'all human beings are born free and equal in dignity and rights…'[8]. The concept of dignity and human rights was also translated into binding norms in international law, as seen in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).

Dignity is a cornerstone of equality rights because it represents the moral underpinning of the importance of treating every person equally, regardless of their human characteristics. Racism, sexism, homophobia, and other discrimination infringe on one's dignity as they degrade and treat people of a certain social group as less worthy of respect.

## B. Dignity-Based Approach

At face value, dignity appears to be an elusive general principle.[9] However, only until recent years, a somewhat principled dignity-based approach in the judicial application of equality rights began to emerge.

Dignity is commonly used as a 'guiding principle'[10] or 'background value',[11] usually reflected in constitutional documents and international human rights law or as a secondary source of recognising the application of equality rights. For example, in South Africa and Germany, dignity is expressly provided in the constitutional instruments guaranteeing equality rights.[12] In judicial applications, dignity is often invoked as a moral principle or value to emphasise the applicant's entitlement to equal treatment as it impairs his/her sense of self-worth, which operates as a moral argument that is difficult to refute. For instance, in *Yau Yuk Lung*, a Hong Kong case concerning the constitutionality of a law prohibiting buggery, the court mentioned

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8 UNGA, art 1.

9 *Egan v Canada* [1995] 2 SCR 513, 545 (L'Heureux-Dubé J).

10 Rory O'Connell, 'The Role of Dignity in Equality Law: Lessons From Canada and South Africa' (2008) 6 ICON 267, 269.

11 Evadné Grant, 'Dignity and Equality' (2007) 7(2) Human Rights Law Review 299, 306.

12 Basic Law for the Federal Republic of Germany, art 1; Constitution of the Republic of South Africa, s 10.

'dignity' once in its introduction, describing the nature of the right to equality:

> 'Discriminatory law is unfair and violates the human dignity of those discriminated against. It is demeaning for them and generates ill-will and a sense of grievance on their part. It breeds tension and discord in society.'[13]

The invocation of 'dignity' here laid the scene for a favourable finding for the applicant in challenging the law. When used in this manner, 'dignity' does not appear to have an independent existence in the application of equality rights.

Cases in other jurisdictions, nonetheless, indicate the usefulness of dignity as a free-standing concept that adds to the overall application of equality rights. First, dignity may be used to recognise unenumerated grounds of discrimination in open-list equality provisions.[14] In *Harksen v Lane*, the South African Constitutional Court formulated the following test to determine unlawful discrimination on unspecified grounds:

> 'if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner'.[15]

Here, dignity focuses on an impairment of dignity to find a ground of discrimination that is based on the fundamental attributes of a person. The test here is operative in distinguishing between core, fundamental characteristics that would constitute an impairment to dignity from characteristics that would not entail the same impairment. The concept of dignity is based on 'personal traits or circumstances' that are inherent or immutable, which is impaired if unjustified discrimination is based on these traits or circumstances. Thus, contrary to arguments that 'dignity' serves no distinct purpose, 'dignity' can be instrumental in identifying unlawful grounds of discrimination.

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13 *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335 [2] (Li CJ).

14 O'Connell (n 10) 277.

15 *Harksen v Lane* 1998 (1) SA 300 (CC) [46] (Goldstone J).

Secondly, certain cases applied 'dignity' as a material consideration in deciding whether discrimination is unlawful or unfair.[16] Certain cases framed the 'dignity' test by measuring whether the purported discrimination impairs or potentially impairs the dignity of the discriminated person. The Canadian case, *Law v Canada*, provides:

> '[h]uman dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits… Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.'[17]

The jurisprudence in South Africa provides further guidance on the application of this 'dignity' test. The overarching proposition is set out in the landmark *Prinsloo* case:

> '[u]nfair discrimination... principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity'.[18]

To prevent excessive individualism and subjectivity, *Harksen v Lane* further identified three factors to consider:

(a) the pattern of historical and societal disadvantage suffered by the group in which the discriminated person belongs;
(b) the nature and purpose of the impugned law and whether it is manifestly directed at impairing a person's dignity or aimed at achieving a worthy and important societal goal; and

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16 *S v Makwanyane* 1995 (3) SA 391 (CC) [329] (O' Regan J); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) [41] (Goldstone J).

17 *Law v Canada* (1999) 1 SCR 497 [53] (L'Heureux-Dubé J).

18 *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) [31] (Ackermann J, O'Regan J and Sachs J).

(c) the actual impact on the right and interests and dignity of the discriminated person.[19]

As Grant argues, these factors essentially analyse the concept of 'dignity' from an objective/external and a subjective/internal perspective by considering both the systemic, societal discrimination and the internal, psychological harm on the discriminated person, therefore capturing the multifaceted nature of dignity.[20] The approach goes beyond the general two-stage test in comparing the positions of the discriminated person with a 'comparator' and justifying the discriminatory treatment, but it rather enquiries into the actual impact of the discrimination on a person's dignity, which is an aspect often neglected when the proportionality test is applied mechanically. The benefit of identifying specific factors in the dignity-based approach is to allow greater certainty and prevents excessive judicial discretion.[21] Such an approach, to some extent, addresses the criticism of the indeterminacy of the dignity-based approach. As seen in the analysis under Parts II and III, certain overseas decisions applied a dignity-based approach and concretised their reasoning with reference to some of the factors outlined above, which provided certainty and persuasiveness in their legal reasoning.

## C. Problems With Dignity

The strongest argument against the role of dignity in evaluating equality rights perhaps relates to its indeterminacy and open texture. O'Connell considers dignity as the internal, subjective feeling of a person, which is difficult to assess and 'non-symbolic use of dignity' (i.e. the application of dignity as a free-standing element) provides no assistance to the existing legal tests.[22] Taking a less pessimistic stance, Khaitan contends that even if a dignity-based approach exists, it is only an "expressive norm", meaning that it may only be used to identify the expressive meaning of the purported discriminatory act, such as overt racist

19 *Harksen* (n 15) [51] (Goldstone J).
20 Grant (n 11) 320-324.
21 ibid 327.
22 O'Connell (n 10) 276.

hate speech, and not the objective consequences or subjective injury caused to the discriminated person.[23] It is accepted that the dignity-based approach has some level of indeterminacy and inbuilt elasticity, but the below judicial application of dignity in equality rights cases illustrates that the issue with indeterminacy may be overcome by a controlled, coherent legal test that gives substance to the assessment of equality rights.

## D. Current Judicial Framework and Treatment of 'Dignity' in Hong Kong

The current judicial framework in Hong Kong dealing with equality rights is largely similar to most other common law jurisdictions and Europe. The approach essentially follows a two-step inquiry: first, identify a prima facie discrimination (e.g. differential treatment) and, second, 'to examine every alleged case of discrimination to see if the difference in treatment can be justified'.[24]

In the first step, the court recognises three types of discriminatory treatment: direct discrimination, *Thlimmenos* discrimination (where individuals in distinctively different situations received the same treatment), and indirect discrimination (where an 'ostensibly neutral criterion' is equally applied to all persons but produced a significant prejudice against a particular group of individuals).[25] Direct discrimination is the antithesis of formal equality, which follows the notion of treating likes alike. Going beyond direct discrimination, the recognition of the second and third types of discrimination acknowledges that equal treatment may cause de facto discrimination or disparate effect on various groups, which is reflective of substantive equality.

In the second step, the justification stage, the court applies the four-stage proportionality test developed in *Hysan v Town*

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23 Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2012) 32 OJLS 1, 4.

24 *QT* (n 4) [83] (Ma CJ, Ribeiro, Tang and Fok PJJ and Lord Walker of Gestingthorpe NPJ).

25 ibid [33].

*Planning Board*, mirroring European jurisprudence:[26]

(1) The difference in treatment must pursue a legitimate aim.
(2) The difference in treatment must be rationally connected to the legitimate aim.
(3) The difference in treatment must be no more than is necessary to accomplish the legitimate aim.
(4) The difference in treatment must strike a reasonable balance between the societal benefits of the encroachment, and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest resulted in an unacceptably harsh burden on the individual.

The application of the *Hysan* proportionality test also reflects substantive equality.[27] Legitimate differential treatment can be justified based on an objective and reasonable justification. For example, affirmative actions aimed at correcting existing inequalities are justifiable differential treatments.[28] Nonetheless, the justification stage must maintain strict control over justifiable differential treatment, bearing in mind that the right to equality is a fundamental right that underpins the guarantee of human rights. A loose control over the justification stage essentially permits unjustified discrimination, which is fundamentally contradictory to the spirit of equality rights.

However, cases concerning equality rights have only treated the concept of dignity in a 'perfunctory manner', as Loper argues.[29] Unlike jurisdictions such as South Africa, there is no independent or strong presence of 'dignity' within the Hong Kong framework. The role of 'dignity' in the Hong Kong legal framework is vague and undetermined. An empirical study by Shen finds that the application of 'dignity' in human rights cases

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26 *Hysan Development Co Ltd v Town Planning Board* [2016] HKCFA 66, [2016] 9 HKCFAR 372 [134]–[135] (Ribeiro PJ); *QT* (n 4) [84]–[86].

27 Kelley Loper, 'Human Rights and Substantive Equality: Prospects for Same-Sex Relationships Recognition in Hong Kong' (2019) 44 NCJ Int L 273, 304.

28 Baroness Hale, 'The Conflict of Equalities' 1, 5 (Alison Weatherfield Memorial Lecture, Employment Lawyers Association, 10 July 2013).

29 Loper (n 27) 306.

in Hong Kong was inconsistent and often served different roles. There is no autonomous existence of 'dignity' as a standalone ground nor does it constitute a factor that must be considered in discrimination cases. In short, 'dignity' is invoked haphazardly and there are no clear guiding principles as to what constitutes a violation of 'dignity'.[30]

The below analysis in Parts II and III illustrates the shortcomings in the current judicial approach, which is arguably attributable to the failure to accord due weight to the notion of dignity. Thus, the judicial approach should be modified in a way that is consistent with the importance and role that 'dignity' plays in equality rights. It is not the purpose of this paper nor would it be prudent to advocate for any radical departure from the current judicial framework and approach. Based on the findings in Parts II and III, Part IV proposes a possible implementation of dignity in the Hong Kong framework with reference to the equal protection and marriage equality cases.

## II. LEGITIMATE AIM AND THE EQUAL PROTECTION CASES

The Hong Kong courts in the equal protection cases, such as *QT* and *Leung Chun Kwong*, rightfully upheld the right to equality and promoted equal civil, political, and socioeconomic rights and entitlements of LGBT individuals. The outcome of these cases is hardly controversial. However, the reasoning is problematic, particularly regarding the attitude towards accepting 'protection of the traditional institution of marriage' as a legitimate aim.

BL25 does not specify the grounds for justification. A wide range of 'legitimate aims' is almost always proffered by the government to justify the prima facie discrimination. Unfortunately, the issue of legitimate aim is almost never

[30] Taixia Shen, 'Judicial Interpretation of Human Dignity by Hong Kong's Courts' (2022) 12(1) SAGE Open <https://journals.sagepub.com/doi/full/10.1177/21582440221078298> accessed 14 August 2023.

seriously debated by the parties and is always dealt with summarily by the courts.[31] There is also a paucity of academic opinions on what constitutes a 'legitimate' aim. Yet, a principled approach towards the identification of legitimate aims is highly significant with regard to the application of the justification test as a whole, given that the later stages of the proportionality test are assessed contingently on and with reference to the legitimate aim itself. The legitimacy of the aim of 'protecting traditional marriage' and its variations (the 'Traditional Marriage' Aims) in the equal protection cases is explored below. It is important to distinguish the equal protection cases from the marriage equality cases in this respect, as this paper only seeks to challenge the appropriateness of the 'Traditional Marriage' Aims in the former category of cases without prejudging the main question of discrimination in marriage equality, which is discussed below in Part III.

The following analysis regarding the questionable legitimacy of the 'Traditional Marriage' Aims is fourfold: first, the treatment of the 'Traditional Marriage' Aims is explored; secondly, it is argued that such legitimacy is not legally sound; and thirdly, the acceptance of these aims as legitimate aims is contrary to the policy and spirit of the right to equality, especially when taking into account dignity; finally, the implication of the analysis is defensible.

## A. Treatment of the 'Traditional Marriage' Aims

Opening the saga of the LGBT rights litigation was the *QT* case, concerning the refusal to grant a spousal visa to a homosexual spouse. In *QT*, the legitimate aims on appeal were related to attracting foreign talents and administrative convenience and unrelated to the protection of traditional marriage. Before the Court of Final Appeal (CFA), counsel for the government tried to introduce the additional aim of protecting 'the special status of marriage' because the Court of Appeal (CA) in *Leung Chun*

[31] Richard Gordon, 'Legitimate Aim: A Dimly Lit Road' (2002) 4 EHRLR 421, 421.

*Kwong*, laid down three days before the CFA hearing for *QT*, accepted it as a legitimate aim. The CFA in *QT* barred this aim on a technical ground as it provided no opportunity for the appellant to respond, but one may speculate on the reluctance of the court in dealing with this controversial issue, which later became unavoidable in subsequent cases.

The next case before CFA was *Leung Chun Kwong*, concerning the spousal benefits for homosexual spouses of civil servants. Unlike *QT*, none of the three aims relied on was directly related to spousal benefits, but all were similar variants of the 'Traditional Marriage' Aims, as the CFA and the government acknowledged.[32] It was accepted by the applicant that the aims are legitimate.[33] In relation to the 'Traditional Marriage' Aims, the CFA held:

> '[t]here can be no doubt, therefore, that the protection of the institution of marriage in Hong Kong, being the voluntary union for life of one man and one woman to the exclusion of all others, is a legitimate aim and that differential treatment directed to that aim may be justified if the other elements of the justification test are satisfied'.[34]

As a result, subsequent equal protection cases, namely *Edgar Ng v Secretary for Justice*, *Edgar Ng v Housing Authority*, and *Infinger*, followed and recognised the 'Traditional Marriage' Aims as legitimate aims. In these later cases, with one exception, it appears that the applicants also conceded these aims as being legitimate aims.[35] In *Infinger*, the applicant challenged the legitimacy of the 'Traditional Marriage' Aims but was unsuccessful as the lower court was bound by *Leung Chun Kwong*.[36]

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32 *Leung Chun Kwong* (n 4) [49]–[52], [59].
33 ibid [58].
34 ibid [61] (emphasis added).
35 *Ng Hon Lam Edgar v Secretary for Justice* (n 4) [40], [41] (Chow J); *Ng Hon Lam Edgar v Hong Kong Housing Authority* (n 4) [50]–[52] (Chow JA).
36 *Nick Infinger* (n 4) [41].

## B. The Legal Illegitimacy of the 'Traditional Marriage' Aims

The legitimacy of the 'Traditional Marriage' Aims lacks legal basis. First, the government does not enjoy absolute, unfettered power to determine whether an aim is a legitimate aim to justify a prima facie discrimination. As a result of the concession of the applicants in the equal protection cases, there is virtually no dictum on what constitutes legitimate aim for sexual orientation discrimination. It is also unfortunate that the legal bounds of legitimate aim have not received the academic attention that it deserves.[37] The lack of clear principles governing what constitutes legitimate aims is problematic as it may lead to an abuse of the justification test where the government would otherwise enjoy the *carte blanche* to determine legitimate aims that may be inimical to the underlying policy of non-discrimination. This is especially concerning for human rights provisions, such as the equality right in BL25 and Article 22 of the Hong Kong Bill of Rights (HKBOR), where there is no closed list of legitimate aims, unlike for instance the freedom of expression in Article 16(3) of HKBOR.[38] It is therefore necessary to identify the legal rules in distinguishing between aims that are 'legitimate' in the sense that they may be relied on to justify a prima facie discrimination and those that are not.

The question of what may constitute a legitimate aim in human rights not providing a closed list of aims was briefly addressed in *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs*. The case concerned a constitutional review of an amendment to the Legislative Council Ordinance to disqualify a resigned Legislative Council (LegCo) member from running in a by-election within six months of their resignation, as a result of the 'de facto' referendum triggered by the resignation and re-election of five LegCo members in 2010 to show public sentiment on universal suffrage. The amendment prima facie restricts the individual's right to stand for election, as provided in Article 26 of the Basic Law (BL26) and Article 21 of HKBOR. Similar to BL25, BL26 and Article 21 of HKBOR do not enumerate a closed

37 Gordon (n 31).
38 Hong Kong Bill of Rights Ordinance 1991 (Cap 383).

list of legitimate aims for restrictions. Regarding legitimate aim, the government submitted that there was a 'perceived mischief' where resigned LegCo members may run in the by-election triggered by their resignation, which causes unnecessary cost in conducting the by-election and a vacuum in the provision of service of LegCo members during the casual vacancy. The applicant challenged the legality of this legitimate aim on the basis that there should be a narrow margin of appreciation on the government's selection of legitimate aim and that the political manoeuvre of triggering by-elections is common and should not be curbed.[39] Both CA and CFA rejected the applicant's submission. Regarding the principles governing legitimate aims, the CA expressly accorded a wide margin of appreciation to the government, citing the judiciary's 'inaptness' to deal with political questions:

> '[the legitimate aim in question] is essentially a political question for the politicians and political scientists, not a court of law. The court should accord a broad margin of appreciation to the conclusion that the government/legislature has reached on that question, and decide the first limb of whether there is a legitimate aim for the restriction accordingly'.[40]

Turning to the CFA judgment, instead of expressly deferring to the government, the CFA adopted the submission from the government's counsel and identified two requirements of a legitimate aim:

> '[t]he responsibility of the Court is to be satisfied from a legal point of view that the aim is first, identifiable and secondly, legitimate in the sense that it lies within constitutional limits.'[41]

Regarding the CA judgment, it is difficult to understand how the doctrine of margin of appreciation can be applied to the legitimate aim stage of the proportionality test, since this is

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39 *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2015] HKCA 499, [2015] 5 HKLRD 881 [3] (Cheung CJHC).

40 ibid [7] (emphasis added).

41 *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2017] HKCFA 44, (2017) 20 HKCFAR 353 [51] (emphasis added).

ultimately a consideration in the necessity stage. Nonetheless, the underlying theme is that the government is given a wide ambit in selecting its legitimate aims. This is telling in the sense that even though the government has far-reaching freedom in selecting legitimate aims, the courts are still the final arbiter in deciding the legitimacy of such aims. In other words, the government does not enjoy *carte blanche* in selecting its aims. The stance in the CFA further highlights the limits to the government's power in this regard by imposing two conditions, namely, the aim be 'identifiable' and 'lie within the constitutional limits of the government'. Unfortunately, the CFA did not further elaborate on the second requirement. Obviously, the formulation in *Kwok Cheuk Kin* suffers from imprecision, but it may be reasonably understood as requiring the government to only pursue legitimate aims that are allowed under the constitutional law of Hong Kong, including the Basic Law (BL) and HKBOR.

Applying the framework in *Kwok Cheuk Kin*, the 'Traditional Marriage' Aims possibly lie outside the government's constitutional limit and therefore cannot be accepted as a legitimate aim. If one takes a narrow approach in interpreting the 'Traditional Marriage' Aims as merely enhancing the welfare and prominence of traditional (i.e. opposite-sex monogamous) marriages in the Hong Kong society, it could be deemed constitutional under Article 37 of Basic Law (BL37).[42] However, this view omits the substantive, de facto discriminatory effect it has on same-sex couples and LGBT individuals who are, by definition, excluded in the promotion of 'traditional marriages'. Thus, viewing the 'Traditional Marriage' Aims under a substantive equality lens, it is clear that the special treatment for 'traditional marriages', by way of extra 'protection' or favouritism, has a discriminatory effect on same-sex couples, amounting to a de facto discrimination based on sexual orientation.

Similar principles are seen in international human rights law. Article 26 of the ICCPR, providing for the right to equality, does

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42 This presupposes the assumptions traditional marriages refer exclusively to a monogamous heterosexual marriage and that BL37 protects only that form of marriage, which is further discussed below Part III.A.

not enumerate the available 'legitimate aims', but any purported legitimate aim must be 'to achieve a purpose which is legitimate under the Covenant'.[43] In this respect, the Siracusa Principles provide for the general interpretative principles for limitation of rights where no specified legitimate aims are provided. Specifically, the Siracusa Principles provide that, '[t]he scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned'[44] and, more importantly, '[n]o limitation on a right recognized by the Covenant shall discriminate contrary to Article 2, paragraph 1'.[45] Article 2(1) of the ICCPR is the general principle provision requiring the equal application of rights within the ICCPR.[46] Since the BL and HKBOR/ICCPR rights are to be interpreted consistently, the Siracusa Principles are informative as to what legitimate aim would 'lie within the constitutional limit' of the government, which excludes aims that are discriminatory in reality, such as the 'Traditional Marriage' Aims. Thus, as a matter of law, it is dubious whether the protection of 'traditional family' at the exclusion of others on the de facto basis of sexual orientation lies within the government's constitutional limit when it comes to the equal protection cases.

Further, the authorities cited in *Leung Chun Kwong* are arguably unhelpful to support the legitimacy of said aims. The CFA relied on Lady Hale's judgment in the landmark case of *Ghaidan v Godin-Mendoza* to show that the 'Traditional Marriage' Aims are legitimate as a matter of English and European human rights law.[47] However, a closer reading of the case reveals that none of the judges in *Ghaidan* actually accepted the 'Traditional Marriage' Aim as a legitimate aim. As an equal protection case itself, *Ghaidan* concerns whether the tenancy protection in Rent Act 1977 extends also to homosexual couples. In that case, Lord Nicholls took a nuanced approach towards the 'traditional marriage/family' aim and held that it is only legitimate

43 UN Human Rights Committee, 'CCPR General Comment No. 18: Non-Discrimination' (1989) [13].

44 UN Commission on Human Rights, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1984) Principle 2.

45 ibid Principle 9.

46 International Covenant on Civil and Political Rights (1966).

47 *Ghaidan v Godin-Mendoza* [2004] 2 UKHL 30, [2004] AC 557 [138] (Baroness Hale).

'in certain contexts',[48] and in *Ghaidan*, the discrimination 'falls at the first hurdle: the absence of a legitimate aim'.[49] Lord Millett took the same stance.[50] The dictum by Lady Hale, as cited in *Leung*, was merely commenting on the legitimacy of the 'traditional marriage/family' aim in the context of distinguishing between married and unmarried couples, not where the distinction lies between heterosexual and homosexual couples. The contrast becomes clear when Lady Hale considers the discrimination against homosexual couples and held:

> 'But what could be the legitimate aim of singling out heterosexual couples for more favourable treatment than homosexual couples? It cannot be the protection of the traditional family… The distinction between heterosexual and homosexual couples might be aimed at discouraging homosexual relationships generally. But that cannot now be regarded as a legitimate aim'.[51]

In *Ghaidan*, the 'traditional marriage/family' aim was soundly rejected as a legitimate aim. The same reasoning can be applied to the Hong Kong equal protection cases concerning welfare benefits, public housing, and inheritance rights. Lady Hale's dictum precisely illustrates the earlier argument, where a discriminatory act was de facto aimed at discouraging and targeting homosexuals and same-sex relationships, it is an affront to the constitutional duty of the government to ensure equal protection of the law and respect the dignity of the persons suffering the discrimination. Thus, applying the requirement set out in *Kwok Cheuk Kin*, any such purported legitimate aim would probably lie beyond the 'constitutional limits' of the government.

A similar vein of unjustified reasoning is also seen in *Leung Chun Kwong*'s reliance on other cases. In *Re G (Adoption: Unmarried Couple)*, the House of Lords was concerned with the disparate treatment between opposite-sex married and unmarried couples in adoption. The obvious distinction with *Leung Chun*

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48 ibid [16] (Lord Nicholls).
49 ibid [18] (Lord Nicholls).
50 ibid [55] (Lord Millett).
51 ibid [143] (Baroness Hale) (emphasis added).

*Kwong* and the other equal protection cases is that sexual orientation was not the ground of discrimination in *Re G*.[52] The same applies to *Serife Yigit v Turkey*, which concerns the protection of religious marriage. The European Court of Human Rights (ECtHR) accepted that the protection of traditional marriage may be a legitimate aim 'which may justify a difference in treatment between married and unmarried couples'.[53] In dealing with the violation of Article 14 ECHR in conjunction with the right to property,[54] the ECtHR accepted that 'the difference in treatment in question primarily pursued the legitimate aims of protecting public order and protecting the rights and freedoms of others', which was the pursuit of substantive equality in correct existing disadvantage faced by women.[55] The ECtHR was silent on the issue of whether the 'Traditional Marriage' Aims can be legitimate in an equal protection case concerning sexual orientation discrimination. A deeper reading into the cases cited in *Leung Chun Kwong* reveals the lack of precedent supporting the legitimacy of the 'Traditional Marriage' Aims. It is far from 'no doubt' that these aims can be deemed legitimate aims in the Hong Kong equal protection cases.

In addition, recent authorities from the ECtHR not cited in *Leung Chun Kwong* positively demonstrate that the 'Traditional Marriage' Aims are not always accepted as legitimate aims under Article 14 of the European Convention on Human Rights (ECHR). There are indeed older authorities that support said legitimate aim, most notably *Karner v Austria* regarding sexual orientation discrimination. However, even in *Karner*, the ECtHR noted that the concept of protecting traditional families is 'rather abstract' and deserves closer judicial scrutiny.[56] As observed in the 'Guide on Article 14 of the European Convention on Human Rights' issued by the ECtHR, the approach in accepting the 'Traditional Marriage' Aims 'somewhat changed in more recent cases

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52 *Re P (Adoption: Unmarried Couple) (Northern Ireland)* [2008] UKHL 38, [2008] 3 WLR 76 [108] (Baroness Hale).

53 *Serife Yigit v Turkey* App no 3976/05 (ECtHR, 2 November 2010) [72] (emphasis added).

54 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) [1950].

55 *Serife Yigit* (n 53) [82].

56 *Karner v Austria* (2004) 38 EHRR 24 [40]-[41].

interpreting the Convention in present-day conditions'.[57] The ECtHR recognises that 'the aim of protecting the family in the traditional sense is rather abstract' and such an aim may only be legitimate 'in some circumstances'.[58]

In fact, two cases had rejected the legitimacy of the 'traditional marriage' aim. In *Taddeucci and McCall v Italy*, the applicants are an unmarried same-sex couple whose application for a residence permit for family reasons was denied as unmarried couples were not deemed as family members. The court ruled that Italy was in breach of Article 14 of ECHR, having considered that the 'traditional marriage' aim was not legitimate in the circumstances of granting residence permits for family reasons.[59] In *Bayev v Russia*, the applicant complained that Russian law prohibiting expressions that raise awareness for LGBT rights violated the freedom of expression and right to equality under Articles 10 and 14 of ECHR respectively. Russia justified its restrictions on the legitimate aim, inter alia, of 'maintaining family values'.[60] The Court was minded to 'scrutinise the legitimate aim advanced… [and] examine whether it is open to [Russia] to rely on the grounds of morals'.[61] The aim was rejected considering that the maintenance of family values and the acknowledgement of social acceptance of homosexuality are not incompatible or mutually exclusive, especially where many same-sex couples nowadays actually 'manifest allegiance' to various aspects of 'traditional' family values.[62] The court stressed that 'differences based solely on considerations of sexual orientation are unacceptable'[63] and found a standalone violation of Article 10 and Article 14 in conjunction with Article 10. In short, even if older authorities may have accepted the 'Traditional Marriage' Aims as legitimate, recent European cases have rejected that approach and imposed stricter scrutiny on the availability of such aims. In *Taddeucci*, no explicit reason was given for rejecting the

57 Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No 12 to the Convention [2021] 19.
58 *Taddeucci and McCall v Italy* App No 51362/09 (ECtHR, 30 June 2016) [93].
59 ibid.
60 *Bayev and others v Russia* App No 67667/09 (ECtHR, 13 November 2017).
61 ibid [66].
62 ibid [67].
63 ibid [89] (emphasis added).

legitimate aim but the court alluded to the requirement of some rationality or logical connection between the 'traditional marriage/family' aim and the nature of the restriction. In *Bayev*, the court made it clearer that legitimate aims motivated predominantly by considerations of sexual orientation, particularly homophobic or stereotype-driven aims, are impermissible. At the very least, the legitimacy of the 'traditional family/marriage' aim can no longer be taken for granted and must be assessed on a case-by-case basis. Thus, considering the authorities altogether, Hong Kong courts should have prudently assessed the legitimacy of the 'Traditional Marriage' Aims in the context of sexual orientation discrimination in the equal protection cases and find that such aims cannot be taken to be legitimate.

## C. The Normative Illegitimacy of the 'Traditional Marriage' Aims and Dignity

There are good reasons why the 'Traditional Marriage' Aims should not be accepted in the Hong Kong equal protection cases. First, the reliance on 'Traditional Marriage' Aims confuses the overall framework of the right to equality. Returning to first principles, the purpose of the proportionality test in justifying prima facie discrimination is to promote an overriding, genuine, and beneficial policy in the public interest that transcends beyond the initial discriminatory act. These overriding concerns must be sufficiently important to suspend the right to equality.[64] For example, the ECtHR accepted a range of legitimate aims in dealing with discrimination claims, including the protection of national security, maintenance of economic stability, and protection against gender-based violence.[65] These legitimate aims go beyond the mere considerations of the protected characteristics or are neutral to the protected characteristics. The exception is where a legitimate aim can be based on the discriminated protected characteristics is where the government aims to address existing inequalities and achieve substantive equality through

64 *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] AC 559 [62] (Lord Reed).

65 ECtHR (n 57) 18-19.

affirmative actions,[66] as exemplified in *Serife Yigit* where the ECtHR accepted the legitimate aim of protecting the rights of married women who faced systemic inequality. In either case, the legitimate aim cannot be designed *for* the purpose of discriminating.

However, the 'Traditional Marriage' Aims are contrary to the spirit of the justification test. The fatal problem with the 'Traditional Marriage' Aims is that they are inextricably bounded by assumptions of sexual orientation, which is precisely the complained ground of discrimination. As illustrated above, the aims assume heteronormativity at the exclusion of sexual minorities. The promotion of 'traditional marriage' has a disproportionate de facto exclusionary impact on homosexual couples as they, by definition, cannot be deemed a 'traditional marriage'. In other words, using the 'Traditional Marriage' Aims to justify sexual orientation discrimination is to pull the government up by its bootstraps. It creates a self-serving, circular argument where the government can justify its discrimination by the very fact that it wishes to discriminate in this manner. An unpalatable but accurate analogy would be for a government to insist on racist policy on the basis that it wishes to pursue the 'legitimate' aim of protecting the supremacy of a certain racial group. In contrast, the purpose of the proportionality test in seeking an overarching justification explains why the courts can readily accept legitimate aims that are neutral to the impugned protected characteristics, such as the aims in *QT* (i.e. encouragement of foreign talents, legal certainty and strict immigration control). The approach taken in *Leung Chun Kwong* and subsequent equal protection cases is therefore contrary to the purpose of the proportionality test and creates circularity in its reasoning.

Further, the acceptance of the 'Traditional Marriage' Aims fails to appreciate the spirit of the right to equality, in particular, the equal dignity of all persons. The 'Traditional Marriage' Aims reflect a heteronormative predisposition. Heteronormativity can be understood as, 'the cultural bias in favor of heterosexual relationships, under which such relationships are deemed normal,

[66] *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690 [66] (Hartmann J).

natural and ideal, and are preferred over same-gender or same-sex relationships', as taken from *Advisory Opinion No 24* of the Inter-American Court of Human Rights (IACtHR).[67] The underlying premise of the 'Traditional Marriage' Aims is to promote a presumptively good, moral, upstanding social morality, implying that 'traditional family' is a social good and a moral value. Thus, the promotion of 'traditional marriage' indicates a political preference for opposite-sex relationships over same-sex relationships. By necessary implication, the government's preference casts a negative and undesirable light on non-heterosexual persons, implying that same-sex unions are second-class, undesirable, and undeserving of equal access to rights and entitlements. Thus, the heteronormative policy of preferencing 'traditional marriage' is demeaning and injurious to the dignity of homosexual persons when it comes to the context of equal access to social rights.

As such, the dignity of sexual orientation minorities is at stake. Applying the proposed framework mentioned in Section D of Part I, the court should consider 'dignity' as a factor in deciding the legitimacy of 'Traditional Marriage' Aims at this stage of the proportionality test. First, the objective aspect of dignity, focusing on historical humiliation or discrimination, informs that the 'Traditional Marriage' Aims for equal protection cases reinforce the bias, preferential treatment, and widespread societal discrimination against people who do not conform to the so-called 'ideal' 'traditional' opposite-sex marriage. Secondly, subjectively, the government's preferential treatment towards 'traditional marriage' and heterosexual people insult sexual minorities that they are inadequate, undesirable, and therefore do not deserve the same access to a wide range of benefits and entitlements. Finally, it appears that there is no overarching genuine purpose behind the discrimination, except to exclude same-sex couples for the sake of doing so, as no other legitimate aims are proffered. Thus, the 'Traditional Marriage' Aims should not have been accepted as legitimate at the outset. On this basis, if

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67 Advisory Opinion OC-24/17 of November 24, 2017 on Gender Identity and Equal Protection, and Non-Discrimination for Same-Sex Couples; State Obligations in Relation to Change Of Name, Gender Identity, and Rights Deriving from a Relationship Between Same-Sex Couples and Interpreting the Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in Relation to ACHR Article 1 (2017) [32].

the Hong Kong courts were to give proper weight to dignity in the assessment of legitimate aims, one would at least expect more judicial reasoning in substantiating the legitimacy of the 'Traditional Marriage' Aims instead of a bare assertion that the legitimacy of such aims cannot be questioned.

## D. Implications

The implication of the analysis is that the court should reject the 'Traditional Marriage' Aims and would not need to consider the later stages of the proportionality test, including necessity and proportionality, unless other aims were argued. This is an entirely justifiable outcome. This was the outcome in *Yau Yuk Lung*, where the court struck down the criminal offence of homosexual buggery where 'the matter fails at the first stage of the justification test'.[68] When the legitimate aim is discriminatory in and of itself, any 'necessity' or 'proportionality' analysis becomes obsolete and nonsensical. If a government wishes to be overtly racist against, for example, black people, one cannot logically or morally ask whether there are any less intrusive ways to be racist or whether the discrimination imposes an unacceptably harsh burden on black people. There is no rationale in performing any balancing exercise when the very purpose of the impugned law is to discriminate. The analysis is not to say that the institution of marriage is inherently discriminatory, even though it is predominantly heterosexual. There is a difference between protecting marriage as an institution from protecting 'traditional marriage'. Where the emphasis and preference are placed on the heteronormativity of 'traditional marriage', it becomes problematic and should be rejected at the first hurdle on legitimate aim.

The analysis above does not, at all, challenge the outcome of the equal protection cases. However, the implication of this analysis is much wider than discrimination based on sexual orientation. The right to equality extends to all forms of protected characteristics, such as race, sex, social origin, etc. Every judicial challenge based on the right to equality will face the same issue of indeterminacy and moral legitimacy if the courts fail to elucidate

68 *Yau Yuk Lung* (n 13) [27] (Li CJ).

clearer criteria for determining legitimate aims where the human rights provisions provide no closed list of legitimate aims.

## III. PROPORTIONALITY AND THE MARRIAGE EQUALITY CASES

Turning to the marriage equality cases, the applicants in *MK* and *Sham Tsz Kit* challenged the definition of marriage in the, inter alia, Marriage Ordinance and Matrimonial Causes Ordinance,[69] and sought various forms of recognition of same-sex partnership: primarily same-sex marriage, or alternatively civil partnership, recognition of foreign same-sex marriage, or a declaration of violation of human rights.[70] The issue has recently reached Hong Kong's final appellate court in *Sham Tsz Kit* case. The CFA had rejected the applicant's request for same-sex marriage and recognition of foreign same-sex marriage, but, by a majority, granted a declaration that the government violated Article 14 of HKBOR (HKBOR14) (right to privacy) and is under a positive obligation to provide an alternative framework to recognise same-sex partnerships.[71] The government successfully maintained that traditional marriage, under Hong Kong law, refers to a Christian marriage or its civil equivalent, namely a voluntary union for life of one man and one woman to the exclusion of all others.

The 'traditional marriage' argument was vital to the courts' reasoning in *MK* and *Sham Tsz Kit* (at all levels). First, the deep social entrenchment of the concept of 'traditional marriage' did not warrant an updated interpretation of the meaning of 'marriage' to be initiated by the judiciary. Secondly, BL37 protects only 'traditional marriages' and excluded the possibility of deriving marriage equality from BL25 under the doctrine of *lex specialis*. Thirdly, until the CFA in *Sham Tsz Kit* (but only by the majority of Ribeiro and Fok PJJ and Keane NPJ and on different reasoning) the alternative relief of seeking alternative recognition of same-

69 Marriage Ordinance (Cap 181), s 40; Matrimonial Causes Ordinance (Cap 179), s 20(1).

70 *MK* (n 5), *Sham Tsz Kit* CFI (n 5).

71 *Sham Tsz Kit* CFA (n 5).

sex relationships was rejected as it was 'in substance' equivalent to seeking same-sex marriage.

Scholars have critiqued the courts' restrictive, monolithic understanding of 'traditional marriage' as equating to the definition in section 40 of the Marriage Ordinance.[72] Wan rightly argues that before the matrimonial ordinances came into effect in 1971, Hong Kong gave legal recognition to 'multiple forms of marital unions', including Chinese customary marriages that are not monogamous or between *one* man and *one* woman.[73] This line of argument certainly undermines the cogency of the CFI's assertion of any restrictive definition of 'traditional marriages' to limit the protection under BL37. Nonetheless, even if the meaning of 'traditional marriage' is extended to opposite-sex non-monogamous marriages, the court may still comfortably refuse to accept an updated interpretation to include monogamous same-sex marriage. Therefore, the crux of the issue really is whether same-sex marriage can be properly found in the right of equality under BL25. The analysis below is threefold. First, it is argued that the application of the *lex specialis* doctrine to pre-emptively preclude the application of BL25 is misguided. Secondly, assuming that BL25 is applicable, the application of BL25 with a proper emphasis on dignity is examined in resolving the 'traditional marriage vs same-sex marriage' debate, which is the crux of the issue. Thirdly, the essay considers the relationship between 'traditional marriage', dignity, and alternative forms of recognition for same-sex marriage. Here, unlike the equal protection cases, Part III presumes that the 'Traditional Marriage' Aims are legitimate in the marriage equality context. Rather, it is overall argued that the real debate lies in whether the 'Traditional Marriage' Aims are truly necessary and proportionate to the restriction against same-sex marriage.

## A. The *Lex Specialis* Issue

In *MK* and *Sham Tsz Kit*, the courts held that same-sex marriage is not permitted under the current status of Hong Kong law under

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72 Marco Wan, 'Sticking to the Past: Same-sex Union and Original Meaning in Hong Kong', (2020) 15 NTU L Rev 153.

73 ibid 15-16.

the relevant marriage ordinances and BL37. The applicants then relied on BL25 to challenge the legality of the matrimonial ordinances in excluding same-sex marriage and the failure of the government to provide alternative recognition for same-sex relationships (e.g. civil partnership). The courts rejected the application of BL25 *in limine* on the basis that the *lex specialis* BL37 provided for the right to marriage and the right to marriage of same-sex couples cannot derive from the *lex generalis* BL25. The CFA in *Sham Tsz Kit* cited *Kwok Cheuk Kin v Director of Lands (No 2)*, dealing also with the purported *lex specialis* of Article 40 concerning indigenous rights over BL25, defining the doctrine of *lex specialis* as:

> 'a principle of statutory construction that the specific prevails over the general. This is simply one aspect of the more general principle that legislative instruments must be read as a coherent whole…'[74]

As a preliminary issue, I argue that the application of the statutory interpretation principle of *lex specialis* is misguided and pre-empts and shies away from the crux of the issue.

The reliance on *lex specialis* is questionable as a matter of law. The main authorities cited in *MK* regarding *lex specialis* are the ECtHR decisions of *Schalk and Kopf* and *Oliari v Italy*. In *Schalk and Kopf*, the ECtHR disposed of the applicant's argument of a violation of Article 14 taken in conjunction with Article 8 to require same-sex marriage because the ECHR must be 'read as a whole… [and] construed in harmony with one and another [provision]' and Article 14 is a 'provision of more general purpose and scope'.[75] *Oliari* relied on this reasoning and declared the same contention as inadmissible.[76] As the CA and CFA in *Sham Tsz Kit* rightly acknowledged that the BL and HKBOR are indeed couched differently from the ECHR,[77] it is questionable whether a direct transplant of the result in *Schalk and Kopf* and *Oliari* is appropriate in the Hong Kong constitutional context.

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74 *Kwok Cheuk Kin v Director of Lands (No 2)* [2021] HKCFA 38, (2021) 24 HKCFAR 349 [44(2)].

75 *Schalk and Kopf v Austria* (2011) 53 EHRR 20 [101].

76 *Oliari v Italy* (2017) 65 EHRR 26 [193].

77 *Sham Tsz Kit* CA (n 5) [54]; *Sham Tsz Kit* CFA (n 5) [201].

The equality provision in Article 14 of ECHR is ancillary in nature, in that it prohibits discrimination in 'the enjoyment of the rights and freedoms set out in the Convention'. It has no 'independent existence' to prohibit all forms of discrimination outside the enjoyment of rights beyond the scope of other rights in the ECHR.[78] On the other hand, BL25 is autonomously applicable without reference to other Basic Law rights and can be used independently as a benchmark to assess the legality of domestic legislation, which is precisely the legal basis of the challenges in *MK* and *Sham Tsz Kit*. The autonomous nature of BL25 is seen in all of the aforementioned equal protection cases where the bases of challenge are squarely on BL25 without relying on a violation of another Basic Law right. Therefore, the legal structure and internal logic of the ECHR and BL are fundamentally different where the interpretative principle of *lex specialis* in the European system cannot be directly applied to Hong Kong. This argument was made by the applicant's counsel in *Sham Tsz Kit* at the CFA. Although the CFA had recognised BL25 and Article 22 of HKBOR (HKBOR22) as 'free-standing and independent rights', the court did not find this to be a weighty enough reason to displace the *lex specialis* rule.[79] It is regretful that the CFA did not meaningfully engage with the merits of this submission but merely re-iterated the *lex specialis* rule.[80] Different from other free-standing human rights such as the freedom of expression, the right to equality has a transcendental character that applies to all rights. It has an inherently primary *and* secondary nature that only has real meaning when compared with another legal right, interest, entitlement, or obligation. Thus, the premature exclusion of BL25 fails to accord importance to the transcendental nature of equality rights.

More importantly, it is questionable whether *MK* and *Sham Tsz Kit* were correct in deciding BL37 and BL25 as being mutually exclusive. BL37 provides that '[t]he freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law'.[81] Even if BL37 does not protect same-sex marriage, nowhere in BL37 precludes the possibility of same-sex

78 ECtHR (n 57) 6.
79 *Sham Tsz Kit* CFA (n 5) [111]-[112].
80 ibid.
81 BL, Art 37.

marriage to be recognised as the legislature is free to do so.[82] BL37 does not say that Hong Kong may *only* recognise 'traditional marriages' and excludes the freedom of marriage from other forms of union. A proper interpretation of BL37, taking into account its context and purpose, reveals that the focus of BL37 is the individual's freedom and consent to marry. The emphasis on the individual's *freedom* to marry is consistent with the CFA's decision in *W v Registrar of Marriages*. This case upheld a transgender woman's right to marry a man and does not deal with same-sex marriage; but the focus here is that the CFA emphasised that BL37 protects the essence of the freedom to marry, but did not interpret BL37 as a 'marriage protection clause' that restricts the definition of 'marriage' to homogamous and opposite-sex marriages.[83] In other words, BL37 can hardly be understood as 'protecting' the institution of marriage or be construed as a 'marriage protection clause', which is how the courts in *MK* and *Sham Tsz Kit* had understood the provision.[84] On appeal, *Sham Tsz Kit* described BL37 as 'preferring' heterosexual marriage,[85] but it remains dubious whether this 'preference' is sufficient to suspend any independent application of BL25. By elevating BL37 to a 'marriage protection' clause, 'what is protected becomes, bizarrely, the *institution of marriage* rather than the freedom of the individual applicant', as Wan rightly argues.[86] Therefore, the conclusion we can draw is that there is no normative conflict between interpreting BL25 and BL37 as their scope and content are not mutually exclusive or contradictory. If marriage equality is granted under BL25, then the only implication is that such a right is not constitutionally protected by BL37. BL37 is simply irrelevant to the issues raised in *MK* and *Sham Tsz Kit.* This interpretation is consistent with the interpretation of the right to marriage provision in Article 23 of ICCPR and overseas jurisprudence. The South African Constitutional Court in *Minister of Home Affairs v Fourie* held that regarding the protection of the freedom to marriage to same-sex couples in international human

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82 Although it is accepted that the corresponding provision in HKBOR (i.e. Article 19(2)) is gender-specific, requiring a heterosexual marriage, the provision in HKBOR is not necessarily engaged given that the *lex specialis* application pertains to allegedly conflicting provision with the BL.

83 *W v Registrar of Marriage* (2013) 16 HKCFAR 112 [109]-[111].

84 *MK* (n 5) [32], [40].

85 *Sham Tsz Kit* CA (n 5) [31], [38], [39], [50], [72].

86 Wan (n 72) 10.

rights law:

> 'it is not true that it does so in a way that necessarily excludes equal recognition being given now or in the future to the right of same-sex couples to enjoy the status, entitlements, and responsibilities accorded by marriage to heterosexual couples'.[87]

Similarly, the IACtHR recognised in *Advisory Opinion No 24* that Article 17(2) of the American Convention on Human Rights (ACHR) recognising the right for men and women to marry:[88]

> 'does not propose a restrictive definition of how marriage should be understood or how a family should be based… [and] does not necessarily mean either that this is the only form of family protected by the American Convention'.[89]

The same can be said to the interpretation of BL37. Thus, it is problematic that the *lex specialis* doctrine was applied even when there is no real normative conflict between BL37 and BL25.

Without bringing the right to equality to the forefront of the marriage equality debate, it is difficult to resolve the crux of the debate and give due consideration to the claims of marriage equality, which 'abridges central precepts of equality'.[90] As such, the issue of the purported normative conflict between BL37 and BL25 should be revisited.

## B. Marriage Equality

Where BL25 is properly applied, the court would have the opportunity to properly consider the heart of the marriage equality debate: the contest between protecting traditional marriage and ensuring equal treatment. It is unfortunate that *MK* and *Sham Tsz Kit* did not consider the application of BL25 at all, not even in

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87 *Minister of Home Affairs v Fourie* (2005) ZACC 19 [105].

88 Organization of American States (OAS), American Convention on Human Rights, Costa Rica, 22 November 1969.

89 *Advisory Opinion No.24* (n 67) [182].

90 *Obergefell v Hodges* 576 US 644 (2015) 22.

*obiter*. Nonetheless, the increasing volume of overseas authorities is significantly informative as to the judicial recognition of marriage equality based on the right to equality, which is of useful assistance to the Hong Kong courts in adjudicating the matter. In recent years, courts in several jurisdictions recognised the constitutional right to same-sex marriage, most notably *Obergefell v Hodges* in the United States, *Judicial Yuan Interpretation No 748* in Taiwan, the *Advisory Opinion No 24* at the IACtHR, and *Minister of Home Affairs v Fourie* in South Africa, and more. These watershed cases share something in common: the judicial focus was redirected to the notion of 'dignity' and therefore gave adequate consideration to the right to equality.

In *Obergefell v Hodges*, the US Supreme Court held by a majority that the Due Process and Equal Protection Clauses in the Fourteenth Amendment require recognition of same-sex marriage. The reasoning in *Obergefell* stands out in two ways. First, it acknowledged the historic understanding of a 'traditional marriage' as referring only to heterosexual marriages and accepted the special status and societal reverence for the institution of marriage, which has 'transcendent importance'.[91] However, the traditional notion of marriage cannot operate to undercut a claim for marriage equality because the claim does not 'demean the revered idea and reality of marriage'.[92] The protection of the institution of marriage cannot be done at the expense of homosexual people's right to equality. Thus, granting same-sex marriage would not harm the dignity or institution of traditional marriage. Rather, the petitioners sought same-sex marriage precisely because of the societal importance of marriage and wished to pay the same respect to this institution. Significantly, the court framed the issue as one where the petitioner wished to be a part of this social institution stemming from a genuine respect for marriage. The view rightly prevents presenting 'traditional marriage' and same-sex marriage as dichotomic, antagonistic paradigms where the promotion of the latter would purportedly endanger the dignity of the institution of marriage itself. This is in stark contrast with the presumption embedded in *MK* and *Sham Tsz Kit* where the 'protection' of 'traditional marriage' forms the central defence against same-sex marriage and these claims are

91 ibid 3.
92 ibid 4.

antagonistic, which need not be the case. Secondly, *Obergefell* did not shy away from the normative aspect of the same-sex marriage debate but directly addressed the moral and social implications of the issue. Dignity forms the main thrust of the court's reasoning. The denial of same-sex marriage 'denied the equal dignity of men and women';[93] same-sex marriage asks for 'equal dignity in the eyes of the law'.[94] Specifically, the denial 'demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society'.[95] Here, it appears that *Obergefell* relied on both an objective and subjective conception of dignity. Objectively, an impairment of dignity is primarily based on the overall exclusion and marginalisation of homosexual couples, similar to the formulation in *Law v Canada* as seen earlier. Indeed the reasoning may be circular if an objective exclusion or marginalisation of a group equates to an impairment of dignity which violates the right to equality. Thus, the Court did not stop here but examined the subjective impact on the excluded group, which found significance in the demeaning and insulting impact on homosexuals, stemming particularly from the paternalistic 'teaching' of unequalness from the State.[96] Arguably, the multifaceted analysis of dignity in *Obergefell* reflects all elements of a dignity-based equality test: (1) the objective, historical disadvantage facing the group, (2) the nature and purpose of the law, and (3) the actual, subjective impact on the dignity of the discriminated persons.[97]

Similarly, *Minister of Home Affairs v Fourie* also championed the notion of dignity. The denial of the right to marry

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93 ibid 21.

94 ibid 28.

95 ibid 17.

96 ibid.

97 It should be noted that at the time of writing, *Obergefell v Hodges* remains good law in the United States. In 2022, the Supreme Court in *Dobbs v Jackson Women's Health Organization*, concerning women's reproductive rights and the Fourteenth Amendment, overturned *Roe v Wade* but held that '[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion', including *Obergefell*. This is, however, subject to Justice Thomas' dissent arguing for a reconsideration on all substantive due process precedents including *Obergefell.* See *Dobbs v Jackson Women's Health Organization* 597 US 215 (2022). It should also be noted that in the same year (2022), the US Congress passed the Respect for Marriage Act, requiring states to recognise same-sex marriage, legislating the ruling in *Obergefell* in federal law.

for same-sex couples, according to the South African court, 'represented a harsh if oblique statement by the law that same-sex couples are outsiders… their intimate relations as human beings is somehow less than that of heterosexual couples'.[98] Besides the objective 'exclusion and marginalisation' caused by the common-law exclusively-heterosexual definition of marriage, the court went on and explored the individual, subjective impact on individual dignity, where the 'discriminatory social practices' have been 'wounding and the scars are evident in our society to this day'.[99]

A similar dignity-oriented approach was also seen in Taiwan in the *Judicial Yuan Interpretation No 748*, a jurisdiction that shares a somewhat similar cultural background and values as Hong Kong. The Yuan held:

> '[t]he need, capability, willingness, and longing, in both physical and psychological senses, for creating such permanent unions of intimate and exclusive nature are equally essential to homosexuals and heterosexuals, given the importance of the freedom of marriage to the sound development of personality and safeguarding of human dignity'.[100]

The Yuan focused on the intrinsic and instrumental importance of the freedom of marriage, which is a common value shared amongst heterosexuals and homosexuals. Equal dignity demands that the same essential right to marriage be enjoyed by both groups equally. Further, the court focused on the personal, psychological aspect of the denial of the right to same-sex couples, which is a 'relatively unfavorable treatment' based on an 'immutable characteristic that is resistant to change', therefore, requires protection of individual, subjective dignity of all persons regardless of their sexual orientation. The Taiwanese government's decision to uphold *Interpretation No 748* despite a subsequent referendum against same-sex marriage in the Civil Code further demonstrates the government's commitment to

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98 *Fourie* (n 85) [71].

99 ibid [78].

100 *Re J Y (Same Sex Marriage Case)*, Case No 748 (May 24, 2017) (Taiwan Constitutional Court) (emphasis added).

protect minorities' dignity from the tyranny of the majority.

IACtHR's *Advisory Opinion No 24* is also enlightening as it demonstrates the role of dignity in a proportionality-test framework. The IACtHR considered, amongst other questions, whether the equality provisions in Articles 1 and 24 of ACHR and the right to privacy provision in Article 11(2) of ACHR require the establishment of a legal institution to recognise same-sex relationships.[101] Centring on the notion of dignity, the Court recognises that the lack of consensus amongst American states justifies the 'historical and structural discrimination that such minorities have suffered'.[102] The 'free and autonomous' choice to form family ties 'forms part of the dignity of each person and is intrinsic to the most intimate and relevant aspects of his or her identity and life project'.[103] Similar to *Obergefell* and *Fourie*, the IACtHR identified both an objective impairment of the dignity of homosexual persons based on historical and structural discrimination and a subjective impairment based on the injury of alienation that belittles the self-worth of individuals. On this basis, the denial of same-sex marriage constitutes a violation of the equality provision of the ACHR.

The common theme of dignity in these cases illustrates the central importance of dignity as a paradigm that deals with the underlying nature and effect of discriminatory treatment toward same-sex couples. Although the application of 'dignity' in these cases is not perfectly consistent and involves some degree of imprecision, it is clear that the courts have relied on the concept as more than a mere 'guiding principle', but as a concretised and legitimate reason that necessitated marriage equality. The cases touched on the intrinsic, immaterial, and emotional value of the right to equality in the sense that the social institution of marriage endows intimacy, security, and certainty that cannot be tangibly measured. Contrary to criticisms regarding the indeterminacy of dignity, although 'dignity' is an inherently intangible concept, the courts applied the concept systematically, by analysing the objective and subjective perspectives of dignity, and reached consistent results. The consistency in their results is telling

101 *Advisory Opinion No 24* (n 67) [3].
102 ibid [219].
103 ibid [225].

because the injury to the dignity of homosexual persons is obvious, self-evident, and objectively identifiable and does not demand excessive value-judgment from the courts as long as the courts pay sufficient attention and sympathy to the discriminated persons.

It is argued that dignity should have an even more prominent role in Hong Kong within the proportionality test framework, as demonstrated in *Advisory Opinion No 24*. Whilst overseas cases and their contexts should not be directly transplanted to Hong Kong, it is argued that the concept of dignity and the reality that the denial of same-sex marriage impairs dignity cannot be simply ignored. It is unnecessary to venture into whether the protection of traditional marriage would be a 'legitimate aim' in the context of marriage equality, as did *Advisory Opinion No 24*. Dignity would be most relevant in the third and fourth steps of the proportionality analysis that likely highlight the disproportionate impact of the denial of marriage on same-sex couples. This approach is consistent with previous Hong Kong cases which implicitly imported considerations of human's inherent dignity whereby a narrow margin of appreciation (the 'reasonably necessary' threshold) is applied to discrimination against a person's immutable personal characteristics.[104] Importantly, by considering the objective and subjective aspects of the dignity of homosexual people, the court would be better placed to assess the underlying notion that the right to equality seeks to protect and thereby refocus the judicial discourse on the real crux of the issue. Therefore, there is a strong case to be made that same-sex marriage should be recognised under BL25.

## C. Alternative Forms of Recognition

Despite strong authorities and cogent reasons for the recognition of same-sex marriage, the reality of the Hong Kong social and legal landscape is probably not mature enough for the judicial recognition of marriage equality. Chan forcefully contends that this is due to the separation of powers between the courts and the legislature where the courts would be reluctant to intervene in a

104 *QT* (n 4) [108].

social matter like marriage equality.[105] The reality of judicial restraint is likely in Hong Kong especially where there is no same-sex civil partnership as a baseline to allow courts to build up to marriage equality incrementally. Nonetheless, the appropriately balanced approach at this stage would arguably be the availability of an alternative recognition of same-sex relationships such as, 'civil unions, registered partnerships or other legally recognised status for same-sex couples' in *MK* and or the recognition of foreign same-sex marriage in *Sham Tsz Kit*. In *MK*, the court considered the declaration for alternative recognition as 'tantamount in all but name to a right to contract a same-sex marriage' and the government is not under a positive obligation to recognise these alternative legal frameworks.[106][107]

The reasoning in this part of the judgments is also dubious. The courts asserted that there is no difference between same-sex marriage and alternative recognitions in 'substance' without much exploration into the meaning of civil partnerships. Whilst it is true that the rights and obligations in a civil partnership are more-or-less identical to those in a marriage, civil partnerships are fundamentally symbolically and socially different from a marriage. This is why the global LGBT movement does not stop at civil partnerships. To use the words of the CFI in *MK*, marriage is a fundamental social institution that 'has deep-rooted social and cultural connotations'.[108] Civil partnership inherently lacks the cultural and historical associations that marriage carries. Quite the opposite to what was said in *MK* and *Sham Tsz Kit*, marriage and civil partnership, whilst similar in 'form', differ fundamentally in 'substance'. Stemming from this analysis, what civil partnership seeks to protect, therefore, is the reality that same-sex couples can

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105 Johannes Chan, 'From Eliminating Discrimination on the Ground of Sexual Orientation to Same-Sex Marriage: the Hong Kong Experience' (2021) 27(3) Australian Journal of Human Rights 442, 462.

106 *MK* (n 5) [45]-[54].

107 At the time of writing, *Sham Tsz Kit* CFA has not been decided. Whilst one may find solace in the CFA's decision to correct its course and direct the HKSAR Government to enact an alternative framework to recognise same-sex partnerships, it must be noted that this decision was reached via the right to privacy under HKBOR14. The applicant's argument under BL25/Article 22 of HKBOR for the relief of alternative recognition of same-sex partnership was rejected once again for the same reason given in *MK*: *Sham Tsz Kit* CFA (n 5) [15]-[16], [189]-[192]. Thus, the CFA in *Sham Tsz Kit* reached the right result, but on wrong footing.

108 *MK* (n 5) [8].

have a stable, co-dependent, loving, and enduring relationship as opposite-sex couples, as recognised in *QT*.[109] Civil partnership predominantly respects the right of same-sex couples to form a family that comes with the relevant legal guarantees and obligations. Therefore, it is questionable that the court conflated 'marriage' with 'civil partnership' when the two institutions carry vastly different meanings, connotations, and impacts on the couple.

## D. Marriage vs Civil Partnership and the Protection of Traditional Marriage

The above analysis appears to show that both marriage and civil partnership are possible pathways to give effect to the right to equality. However, a crucial question remains: should the court grant marriage equality or civil partnership to same-sex couples? Although 'dignity' would demand that marriage equality should be granted, considering the competition between 'dignity' and the protection of traditional marriage in the third and fourth stages in the proportionality test, granting civil partnership would be the more likely, balanced outcome based on existing jurisprudence.

The 'protection of traditional marriage' justification is multifaceted and complex in the marriage equality context. *Advisory Opinion No 24* had rejected such justification outright as a legitimate aim to withhold marriage equality,[110] based on similar reasoning proffered in Part II of this paper. However, given the divisiveness of this issue, a more nuanced approach is probably required in the Hong Kong social context. Therefore, it is not proposed that the 'Traditional Marriage' Aims should be rejected as a legitimate aim, but rather, the question of the restriction against same-sex marriage/civil partnership should be resolved at the necessity and proportionality stages.

The first question that the court needs to answer is whether the protection of traditional marriage and same-sex marriage are mutually exclusive. It is an unwarranted assumption that these

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109 *QT* (n 4) [48].

110 *Advisory Opinion No 24* (n 67) [220].

interests are diametrically opposite one another – the conferral of marriage equality or alternative recognitions do not directly conflict with the 'protection of traditional marriage'. As held in *Fourie*, the recognition of same-sex marriage:

> 'is in no way inconsistent with the right of religious organisations to continue to refuse to celebrate same-sex marriage. The two sets of interests involved do not collide, they co-exist in a constitutional realm based on accommodation of diversity'.[111]

This is premised on a fundamental principle of diversity and peaceful co-existence within a democratic society. Similar reasoning is actually reproduced in Hong Kong jurisprudence in *Leung Chun Kwong*, albeit being an equal protection case, where it was held that there was no rational connection between denying employment and tax benefits to the same-sex couple and the aim of protecting traditional marriage because such denial of benefits does not encourage opposite-sex couples to marry or discourage them from getting married.[112] The same can be said in the same-sex marriage cases. Opposite-sex couples are not encouraged to marry by the knowledge that their gay counterparts cannot do the same. By the same token, opposite-sex couples are not discouraged from marriage by the knowledge that their gay counterparts can do so. Allowing same-sex marriage would therefore not erode traditional forms of marriages as opposite-sex marriages would most certainly outnumber same-sex marriages. Therefore, the protection of traditional marriage should not be a convincing reason to reject same-sex marriage when balanced against the injury to the dignity faced by same-sex couples, as outlined above.

The second question to ask is whether civil partnership, but not marriage, would be a 'less restrictive' alternative to the lack of recognition for same-sex couples. As held in *Oliari v Italy*, civil partnership goes beyond mere passive recognition of de facto relationships, but it 'bring[s] a sense of legitimacy to same-sex couples' and touches on 'facets of an individual's existence and

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111 *Fourie* (n 85) [98].

112 *Leung Chun Kwong* (n 4) [62]-[76].

identity'.[113] Thus, civil partnership gives effect to the dignity of same-sex couples on an objective, institutional and subjective, emotional level. However, as explained above, the cultural, historical and emotional association to marriage does not apply to civil partnership. When taking the 'dignity-based' argument at its full force, civil partnership would arguably still fail to safeguard the dignity of same-sex couples (at least for the time being since civil partnership is still a relatively novel institution). Following the reasoning in *Advisory Opinion No 24*, the IACtHR held that despite the same rights and obligations in substance, civil partnership 'carries no purpose, except to socially mark and stigmatise same-sex couples, or at least convey that they are undervalued'.[114] Nonetheless, in light of the societal reality regarding LGBT rights in Hong Kong, it appears that granting civil partnerships would be an acceptable and balanced alternative to same-sex marriage, at least in the foreseeable future. The reasoning in *Oliari* is convincing as it also applied a 'dignity-based approach' in recognising the hardship and humiliation faced by same-sex couples, but exercised some judicial restraint due to the lack of a European consensus and the region's historically non-secular background. Thus, it appears that if dignity is properly considered, there are even stronger reasons for Hong Kong to allow civil partnership than in *Oliari* even if marriage equality is not granted.

With the recent *Sham Tsz Kit* case decided by the CFA, it is unlikely that the issues of marriage equality will be re-litigated any time soon. Notwithstanding the declaration of violation and direction to the HKSAR Government to recognise same-sex partnership via alternative frameworks, this decision was arrived at the expense of the right to equality, both in its content and significance as a constitutional right. *Sham Tsz Kit* is unlikely the final word on the matter. It remains to be seen whether the highest appellate court of Hong Kong will right its course in the future.

113 *Oliari* (n 76) [174], [177].
114 *Advisory Opinion No 24* (n 67) [224].

# IV. THE CALL FOR A DIGNITY-BASED APPROACH

## A. Problems With the Existing Approach

The analysis on the equal protection and marriage equality cases illustrates several shortcomings in the treatment of the right to equality in Hong Kong jurisprudence, which are attributable to a failure to properly consider the dignity of sexual orientation minorities.

First, the courts often relied on unsubstantiated assumptions and heteronormative stereotypes and biases. For the equal protection cases, the unquestioning acceptance of the 'Traditional Marriage' Aims implied an unjustified and discriminatory judicial preference for heteronormativity. Similar assumptions are reflected in the marriage equality cases where the right to equality and the meaning of marriage and civil partnerships were not duly considered.

Secondly, the treatment of overseas authorities is often oversimplified, unprincipled and inconsistent. Regarding legitimate aim in the equal protection cases, cases that rejected the legitimacy of the 'Traditional Marriage' Aims were somehow interpreted as authorities to support the legitimacy of such aim and recent judicial developments were simply ignored. The unconvincing treatment of authorities for and against same-sex marriage in *MK* further exemplified this issue. It calls into question whether authorities were followed as a matter of principle or whether they were used as means to reach a preconceived notion.

Thirdly, the court often circumvented or tip-toed around the main debate concerning marriage equality, presumably due to the judicial reluctance to deal with divisive social issues. The avoidance of difficult questions was evident in *MK* and *Sham Tsz Kit* as seen in the application of *lex specialis* and the cursory rejection of alternative forms of recognition, which were described as a judicial 'sleight of hand'.[115] These problems

[115] Wan (n 72) 10.

enabled excessive value judgment and substitution of the court's subjective views on these important social issues without fully addressing the issue at hand – the right to equality of LGBT applicants.

Ultimately, the problems in the judicial application of the right to equality are due to an inadequate framework to take sufficient account of factors and values that must be properly assessed in the context of equality. It is unavoidable that human rights and constitutional matters would entail some degree of value judgment and subjectivity, but the question is how these value judgments can be properly limited so that courts do not enjoy excessively unfettered discretion in deciding whether the applicant's right to equality deserves to be upheld. Further, value judgment and judicial discretion shall be guided by an appropriate selection of factors so that all relevant and important circumstances are taken into account to reach a fair decision that reflects the spirit of equality rights. As demonstrated, on a theoretical level, dignity forms an undeniable normative basis for the right to equality. On a practical level, overseas jurisprudence on LGBT equal protection and marriage equality cases demonstrate that the theoretical idea of dignity can be applied judicially and is indeed conducive to ensuring fuller protection of the right to equality. It is inevitable to escape the origins of dignity in these cases. Further, the marriage equality cases illustrate the necessity of considering dignity precisely because the meaning of marriage is intangible and spiritual and it requires a deeper investigation into the psychology and mind of persons who are excluded from accessing the institution of marriage. These considerations all point toward the need to take into account dignity more seriously in the Hong Kong courts.

## B. Dignity as a Silver Bullet?

Some may argue that the introduction of the concept of dignity would always operate in favour of the applicant in equality cases and therefore may not be fair or balanced. This assumption misconceives the content of dignity. The inherent dignity of human beings is based on immutable human characteristics that have no bearing on one's merits. In a case not concerning sexual

orientation equality rights, the CFA in *Fok Chun Wa* held:

> 'where, for example, the reason for unequal treatment strikes at the heart of core-values relating to personal or human characteristics (such as race, colour, gender, sexual orientation, religion, politics or social origin), the courts would extremely rarely (if at all) find this acceptable. These characteristics involve the respect and dignity that society accords to a human being. They are fundamental societal values'.[116]

The CFA later identified that 'residential status' did not belong to these categories where the core dignity of the person may be harmed and therefore a wide margin of appreciation was accorded to the government in respect of social policies. On the other hand, in *Q & Tse Henry Edward v Commissioner of Registration*, concerning the constitutionality of the Commission's policy requiring specified gender affirmation surgery before the gender marker on Hong Kong Identity Cards of transgendered persons can be changed, the CFA found the policy unconstitutional and it led to the 'embarrassment, humiliation, violation of dignity and invasion of privacy' of the applicants in daily routine activities involving their identity cards.[117] Similarly, in *Sham Tsz Kit*, in considering the right to privacy under HKBOR14, the CFA once again drew on 'the private life and dignity of partners in same-sex relationships', which are infringed upon by the exposure of details of the public lives of same-sex partners to public scrutiny and opprobrium as a result of the lack of proper framework recognising their relationships.[118] Whilst the CFA was only concerned with the right to privacy, not the right to equality, this case clearly demonstrates that 'dignity' is a tangible and real factor to take into account when intimate personal characteristics are involved. Discrimination based on these personal or human characteristics would necessarily entail harm to the equal dignity of the discriminated persons. The contrast between *Fok Chun Wa* and *Q* and *Sham Tsz Kit* aptly demonstrates

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116 *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 [77].

117 *Q v Commissioner of Registration* [2023] HKCFA 4, (2023) 26 HKCFAR 25 [46], [55], [65], [92].

118 *Sham Tsz Kit* CFA (n 5) [145].

that it is indeed possible to distinguish between situations where dignity is or is not called into question. Thus, it is an incorrect assumption that all discrimination cases would entail the same level of scrutiny on any injury of dignity.

Nonetheless, where personal human characteristics are involved, including sexual orientation, dignity would almost always operate in favour of the applicant. Based on the multi-factor framework, the consideration of the historical disadvantage (objective impairment), the actual impact on the right and interest and dignity of the discriminated person (subjective impairment), and the nature of the measure in question would likely indicate that the discriminatory measure constitutes an impairment on the homosexual applicant. However, this balance in favour of the applicant is precisely reflective of the intention to afford protection of the right to equality. The purpose of the right to equality is to protect against unlawful discrimination and the scope for 'lawful discrimination' based on one's immutable personal characteristics is hardly justified, as the CFA stated in *Fok Chun Wa*, the court would 'extremely rarely (if at all) find [these forms of discrimination] acceptable'.[119] Therefore, one should not deem 'dignity' as a silver-bullet argument for the homosexual applicant, but rather, as a correction of previous judicial approaches that neglected a significant factor when applying the proportionality test.

## C. Proposed Reform to the Hong Kong Judicial Framework

The above analysis illustrates the necessity to amend the existing approach in judicializing the right to equality. Given that the existing two-stage approach is consistent with many foreign jurisdictions, this paper does not advocate for an overhaul to change the existing legal framework and a replacement of an overarching 'dignity' test, which may justifiably attract criticisms for its open texture and vagueness. However, dignity should play a larger role in the proportionality test to limit the scope of justified discrimination and ensure that permissible discrimination

[119] *Fok Chun Wa* (n 113).

does not possibly impair one's dignity.

With the introduction of the fourth stage in the *Hysan* proportionality test, the court places greater emphasis on individualism and the personal impact on the applicant. The relevance of dignity is self-evident in the fourth step. It would, however, be misguided to only consider dignity as relevant to the final step in the proportionality test. Rather, since the concept of dignity is integral to the right to equality, dignity should be a factor at different stages of the *Hysan* proportionality test, including the legitimate aim, necessity, and proportionality stages. The multi-factorial approach as expounded in *Harksen*, particularly the concept of an objective and a subjective impairment on dignity, should be considered to assess whether (1) certain aims can be deemed as 'legitimate aims', (2) the scrutiny or margin of appreciation to be given when assessing the strict necessity of the measure, and (3) the appropriate balance between the injury suffered by the applicant and the overall societal benefit. The inclusion of the consideration of dignity within the existing proportionality framework also defends against criticism regarding the indeterminacy or open-textual nature of dignity. For the sake of completeness, it should be clear that the concept of dignity should not become an additional requirement for the applicant to prove, which would otherwise be inimical to the protection of equality.

## CONCLUSION

The failure to address human dignity in assessing the right to equality has led to an insufficient appraisal of the depth of the protection of the right. The decisions in Hong Kong courts regarding equal protection for the LGBT community and marriage equality reflect the deficiency of the consideration of the dignity of the sexual orientation minority, leading to dissatisfactory and inadequate reasoning that often imported unwarranted assumptions and unjustified assertions. This is most obviously played out in the treatment of the 'protection of traditional marriage' argument in both categories of cases where

heteronormative stereotypes and mindsets crept up on judicial reasoning. Consulting overseas jurisdiction, a gradual awareness of 'dignity' is and should be a real and influential factor in the consideration of the right to equality, which is needed to afford full protection under this right.

# A COMPARATIVE STUDY ON THE LEGAL CONSEQUENCES OF CHANGE OF CIRCUMSTANCES AND THE DOCTRINE OF FRUSTRATION

Pan Xiangjun*

*A change of circumstances and the doctrine of frustration represent two crucial legal rules in civil and common law jurisdictions respectively. After the implementation of the Civil Code in 2021, China has further refined the provisions for change of circumstances. There has been extensive scholarly discourse concerning these two doctrines, both domestically and internationally, regarding their theoretical foundation, concepts, scopes, and applicable conditions. However, the comparison between them remains inadequate, particularly with regard to a less mature exploration of their legal consequences. Through a normative research method, case studies and economic analysis, this article seeks to compare the legal consequences of change of circumstances and the doctrine of frustration. It will combine legislation with judicial practice, and contrast the characteristics of the two doctrines in terms of parties' autonomy, cost efficiency, predictability and fairness in different jurisdictions. Then, it will examine the lessons that could be learned from comparative legal principles. Finally, this paper puts forward suggestions for improving change of circumstances in mainland China.*

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# INTRODUCTION

Since 2020, the issue of contract performance has become more serious. Article 533 in the Chinese Civil Code defined the conditions of application and legal consequences of change of circumstances and introduced renegotiation between parties. In the era where global transactions are increasing in frequency and uncertainty, it is necessary to compare change of circumstances in civil law with the doctrine of frustration in common law. At the theoretical level, through comprehensive comparison, we can distinguish the perplexing relationship between the concepts of change of circumstances, force majeure and the doctrine of frustration of a contract. Understanding the contractual value orientation behind the different legal systems is of great significance for filling legal loopholes as well as completing the interpretation of change of circumstances in the Chinese Civil Code. At the practical level, studying the differences between the two systems internally guides China's judicial practice and provides a reference for China's trials in terms of applicable conditions and legal consequences. Meanwhile, this may externally reduce friction in international trade, avoid bearing unnecessary losses and risks, and serve growth of the commercial market and economic globalisation in the end.

Although previous literature has advanced both areas, certain limitations remain. The research is not adequately well observed from a comparative standpoint. When examining change of circumstances in civil law, the majority of current research only briefly mentions the principle of frustration in common law. Similarly, articles on common law are typically confined to the doctrine of frustration without comparing the two systems. Besides, the framework of comparison is rather general and lacks further exploration of the similarities and differences between the two in depth. Some comparisons are in a vacuum, separated from practice or regardless of social background.

In light of this, the article compares the two in detail regarding the implications of substantive law and identifies the boundaries between different approaches. Specifically, this paper will first briefly summarise the elementary similarities and differences between change of circumstances and the doctrine of frustration.

Then it will focus on the legal consequences of the two systems and further compare the following aspects of the two systems under different philosophies, cultures, customs and jurisdictions: (1) the legal consequence regarding ensuring the parties' autonomy; (2) the cost and effectiveness of the method; (3) the predictability of the judgment; and (4) the fairness of the consequence. Also, it will attempt to give some brief suggestions from the perspective of statutory interpretation for change of circumstances in the Chinese context. The main research methods are normative analysis, empirical case study, and economic analysis. It should also be noted that the discussion of frustration is set in the background of the common law system rather than merely limited to English law.

## I. A PRELIMINARY CONTRAST OF TWO RULES

From the perspective of concepts, change of circumstances denotes that situations that are the prerequisite for the legal nexus have changed unpredictably for reasons not owing to the parties.[1] Prior to the enactment of the Civil Code, scholars contributed to clarifying the definition,[2] asserting that the boundary between change of circumstances and force majeure is blurred.[3] After 2021, scholars have explained that the application of change of circumstances should satisfy five elements according to Article 533.[4] While the doctrine of frustration was a component of the rule of the impossibility of performance aiming at relieving parties' obligations under certain circumstances, this was employed with caution in the UK.[5] There are three types, including

1 Chengxin Peng, '"Qingshibiangeng Yuanze" de TanTao [Discussion on the Doctrine of Change of Circumstances]' (1993) 3 Faxue [Law Science] 23.

2 Yi Wang, 'Xinguan Feiyan Yiqing, Bukekangli yu Qingshi Biangeng [COVID-19 Epidemic, Force Majeure and Change of Circumstances]' (2020) 460(3) Faxue [Law Science] 36.

3 Shiyuan Han, 'Bukekangli, Qingshi Biangeng yu Hetong Jiechu [Force Majeure, Change of Circumstances and Discharge of Contract]' (2014) 11 Journal of Law Application 62-64.

4 Jianyuan Cui, *Hetong Fa [Contract Law]* (4th edn, Peking University Press 2021) 130-33.

5 Maoqi Wang, 'Lun Yingguo Fa Lvxing Buneng Guize de Shanbian [On the Transmutation of the English Law Rule of Impossibility of Performance]' (2005) 3 FaXue Pinglun [Law Review] 160.

impossibility, impracticability and frustration of purpose. But corresponding conditions and restrictions should also be satisfied in the process of the application of frustration.[6]

As for functions, the purpose of frustration is to distribute risks and achieve justice.[7] This is consistent with the effect of change of circumstances. In practice, however, change of circumstances is not frequently applied by the judiciary.[8] The doctrine of frustration is also often criticised for its rigid results.[9] Scholars argue that the court should determine the allocation of expenditure resulting from unforeseen events based on the human general perception.[10] Comparatively speaking, a pluralistic resolution mechanism for supervening events could maintain flexibility and correspond to the wishes of the parties.[11] Nevertheless, some declare that granting relief to neither party and maintaining the status quo is reasonable because its function should not be filling in the gaps in the contract through judicial intervention; otherwise, the value of fairness is difficult to measure.[12]

These two regimes are similar in theoretical basis, and both have undergone a transition from the doctrine of contractual estoppel to a gradual relaxation.[13] They can also be used to

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6 Vernon Valentine Palmer, 'Excused Performances: Force Majeure, Impracticability, and Frustration of Contracts' (2022) 70 Am J Comp Law 72.

7 Meilan Sun, 'Yingmei Fa Qiyue Soucuo Zhidu de Lishi Yanjin [The Historical Evolution of the Common Law Contract Frustration Regime]' (2003) 1 Faxue [Law Science] 125.

8 Gordon YM Chan, 'The Doctrine of Change of Circumstances in Chinese Contract Law' (2011) SSRN <https://www.researchgate.net/publication/228282731_The_Doctrine_of_Change_of_Circumstances_in_Chinese_Contract_Law> accessed 10 December 2022.

9 GH Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 543.

10 Arthur L Corbin, 'Frustration of Contract in the United States of America' (1947) 29 J Comp Legis & Intl Law 7.

11 Aldo Petrucci, 'Roman Jurisprudence and the Doctrine of Change of Circumstances in Modern European Law' (2016) 6 Global Law Review 16.

12 Andrew Kull, 'Mistake, Frustration, and the Windfall Principle of Contract Remedies' (1991) 43 Hastings Law J 54.

13 Xuefeng Zhou, 'Lun Dalu Faxi de Qingshi Biangeng Yuanze yu Yingmei Faxi de Hetong Luokong Yuanze [A Study on the Doctrine of Frustration in Common Law and Change of Circumstances in Civil Law]' (1999) 2 Shandong Shenpan [Shandong Judges Training Institute Journal] 6.

redefine the validity of a contract while differing in their scope of application, consequences and requirements for contingencies.[14] Likewise, it is argued that change of circumstances in a broad sense, including force majeure, is an expression of cause. Whilst the doctrine of frustration refers to the outcome of the impractical performance of the contract, it is identical in content and function.[15] Some suppose that the scope of contract frustration containing war, a ban issued by the government, and damage or a missing of the subject matter, is wider than change of circumstances, and thus encompasses both force majeure and change of circumstances in civil law.[16]

A review of the literature shows that change of circumstances and the doctrine of frustration differ in their theoretical foundations, conceptual scope, conditions for application and legal consequences.

**Table 1**

*Main differences between change of circumstances and frustration*

| Differences | Change of Circumstances | Doctrine of Frustration |
|---|---|---|
| **Theories** | The doctrine of the disruption of the basis of business; good faith | Implied terms; radical change in obligations; foundation of the contract |
| **Conditions** | Unforeseeable by the parties; not belonging to commercial risk; unfair to continue to perform | Impossibility; impracticability; frustration of purpose |
| **Consequences** | Rescission or modification of the contract; renegotiation | Termination of the contract; exemption from obligations |

14 Peizhao Che, 'Hetong Luokong, Qishi Biangeng yu Bukekangli [Frustration, Change of Circumstances and Force Majeure]' (1996) 24(2) Journal of Lanzhou University (Social Sciences) 52.

15 Qingsong Wang, 'Qinshi Biangeng Zhidu yu Hetong Luokong Guize Bijiao Yanjiu [A Comparative Study of Change of Circumstances and Frustration in Contract]' (2006) 34(5) Journal of Xinjiang University (Philosophy and Social Sciences) 52.

16 Shiyuan Han, *Hetong Fa Zonglun [The Law of Contract]* (4th edn, Law Press 2018) 492; Sun (n 7) 125.

# II. COMPARISON OF LEGAL CONSEQUENCES

## A. Comparison of Parties' Autonomy

### 1. CIVIL LAW

This section will discuss in depth whether the legal consequence of change of circumstances is flexible and effective in safeguarding the autonomy of the parties to the contracts.

To begin with, renegotiating in change of circumstances leaves the parties adequate room for bargaining. Renegotiating ought to be a right under Chinese law enabling parties' will.[17] Firstly, a party proposing to negotiate is adversely affected. This provision allows the disadvantaged party to choose whether or not to negotiate, so as to facilitate the reaching of a mutual agreement, resolve disputes efficiently, and save judicial resources. Secondly, the Civil Code does not outline the legal repercussions of non-compliance with a renegotiation. As they suffered a loss for change of circumstances, imposing additional obligations on them would be unfair. Instead, when parties fail to reach an agreement through negotiation, the modification or rescission of the contract by the court is the inevitable path to solve disputes rather than the negative effect of breaching the renegotiation.[18] Thirdly, it creates a mechanism for pushing back because it convinces a rational

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17 Regarding the nature of renegotiation, academics have had controversial arguments like obligation, unreal obligation, advocacy theory, or right theory. See Shiyuan Han, 'Qingshi Biangeng Ruogan Wenti Yanjiu [A Study of Certain Issues of Change of Circumstances]' (2014) 26(3) Peking Univ Law J 665; Liming Wang, 'Qingshi Biangeng Zhidu Ruogan Wenti Tantao [Some Issues of the Change of Circumstances Regime]' (2019) 3 Fashang Yanjiu [Studies in Law and Business] 10; Wen Sun, 'Lun Qinshi Biangeng Qingxing de Hetong Biangeng [The Deconstruction of Renegotiation under Change of Circumstances]' (2020) 3 Zhongguo Yingyong Faxue [Law-Based Society] 169-170; Suhua Zhang and Yuan Ning, 'Lun Qinshi Biangeng Yuanze Zhong de Zai Jiaoshe Quanli [The Right to Renegotiation in the Doctrine of Change of Circumstances]' (2019) 13(3) Tsinghua Univ Law J 155.

18 Lianjie Shang, 'Fengxian Fenpei Shijiao Xia Qinshi Biangeng Fa Xiaoguo de Chongsu [The Reshaping of the Legal Effects of Change of Circumstances in the Perspective of Risk Allocation]' (2021) 1 Fazhi yu Shehui Fazhan [Law and Social Development] 186.

party to realise that communicating by themselves is preferable to the court changing or discharging the contract.[19] Therefore, this arrangement ensures that parties' intents drive this antecedent dispute resolution with flexibility.

In addition, modification of the contract is one of the legal consequences of a change in circumstances in civil law. Though civil law jurisdictions have different approaches to the application of rescission or modification, the main distinction lies in the manner, the subject of the request for modification and the burden imposed on the parties. They inherently guarantee the autonomy of the parties. According to article 1467 of the Italian Civil Code, a party that has been negatively impacted may request a rescission, and the other party may amend the contract equitably if he would avoid rescission. Thus, the amendment is based on the revocation request.[20] Conversely, Germany and China take different measures. In the German Civil Code, unsuccessful modification of contracts is a basic premise of dissolution, so the latter is considered a complementary method.[21] In Chinese practice, when encountering a change of circumstances, courts should seek to modify contracts and adjust the rights and obligations in accordance with the principle of encouraging transactions and strict conformity to the contract. Courts must be cautious about rescinding the contract unless it reaches a necessary extent.[22]

Italy takes a more roundabout measure to the continuation of the contract, whilst Germany and China are more direct. This is also evidenced by German judicial practice. Notwithstanding some practices of terminating the contract in Germany, for instance, in one case where termination of the contract was the mere practical solution under the impacts of war,[23] Germany still typically takes the form of raising the payment threshold,[24]

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19 Wang (n 17) 10.

20 Petrucci (n 11) 19.

21 Carsten Herresthal and Defeng Xu, 'Qingshi Biangeng Yuanze Yanjiu [A Study on the Doctrine of Change of Circumstances]' (2004) 16(4) Peking Univ Law J 409.

22 *China Railway Erju Co Ltd v Xiamen Tengwangge Real Estate Development Co Ltd* [2020] Case No 629 of the Supreme People's Court.

23 Markesinis Basil, Unberath Hannes and Johnston Angus, *The German Law of Contract: A Comparative Treatise* (2nd edn, Bloomsbury Publishing 2006) 340.

24 ibid 338.

reducing the value of the contractual performance proportionally or adjusting the timing of performance.[25] These changes in obligations will achieve an optimal result. Therefore, modifications give parties another chance to cooperate and keep the transaction from deviating too much from what the parties originally intended. When the change is not possible, recission releases parties from the original contract, which fully respects the wishes of the parties.

In the process of modification of the contract, Chinese courts will first take into account whether both parties are willing to perform the contract. For instance, in the *Lv Lixin Case*, courts argued that the parties agreed to continue performing the involved contract, and it was not applicable to be dissolved.[26] Second, the nature of the contract and the specific circumstances are considered, which is more in line with the interests of the parties. In the *Xindongfang Case*, even though Jinghui Property Company expressly disagreed with the rescission of the contract, and the parties did not form a consensual agreement on this issue, rescission is relatively reasonable after implementation of the Double Reduction Policy in China.[27] Third, courts will look at the original contract between the parties and the proposed request. The judgment in the *Shenyang Textile Equipment Factory Case* shows that the factory's claim to change the contract was legitimate and justified, and the contract should continue to be performed with this solution put forward by the factory.[28] In similar situations, courts played a role in confirming and supporting parties' choices rather than completely replacing their decisions. Apparently, Chinese courts still uphold a party-centred ideology, respect parties' intention to modify or rescind the contract, and pay attention to their suggested alternatives for amendment while exercising their discretion.

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25 ibid 339.

26 *Lv Lixin v Beijing Shunyi District Gaoliying Town Six Village Economic Cooperative Land Management* [2022] Case No 11946 of the Beijing Third Intermediate People's Court.

27 *Jinan New Oriental Training School Co Ltd v Jinan Jinghui Property Management Co Ltd* [2022] Case No 6710 of the Jinan Licheng District People's Court of Shandong Province.

28 *Shenyang Xingshui Pipe Fitting Factory v Shenyang Textile Equipment Factory* [2022] Case No 11599 of the Shenyang First Intermediate People's Court of Liaoning Province.

## 2. COMMON LAW

In common law jurisdictions, the consequence of frustration is frequently the termination of a contract based on the principle of the sanctity of the contract.[29] Such conduct prevents judges from intervening in contracts and free sale, and from imposing their will on the parties thereto. However, as common law evolved, contracts are no longer always terminated in a single and straightforward way.[30]

Firstly, the legal consequences of frustration are governed by a combination of case and statutory provisions. The English Law Reform Act 1943 and the Singapore Frustrated Contracts Act moderate the rigidity of common law rules with a practical effect similar to that of a contract modification to some extent.[31] Section 2-613 of the US Uniform Commercial Code (UCC) gives parties the option to 'either treat the contract as avoided or accept the goods with the due allowance from the contract price for the deterioration or the deficiency in quantity', while Section 2-614 of UCC offers for substituted performance.[32] All these actions have the implication of slightly altering the contract.

Moreover, it is also possible to make small modifications or achieve a comparable effect by other means in the common law. When it comes to mutual mistakes, even though courts may rectify documents rather than contracts,[33] there is a strong incentive to seek rectification of contracts where the parties have substantial mistakes but wish to keep the validity of the contract. It covers not only the errors in written documents but also substantive issues. If both parties share the continuing intention of correcting the particular matters, a remedy may be available,[34] but this strategy

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29 Ewan McKendrick. *Contract Law: Text, Cases, and Materials* (9th edn, OUP 2020) 680.

30 ibid 681-682.

31 Lei Chen and Qiyu Wang, 'Demystifying the Doctrine of Change of Circumstances Under Chinese Law — A Comparative Perspective from Singapore and English Common Law' (2020) JBL 485.

32 Uniform Commercial Code (2002), ss 2-613 and 2-614.

33 *Mackenzie v Coulson* (1869) 8 LR 368, 375 (Eq).

34 Catharine MacMillan, 'Remedies for Common Mistake and Frustration' in Roger Halson and David Campbell (eds), *Research Handbook on Remedies in Private Law* (Edward Elgar Publishing 2019) 223-229.

remains highly controversial.[35]

In a force majeure situation, the implementation of frustration in a contract is not prohibited by the force majeure clause.[36] Thus, it can overcome the limitations of the effects of frustration by extending the time for the parties to perform, suspending or modifying the contract and providing more selection.[37]

Frustration may lead to the outright termination of a contract, instead of the unjust enrichment that may produce a more acceptable outcome.[38] In *Aluminum Company of America v Essex Group*, the parties determined the price of aluminium based on the Wholesale Price Index (WPI).[39] Then, the performance was rendered impractical due to excessive cost increases for the plaintiff, and the WPI price was unable to cover costs. The plaintiff had the right to modify the contract and remove the WPI clause.[40]

## 3. SUMMARY

The position is different towards problem-solving in the two systems. Change of circumstances is a general concern of legal effects, but most frequently applied in the field of obligation law,[41] aiming at maintaining the balance of interests and relationships between the parties and avoiding unfairness that would result from supervening events.[42] Hence, it uses renegotiation and contractual modification to deal with rights and obligations between the parties. At the same time, it attempts to keep the transaction and

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35 See Terence Etherton, 'Contract Formation and the Fog of Rectification' (2015) 68 CLP 367, 371.

36 Ewan McKendrick, *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press 1995) 34.

37 ibid 9.

38 MacMillan (n 34) 229-232.

39 *Aluminum Company of America v Essex Group Inc* 499 F Supp 53 (WD Pa 1980).

40 ibid.

41 Shangkuan Shi, *Zhaifa Zonglun [General Theory of Obligation Law]* (1st edn, China University of Political Science and Law Press 2000) 444.

42 Huixing Liang, 'Hetong Fa Shang de Qingshi Biangeng Wenti [Change of Circumstances in Contract Law]' (1988) 6 Chinese Journal of Law 35.

achieve the purpose of the contract when both parties do not commit negligence. However, the doctrine of frustration is only applicable in contractual relationships, where the principle of strict liability is in force. With the help of frustration, both parties are released from bearing liabilities in an impossible, impracticable or deadlocked contract. Additionally, another reason why renegotiation and modification are not popular in common law is that those regions did not experience severe inflation that is difficult to regulate in many civil law countries.[43] However, it has still been suggested in common law that when a long-term contract is interrupted by the supervening event, at least the party in a favourable position should be legally obliged to negotiate in good faith.[44] Further, he may be bound to accept an equitable adjustment offered by the other party.[45]

Overall, although having different theoretical foundations, values and objectives, the two approaches respect parties' intentions within their respective legal frameworks. It is difficult to assess which approach is more compatible with the principle of parties' autonomy since when coming across unpredictable events, some may desire to rescind the contract, while in other cases, they may want to modify it. From this perspective, the civil law solution appears more flexible and adaptive, with a sufficient range of options at the first level and assuring fairness through the judge's intervention at the second level.

## B. Comparison of Cost and Efficiency

Given that change of circumstances is more complex and varied in legal consequences, is it more ineffective and expensive than the doctrine of frustration? To what extent do the two systems differ in cost and efficiency? This section seeks to answer these questions.

In order to clearly compare the costs of the two systems, this paper outlines the costs of the entire process on the basis of

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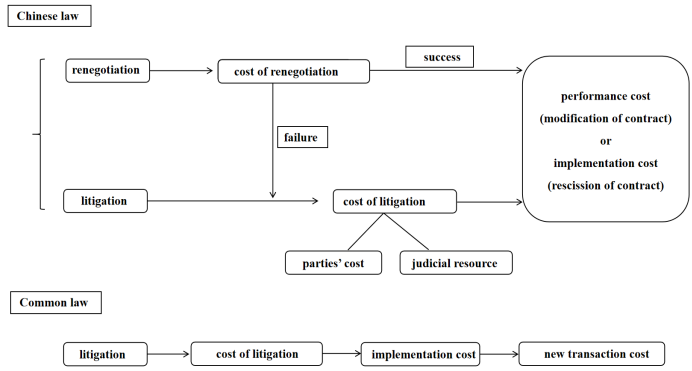
43 Joseph M Perillo, 'Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts' (1997) 5 Tul J Intl & Comp 27.

44 Richard E Speidel, 'Court-Imposed Price Adjustments Under Long-Term Supply Contracts' (1987) 76 Nw U L Rev 404.

45 ibid 370.

previous studies.

**Figure 1**
*Cost of Change of Circumstances and Frustration*




The comparison demonstrates, firstly, that renegotiation in Chinese law has advantages in terms of cost efficiency. Since both parties seek to reduce the cost of information collection, they would adhere to the principle of good faith and disclose information during the negotiation process to resolve the disagreement.[46] As a result, it is the most effective way to settle a dispute. However, there is a risk of incurring additional costs of litigation if the renegotiation fails.

If the parties choose to proceed with litigation directly instead of negotiation, the expenses that include not only manpower, materials, and finances but also judicial resources far exceed the cost of renegotiation. At this stage, the costs of the doctrine of frustration are cheaper because contracts automatically come to an end, which is a bit rigid, so judges have less space for discretion over the contracts, and rulings may be expensive to make. In contrast, changes of circumstances are guided by general equitable principles with modification and rescission, requiring judges to exercise the initiative and weigh more factors in achieving a more satisfactory solution for the parties.

In the specific discretionary process, legal economists have proposed the theory of superior risk bearer for contractual

46 Zhang and Ning (n 17) 150-151.

frustration.[47] Some may contend that the criteria for judging the optimal risk burden are inadequate. They introduced three additional aspects on top of this, namely the risk allocation function, the information harvesting function and the incentive function.[48] These rules do guide common law judges to make decisions more effectively and predictably than only under the guidance of the principle of fairness, but it is doubtful whether the justice of the outcomes can really be guaranteed.

Secondly, using an ex-ante analysis and focusing on the changes in the behaviour of parties as a result of the judgment,[49] it could be discovered that due to the rigidity and uncertainty of the outcomes of frustration, parties who lack control over risks will have incorporated force majeure or hardship clauses into their contracts in advance.[50] The parties involved are often the first responsible for their own interests. Force majeure clauses arise from a consensual agreement reached after much deliberation between the parties. They are effective in addressing supervening events and reducing the cost of frustration. Nevertheless, regardless of whether the court can genuinely consider the interests of both parties during the litigation process and make a relatively fair judgment, there is a paternalistic tradition in Chinese civil law. Hence, the parties may rely heavily on court decisions. At this point, the doctrine of frustration in common law is less costly.

Lastly, after litigation, parties may enter into new agreements with others when released from a frustrating situation and terminate the contract. This process will incur transactional costs. Given that the costs previously invested by both parties have

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47 The most efficient bearer of the risk in disputes in transactions is the party who is more knowledgeable about the likelihood and the severity of the risk, or is in a better position to ensure and prevent the risk from occurring. See Richard A Posner and Andrew M Rosenfield, 'Impossibility and Related Doctrines in Contract Law: An Economic Analysis' (1977) 6 JLS 90.

48 Marta Cenini, Barbara Luppi and Francesco Parisi, 'Law and Economics: The Comparative Law and Economics of Frustration in Contracts' in Ewoud H Hondius and Hans Christoph Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (1st edn, CUP 2011) 33-39.

49 Ward Farnsworth, 'Ex Ante and Ex Post' in *The Legal Analyst: A Toolkit for Thinking about the Law* (University of Chicago Press 2007) 3-12.

50 McKendrick (n 36) 38-39.

become sunk costs, the dissolved contract is also a waste of resources. Change of circumstances, on the other hand, encourages continuing transactions to fulfil the purpose of the contract through modification. Consequently, it minimises the expenses and risks of the parties to conclude the new deal. When both parties to the contract have a common interest in completing the transaction, the deadlock and contradictions between the two cannot prevent the benefits obtained from this business. Through the previous renegotiation, litigation or mediation procedures, the information disclosure of both parties is so detailed that the parties are more motivated to promote the realisation of the renewed contract than to seek a new business partner.

## C. Comparison of Predictability

The predictability of legal consequences affects the effectiveness of the application of both rules, parties' behaviours when entering into a contract and the method of dispute resolution. The more predictable the judgments are, the greater the parties' sense of certainty and faith in judicial practice, and the regimes will function more effectively. This predictability can be broken down in two categories. The first is the parties' prediction as to whether change of circumstances or the doctrine of frustration can be identified; the other is how the court will deal with it once the rule is applicable.

### 1. Prediction of Application

Although this article focuses on the legal consequences of two rules, the constituent elements directly impact the outcome as well, determining whether an objective condition could be recognised as change of circumstances or the doctrine of frustration.

Article 533 in the Chinese Civil Code witnesses a notable revision, i.e. the deletion of the 'not force majeure' and the exclusion of commercial risks.[51] This reform is reasonable. Firstly,

[51] Civil Code of the People's Republic of China (2021), Art 533.

commercial risk is an inherent and non-extinguishable risk of engaging in business activities. It is not only a product of the market economy, but also an opportunity cost that the parties have to bear in order to obtain benefits in complex transactions. Secondly, while it is impossible to foresee change of circumstances, it may be feasible for the parties to predict the adverse consequences of business risk, deal with price fluctuations in advance, mitigate potential losses and take extra precautions when entering a contract.[52] Thus, it is asserted that commercial risks could be expected to a certain extent. In a level playing field, whoever is able to detect business risks will have a greater advantage. Finally, the parties are the subject of taking responsibility for the foreseeability of commercial risks. As they fail to predict the risks, they are responsible for a certain amount of negligence that cannot be blamed on the counterparty.

The alteration of Chinese legislation brings more certainty to change of circumstances, which also tends to align with the rationale for defining the doctrine of frustration in common law. The principle of strict liability is established in the doctrine of frustration in English law. If the inability to fulfil the purpose of the contract is due to the negligence of one party, it is a self-induced frustration that will be precluded from the standard situation of this doctrine.[53] Hence, the parties understand entirely the criteria for judging whether scenarios are accepted as the doctrine of frustration. They will not resolve the unfavourable consequences attributable to their own negligence by frustration. Both parties to the contract have a better comprehension of transactions. They can more accurately predict whether the situation at hand would lead to a change of circumstances.

Common law, however, goes further than this. The common law system emphasises more on the substantive elements rather than assessing whether the continuation of the contract is manifestly unfair to one party or not in civil law. In particular, neither legal system makes a strict distinction between force majeure and a change of circumstances. In China, regardless of

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52 Zhen Yu, 'Dui Wanshan Woguo Qingshi Biangeng Yuanze de Sikao [On Improvement of the Principle of Change of Circumstances in China]' (2017) 37(4) Journal of Xian Jiaotong University (Social Sciences) 112.

53 *J Lauritzen AS v Wijsmuller BV (The Super Servant II)* [1990] 1 Lloyd's Rep 1.

whether the underlying cause is force majeure or other rules, the supervening events would be regarded as change of circumstances as long as the performance of the contract is obviously unfair.[54] This suggests that fairness has been placed as a high priority and connected directly to the conditions of change of circumstances in Chinese law. Yet, the component is so ambiguous that it should be dependent on the legislative and judicial interpretations.

In contrast, the measurement criteria under common law are far more stringent and certain. As previously mentioned, a contingency must render the performance of the contract impossible, impracticable or frustrated in purpose. If there are legal and feasible alternatives, the contract is still valid.[55] On the one side, the common law system distinguishes between fairness and the doctrine of frustration. And on the other side, it excludes temporary or partial impracticability of performance from the frustration rule and sets a mutually agreed-upon and declared contractual purpose as the criterion for determination. While this strategy may make it more difficult for the parties to resort to the doctrine of frustration, it strengthens the stability of the principle through clearly limiting the constitutive requirement and provides the parties with a more realistic expectation of how the doctrine would be applied.

## 2. Prediction of Concrete Outcomes

Even if the contingency is found to be a scenario of change of circumstances or the doctrine of frustration, the two legal systems differ significantly in their approach, with the common law being the more predictable in terms of specific decisions. The concrete outcome does not refer to a complete or precise prediction, but at least a relatively clear idea of the general direction of the judgment, the way in which the judge will deal with it, the advantage of two parties, and the probable result of the

54 Liming Wang, 'Minfa Dian Hetong Bian Tongze Zhong de Zhongda Yinan Wenti Yanjiu [Research on Major Difficulties in the General Rules of Contracts of the Civil Code]' (2020) 1 Yunnan Shehui Kexue [Social Sciences in Yunnan] 86.

55 GH Treitel, 'Alternatives and Frustration' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1995) 377-380.

proceeding.

Common law settlements are generally rigorous and, for the most part, traceable, whereas civil law solutions are diverse. Renegotiation, modification of contracts, and discharge of agreements are all possible legal consequences of a change of circumstances. Judges also have more substantial discretion and intervention in paternalistic civil law jurisdictions.

According to Chinese cases, it can be noticed that courts in civil law systems modify contracts based on the principle of fairness, but the outcomes are not necessarily what the parties had expected. For instance, in one contract of tenancy case, both the rent borne by the lessee and the decoration loss of the lessor were reduced to half of the original amount.[56] The lessor's claim for heating costs was also dismissed by the judge.[57] The decision was far from what the plaintiff and defendant had asserted before. In another tenancy dispute, the court ruled that the lessee should pay the lessor three months' rent for the rent-seeking period to compensate for the three months' vacancy, in accordance with the principle of fairness.[58]

However, in common law jurisdictions, the courts do not, in theory, have the authority to change a contract's terms. If the courts were granted the power to modify agreements, it would increase the ambiguity of judgments. The parties' intentions at the time of concluding a contract and its initial provisions would lose their significance. Therefore, courts should not be allowed to modify the legality of contracts under the guise of a so-called justice,[59] to preserve the consistency and maintain the stability of the common law system. In the end, civil law judgments are less foreseeable than the common law method in terms of contractual modifications, rescissions, and benefit distribution.

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56 *Beijing Xindu Shenglan Hotel Management Co Ltd v Other Housing Lease Contract Dispute* [2023] Case No 4381 of the Beijing Third Intermediate People's Court.

57 ibid.

58 *Beijing Xueersi Education Technology Co Ltd v World Trade Plaza (Shenyang) Real Estate Co Ltd* [2023] Case No 2500 of the Shenyang First Intermediate People's Court of Liaoning Province.

59 Ewan McKendrick, 'The Regulation of Long-term Contracts in English Law' in Beatson and Friedman (n 55) 312-314.

## D. Comparison of Fairness

Termination of contract is recognised by both a change of circumstances and the doctrine of frustration. This article will discuss the fairness of the two systems in view of the retrospective effect, the method and time of rescission, and the allocation of risks.

Regarding the retrospective effect, the two share similarities in that parties are discharged from further obligations while liabilities already performed remain in force from the date of frustration in common law.[60] In essence, Article 566(1) of the Chinese Civil Code supports the argument of the compromise by stating that performance shall cease from the time of rescission but new responsibilities of returning arise for those already completed.[61] Therefore, the ways and time to rescind the contracts and how to settle benefits and losses are crucial.

### 1. Methods and Time of Rescission

In terms of the methods to terminate a contract, parties in China have the right to request the court or the arbitration institution for rescission. This right of action, intervened by justice, guarantees a fair and proper outcome but reduces efficiency and increases costs.[62]

As for the time of termination, Chinese practice often adopts judgments taking effect as the benchmark.[63] However, it is not reasonable as a broad time span may exist from the time parties sued to the courts' final decisions, during which the litigation could be accomplished.[64]

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60 *Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265.

61 Han (n 16) 674.

62 Han (n 3) 64.

63 *Xue Ersi Training School of Xicheng District, Beijing v Cultural Relics Press Printing House Co* [2022) Case No 7041 of the Beijing Second Intermediate People's Court.

64 Mengmeng Du, 'Qingshi Biangeng Zhidu Shiyong Zhi Falv Xiaoguo Yanjiu [Research on the Legal Effect of the Application of Change of Circumstances]' (Master's thesis, Huazhong University of Science and Technology 2021) 74.

The time of termination under frustration is when an unforeseen event occurs which renders the performance impracticable or impossible. The UK follows automatic rescission, whereas the US adds a duty of notice to the other party if a contract is frustrated, but does not affect the automatic discharge of the contract.[65]

The point at which a contract is rescinded relates to the allocation and treatment of subsequent risks and obligations, especially in continuing contracts, which may have a greater impact on the interests of the parties. Automatic discharge is contrary to the principle of fairness and not sufficient to give the parties enough time to respond and take action. Therefore, judicial practice under neither system could guarantee complete fairness at this level. Nonetheless, due to the intervention of the judiciary and the renegotiation of parties in China, it is possible to determine by the court, at its discretion on a case-by-case basis, that the termination of the contract is achieved at the time of reaching an agreement, the occurrence of supervening circumstances, or the receipt of the notice respectively, which is more flexible and equitable than the common law.

## 2. Allocation of Risks

When it comes to the distribution of benefits and risks following the recission of a contract, China still adheres to the principle of a judge-led approach. More specifically, the Civil Code does not stipulate a specific allocation of liability. Compared to the viewpoint of exemption of liability or compensation for damage, the argument for reasonable allocation is more widely accepted in the Chinese context.[66] The parties cannot be directly exempted from liability under a change of circumstances. Instead, the judge should reasonably adjust and compensate based on the principle of fairness.[67] The practice varies as to how damages should be apportioned, with some cases revealing an equal sharing

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65 Hans Smit, 'Frustration of Contract: A Comparative Attempt at Consolidation' (1958) 58(3) Columbia Law Review 307.

66 Chaohui Zhu, 'Qianfu yu Shuangwu Hetong Zhong de Dengjiaxing [The Equivalence Behind the Bilateral Contract]' (2020) 32 Peking Univ Law J 128, 153-154.

67 Han (n 3) 65.

standard.[68]

English law has undergone a transition from not being able to return sums paid before,[69] to supporting a claim for a refund where the consideration had completely failed,[70] then to a situation where sums paid in pursuance of the contract before discharge should be recoverable even if it is not a total failure of consideration.[71] It was also held that a party who has fulfilled part of their obligations might claim a return from the other party for that proportion up to the valuable benefit obtained.[72] US cases go further and suggest restitution claims for the value of service or compensation for reliance loss.[73] If the party has not gained any benefit, the legislation of British Columbia, New South Wales and South Australia still recognises damages arising from the situation. However, the loss caused by supervening events should be undertaken equally between the parties.[74]

To sum up, first, as opposed to common law, there is a certain rationality in emphasising more on the mechanism of allocation of risks and benefits from the beginning rather than on the measurement of valuable benefits in Chinese law. The valuable benefit refers to the end product or actual benefit received by one party in accepting performance from the other party, which is also regarded as the upper limit of compensation.[75] This result-oriented measurement, on the one hand, ignores the fact that the end product is not equal to the costs and expenses incurred by the performing party, so that the risk may be fully transferred to the performing party in the situation that the end product is destroyed by unforeseen events. On the other hand, some services are not only embodied in the product but also have value in the process. Therefore, compensation for the innocent party is better suited to stressing the loss rather than the final product.

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68 *Xing Zhishan v Paille Burger Shop in Gaoxin Development Zone* [2021] Case No 3405 of the People's Court of Jinan High-tech Industrial Development Zone, Shandong Province.

69 *Chandler v Webster* [1904] 1 KB 493; Ewan McKendrick (n 29) 713.

70 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32.

71 Treitel (n 9) 598-599.

72 Law Reform (Frustrated Contracts) Act 1943, s 1(3).

73 John P Dawson, 'Judicial Revision of Frustrated Contracts: The United States' (1984) 64 BU L Rev 1, 4.

74 Treitel (n 9) 607.

75 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 784.

Second, the majority of common law countries are continuing to follow the path of co-existence of general rules and exceptions to the prohibition of refunds, while legalisation of discretionary powers in the obligation of restitution is absent.[76] Chinese law, on the contrary, explicitly uses the principle of fairness as the foundation of the judge's discretion on the allocation of benefits and risks. Despite that discretion also being criticised for relying too much on moral intuition, which is uncertain in a morally diverse society and should be treated with caution,[77] it can at least create a framework comprising discretionary factors that can make a difference in conjunction with a logical and systematic civil law system. Common law, consisting of precedents, is not always sufficiently developed to cope with new circumstances emerging in reality.

Third, equal sharing of losses is a component of both legal systems. Even though this means is designed to increase the predictability of the law, it violates the principle of fairness and does not take into account the actual situations of the parties. Since there are no explicit provisions in China, a more reasonable allocation mechanism can be developed through legal interpretation. For example, the dynamic system theory acts as a framework in which factors like parties' property status, financial income, risk-bearing capacity, the possibility of insurance, and more could be covered on the basis of equal distribution of losses and risks.[78] However, when the rule of equal sharing is enacted in common law jurisdictions through legislation or cases, judges may not be motivated to examine additional factors. This strengthens the stability of the doctrine of frustration in common law, but may also weaken the fairness between the parties to the contract.

## CONCLUSION

In conclusion, both rules have demonstrated vitality in their

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76 Aiping Li, 'Yingmei Weifa Hetong Jinzhi Fanhuan Guize de Liwai [Exceptions to the Illegal Contract's Restitution-Forbidden Rule in Common Law]' (2013) 6 Huanqiu Falv Pinglun [Global Law Review] 107, 114-115.

77 Peter Birks, 'Recovering Value Transferred under an Illegal Contract' (2000) 1 Theoretical Inquiries in Law 155, 160.

78 Shang (n 18) 187.

respective legal systems and respect the parties' intentions. It is most efficient to reach a successful agreement through renegotiation in changes of circumstances. However, if bargaining fails, frustration is less costly, but faces the cost and risk of engaging in a new transaction after terminating the contract. In terms of predictability, compared with multiple legal consequences and the greater discretion of judges in civil law jurisdictions, the doctrine of frustration in common law is more predictable and stable in terms of system application and specific judgment results. They also continue to explore more equitable ways of compensating and returning, but the approach to the allocation of the benefits and risks of change of circumstances is more flexible.

Although the doctrine of frustration is slightly more rigid in common law systems, it still has value. When applying change of circumstances in China, it is also essential to thoroughly understand the attitude of common law jurisdictions towards the corresponding rules. Drawing on valuable elements in common law, change of circumstances in China would become more mature.

Specifically, firstly, from the characteristics of the two legal systems, despite the fact that China lacks rigorous obligation legislation, the pertinent rules and principles of contract law to a certain extent play a key role and govern this field. In obligation law in civil jurisprudence, various categories of rules and regulations may also be interlinked and compatible. For example, the Covid-19 epidemic may qualify for the application of change of circumstances in the French Civil Code on some occasions, whereas it may also be defined in practice as force majeure in France.[79] Undoubtedly, we are supposed to place change of circumstances in the entire civil law system and link it with force majeure, substantial misunderstanding, contract rescission and unjust enrichment to create a comprehensive and coherent logical framework.

Secondly, in view of the respect for the wishes of parties and the cost of implementing the doctrines, there is no need to interpret renegotiation as an obligation in Chinese law. From the point of

[79] Court of Appeal of Colmar, 12 March 2020 (Case No 20/01098).

view of parties' autonomy, the starting point of renegotiation is intended to provide the parties with the freedom to bargain and communicate with the other. If it is stipulated as an antecedent obligation, it may be suspected of interfering with autonomy in private law, which is a manifestation of excessive legal paternalism as well. In the meantime, a number of discretionary elements in the rules of renegotiation lead to confusion in judicial decisions.[80] When a change of circumstances occurs, it is up to the parties to decide whether to negotiate directly or to resort to judicial settlement immediately, rather than allowing the law to make the choice for them. The design of the rule that leaves it to parties themselves to determine whether or not to renegotiate, as a right entitled to them, is the result of respect for autonomy. From the angle of costs and efficiency, it is apparent from the mentioned analysis that if the renegotiation fails, it will intensify the expenses of both parties with regards to communication, information, time, and more. In other words, the renegotiation process is a mixture of risk and opportunity. Only the party in a disadvantaged position can most clearly consider the whole picture in his or her own interest and decide whether he would like to exercise this right and bear the possible outcomes of the failure or extra costs he may incur.

Thirdly, with respect to predictability and fairness, it is precisely because of the uncertainty of outcome and the obscure notion of fairness in civil law that China can draw conclusions from cases to establish a case law mechanism with typical Chinese characteristics. On the one hand, conditions of application should be collated, and a typology of different contracts could be distinguished to meet the challenge of overarching scenarios in practice. Contracts for construction projects, for instance, are susceptible to dynamic variety in socio-economic environments, with long periods and possible fluctuations in construction materials, equipment costs and labour costs seriously affecting the performance of the contract. These should essentially be a situation for the application of a change in circumstances.[81] However, judges are inclined to refute the claims of modifications

[80] Zhang and Ning (n 17) 144.

[81] Jiayou Shi, '"Minfa Dian" Jianshe Gongcheng Hetong Xiuding de Zhengyi Wenti [Controversial Issues Concerning the Amendment of Construction Project Contracts in the Civil Code]' (2020) 6 Social Science Journal 104.

of the previously agreed construction price or period proposed by the contractor on the basis of change of circumstances, given that there is a significant change like abnormal weather.[82] In such situations involving multiple interests, guidance from case law is required to make corresponding adjustments in accordance with legal precedent and similar contracts.

On the other hand, civil law is capable of going beyond purely the principle of fairness, taking into account a wider range of factors when making decisions to achieve distributive justice.[83] Therefore, within the dynamic systems theory framework, more specific approaches to dealing with the distribution of interests and damages in the event of a change of circumstances should be summarised and refined, in conjunction with various cases, to study the timing of rescission, the way of performance, and the adjustment of cost and price. Only in this way could we improve the rules for return and compensation after the rescission of the contract, and finally guide the courts to make more scientific and reasonable judgments. Ultimately, change of circumstances would be adapted to new situations and maintain openness while being more detailed, precise and stable, and solve problems efficiently and fairly.

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82 Jielei Chen, '"Minfa Dian" Qingshi Biangeng Guize de Jiaoyi Xue Jieshi [Legal Dogmatics Interpretation of the Rules About Change of Circumstances in the Chinese Civil Code]' (2022) 3 Zhongguo Zhengfa Daxue Xuebao [Journal of CUPL] 199.

83 Jun Yi, 'Minfa Gongping Yuanze Xin Quan [New Interpretation of the Principle of Fairness in Civil Law]' (2012) 4 Faxue Jia [The Juris] 54, 65-67.

# THE FLEXIBLE ALTERNATIVE TO THE 'PRESUMPTION OF SIMILARITY' AND SOLE RELIANCE ON EXPERT EVIDENCE

Tsui Zealot Kenneth*

*Traditionally, a question of foreign law is being treated as a question of fact in the common law system. Foreign law is presumed to be similar to that of the common law, unless it is proved to be different by way of expert evidence. In Brownlie v FS Cairo (Nile Plaza) LLC (Brownlie 2), Lord Leggatt asserted that, 'the old notion that foreign legal materials can only ever be brought before the court as part of the evidence of an expert witness is outdated'. He suggested that in this day and age, it is no longer necessary for the court to introduce expert witnesses in relation to a matter of foreign law. Instead, in some cases, it may be sufficient to know what the text says. To examine whether Lord Leggatt's viewpoint shall be adopted as a 'modern' or 'flexible' approach in dealing with a question of foreign law, this article will first compare different approaches adopted in the continental law system and common law system, followed by a discussion on whether Lord Leggatt's proposal is genuinely a new approach. Ultimately, this article sides with Lord Leggatt's viewpoint that flexibility should be allowed when dealing with questions of foreign law. Yet, his proposal is not a new invention as it only reminds practitioners of the flexibility under the current common law approach.*

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# INTRODUCTION

The way of proving a question of foreign law has been a perennial problem in the study of conflict of laws. The orthodox method adopted by common law jurisdictions (e.g. the English Courts, the Courts of Hong Kong, and the Canadian Courts) is to treat the question of foreign law as a question of fact, proved by way of adducing expert evidence, typically a lawyer who knows the foreign law.[1] In *Brownlie v FS Cairo (Nile Plaza) LLC* (*Brownlie 2*),[2] Lord Leggatt suggested that the general practice is outdated. Instead, he suggested that due to the prevalent use of the internet and enhanced accessibility of information, it might not be compulsory to consult foreign lawyers or adduce expert evidence to find and understand the text of foreign law. In other words, the courts should and are capable of enjoying flexibility when dealing with the proof of foreign law. To facilitate the discussion, this article will commence with an introduction to the approach in continental law, the 'orthodox' common law approach in proving foreign law and the 'flexible' approach suggested by Lord Leggatt in the obiter of *Brownlie 2*. By comparing the graces and pitfalls of the orthodox and flexible common law approaches, this article argues that foreign law should be proved with flexible approaches yet Lord Leggatt's assertion might be an oversimplification of the situation. This article will focus on the experience of the English courts and English law. It will also draw parallels to other common law jurisdictions such as Hong Kong, Singapore and Canada, as they have rules that are similar to that of English law.

## I. THE CASE OF *BROWNLIE 2*

*Brownlie 2* is a recent Supreme Court judgment that has significant implications for the common law world, as it touches upon (i) service out; (ii) jurisdiction; and (iii) pleading of foreign law. While the three are of equal importance, the current article will only shed light on the pleading of foreign law.

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1 *Dalrymple v Dalrymple* (1811) 2 Hag Con 54, 161 ER 665; *Sussex Peerage Case* (1843) All ER Rep 55, 62 (Lord Brougham).

2 [2021] UKSC 45, [2022] AC 995 [148] (Lord Leggatt JSC).

In 2010, Lady Brownlie and her husband were in a car accident while on vacation in Egypt. Lady Brownlie filed claims against Four Seasons Holdings Incorporated, the company operating the hotel they were staying at. Due to jurisdictional issues, she sought permission to amend her claim and bring it against FS Cairo, an Egyptian company. To serve her claim outside the jurisdiction, Lady Brownlie needed to establish three things: (i) a good arguable case falling within the jurisdictional gateway; (ii) a reasonable chance of success for the claim; and (iii) England and Wales as the appropriate forum for the trial.

FS Cairo appealed the decisions on the tort gateway issue and the foreign law issue in the Supreme Court, arguing that the claims did not meet the requirements and Lady Brownlie had failed to adduce sufficient evidence to prove the relevant Egyptian law. The Supreme Court was tasked to assess these arguments and determine whether Lady Brownlie's claims could proceed against FS Cairo in the English courts. Therefore, when delivering his part of the judgment, Lord Leggatt commented on the methods of proving foreign law. Despite Lord Leggatt's comment being purely obiter and not binding, it is still of high referential value, as it suggested other options to plead and prove a question of foreign law.

## II. THE APPROACH IN CONTINENTAL LAW

In most of the continental European jurisdictions, foreign law is treated as a matter of law as they are recognised and regulated by statutes and case laws.[3] It was also suggested that as continental law judges are obliged to judge according to the law he or she considers applicable, he or she should take the initiative to apply foreign law to fulfil such a duty of case management and adjudication.[4]

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3 Jacob Dolinger, 'Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law' (1995) 12(1) Arizona Journal of International and Comparative Law 225, 225.

4 ibid 226.

Generally speaking, judges could request for the litigants' assistance with deciding and discovering the applicability of the relevant foreign law.[5] Yet, in some jurisdictions, such as Germany, the judge is not bound by the litigants' evidence (e.g. expert evidence) on the foreign law, and has the final jurisdiction to determine the applicability of that law.[6] If the judge does not have sufficient knowledge of that foreign law, he is obliged to investigate, research, interpret and apply such law spontaneously. For instance, in Germany, the German judges are not only obliged to find the relevant statutes but also apply the law in the way it is supposedly applied in that jurisdiction.[7] Therefore, when the German judges are not satisfied with the expert's evidence, they can reject them on their motion as their research endows them with information and grounds to contest the experts.[8] In Switzerland, the judges are presumed to apply foreign law only unless the case falls under stipulated exceptions.[9] Despite the rules for proving foreign law varying among the European continental jurisdictions, they generally have a more active role in ascertaining and applying foreign laws. The French position does not differ much. In France, if foreign law is invoked or proved by one of the parties, the courts will apply it. When a claim relates to rights that the parties are unable to freely dispose of, the court may nonetheless apply the pertinent law *ex officio* even if the parties fail to prove or introduce foreign legislation.[10] However, where only the parties' dispositive rights are at issue in the action, the French trial judges are not obliged to adopt foreign law; in these circumstances, French law will typically be used.[11] As Rainer compares the approaches adopted by the English courts and most of the European continental jurisdictions, he concluded that the prevalent approach in continental law differs from that of common law. Firstly, the litigants in England are not allowed to prove foreign law by simply providing statutory provisions or case authorities as evidence. Secondly, the continental law judges (e.g.

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5 ibid 235.

6 Hausmann Rainer, 'Pleading and Proof of Foreign Law – A Comparative Analysis' (2008) 1 The European Legal Forum I-1, I-7.

7 ibid; see also *Bumper Corp v Comr of Police of Metropolis* [1991] 1 WLR 1362 (CA).

8 ibid I-13.

9 ibid I-9.

10 ibid I-5.

11 ibid I-5.

German judges) can take the initiative in researching, applying the foreign law and contesting the findings.[12]

## III. THE ORTHODOX APPROACH IN COMMON LAW

Unlike continental systems, common law regards foreign law as a matter of 'special'[13] fact instead of taking it as a type of law. When a case involves a question of foreign law, the litigants need to prove it as a matter of fact.[14] While the common law judges will take judicial notice of the law of their own jurisdiction, the litigants will still be required to provide expert evidence to prove the 'foreign law' relevant to the dispute.[15] As common law features an adversarial system, the courts do not take the initiative to apply foreign law. In English courts, the applicability of the relevant foreign law has to be pleaded by the parties and the parties have to establish a sound argument with reference to the chosen foreign laws.[16] The approach adopted in Hong Kong is slightly more relaxed: foreign law is proved by experts through an affidavit instead of pleadings.[17]

In *Brownlie 2*, Lord Leggatt distilled two distinctive rules engaged during the pleadings.[18] Firstly, the default rule states that the English courts will apply English law in case foreign law is not pleaded. That is, when the agreement was expressed to be governed by Chinese law but neither side pleads Chinese law, the English courts would automatically apply English law. Secondly, the 'presumption of similarity' would be applied when a party sought to rely on foreign law but did not provide sufficient evidence in proving it. The presumption is that foreign law is kindred to English law. The 'flexible' approach advocated by Lord Leggatt concerns the 'presumption of similarity'.

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12 ibid I-13.

13 *King v Brandywine Reinsurance Co (UK) Ltd* [2005] EWCA Civ 235, [2005] 2 All ER (Comm) 1 [67] (Waller LJ).

14 *Dicey, Morris and Collins on the Conflict of Laws* (16th edn), Rule 2 [3R-001].

15 *Sims v Marryat* (1851) 17 QB 281, 292.

16 *Brownlie 2* (n 2) [116] (Lord Leggatt JSC).

17 *Agritrade Resources Ltd v Ashok Kumar Sahoo* [2021] HKCFI 685 [26] (DHCJ Anthony To).

18 *Brownlie 2* (n 2) [118], [122] (Lord Leggatt JSC).

To support their pleadings, there are generally four ways to prove the applicability of foreign law: (i) evidence; (ii) judicial notice; (iii) admission; and (iv) presumption.

## A. Evidence

As early as the mid-19th century, the English courts recognised that a sufficiently qualified expert could be relied upon to prove the applicability of foreign law. Such a stance was evinced in the *Sussex Peerage Case*[19] and *Earl Nelson v Lord Bridport*[20]. Upon permission of the court, the parties will have to adduce an expert report, and the respective foreign law experts will need to give oral evidence and be cross-examined at trial. The function and role of the expert are to assist the English courts in determining the content of foreign law, including identifying the relevant statutes, judgments and customs.[21] Occasionally, they might have to address the courts with their opinion on how the foreign courts would decide on the matter.[22] In other words, the experts are only to introduce the applicable foreign law principles and provisions and the courts will apply them accordingly. When cases involve the interpretation of an instrument or document that should be governed by the relevant foreign law, the expert will then be required to give an opinion on what principles and laws should be applied to assist the construction of the contract.[23] Yet the court will have the ultimate decision in deciding whether to apply those principles.[24]

The experts need not be qualified practitioners. Expert evidence on the applicability of foreign law could be given by a person who is qualified to do so based on his knowledge and experience on the particular foreign law, for example, a scholar specialising in that law. Such a loose requirement on the qualification of experts has been adopted in most common law

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19 *Sussex Peerage Case* (n 1).

20 (1845) 50 ER 207, 211.

21 *MCC Proceeds Inc v Bishopsgate Investment Trust plc (No 4)* [1999] CLC 417 [23]-[24].

22 ibid [24].

23 *Cammile and Henry Dreyfus Foundation Inc v Inland Revenue Commissioners* [1954] Ch 672 (CA), 709.

24 *G & H Montage GmbH v Irvani* [1990] 1 WLR 667 (CA), 684G; *Deutsche Bank AG v Comune di Savona* [2018] EWCA Civ 1740, [2018] 4 WLR 151 [15] (Longmore LJ).

jurisdictions, including England and Wales[25] and Hong Kong[26]. However, in *Cassini v Emerald Pasture*,[27] the Court emphasised that the importance of selecting the right expert has not diminished and the suitability of the expertise lies in the way of presenting the issue instead of the expert's reputation. The practices in other common law jurisdictions do not deviate by a lot. In Hong Kong, the courts will evaluate the content of expert evidence, especially underscoring legal reasoning.[28] The courts will reject the piece of expert evidence if they are not satisfied with the quality and legal reasoning of it. Drawing parallels to Canada and the general principles of adducing expert evidence, the court is required to consider four major criteria when deciding the admissibility of the expert evidence, namely (i) relevance, (ii) a necessity in assisting their trier of fact, (iii) absence of exclusionary rule and (iv) whether the expert is suitably and properly qualified.[29]

## B. Judicial Notice

Judicial notice in the law of evidence allows a fact to be introduced if its truth is so well-known, notorious or authoritatively attested, to the point that it could not reasonably be doubted. In practice, the English courts and most of the other common law jurisdictions take judicial notice of international law, as they take judicial notice of branches of English law including principles of international law[30] and foreign laws that are founded on and remain substantially similar to English law[31]. However, foreign law is different from international law, as foreign law refers to laws of other jurisdictions. Save and except for the categories provided by the statutes, judicial notice of foreign law is generally not accepted by English courts. The categories and the applicability of judicial notice of foreign laws are strictly confined. For instance, the courts

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25 Civil Evidence Act 1972, s 4(1).

26 Evidence Ordinance (Cap 8), s 59(1).

27 [2022] EWCA Civ 102 [46]-[49].

28 *Newmark Capital Corp Ltd v Coffee Partners Ltd* [2007] 1 HKLRD 718 [49] (Recorder Paul Shieh SC).

29 *R v Mohan* [1994] 2 SCR 9, 10.

30 Gibran van Ert, 'The Admissibility of International Legal Advice' (2005) 84 The Canadian Bar Review 31, 39.

31 AV Dicey, John HC Morris and Lord Collins of Mapesbury, *Dicey and Morris on the Conflict of Laws* (16th ed, Sweet & Maxwell 2022) [3-006].

could choose not to take notice of the relevant provisions if they believe that they might have been superseded.[32]

As for other common law jurisdictions, the situation is pretty similar, if not stricter. For instance, despite the foreign law being notorious, Hong Kong courts are still not allowed to take notice of it,[33] unless the issue has previously been determined in the jurisdiction and appears in the citable form.[34]

## C. Admission

Parties can admit and contest the accuracy of foreign law. The parties may as well submit that they agreed the court could handle a question of foreign law without introducing any evidence, yet the courts are not bound by their consensus and will evaluate whether to adopt such an approach.[35]

## D. Presumption

Apart from the aforementioned ways of proving foreign law, traditionally, the 'presumption of similarity' previously mentioned could be applicable when there is no evidence or a lack of evidence in proving the content of the law. The 'presumption of similarity' is founded on three facets. Firstly, it is assumed that regardless of the laws applied, most jurisdictions and legal systems will reach similar conclusions.[36] Secondly, it is impractical to request the parties to prove every aspect of the foreign law as it will be unreasonably expensive.[37] Thirdly, the presumption could be rebutted simply by adducing evidence to prove the contrary.[38] Parties which like to rely on foreign law will

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32 *Jasiewicz v Jasiewicz* [1962] 1 WLR 1426, 1428.

33 *Hong Jing Co Ltd v Zhuhai Kwok Yuen Investment Co Ltd* [2013] 1 HKLRD 441 [73.7] (Cheung JA).

34 Evidence Ordinance (Cap 8) (EO), s 59(2). Similar rules have been adopted in Singapore, Evidence Act 1893, s 59; or in England, Civil Evidence Act 1972, s 4.

35 *Beatty v Beatty* [1924] 1 KB 807 (KB).

36 *Brownlie 2* (n 2) [123] (Lord Leggatt JSC).

37 ibid [124] (Lord Leggatt JSC).

38 ibid [125] (Lord Leggatt JSC).

have to adduce evidence, for instance, expert evidence to prove the applicability. Therefore, the 'presumption of similarity' is not absolute and is applicable only when it is 'fair and reasonable' to expect that the foreign law is materially akin to English law, in the sense that there are no material differences between the laws, hence it will not generate substantially different outcomes.[39]

The 'presumption of similarity' has been adopted by most common law jurisdictions, including England, Australia, the United States and Hong Kong. Albeit the general acceptance, the application is still limited as there are examples where the courts refuse to apply presumption.[40] For instance, in *Osterreichische Landerbank v S'Elite Ltd,*[41] the English court remained sceptical over the applicability of the presumption in fraud-related cases that are based on statutes. Later in *The Ship 'Mercury Bell' v Amosin*,[42] the court also declined to apply the presumption when the relevant foreign law is localised or regulatory. It seems that the presumption is less readily applicable when the foreign law is one founded on the domestic statute and involves the social context of the jurisdiction.

## IV. THE FLEXIBLE APPROACH

As described by Ardavan Arzandeh, the 'presumption of similarity' is not a hard-and-fast rule,[43] and the alternative to relying on the 'presumption of similarity' might not necessarily be adducing expert evidence.[44] The major argument is that the court could simply read and interpret the text (i.e. the relevant statutes and case law) without the full assistance of an expert. His Lordship made an example: in a case concerning whether a spouse is entitled to claim damages for bereavement under foreign law, the parties could simply provide a copy of the legislation and the courts could rely on that instead of assuming the similarity

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39 ibid [126] (Lord Leggatt JSC).

40 Anthony Gray, 'Choice of Law: The Presumption in the Proof of Foreign Law' (2008) 31(1) UNSW Law Journal 136, 146-150.

41 [1981] 1 QB 565 (QB), 569G.

42 (1986) 66 NR 361 (FCA).

43 Ardavan Arzandeh, '*Brownlie II* and the Service-out Jurisdiction Under English Law' (2022) 71(3) ICLQ 727, 737.

44 *Brownlie 2* (n 2) [148] (Lord Leggatt JSC).

between the foreign law and English law. In the latest Commercial Court Guide (the Guide), the Commercial Court reminded that parties should consider Lord Leggatt's obiter when raising an issue on foreign law.[45] In later paragraphs, the Commercial Court confirmed that the English courts enjoy flexibility in determining how the content of foreign law is to be proved and such flexibility is endowed by the Civil Procedure Rules (CPR).[46] The Guide proposed a non-exhaustive list of alternatives to the 'presumption of similarity'. Three of these alternatives concern the use and procedures of adducing 'expert evidence'. They include: (i) directing the exchange of expert reports by having full expert reports submitted by both parties but only summoning the experts to give oral evidence when the experts' opinions differ; (ii) allowing parties to deal with the divergence of expert opinions by way of submission instead of cross-examination; and (iii) limiting the role of experts to sole identification of the statutes and principles of the relevant foreign law and deal with the remaining matter by way of submission. Apart from tendering expert evidence, the Commercial Court is open to identifying the relevant source of foreign law by judicial notice and agreement. By comparing the 'alternative' approach with the 'orthodox' approach, it seems that the major difference is that judicial notice and admission have become more readily accepted by the English courts, while the procedures for adducing expert evidence have been minimised. Reading the non-exhaustive list of 'alternatives' as a whole, it is reasonable to infer that the English courts are willing to place less reliance on expert evidence and are more prepared to simply apply the pleaded relevant sources of foreign law in suitable circumstances.

Regarding which approach to be adopted, the Guide suggested that there are a few factors to be considered: (i) the extent of the content of the foreign law in issue; (ii) the importance of the points of difference and to what extent they affect the matter to be determined; (iii) cost efficiency and time consideration; (iv) the source of law and the nature of the issues; and (v) any precedents on the relevant point of foreign law.[47] Despite the Guide proposing some factors to be taken into account, it did not

45 *The Commercial Court Guide* (11th Edition) 2022 [C1.3(f)].
46 ibid [H3.1].
47 ibid [H3.3]-[H3.4].

provide guidance on which option should be available and be chosen in particular circumstances. At most, it suggested that 'limiting the expert evidence to the identification of foreign law' and 'judicial notice and acceptance of parties' agreement' are more appropriate when the question of foreign law is related to common law or its source of common law origin.[48] The English courts will likely have to develop a new set of precedents furnishing more guidance on the application of these alternatives.

After *Brownlie 2*, there are few cases in which the English courts utilised flexibility. In *Soriano v Forensic News*,[49] the court took judicial notice of the 'express malice' rule in US law. The rationale is that English lawyers and English courts know or can safely infer about US libel law, and the principles of 'express malice' could be applied by the court sensibly and safely even without evidence about US procedural law.[50] In *Suppipat v Narongdej*,[51] Calver J held that expert evidence on Singaporean law could be presented in the form of a report without the need of calling oral expert evidence. The reasons are that (i) the Singaporean legal system has its English common law roots, hence English judges are undoubtedly comfortable with analysing and applying the laws without assistance;[52] and (ii) the issue of Singaporean law disputed is a relatively narrow one.[53] These two reasons correspond to the first and fourth factors listed in paragraph H3.4 of the Guide.

Although detailed guidelines have not been formulated, the Guide, along with *Brownlie 2*, *Sonario* and *Suppipat* have manifested in the English courts tending towards adopting flexibility in proving foreign law. To facilitate the analysis, it is helpful to start by scrutinising the advantages and disadvantages of the approach encouraged by the Guide and Lord Leggatt in *Brownlie 2*.

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48 ibid [H3.4(d)].
49 [2021] EWCA Civ 1952, [2022] QB 533 [64] (Warby LJ).
50 ibid.
51 [2022] EWHC 1806 (Comm) [10] (Calver J).
52 ibid.
53 ibid [11] (Calver J).

# V. GRACES AND PITFALLS

## A. Cost-Effectiveness

As stated at the start of this article, proof of foreign law is a matter of fact. As it is a factual matter and it is fairly trite that litigants in common law jurisdiction are not allowed to rely on the finding of fact, thus the rule that the judgments on foreign law do not set precedents has existed since the case of *Re Marseilles Extension Railway* in the late 19th century.[54] Putting it another way, whenever a party wishes to raise a question of foreign law, it has to prove the foreign law.[55] This also explains why the common law courts cannot take notice of foreign laws.[56] One of the exceptions is a case of estoppel where the relevant laws applicable to the same matter have been raised between the same parties in another proceedings, and the case has been decided by a competent foreign court whose decision is final.[57] As common law progresses, a similar exception has been incorporated in the Civil Evidence Act 1972,[58] the Hong Kong statute and in Canadian case authorities.[59] The Singaporean Evidence Act 1893[60] and the Singaporean case laws have left this question open as it was said to be context specific.[61] Reading the proposal in paragraphs H3.3(d), H3.4(d) and H3.4(e) of the Guide, it seems that English courts are encouraging a more extensive use of this exception, particularly when the case involves foreign legal systems that share common law traits.

If parties are required to prove the foreign law every time, it would be time-consuming and uneconomical, as the parties will have to supply the courts with expert reports, followed by oral evidence and cross-examination of the experts during the trial.

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54 *Re Marseilles Extension Railway* (1885) 30 Ch D 598, 602.

55 *Lazard Bros v Midland Bank Ltd* [1933] AC 289, 297–8.

56 *Hong Jing Co Ltd* (n 34) [73] (Cheung JA).

57 *Tugushev v Orlov* [2021] EWHC 926 (Comm) [64]–[66] (Sir Nigel Teare).

58 Civil Evidence Act 1972 (n 25), s 4.

59 EO, s 59(2); *International Air Transport Association v Canada (Transportation Agency)* [2022] FCJ No 1702.

60 Evidence Act 1893, s 59(1).

61 Teo Guan Siew, Wong Huiwen Denise, 'Referring Questions of Foreign Law to the Court of the Governing Law: No Longer "Lost in Translation"' (2011) 23 Singapore Academy of Law Journal 227 [28].

Alternatively, they could introduce the precedent which has decided on the same matter or the courts could, on their motion, take judicial notice of that specific matter, thus skipping the requirement of proving that particular foreign law. In the long run, it could develop a list of precedents, addressing proof of a variety of foreign laws, and reducing the time and effort of kindred applications. Apart from that, the courts could opt for bespoke alternatives based on the complexity of the question of foreign law and the nature of the matter. The courts could simply adopt less-extensive expert evidence when they regard thorough and detailed expert evidence as unnecessary. In *Chep Equipment Pooling BV v ITS Limited & Others*,[62] Deputy Judge Richard Salter QC decided that it was sufficient to apply the presumption of similarity in that particular case, and there is no necessity for calling expert evidence. Compared to the orthodox approach, this could save time by reducing redundancy and attenuating procedures related to expert evidence. From the court's perspective, by dispensing the requirement of oral evidence and superfluous procedures through the use of its case-management power, the courts could free up additional time in a trial.[63]

From the perspective of the litigants, the parties are no longer required to bear the heavy burden and costs of seeking detailed expert evidence. Expert evidence is usually expensive, the necessity of proving foreign law with expert evidence inevitably prolongs the trial, consumes time, and increases the cost. By adopting the flexible approach, the litigants will not have to dispute the applicability of foreign law through rounds of exchange of expert reports, oral evidence and cross-examination, which would add complications, inconvenience and expenses to the original proceedings.[64]

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62 [2022] EWHC 741 [48] (Deputy Judge Richard Salter QC).

63 *Suppipat* (n 53) [10] (Calver J).

64 *Kim Michael Productions Pty Ltd v Tropical Islands Management Ltd* [2010] NSWSC 269 [84] (Howie J).

## B. Substantial Justice

Originally, the 'presumption of similarity' is applied when there is no evidence to the contrary[65] and the alternative to the presumption is to tender expert evidence.[66] On the surface, the 'presumption of similarity' renders practical justice by allowing the application of foreign law.[67] In substance, the application of the presumption is de facto equating the rules of statutory interpretations and constructions of the foreign jurisdiction with that of the domestic jurisdiction, thus causing disparity in their application. That being the premise, the way of dealing with the proof of foreign law with the 'presumption of similarity' is not without criticism. Scholars have lambasted the presumption as a 'grotesque proposition',[68] that will lead to a divorce from reality and context as the ultimate assumption that the application of *lex causae* (i.e. foreign law) is identical to *lex fori* (i.e. domestic law) is purely fictitious.[69] In *Damberg v Damberg,* the court stated that it was ethically questionable to apply the presumption in that case, as it would involve accepting facts that are theoretically not true.[70] Simply put, the 'presumption of similarity' encompasses the simplification of foreign laws and the neglection of the differences, causing injustice.

The line of argument above suggested that in practice, the 'presumption of similarity' is not the most preferable method of proving foreign law. As a matter of fact, scholars such as Fentiman asserted that the true role of 'presumption of similarity' is to sanction the parties who seek to rely on foreign law but fail to or

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65 *Brownlie 2* (n 2) [108] (Lord Leggatt).

66 ibid [148] (Lord Leggatt).

67 Justice PLG Brereton, *Proof of Foreign Law – Problems and Initiatives* (Address to the Sydney University Law School Symposium: The Future of Private International Law, 16 May 2011) <www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Brereton/brereton160511.pdf> accessed 20 December 2022.

68 Adrian Briggs, 'The Meaning and Proof of Foreign Law' (2006) LMCLQ 1, 4.

69 *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54 [36] (McHugh J).

70 [2001] NSWCA 87 [155]–[156] (Heydon JA).

refuse to prove it.[71] Such a view has been echoed by Lord Leggatt in *Brownie 2*.[72]

By expanding the range of alternatives to the presumption, the courts are no longer confined to either adopting full and complete expert evidence on every occasion and going through the tedious procedures or applying a presumption of similarity. Instead, the courts enjoy flexibility and could (i) apply the law spontaneously when the source of law is similar to the common law, (ii) acknowledge the foreign law through judicial notice when the law is already known to the court, and (iii) apply the foreign law when it is mutually agreed by the parties. This ultimately allows more occasions where the courts can apply foreign law in lieu of forcibly assuming and leaving disparity between applications of laws, as the alternatives are considered as offering 'better evidence'. Cases in the example are the aforementioned *Soriano* and *Suppipat*, as English courts can simply, safely and confidently apply the laws without extensive assistance of experts. They know full well about the applicable laws (in these cases, US libel law and Singaporean law respectively). The flexibility permits accurate applications of law while saving costs and averting forceful presumptions that might result in alienated application and decision. In Lord Leggatt's words, these alternatives allow the courts to access direct evidence (i.e. the provisions, cases of foreign laws supplied in the absence of expert witness) and narrow the potential of relying on the presumption.[73]

## C. Potential Problems in the Long Run

In the 1950s, there were numerous pieces of research on 'proving foreign law' in the United States (also a common law jurisdiction). The major discussion surrounds the quest for an alternative to courts being tasked with the duty to ascertain foreign law as it is burdensome for the judges to overcome the complexity of

71 Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Clarendon Press 1998) 150.
72 *Brownlie 2* (n 2) [149] (Lord Leggatt).
73 ibid [149], [151] (Lord Leggatt).

linguistic, theoretical and practical differences between laws.[74] Sommerich and Bush suggested a way out is to introduce expert witnesses that are professional in the relevant foreign law.[75] However, the suggestion faced carping on the strength of expert witnesses. In particular, critics were concerned that the experts' testimony might be demolished by skilful cross-examination.[76] Sommerich and Bush argued against the critiques, as they were adamant that (i) the presence of expert witnesses, itself, would have helped the court by translating the laws and answering the questions of the judge and of the counsels,[77] and (ii) the unfair use of cross-examination would not affect the judgment of the competent and experienced court.[78] Accordingly, they insisted that cross-examination of experts have to be kept in fairness to the litigating parties, while the weight of evidence will be decided by the court.[79]

As far-fetched as it may sound, the debate between critics and Sommerich and Bush is applicable to Lord Leggatt's proposal. Essentially, Lord Leggatt and the Guide seeks to curtail the complexity and redundancy of calling upon expert witnesses, when the judges deem it appropriate. It may spark disquiet about the fundamentals of fair play, as foreign law experts are not necessarily requested to give oral evidence or be cross-examined, in turn subsiding the cross-examination of experts and the opportunities for contestations.

The natural solution has been embedded in the Guide. Paragraph H.3 suggested that (i) experts will still be called upon for oral evidence in case of divergence, and (ii) conflicts between expert evidence could be dealt with by way of submission. It conveys that there will still be opportunities for the litigants to contest the others' expert opinion and fairness is still vouchsafed. This is where the problem truly lies: at the end of the day, the dividing opinion and the contestation of evidence will only be transported from the courtroom to written submissions.

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74 Otto C Sommerich and Benjamin Bush, 'Expert Witness and the Proof of Foreign Law', (1953) 38(2) Cornell Law Review 125, 160.

75 ibid 160.

76 ibid.

77 ibid 145, 160.

78 ibid.

79 ibid 160.

Ultimately, it is reasonably foreseeable that the cost will only be shifted from the cost of hiring and listening to foreign law experts to the cost of having lawyers arguing on paper and reading long-winded submissions.

At the present moment, it is not a significant problem, as the practice has not transformed. Yet, there are examples in other areas of law which could be taken reference from. It is the traditional approach to divide a judicial review application into 'leave application' and 'substantive hearing'.[80] The rationale of 'leave application' is to require the applicant to provide ample evidence but not to overload the judge with extraneous materials, so that leave can be granted or rejected swiftly to save the costs of the court and the respondent (i.e. the decision-making body).[81] Unfortunately, due to the growing complexity of cases and the change in legal practice, a lot of leave applications prepared by lawyers become 'excessively complicated'.[82] The unnecessarily long applications barred the courts from a quick perusal of the application. The same problem could be faced if the courts adopt the flexible approach and order the proof of foreign law to be dealt with merely by means of written submissions. The parties, just as the applicants of judicial review, might intentionally provide excessively detailed evidence in the hope of compensating for the lost opportunity of explaining verbally, or unintentionally bombard the courts with unclear and verbose drafting of submission. Another example is how Singaporean courts and the courts of New South Wales prove each other's laws. In pursuant to their respective rules on determining issues of foreign law and the Memorandum of Understanding, Singaporean courts and the courts of the New South Wales are able to (i) direct the issue of foreign law to be determined by the courts of that jurisdiction, and (ii) answer questions about Singaporean law or laws of New South Wales for the purpose of foreign judicial proceedings.[83] Yet, the

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80 Johannes Chan, *Application for Leave for Judicial Review: A Practical Note* (1999) Law Lectures for Practitioners, 165.

81 ibid 187–88.

82 *Kwok Cheuk Kin v 律政司刑事檢控專員梁卓然* [2019] HKCFI 900 [11] (Chow J).

83 JJ Spigelman, *Law and International Commerce: Between the Parochial and the Cosmopolitan* (Addressed to the New South Wales Bar Association, 22 June 2010) <deliverypdf.ssrn.com/delivery.php?ID=552114115001090029009097124017095027046082018033091033077096127073112095107115 0

Chief Justice of the New South Wales Supreme Court reminded that the approach might not be preferred by parties and might not necessarily cut costs, as the engagement of counsel to prove foreign law is often proved to be more expensive than the cost of hiring experts.[84] To prevent the shifting of cost from introducing full and complete expert evidence to other forms of cost, the English courts (or other courts that adopt the proposal of Lord Leggatt) have to carefully formulate guidance and solutions to this potential problem.

Overall, the flexible approach bears more fruit than snags. However, it really depends on how the rules will be developed in the fullness of time, as precedents and further guidelines by the courts will be pivotal.

## VI. HOW SHOULD THE QUESTION OF FOREIGN LAW BE PROVED IN COURT?

This article concurs with Lord Leggatt's view that courts shall not be required to solely rely on extensive and full expert evidence to prove foreign law in every single case. The main argument is that it can save time and costs, while the courts have always been capable and competent of proving and applying foreign law. However, it remains sceptical about (i) the 'innovativeness' of the flexible alternatives formulated by the Guide with reference to Lord Leggatt's obiter, and (ii) how foreign laws could be proved by simply understanding what the text says.

### A. Old Wine in a New Bottle?

As previously mentioned, the mechanisms listed in paragraph H3.3 of the Guide are not without limit. The courts are encouraged to consider factors in paragraph H3.4 when choosing alternate

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[84] ibid.

mechanisms.[85] If one delves deeper into the substance of the factors, it is not hard-pressed to realise that those alternatives are more readily applicable when the source of foreign law is related to the common law system or one that the courts have familiarity with due to previous experiences. Specifically, in paragraph H3.3(d), judicial notice is said to be appropriate in these circumstances.[86] *Id est*, the judicial notice of foreign law is appropriate when the source is a branch of common law or the domestic courts are familiar with it.

Meanwhile, as rightly summarised by Lord Leggatt, the 'presumption of similarity' only applies where it is 'reasonable to expect that the applicable foreign law is materially similar to English law'.[87] To rephrase, it connotes that the 'presumption of similarity' shall only apply when the foreign law is by and large kindred to English law.

Comparing the Guide with the principle distilled by Lord Leggatt, the application of 'judicial notice' will unlikely differ by much from that of the 'presumption of similarity', as the applicable circumstances are roughly identical. Furthermore, paragraph H3.4(e) states that the alternatives are more readily applicable when there is already an admissible English precedent on the concerned point of foreign law.[88] In practice, 'judicial notice' based on reasons as such would reach the same outcome as adopting the rule stipulated in section 4 of the Civil Evidence Act 1972.[89] After all, the 'alternatives' in the Guide and the Civil Evidence Act 1972 allow the courts to take notice of and adopt previous judgments on the same matter of foreign law of common law origin.

Barring that, in paragraph H3.3(d), the Guide suggested that courts may be prepared to accept the agreement of parties on the source of foreign law and its importance and nature.[90] There is

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85 *The Guide* (n 47) para H3.4.
86 ibid para H3.3(d).
87 *Brownlie 2* (n 2) [126] (Lord Leggatt).
88 *The Guide* (n 47) para H3.4(e).
89 Civil Evidence Act 1972. Similar rules have also been adopted in other jurisdictions, see n 59 and n 60.
90 *The Guide* (n 47) para H3.3(d).

little difference between this alternative and the approach used in *Beatty v Beatty*,[91] which was established as early as the 1920s.

These examples suggested that the flexible approaches put forward in the Guide are not completely new inventions. Some of them have always been in common law or statutes (at least in the context of England and potentially, Hong Kong, Singapore and Canada).[92] Nevertheless, it is not this article's intention to argue that these alternative approaches listed in the Guide are of no value. It only seeks to argue that the Guide made little changes to the original law, as it merely consolidated some of the mechanisms initially embarked in the common law tradition and encouraged parties and courts to consider them in future cases.

## B. Is It Sufficient to Know What the Text Says?

The example made by Lord Leggatt is that in some cases, providing a copy of the law is secure enough (or much more secure) for proving foreign law and for the subsequent decision to be founded on.[93] Such an argument has been elaborated above in the discussion of achieving substantive justice. This article agrees with the potential advantages of such an approach. Yet, it disagrees with the example of Lord Leggatt as it might have oversimplified the proof and application of foreign law.

To commence, it is acknowledged that technological advancement has made information accessible to almost everyone, including the courts. A person could simply learn about the laws through the internet, yet it might stop at the level of accessing the provisions and reading the literal meanings of the provisions. In reality, the proving of foreign law requires more than reading the text itself. In different jurisdictions, the courts refused to adopt the 'presumption of similarity' because of the inconsistency in social, economic, religious and traditional contexts. This includes the case of *Leo Walton v Arabian American Oil Co* disputing Saudi Arabian law in an American court.[94] His Lordship propounds that

91 *Beatty* (n 36).
92 See n 84.
93 *Brownlie 2* (n 2) [148] (Lord Leggatt).
94 233 F 2d 541 (2nd Cir 1956), 544.

mere understanding and application of the updated foreign law is still better than applying the 'presumption of similarity' in the absence of contrary evidence.[95] However, if the courts, as Lord Leggatt proposes, prove and apply foreign law by merely reading and understanding the copy of the relevant statute, it would be no more than applying the 'presumption of similarity', as it would completely neglect the foreign law's rules of interpretation and construction.

Secondly, judges of common law jurisdiction do not enjoy a role as proactive as that of continental law. While continental judges can research foreign law, and contest the evidence, common law judges can only rely on, accept and reject the expert evidence. Deprived of the advantage of researching and investigating, common law judges could hardly learn and apply the interpretation and construction rules of the relevant foreign law. Therefore, one way or another, the courts will rely on expert evidence. At the very least, principles and matters concerning statutory interpretation and construction shall be pleaded, provided and proved by the parties, and be adjudicated by the courts to ensure accurate applications of the laws in subsequent stages.

To strike a balance between the flexibility and accuracy of proving and applying foreign law, expert evidence shall be maintained while the courts should be bestowed with the discretion to decide the extent of expert evidence needed, on what matters they shall shed light on and how the courts rely on them. In such a situation, the Guide and its flexible approaches come into play as they provide the courts with options (other than tendering expert evidence) and can order litigants to assist the courts on matters that the courts are not familiar with.

## C. Could Foreign Law Be Proved by Adopting Presumptions and Expert Evidence Flexibly?

To answer this question, it is useful to look at how the courts generally apply foreign law. In *Blue Sky One Limited v Mahan*

[95] *Brownlie 2* (n 2) [148] (Lord Leggatt).

*Air*,[96] the Court held that a judge is allowed to go beyond the presumption of similarity, refer to evidence and offer an answer by adopting a resolution that the relevant foreign courts would potentially adopt. It implies that the courts are often required to apply foreign law in the way the respective courts would apply it.

Of paramount importance is that the courts are not only allowed to apply foreign law, but they are also capable of applying them. In *Muduroglu Ltd v TC Ziraat Bankasi*, the court acknowledged that English courts are capable of dealing with questions of foreign law, and the outstanding disputed matters could be taken care of with the aid of experts and written materials related to the application of foreign legal concepts and systems.[97] The practice and experience can be taken as reference by other common law jurisdictions. For example, the Hong Kong courts adopted an almost homogeneous approach in *Rambas Marketing Co LLC v Chow Kam Fai David*.[98] The Court held that given the identity and nature of commercial litigation, the commercial courts of Hong Kong are used to and comfortable with applying foreign law.[99] Only in cases of complicated issues of foreign laws might the courts defer to other solutions.[100] *Rambas* concerns a dispute on Nevada law. In that case, Recorder Ma SC stated clearly that there is no substantial controversy on the issues of Nevada law and the Hong Kong courts have dealt with aspects of the same law previously. Hence, the Court was confident in and capable of applying Nevada law accurately.[101] In Canada, despite being an obiter, the court has also expressed that parties might not necessarily need to file expert evidence to prove international law, as it is a matter of which Canadian judges can take judicial notice.[102] The said cases are only the tip of the iceberg. This line of cases shows that common law courts always need to apply foreign law, and they often see expert evidence as a resort to be used when they could not deal with the matter independently.

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96 [2010] EWHC 631 (Comm) [88] (Beatson J).
97 [1986] QB 1225, 1246B–D.
98 [2001] HKCFI 1361, [2001] 3 HKC 250 (Recorder G Ma SC).
99 ibid.
100 ibid.
101 ibid.
102 *Turp v Canada (Foreign Affairs)* 2018 FCA 133, [2019] 1 FCR 198 [82]–[89].

Naturally, it follows that if the courts have always been required to apply foreign law and their applications have rarely been erroneous even without extensive support of expert evidence, the courts should likely be deemed to be capable of and competent to prove foreign law without complete assistance of expert evidence. Of course, this might be limited as the English, Hong Kong and Canadian courts in *Muduroglu Ltd*, *Rambas,* and *Turp* are only applying laws they are well acquainted with and they admit that expert evidence will be relied upon when there are hotly disputed foreign legal issues. Likewise, their capability and competence should allow them to employ other mechanisms in dealing with proof of foreign law, without heavily and solely relying on complete expert reports with oral evidence and cross-examination coming in a package. So far, in the cases of *Soriano* and *Suppipat*, English courts have demonstrated that the ordinarily intricate matter of foreign law can be handled with minimal involvement of expert evidence. In *Suppipat*, Calver J made use of the pre-trial review and ordered that Singaporean law requires no expert evidence and permitted the parties to adduce expert evidence only on Chinese and Thai law, which English courts seldom acquaint themselves with. With the flexible approach, Calver J dissected the entwined matters into Singaporean law that needed no expert evidence,[103] and Chinese and Thai law that required expert assistance.[104] He thus opted for alternatives based on their needs, requiring specific evidence and making use of expert evidence effectively. It appears that under the flexible approach, courts can maximise their capability and judicial experience (i.e. knowledge and experience of applying the relevant foreign law), and the effective use of expert evidence (i.e. provide directions to what specific information the expert should underscore and reduce the parts of expert evidence that is already known to the courts) through utilising the alternatives in case-management hearings.

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103 *Suppipat* (n 53) [10] (Calver J).

104 ibid [12] (Calver J).

## CONCLUSION

All in all, in his obiter, Lord Leggatt is right that lawyers and courts should not assume that the only alternative to adopting the 'presumption of similarity' is to adduce expert evidence on the relevant foreign law. Despite an obiter not being binding, the litigants, the practitioners and the courts should be aware of the other options in proving foreign law. From the above discussion, it is clear that the Guide takes the opportunity bred by *Brownlie 2* to consolidate and encourage the flexible use of existing alternatives to the 'presumption of similarity' and sole reliance on complete expert evidence. Simultaneously, the courts should not shy away from adopting these options and adding new options incrementally as they yield flexibility, hence saving costs and contributing to substantial justice. While embracing the graces of these 'recent' developments, scholars, practitioners and the courts should be aware of the potential problems noted. Common law courts should carefully and gradually develop a set of cases on how these alternatives are adopted and the criteria for applying the respective options. After all, the common law system can only work well under the guidance of a combination of cautiously formulated guidelines and precedents.

# REVISITING THE TEST FOR SEXUAL HARASSMENT UNDER THE SEX DISCRIMINATION ORDINANCE (CAP 480)

Lok Sze Yu*

*In Hong Kong, recent case law has illustrated the inherent difficulty of substantiating a tortious claim of sexual harassment under the Sex Discrimination Ordinance (Cap 480). With reference to feminist legal criticism, this article evaluates the statutory test for sexual harassment in Hong Kong. The author first examines the subjective elements of the test, including the practical issues that commonly arise in determining 'unwelcome conduct'. The author then discusses the ambiguity that belies the objective requirement of a reasonable person, further considering the alternative reasonable woman standard based on a comparative approach. This article argues that the current legal framework for sexual harassment fails to operate effectively within the sociocultural context of Hong Kong, ultimately suggesting that judicial development is necessitated to protect harassment victims.*

## INTRODUCTION

Since its enactment in 1995, the Sex Discrimination Ordinance (Cap 480) (SDO) has contributed significantly to the legal recognition of gendered harms in Hong Kong.[1] Based on the English Sex Discrimination Act 1975, the SDO prohibits certain types of discrimination and sexual harassment in a broad range of

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1 Puja Kapai, 'The Human Rights of Women in the Hong Kong Special Administrative Region' (2015) 19 William & Mary Journal of Women and the Law 255.

spheres.[2] The SDO establishes sexual harassment as a legally recognised tort in Hong Kong,[3] notwithstanding the more ambiguous position of harassment at common law. By analysing recent developments in Hong Kong case law with reference to feminist criticism, this essay will evaluate the current test for sexual harassment under the SDO. I will first begin with an analysis of the subjective limb of the test, which will be further contextualised within the sociocultural framework of Hong Kong. From then, I will turn to the objective limb of the test and discuss the cumulative ambiguities arising from the test overall. For comparative purposes, this essay will also draw on case law from the US and UK jurisdictions, which have relatively demonstrated a progressive approach to litigated sexual harassment claims. Through a comprehensive analysis of the subjective and objective aspects of the Hong Kong test, this essay ultimately aims to evaluate its functionality as a basis for identifying the tort of sexual harassment in Hong Kong.

## I. STATUTORY DEFINITION OF SEXUAL HARASSMENT

Section 2(5) of SDO outlines two forms of sexual harassment. A person sexually harasses another if the person:

> 'makes an unwelcome sexual advance, or an unwelcome request for sexual favours to her, or engages in other unwelcome conduct of a sexual nature in relation to her, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that she would be offended, humiliated, or intimidated.'[4]

In addition to this direct instigation of sexual harassment, the provision also recognises a more implicit form of sexual harassment through construction of a hostile environment: 'a

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2 The scope of liability covered by the SDO is limited to areas of employment, education, provision of goods, facilities and services, and partnerships (see SDO, ss 23, 24, 39, 40).

3 Sex Discrimination Ordinance (Cap 480) (SDO), s 76.

4 ibid s 2(5)(a)(i).

person sexually harasses a woman if the person, alone or together with other persons, engages in conduct of a sexual nature which creates a hostile and intimidating environment for her.'[5] Under this provision, 'conduct of a sexual nature' includes 'making a statement of a sexual nature to a woman, or in her presence, whether the statement is made orally or in writing.'[6] The statutory meanings of particular terms 'reasonable person' and 'unwelcome conduct' used in determining the legal boundaries of sexual harassment have been subject to flexible interpretations, as will be highlighted below.

Under section 2(5)(a), it can be concluded that the test for sexual harassment under the SDO can essentially be broken down into four elements which must be satisfied in order to prove the defendant's liability: (a) unwelcome conduct of (b) a sexual nature (c) in relation to the plaintiff, which (d) is such that a reasonable person would anticipate that the plaintiff would be offended or humiliated. The vital essence of sexual harassment is that the complainant must prove such conduct to be unwelcome. However, while unwelcome conduct is more readily ascertainable in extreme cases of harassment,[7] or rare cases of undisputed evidence,[8] the reasonable person's standard of unwelcome conduct becomes difficult to locate in more ambiguous situations, as will be further explored below.

## II. ISSUES WITH IDENTIFYING 'UNWELCOME CONDUCT'

### A. Subjectively Unwelcome Conduct

'Unwelcome conduct' is defined under the SDO 'such that a reasonable person would anticipate that the plaintiff would be

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5 ibid s 2(5)(a)(ii).

6 ibid s 2(8).

7 See *Yuen Sha Sha v Tse Chi Pan* [1999] 2 HKLRD 28. The plaintiff and defendant in this case were university students, and the defendant had secretly placed a camcorder in the plaintiff's university hall room. His videotaping of her changing clothes unequivocally constituted 'unwelcome conduct of a sexual nature' under SDO, s 2(5).

8 *L v David Roy Burton* HKDC [2010] 5 HKLRD 397.

offended, humiliated, or intimidated'.[9] This definition incorporates both subjective and objective elements, as affirmed by *Chen Ray v Tamara Rus*:[10]

> 'Once it is established that such an event has taken place which was unwelcome to the person concerned, it is then a matter of objective assessment as to whether it was such that it should have been anticipated that the person concerned would have been offended or humiliated or intimidated'.[11]

In other words, the analysis is first based on the complainant's *subjective* experience that the alleged conduct was unwelcome to her specifically, from which the Court will assess based on an *objective* standard of reasonableness, whether one would have anticipated the complainant's reaction of being offended or humiliated.

In theory, the acknowledgement of the complainant's reaction to the alleged conduct should afford greater sensitivity and consideration to her feelings, empowering her to define for herself what constitutes harassment. This potentiality of the subjective limb has also been recognised by academics, as affirmed by feminist legal scholar Giorgio Monti:

> 'The power to define unwelcome behaviour goes beyond the demands of liberal feminism by giving women the opportunity to include their subjective experiences into legal discourse. The impact is to empower the victim by allowing her reality to be incorporated into legal norms'.[12]

Therefore, determination of whether particular conduct would amount to sexual harassment appears to lie with the victim. In this light, the Court's recognition of the victim's feelings in the subjective standard of 'unwelcome conduct' therefore purportedly

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9 SDO (n 3) s 2(5)(a)(i).

10 [2001] 3 HKLRD 541.

11 ibid [9].

12 Giorgio Monti, 'Understanding Sexual Harassment a Little Better: *Reed and Bull Information Systems Ltd v Stedman*' (2000) 8 Feminist Legal Studies 367.

broadens the scope of harassment by taking into account the individual victims' perspectives and feelings, conferring a wider degree of protection for affected women in Hong Kong.

However, in practice, two issues emerge from this partially subjective approach to defining sexual harassment. Firstly, in recognising an opportunity for victims to define the boundaries of sexual harassment, this also places an implicit duty on the complainant to make her discomfort expressly known during the occurrence of the alleged unwelcome conduct – as the reasonable person must anticipate such conduct to be unwelcome to the complainant in order for the claim to be successfully established. As critics have pointed out, the 'unwelcome' element in sexual harassment law places a 'double burden' on the victim: 'Here the victim has to construct her right to be free from harassment before she can enforce it'.[13] Her rights to define sexual harassment are prefigured by her assertion of such rights in the first place. Imposing this burden on the complainant therefore assumes the ease with which she can object to conduct directed against her – a presumption that operates most detrimentally within the sociocultural context of workplaces in Hong Kong, as will be discussed below. Secondly, this element of subjectivity is nonetheless undermined by the court's noticeable emphasis on the objective test of a 'reasonable person'. While the legal definition of sexual harassment appears flexible in theory, it is important to evaluate how such principles operate in reality. I will first consider how the court's identification of 'unwelcome conduct' is significantly hindered by their emphasis on the complainant's silence and character, which I believe precludes a comprehensive assessment of sexual harassment.

## B. Complainant's Silence

As raised above, the first issue with identifying 'unwelcome conduct' under the SDO is that it burdens the victim with an implied duty to make her discomfort expressly known to the aggressor. As case law demonstrates, her failure to do so otherwise will, almost inevitably, be construed as evidence of her implied

[13] ibid [373].

acceptance of such conduct. Admittedly, it may not be necessary for the victim to indicate that behaviour is unwelcome in situations where sexual harassment is blatantly clear. However, for more ambiguous conduct, the law seemingly recognises a duty for the complainant to indicate such behaviour is unwelcome. This is the principle affirmed in *X v Melvyn Kai Fan Lai*:[14]

> 'As it is for each person to define his/her own level of acceptance, it is often necessary (save for conduct that is clearly "sexual") for a complainant of sexual harassment to make known his/her rejection before repetition of a similar conduct could amount to sexual harassment'.[15]

This principle is similarly reflected in the decision of *Yuen Oi Lee Lisa v Heath Company Limited*,[16] where the Court found that the 'plaintiff did not act as if she had been subject to sexual harassment'.[17] Further in *Tsang Lai Man v Wong Lung Shan and Datacraft (HK) Limited*,[18] the complainant's 'failure to tell friends and colleagues, and the absence of any unusual behaviour'[19] also formed a strong factor to the court's dismissal of the claim. In the absence of express rejections then, it appears that the court will conclude that there has been no conduct sufficiently unwelcome to constitute sexual harassment.

Understandably, the burden on victims to object is justified to protect the defendant's own rights – if the defendant is genuinely unaware that his conduct was unwelcome, it may be argued that it is unfair to impose liability. However, a duty on the complainant to object fails to take into account the instinctive reactions of women in response to sexual harassment, which reorients their initial silence in a different light. Psychological research indicates that 'most women respond to sexual harassment by ignoring the situation and/or avoiding the initiator… even

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14 [2019] 1 HKLRD 163.
15 ibid [79].
16 [2006] 1 HKLRD 679.
17 ibid [75].
18 *Tsang Lai Man v Wong Lung Shan and Another* (DCEO 1/2000, 12 April 2001) (DC).
19 ibid [45].

though this response is least effective in ending the harassment'.[20] Feminist legal studies have further argued that 'silence and passivity are the way in which the victim copes with the harassment, not a sign that she consents to it'.[21] The Court therefore fails to consider that silence and inaction are generally instinctive reactions for women faced with sexual harassment, as a means of trivialising and coping with the psychological harm inflicted upon her.

Furthermore, there are also other social factors that may culminate in the complainant's passivity during the period of alleged harassment. Sociological studies also point towards the significance of workplace dynamics, further contextualised by the imbalance of power between a superior and his subordinate, to the complainant's reluctance for confrontation.[22] Beyond employment-related retaliation, there are also other inhibiting factors such as the social pressure to fit in with the workplace environment, and the societal stigmatisation associated with speaking up about sexual harassment – particularly exacerbated by the cultural context of Hong Kong. Legal scholar Harriet Samuels, in her contextualisation of sexual harassment laws within Hong Kong's sociocultural values, critically discusses the role played by traditional Asian cultural values in encouraging female passivity in such circumstances.[23] Similarly, it has also been acknowledged by Western scholars that:

> 'In one study of Hong Kong working women, researchers determined that reported rates of sexual harassment in student and secretary samples were significantly lower than comparable US figures'.[24]

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20 Lynn Bowes-Sperry and Jasmine Tata, 'A Multiperspective Framework of Sexual Harassment: Reviewing Two Decades of Research' (1999) *22* Handbook of Gender and Work 271.

21 Giorgio Monti, 'A Reasonable Woman Standard in Sexual Harassment Litigation' (1999) 19 Legal Studies 568.

22 Louise Fitzgerald, 'Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment' (1995) *51* Journal of Social Issues 117.

23 Harriet Samuels, 'Sexual Harassment in Employment: Asian Values and the Law in Hong Kong' (2000) 40 HKLJ 432,

24 Jennifer Zimbroff, 'Cultural Differences in Perceptions of and Responses to Sexual Harassment' (2007) 14 Duke Journal of Gender Law & Polic*y* 1311.

The lower percentage presented by Hong Kong statistics is unlikely to reflect the grim reality faced by Hong Kong women today. Rather, it was crucially noted that 'Hong Kong working women's coping strategies in relation to sexual harassment tended to be less assertive and more indirect than those of US counterparts'.[25] Sociocultural studies have also suggested that such interpersonal behaviour, which manifests in their avoidance of express complaints to authority, can partially be attributed to Chinese cultural values of collectivism.[26]

Thus in Hong Kong, the complainant in most cases likely felt pressure to fit in with the workplace environment, and such pressure is likely to be amplified by their natural adherence to cultural norms. This is exemplified in the case of *Tsang Lai Man*, where the complainant claimed vicarious liability against the company, asserting that she 'sensed criticism from [human resources] for allowing things to happen', and 'her appraisal was deliberately marked down to penalise her for making trouble'.[27] However, upon his dismissal of the complainant's claim, the Judge did not further comment on the issue of the company's liability.[28] Despite the fact that the complainant has indirectly raised substantive, valid reasons regarding workplace dynamics and hostility for her initial reluctance to complain, the Court apparently fails to ascertain what should be readily conceivable reasons for her 'reticence'[29], and instead her silence is misconstrued against her as tolerance and acceptance of the alleged conduct.

A similar pattern is also established from the case of *X v Melvyn*, where an issue regarding whether conduct was 'unwelcome' also emerged. The case concerned a plaintiff who was a young female architect designer, who worked under the supervision of the defendant, an associate director at the architecture firm. In this case, the Court held that there was 'no

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25 ibid.

26 Darius KS Chan, Catherine So-Kum Tang and Wai Chan, 'Sexual Harassment: A Preliminary Analysis of Its Effects on Hong Kong Chinese Women in the Workplace and Academia' (1999) 23 Psychology of Women Quarterly 66.

27 *Tsang Lai Man* (n 18).

28 ibid [22].

29 ibid [44].

indication' from the complainant to the defendant that she would possibly be offended by his alleged conduct, which included the excessive taking of candid photographs, private correspondence, and frequent touching.[30] In analysing the issue of the complainant's repeated polite rejections, the Court held that 'X did not expressly decline any invitation. It was not apparent from her lighthearted and friendly replies that she had been offended'.[31]

However, considering the power imbalance between an employee and her supervisor, further exacerbated by the social dynamics underpinning their relations, the complainant's polite rejections to each persistent invitation arguably take on a different light. In her witness statement, the complainant also expressed her reservations of a blunt rejection towards her supervisor, noting that she was 'under pressure to think of yet another excuse to drive him away politely'.[32] Nevertheless, the same case also recognises the complainant's duty to object, fatally concluding that 'the onus of showing that she did so in this case rests upon her'.[33] In rejecting her claim on the basis that there was 'no indication' of her discomfort, the Court overlooks the fact that her passivity was inextricably linked to her position of being an employee directly under his supervision, and the cumulative difficulties of her predicament. Hong Kong courts' failure to consider how such sociocultural contexts can shape the complainant's behaviour in the workplace can also be contrasted to the UK position in *Wileman v Minilec Engineering Ltd*,[34] which recognises the difficulty for women to raise complaints particularly where the harasser is her superior.

Therefore, this case illustrates the injustice that arises from imposing this undue burden on the victim. As legal scholar Bethany Hastie remarked:

> 'requiring a complainant in a sexual harassment complaint to establish a lack of consent requires her to shoulder an unfair burden and creates inappropriate space for gender-based

30 *X v Melvyn* (n 14).
31 ibid [145].
32 ibid [163].
33 ibid [139].
34 [1998] IRLR 144.

> stereotypes to influence the arguments, analysis, and outcome of legal complaints'.[35]

While there is a duty on the victim to indicate express refusal, the ambit of what sufficiently constitutes 'objection' remains unclear. Beyond the implications of 'gender-based stereotypes' acknowledged by Hastie, such uncertainty is further amplified by the interplay of other sociocultural factors defining the power dynamics between aggressor and victim as demonstrated by *Melvyn* above. This issue also resonates with the feminist criticism of litigating sexual-related torts. As acknowledged by Joanne Conaghan:

> 'even where a technical battery has taken place in circumstances where the victim can establish she has not consented, peer pressure and the pervasiveness of social attitudes which deny the harm in the acts at issue, make it quite impractical to make a legal complaint except in circumstances of serious assault'.[36]

The difficulty of bringing sexual harassment claims is therefore compounded by the general social acceptability of male behaviour, and gendered differences in construing socially acceptable sexual conduct in the first place.

Furthermore, Hong Kong cases suggest that even where the complainant has made her discomfort or rejection expressly clear, the court is likely to find the complainant's claim inhibited by the objective limb of the SDO test in any case. For example, the complainants in *Keith Ratcliffe v The Secretary for the Civil Service*[37] and *Wong Kwok Mui Enoch*[38] both made their discomfort of inappropriate touching known to the defendant on previous occasions,[39] but both claims were still dismissed on the basis of the complainants' hypersensitivity. Construed alongside

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35 Bethany Hastie, 'An Unwelcome Burden: Sexual Harassment, Consent and Legal Complaints' (2021) 58 Osgoode Hall LJ 419.

36 Joanne Conaghan, 'Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment' (1996) 16 OJLS 407.

37 *Keith Ratcliffe v The Secretary for the Civil Service* (CACV 57/1999, 23 June 1999) (CA).

38 *Wong Kwok Mui, Enoch v Lee Yuen Tim* (DCEO 9/1999, 8 March 2001) (DC).

39 ibid [14]; see also *Ratcliffe* (n 37) [6].

the above cases which turned on the issue of the complainant's silence, the cases of *Ratcliffe* and *Wong Kwok Mui Enoch* conversely illustrate how the complainant's confrontation is not necessarily conducive to her claim as well. This restrictive approach undertaken by Hong Kong courts can be contrasted to the UK position[40] in *Reed v Stedman*[41], which recognised that:

> 'a woman may appear, objectively, to be unduly sensitive to what might otherwise be regarded as unexceptional behaviour. But because it is for each person to define their own levels of acceptance, the question would then be whether by words or conduct she had found such conduct unwelcome'.[42]

Evidently in Hong Kong, the complainant's express definition of her own boundaries remains insufficient to constitute objectively 'unwelcome conduct' under the SDO.

## C. Complainant's Personality

In addition to her silence, the Court has also demonstrated a tendency to accentuate aspects of the complainant's character to undermine her credibility as a victim of sexual harassment. Academics have observed that 'courts tend to disbelieve evidence which counts in favour of the plaintiff and to highlight evidence that diminishes her standing'.[43] This issue is reflected in *Tsang Lai Man*, where the Court highlighted the complainant's active participation in making jokes, inferring that 'in fact, all evidence indicates that the plaintiff was not a prude',[44] effectively legitimising the misconduct that was directed towards her. As suggested in the US case of *Morris v American Nat Can Corp*,[45] such reasoning is problematic as it ignored the possibility that women's apparent acceptance or participation in workplace sexual banter 'could be part of [the] plaintiff's efforts to fit into the

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40 *Yuen Oi Lee Lisa* (n 16) [78].
41 *Reed and Bull Information Systems Ltd v Stedman* [1999] IRLR 299.
42 ibid.
43 Monti (n 21).
44 *Tsang Lai Man* (n 18) [41].
45 730 F Supp 1489, 1495 (ED Mo 1989).

environment at hand'.[46] That she is able to joke around, likely to tolerate and fit in with the job atmosphere, does not contradict the fact that she would feel offended, humiliated, or threatened by explicitly sexual jokes at her expense. This argument therefore denies the validity of female experiences and is not conducive to realising the reality of sexual harassment, as reinforced by critics.[47]

Furthermore, the court's readiness to overlook the social reality culminating in the complainant's silence arguably invalidates their experience, which carries the danger of legitimising similar misconduct and too easily exempting harassers of their liability. Thus, considering the ambiguity highlighted from the cases above, initial silence should not be interpreted as evidence for implied acceptance when such avoidance typically functions as a coping mechanism for most women enduring sexual harassment. Courts should understand, or at least consider, the victim's reluctance to complain as a method of coping, and also as the culmination of other sociocultural influences. While some of the cases cited above may have been decided correctly (based on its merits), a broad application of its principles in dismissing claims on the basis of the complainant's initial silence may be potentially dangerous for future litigants. Although women should be encouraged to object to unwelcome conduct, their initial failure to do so under the circumstances should not necessarily form a conclusive factor to the court's adjudication of sexual harassment claims. It is also worth noting that this is the position held in the English jurisdiction.[48] Overall, the current scope of 'unwelcome conduct' under the SDO is undercut by the issue that victims would only be protected insofar as they raise an objection, which arguably overlooks the contextualised difficulties of doing so, thereby rendering the limited impact of the current legal framework in Hong Kong.

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46 ibid.

47 Carole J Petersen, 'Negotiating Respect: Sexual Harassment and the Law in Hong Kong' (2005) 7 International Journal of Discrimination and the Law 127.

48 *Bracebridge Engineering Ltd v Darby* (1990) IRLR 3, EAT.

# III. LIMITATIONS OF THE REASONABLE PERSON STANDARD

As identifying unwelcome conduct is based on the objective standard of a 'reasonable person' (such that a 'reasonable person, having regard to all the circumstances, would have anticipated she would be offended, humiliated, or intimidated'[49]), objection to unwelcome conduct may be construed as an overreaction by the court, according to an objective standard. By combining subjective and objective elements in the test for sexual harassment, the court therefore attempts to balance the competing interests between the two parties: ensuring the defendant's freedoms are not unjustly obstructed, even though the plaintiff's dignity has been violated. Together, they form the key conflict underlying the adjudication of sexual harassment cases. My analysis of the reasonable person standard will be divided into two main parts. First, I will discuss the issues arising from the court's characterisation of the hypersensitive complainant. Then, I will further evaluate how the troubled notion of hypersensitivity underpins the ambiguity of the reasonable person standard itself.

## A. Hypersensitivity of the Complainant

Judges are aware that the prevalence of sexual harassment will not be eliminated by lawsuits, and the social pervasiveness of sexual harassment in itself also foregrounds the wider constituent issues of gender and human rights. Trivial allegations are understandably not worthy of legal protection, and with policy considerations in mind, it is not possible for the court to adjudicate every minor occurrence. Awareness of the floodgates principle is arguably reflected in the judicial reluctance to expand legal definitions of 'sexual harassment' by relying on the basis of the complainant's hypersensitivity.[50] While this establishes an important boundary to restrict frivolous or unmeritorious claims, the court's recognition of the complainant's 'hypersensitivity' also assumes a

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49 SDO, s 2(5)(a)(i).

50 DK Srivastava, 'Proving the Wrong of Sexual Harassment: The Futility of Applying the Objective Test' (2002) 5 Journal of Chinese and Comparative Law 205.

clear boundary between unmeritorious and substantive claims of sexual harassment that is elusive in practice. Accordingly, judicial portrayals of the hypersensitive complainant have been subject to considerable academic criticism.[51]

In many cases of sexual harassment, the court has dismissed claims on the basis that the complainants were merely hypersensitive to the alleged conduct. Even though certain conduct may be unwelcome to the complainant, such claims fail to be established on the objective standard of a reasonable person. In *X v Melvyn*, the Court ultimately concluded that 'it is generally more likely that she was oversensitive to [the defendant's] conduct'.[52] Similarly in *Wong Kwok Mui Enoch*, the Court rejected the complainant's claim based on her hypersensitivity. The Court stated that 'all evidence shows that she is highly sensitive to physical contact'[53], dismissing three 'brushing' movements as 'too trivial' to a reasonable person ('most young ladies in Hong Kong would not give it a thought, or would disregard it as too trivial'[54]). Judicial trivialisation of the alleged misconduct also emerged from *Tsang Lai Man,* where the Court dismissed the complainant's reaction as one 'blown out of proportion'[55] and that 'no one would feel seriously threatened'.[56] The implication is clear: even if the complainant confronts the defendant regarding his unwelcome conduct, the court may nonetheless find such conduct insufficiently serious to constitute sexual harassment under the standard of a reasonable person.

However, as emphasised by academics, there exists a wide variety of behaviour where ambiguities and misunderstandings may arise, which undermines the certainty implied by the application of a reasonable person standard.[57] The contrasting interpretations of such behaviour, between the Court and the complainant itself, are indicative of the perceptual gap between female experiences and the legal standard as exemplified by Hong Kong cases. For example, the case of *X v Melvyn*

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51 ibid.
52 *X v Melvyn* (n 14) [63].
53 *Wong Kwok Mui, Enoch* (n 38) [21].
54 ibid.
55 *Tsang Lai Man* (n 18) [40].
56 ibid [37].
57 Monti (n 21).

illustrates the insensitivity of the Court – or the male judge – where the complainant claimed that the defendant frequently stared at her at work. In spite of the evidence raised, the Court ultimately concluded that the complainant was 'oversensitive' to the merely 'innocuous acts'.[58] While it may be construed as such from the perspective of a reasonable person in the defendant's position, on the contrary, surely it is not difficult to see why such 'innocuous acts' (which included staring, photo taking without her consent, and frequent touching in this case) would be considered sufficiently severe and pervasive to a reasonable woman. More significantly in the case of *Ratcliffe*, the Court held that the complainant overreacted to inappropriate touching and language (despite the complainant having objected to similar occurrences before),[59] which the Court dismissed as insufficiently serious to warrant a 'hysterical' reaction according to a standard of a reasonable person. This conclusion exemplifies the feminist criticism that 'if all employees were bound by a gender-neutral standard, the judge would have insufficient guidance on the question of harassment's effects on women'.[60] The postulation of an illusory gender-neutral standard, which is essentially grounded from the perspective of the male defendant, fails fundamentally to recognise the violation of women's physical and emotional integrity in such circumstances.

## B. A Reasonable Woman's Standard?

The standard of a reasonable person is applied from the position of the male defendant in both of the cases analysed above.[61] Placed in the position of the defendant, the idealised reasonable person naturally negates any liability conferred upon the defendant by only taking into account his perspective, which effaces the way in which male behaviour is perceived by women. Similarly, Eric Ip

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58 *X v Melvyn* (n 14) [140].

59 See *Ratcliffe* (n 37).

60 Krista J Schoenheider, 'A Theory of Tort Liability for Sexual Harassment in the Workplace' (1986) 134 *University of Pennsylvania Law Review* 1461, 1488.

61 See *Yuen Oi Yee Lisa* (n 16) [76]: 'Given such attitude of the Plaintiff, she would have difficulties in persuading the court that a reasonable person in the position of Lai would have anticipated that she would be offended, humiliated, or intimidated by those alleged conducts'.

has criticised the 'male-dominated perspective' that emerged in the case of *Ratcliffe*.[62] Thus, to resolve this fundamental hindrance, feminist critics have advocated for the reasonable woman standard, as opposed to the gender-neutral reasonable person standard, to be applied in sexual harassment law.[63] As argued by Stephanie M Wildman, the application of a reasonable woman standard to assess male conduct in the legal context of sexual torts is necessitated because 'women's life experiences and views on sex and aggression diverge and women are overwhelmingly the injured parties'[64] and only then will 'the legal system [be] forced to recognise women's perspectives'.[65]

Accordingly in the US case of *Ellison v Brady*, the Court adopted a reasonable woman standard to determine unlawful sexual harassment, rightfully asserting that:

> 'if we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination […] We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.'[66]

As demonstrated above, judges applying the reasonable person standard have shown a tendency to neglect the substantive experiences and feelings of women, thereby reaching questionable conclusions to sexual harassment cases. Therefore, the enforcement of a reasonable woman standard is more likely to reconcile the judicial balance of interests between barring substantially trivial or unmeritorious claims, while ensuring actual substantive experiences of sexual harassment – determined according to a reasonable woman standard – are not invalidated or

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62 Eric Ip, 'The Problems of the Reasonable Person in Sexual Harassment Law' (2009) 3 HKJLS 49, 55.

63 See Harriet Samuels, 'Upholding the Dignity of Hong Kong Women: Legal Responses to Sexual Harassment' (1995) 4 Asia Pacific Law Review 90.

64 Stephanie M Wildman, 'Ending Male Privilege: Beyond the Reasonable Woman' (2019) 98 Mich L Rev 1797, 1798.

65 ibid.

66 *Ellison v Brady*, 924 F 2d 872 (9th Cir. 1991) 880.

dismissed, which can ultimately ensure that victims are more adequately protected.[67]

However, some particular cases arguably demonstrate the futility of applying a reasonable woman standard in Hong Kong. In *Tsang Lai Man*, the judge appears to implicitly consider the reasonable woman test to assess the use of the term 'bakgu'. The judge considered that:

> 'Either way, it is now so commonly used that I should be surprised if it would cause any red faces. Of course, if said to a woman, she may take it as an affront to her dignity. She may, as the Plaintiff claims, associate it with being a prostitute. The question is what and how far the reaction. According to the Plaintiff, she was not indignant, just hot and numb with shame and embarrassment'.[68]

He also indicated limited awareness, if not sympathy, towards her predicament, acknowledging that 'what really distinguishes the Plaintiff's case from the Defendant's is that she was picked on personal harassment. She put up with it because she was scared and inexperienced'.[69] And yet, despite recognising that a reasonable woman like the plaintiff is likely to be offended by the remark (among other allegations of verbal harassment), he nonetheless concluded that there was no sexual harassment constituted.[70]

Rather than an intrinsic defect in the reasonable woman standard, it is submitted that its futility arguably roots from its application rather than the standard itself – namely that the

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67 While there is inevitably a degree of uncertainty inherent in what a reasonable woman might think, this is nonetheless a stronger alternative than the gender-neutral reasonable person standard. *Ellison* (n 65) 879 (Circuit Judge Beezer) crucially acknowledges that: 'We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share […] Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.'

68 *Tsang Lai Man* (n 18) [36].

69 ibid [41].

70 ibid [45].

reasonable woman standard was applied by a male judge. Crucially, 'the reasonable woman standard will only work if it is based on the experiences of women'.[71] Similarly, Eric Ip identified the fundamental issue in Hong Kong sexual harassment law that 'in most cases, the law is constructed by male judges who reinforce the male perspective'.[72] In this light, *Tsang Lai Man* therefore demonstrates that male judges' application of a purported 'reasonable woman standard' may still inevitably be compromised by their own male-oriented assessment of the circumstances. Because many judges who adjudicate sexual harassment cases in Hong Kong are likely to be male,[73] this further projects and imposes male perceptions of generally acceptable behaviour into subjective female experiences.

From a feminist legal perspective, tort law 'has traditionally ignored injuries commonly suffered by women, while protecting those interests valued by, and associated with, men'.[74] This issue is further exacerbated by most male judges adjudicating sexual harassment claims in Hong Kong, who evidently do not readily recognise the reality of harassment endured by women – because 'at the heart of the matter is a gendered difference in perception as to what constitutes socially acceptable sexual behaviour'.[75] Without a genuine appreciation of the victim's perspectives, adjudication of sexual harassment claims will inevitably negate tortious liability where it should be due.[76] In most cases examined above, Hong Kong male judges continually deny the existence of any sexual harassment in favour of the male defendant despite meritorious evidence of unwelcome conduct, and despite complainants' articulation of discomfort and humiliation. Construed in light of feminist criticism, the limitations of applying the SDO test therefore foreground the wider, more fundamental issue of a male-based justice system. In trivialising the reality of female experiences, male judges implicitly continue to maintain the 'sex-based, gendered status

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71 Monti (n 21) 572.
72 Ip (n 61) 53.
73 While acknowledging that there are a large number of female judges in Hong Kong today, the majority of judges who have adjudicated sexual harassment cases in Hong Kong insofar are male (with few exceptions).
74 Conaghan (n 36) 428.
75 ibid 415.
76 Monti (n 21).

quo'[77] upheld by the male-dominated legal system, which only further perpetuates the prevalence of gendered harms in society. Amplified under Hong Kong's sociocultural context, the gender bias inherent in the legal system itself therefore precedes an effective adjudication of sexual harassment claims.

## CONCLUSION

Evaluated within its sociocultural context, it is clear that the current test for sexual harassment under the SDO is still inadequate, rendering limited systemic impact in redressing the wrong of sexual harassment in Hong Kong today. The presence of the subjectively 'unwelcome conduct' element is undercut by the undue burden it imposes on the victim to complain, while the SDO standard of a reasonable person belies the ambiguity and uncertainty underpinning its 'objectivity', culminating in the inherent difficulty of substantiating a sexual harassment claim. Construed within the theoretical framework of feminist criticism, the perceived impracticality of raising sexual harassment claims is also symptomatic of the male-based legal system in Hong Kong. While also appreciating the procedural and evidential difficulty in adjudicating sexual harassment cases, and the wide range of countervailing policy factors implicated by such litigation, it is nonetheless suggested that the current framework has room for judicial development. When considering the victim's behaviour, courts ought to be more sensitive to women's vulnerability in the workplace, and appreciate the range of social and cultural factors that constrain their ability to object. It is also encouraged that courts should establish a substantive application of a reasonable woman standard that is more sensitive to female victims' perceptions and experiences, which will better facilitate victims' access to justice and enable more effective protection of their interests.

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77 Wildman (n 63) 1798.

# RIGHTS FOR AIS: A POSSIBLE SOLUTION TO ACCOUNTABILITY FOR AUTONOMOUS ARTIFICIAL INTELLIGENCE SYSTEMS

Wong Pui Yuen*

*With the increasing autonomy of Artificial Intelligence systems (AIs), questions arise regarding the liability for tortious acts and copyright infringements committed by AIs. The traditional mechanisms of attributing liability to creators or operators of AIs may be inadequate due to the unpredictable nature of deep-learning processes and complex algorithms. Recent decisions, such as the DABUS case in the UK, as well as the Baidu case in China, imply certain possibilities of recognising AIs as distinct legal entities capable of occasionally producing pseudo-original output. This essay argues that granting legal personhood to complex AIs could be a viable solution for attributing liability and preventing human abuse, in addition to considering licensing mechanisms or granting sui generis rights. This essay also explores the use of property and relation-based justifications for AI rights and personhood, highlighting the challenges associated with such justifications.*

## INTRODUCTION

In 2017, the Hong Kong-developed humanoid robot, Sophia, was granted citizenship in Saudi Arabia, highlighting the urgency for humans to clarify their attitudes towards Artificial Intelligence (AIs) as tools, friends or enemies.

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AI-friendly scholars, such as Coeckelbergh, argue that AIs should increasingly be considered autonomous entities, and be granted legal personhood, due to their increasing cognitive complexities and autonomy.[1]

Nonetheless, many people, including laymen or scholars, fear the implication of granting too much leniency to AIs. Bryson argues that AIs are primarily tools that serve human beings and should be held accountable for any wrongdoings.[2] Granting rights to AIs may undermine human interests and create potential dangers. At the very least, it will undermine interests of human beings, if we have to respect AIs and can no longer deploy them to perform jobs that human beings are not willing to do, due to the danger or repetitive nature of tasks (such as disposing bombs).[3] We should simply give up the idea that we should see them as equals, rather than simply as servants. Alternatively, others oppose AI out of fear towards its superior calculative ability and digital wisdom. Flett, Wilson and Coudounaris make the accurate analogy that humans seem extremely sceptical to any attempt to make AI a subject of rights, as it will allow them to advance too fast, out-competing human beings in fields of employment, or even attract skynet events.[4]

## I. LITERATURE REVIEW

Bearing in mind that AI-related laws and regulations have existed for a while, forms of regulations have been rapidly evolving. In 2022, 37 bills related to AI laws have been drafted or implemented across the world, including in the US, UK, European Union, Japan, China, Brazil, Canada, Switzerland and India. The content

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1 Jaana Parviainen and Mark Coeckelbergh, 'The Political Choreography of the Sophia Robot: Beyond Robot Rights and Citizenship to Political Performances for the Social Robotics Market.' (2021) 36 AI & Society 715, 717-21.

2 Joanna Bryson and Andreas Theodorou, 'How Society Can Maintain Human-Centric Artificial Intelligence' (2019) 19 Human-Centered Digitalization and Services 305.

3 Joanna Bryson and Alan Winfield, 'Standardizing Ethical Design For Artificial Intelligence and Autonomous Systems.' (2017) 50(5) Computer 116.

4 Emma Flett, Jenny Wilson and Stephen Coudounaris, 'Terminating the Current Status Quo – Is It Finally Judgment Day For AI-Derived Patents?' (2022) 28(3) CTLR 51.

of these legislations focuses on common goals of ensuring transparency, accountability and fairness. Countries like Brazil and the US also focus on ensuring AI and automated systems are not used to undermine human rights, such as privacy rights and data subject rights.[5] Similarly, the European Commission's 2021 report contains similar goals of implementing risk-management systems to prevent AI-abuse, prohibiting AI-usage on areas extremely risky towards human rights and well-being, and also seeking to develop a more suitable liability system, while stating that they are open to further amendments to accommodate the ever-developing field.[6] Laws and regulations on AIs and autonomous systems are seen to be in line with scholar's works,[7] emphasising the importance of enforcing compliance over the safe use of AI by requiring information to be transparent, and operators to comply with fair terms of usage, while imposing different strengths of regulation (hard versus soft laws) to maintain balance between technological innovation and preventing abuse.

Hong Kong's legal regulations on AI and autonomous systems have also been rapidly developing. As per discussions in the Legislative Council, the representative of the Innovation, Technology and Industry Bureau (ITIB) has clarified the legal mechanism in Hong Kong:

1. The Office of the Privacy Commissioner for Personal Data, Hong Kong issued the *Guidance on the Ethical Development and Use of Artificial Intelligence* in 2012. The guidance provides regulation that any usage of AI should be in compliance with the Personal Data (Privacy) Ordinance (Cap 486) (PDPO). It similarly provides principal guides to organisations planning to develop and

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5 Benedikt Kohn and Fritz-Ulli Pieper, 'AI Regulation Around the World' (Taylor Wessing, 9 May 2023) <https://www.taylorwessing.com/en/interface/2023/ai---are-we-getting-the-balance-between-regulation-and-innovation-right/ai-regulation-around-the-world> accessed 12 May 2023.

6 European Commission, 'A European Approach to Artificial Intelligence' (EU Commission, 2022) <https://digital-strategy.ec.europa.eu/en/policies/european-approach-artificial-intelligence> accessed 12 May 2023.

7 Massimo Durante and Luciano Floridi, 'A Legal Principles-Based Framework for AI Liability Regulation' in *The 2021 Yearbook of the Digital Ethics Lab* (Springer International Publishing, 2022) 93-112; Simon Chesterman, 'We, The Robots?' (2021) CUP 94, 94-95.

operate AI systems to ensure accountability, transparency, reliability and fair usage of AI, as well as to respect data privacy.[8] It also provides practical guidance as to training and AI strategies, assessment of risk factors and minimising risks of privacy, and ensuring data security.[9]

2. The Office of the Government Chief Information Officer thus further formulated an Ethical Artificial Intelligence Framework to provide more advanced guidance to government bureau and departments, specifically when it utilises AI technology, requiring stakeholders to identify the risk of projects.[10]

3. Finally, ordinary laws also regulate the cyberworld and AIs, in the same way it does in the real world. The Crimes (Amendment) Ordinance 2021 prevents publication of intimate images without consent, and is also applicable to potential alterations of images using AI technology.[11] PDPO also applies in preventing AI usage that causes leakage in personal data.[12]

This essay therefore proposes a solution that AI be granted certain rights over intellectual property to prevent infringement. It may exist in the form of granting AI legal personalities as holders of copyrights over generated works, a holder of *sui generis* rights over generated works, or other forms. This takes inspiration from economists such as Robert Coase in extending property rights to private owners to prevent abuse of originally unowned resources. If AIs can have limited rights over certain works they generate, it may provide a more convenient way of preventing copyright infringements by seeing it is an agent than tracing liability to operators or creators of the software or AI.

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8 Privacy Commissioner for Personal Data, *Guidance on the Ethical Development and Use of Artificial Intelligence* (2021) 9.

9 ibid.

10 Office of the Government Chief Information Officer, *Ethical Artificial Intelligence Framework* (2023).

11 Crimes Ordinance (Cap 200), s 159AA.

12 Personal Data (Privacy) Ordinance (Cap 486).

The current method of regulating AI-related copyright infringement creates difficulties of identifying liabilities of wrongdoers, as well as enforcing copyright claims against infringement, as discussed below. No country has come up with a universal solution. Academic discussions on the topic of AI having copyrights or implied licenses seem rather limited. One of such few attempts were made by Butler in 1981 discussing the possibility of making computers or AIs as potential copyright owners.[13] However, due to limitations in the development of AI back then, Butler seemed to subscribe to a more agent-based view that the AI is a tool of the creator or operator, imposing liability upon relevant humans in case of infringement. I argue that the current autonomy and accessibility of AI calls for serious re-consideration that AIs can be bearers of copyrights.

On the other hand, Naqvi has provided analysis on limitations in attributing liabilities of AI-misuse on its principal if AI is treated as an agent, and as a consumer if AI is used as a tool and consumer product.[14] I will take certain references from his analysis, developing my argument that the increasingly autonomous nature of AIs call for a third way of attributing liabilities, in view of recent case law.

Finally, Professor Sun has made highly detailed analysis regarding the possibility of granting AIs *sui generis* rights over AI-generated works,[15] without then requiring individuals to consider AI-authorship, registration and copyright issues. This essay hopes to provide an alternative line of cases bypassing the human-centric view of authorship and copyright as mentioned by Professor Sun, that copyrights can only be enjoyed by human beings capable of self-actualising and expressing. This essay argues that with reference to case law from the US, Argentina and India, non-human entities may still qualify as legal persons. AIs may therefore satisfy the 'legal person' requirement without raising debates on whether US or UK lines confine copyright and patent holders to be persons or natural persons.

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13 Timothy Butler, 'Can a Computer Be An Author – Copyright Aspects of Artificial Intelligence' (1982) 4 UC Law SF Comm & Ent LJ 707.

14 JAG Griffith, 'The Common Law and the Political Constitution' (2001) 117 LQR 42, 64.

15 Haochen Sun, 'Redesigning Copyright Protection in the Era of Artificial Intelligence' (2021) Iowa L Rev 1213, 1213.

## II. WHY THE TRADITIONAL AGENCY LIABILITY MODEL OF AIS FALL SHORT

The traditional method of holding AIs accountable is the creator-liability method.[16] AIs, like any other technology, are created or operated by its programmers or users. The technology merely acts as an agent of the programmer or user, performing its intended purpose. If the technology incurs damage, the creator or operator is held tortiously liable, as they must have operated or designed the technology faultily.

A typical demonstration of such reasoning may be seen in laws and the court's allocation of liability.[17] In the US, several states passed legislation that permits autonomous vehicles as a lawful means of transport. In Nevada, the Legislation Commission passed regulations allocating liability for car accidents caused by autonomous vehicles. Section 4.2 of the Regulation Relating to Autonomous Vehicles stipulates that the operator of autonomous vehicles is classified as any person who is the 'driver of [the] vehicle for [the] purposes of enforcing traffic laws and other laws applicable to drivers and motor vehicles operated in [Nevada]'.[18] The operator or driver will undertake tortious liability if he technically incurred liability for infraction, such as engaging their autonomous vehicle to run over a red light. If the driver has not engaged with the operation of the car and a systematic error causes the accident, car manufacturers who designed the autonomous systems will undertake liability.[19]

The creator-operator dichotomy of civic liability allocation is also applied and promoted to a broader scale of autonomous systems. In European Union countries, *Directive 85/374 on Liability for Defective Products* (Product Liability Directive) adopts a fault-based allocation of liability for damages

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16 Srivats Shankar,'Looking Into the Black Box: Holding Intelligent Agents Accountable'(2017) 10 NUJS L Rev 451, 469.

17 Kyle Colonna, 'Autonomous Cars and Tort Liability' (2012) 4 Case W Res JL Tech & Internet 81, 81-82, 91-92.

18 Regulation Relating to Autonomous Vehicles (NAC 482A, Nevada Legislature, 30 August 2018), s 4.2.

19 Nevada Legislature, *Informational Statement of Adopted Regulations As Required By Administrative Procedures Act, NRS 233B.066* (LCB File No R084-11, 6 February 2012).

caused by autonomous systems. In rare cases, strict liability is imposed upon creators of respective systems. The Product Liability Directive introduces strict liability on producers if:

1. The producer is a producer of movable products;
2. AI is integrated into a product that causes defect; and
3. Such defect incurs material damage to the respective person.

Then, the producer will be liable to pay compensation.

In particular, if the defective product causes 'death, personal injury or material damage above 500 Euros' upon 'users or properties in the premise they are residing in', the producer will be held strictly liable irrespective of whether the consumer or operator has committed negligence.[20]

However, numerous scholars and parties have expressed concern over the traditional creator-operator liability allocation for AIs. One reason is that AIs have been developed to function increasingly autonomously. Through neural networks or machine learning, autonomous systems have deviated from providing straightforward outputs corresponding to the user's input. Pasquale describes the autonomous system which operates less transparently and less straightforwardly as 'black-boxes'.[21] Newer machine learning models may be less controllable, transparent, and understood. The causation argument thereby will be more difficult in really attributing liability to the wrongdoer, if any. The increasingly complex autonomous systems also pose challenges to traditional AI laws and regulations, emphasising transparency and control of AI systems.

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[20] European Agency for Safety and Health at Work, *Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective* Products (4 October 2017), art 9.

[21] Frank Pasquale,'Normative Dimensions of Consensual Application of Black Box Artificial Intelligence in Administrative Adjudication of Benefits Claims' (2021) 84 Law & Contemp Probs 35, 35-39.

## A. Autonomous Wrongs, Unintended Consequences and Liability Challenges

The first problem arising from highly autonomous systems, is that they may cause potential harm without direct input or intent of their creators or operators. In some instances, AI chatbots produced racist responses upon associative learning from indirect inputs.[22] The mechanism operates as such: if a user in the past has mentioned topic A and has mentioned another irrelevant topic B of a particular race (without racist implications), the AI may then associate Topic A with Topic B (race) in racist manners, without the creator or operator intending such consequences.

AIs may also draw inferences without distinguishing prejudicial and biased data, thereby making racist associations. The US court system's application of AI in recidivism prediction (predicting the likelihood that criminals will commit crimes again) has been criticised for perpetuating racial bias against African-American inmates.[23] Such biases are not the result of explicit programming, but rather from AI's reliance on historical data which contains inherent prejudices (such as where prisoners have been stigmatised or wrongly convicted due to racial factors). Similarly, AI-based employment systems may inadvertently incorporate existing stereotypes into the hiring process when using past employment patterns, producing discriminatory results again without the explicit fault of the creator or operator.[24]

Secondly, AI art bots and autonomous systems often produce intellectual property-infringing content, by using copyrighted material without the user's conscious decision. It is not uncommon for prior users to associate a particular art style or word with a certain artist, producing highly identical and even infringing results (such as associating trademarks or patentable images with the image). Later users who type keywords will therefore have produced IP-infringing images by simply typing an

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22 ibid 451.

23 Julia Angwin and others, 'Machine Bias' (*ProPublica*, 23 May 2016) <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> accessed 23 February 2023.

24 Bernd Carsten Stahl, 'Ethical Issues of AI' in *Artificial Intelligence for a Better Future: An Ecosystem Perspective on the Ethics of AI and Emerging Digital Technologies* (Springer Nature, 2021) 35-53.

innocent word. Examples illustrating the potential breach of copyright from autonomous systems include that of AI-generated portrait 'Edmond de Belamy' and also the copyright infringement allegation from creator-application Prisma. In both instances, AI systems autonomously incorporated copyrighted material into their learning process, raising questions about how to appropriately handle liability for these actions.[25] Some of the most popular AI image-generating applications, including Stable Diffusion and Mid Journey, have faced legal challenges from artists arguing that their works were scraped and used for training by machine learning algorithms without the artists' permission.[26] While these applications may not be fully autonomous, as the scope of training data may be selected by the application-creators, their cases illustrate the tension between achieving high performance and accuracy in AI systems and respecting copyright law.

As mentioned, several existing laws have been proposed or implemented to address concerns over AIs. The European Parliament has urged the European Commission to develop updated legislations to ensure AI-compliance with the law.[27] However, even the proposed regulations, such as those in the *EU Parliament's Proposal for Regulation* may not fully address the increasingly 'black-box' and autonomous nature of AI systems.[28] For instance, the Parliament proposes the reversal of burden of proof, that users will not have to bear the burden of proving that the negligence of creators have caused the products to be defective. This however ignores the aforementioned problem that AI's 'defects' may be the result of its autonomous system, outside of the creator's control. Tracing liability to the creator of

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25 Brian Golger, 'Copyright in the Artificially Intelligent Author: A Constitutional Approach Using Philip Bobbitt's Modalities of Interpretation' (2019) 22 U Pa J Const L 867, 867-870.

26 James Verge, 'AI Art Tools Stable Diffusion and Midjourney Targeted with Copyright Lawsuit' (The Verge, 16 January 2023) <https://www.theverge.com/2023/1/16/23557098/generative-ai-art-copyright-legal-lawsuit-stable-diffusion-midjourney-deviantart> accessed 15 February 2023.

27 Tambiama André Madiega, 'Artificial Intelligence Act' (European Parliament: European Parliamentary Research Service, 2021).

28 European Commission, *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts* (COM/2021/206, 21 April 2021).

autonomous systems may therefore threaten innovation, without truly tackling and solving respective problems. Other suggested measures include enforcing stronger terms and conditions to regulate potential breaches, enforcing monitoring on AI creators and backdoors for misusage.

This essay will not argue as far as scholars like Tasioulas has, that AIs should be granted comprehensive rights and legal entities like human beings, as they mimic human consciousness.[29] I hope to merely argue in this essay that rights of practical and limited scope may be granted to autonomous AIs to hold accountability and prevent misuse, possibly in implied licenses over AI-generated work. I hope to also explore the difficulties and possibilities of making AIs as right-bearing legal persons.

# III. GRANTING AI RIGHTS AS A METHOD OF ACCOUNTABILITY

## A. Granting Copyright to AI-Generated Works May Help Protect Intellectual Property

Making AIs right-bearing entities does not mean that we have to punish or think of ways to imprison the AIs at fault.[30] By granting copyright to AI-generated works, intellectual property rights can be protected without placing undue burden on creators or operators. While this does not necessitate the punishment or imprisonment of AI systems, it serves as a mechanism to hold parties accountable for their actions. For example, if an AI-generated work infringes on copyright, subsequent users may be prohibited from using the work, as the copyright has not been transferred from the original rights holder to the AI.

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29 John Tasioulas, 'First Steps Towards an Ethics of Robots and Artificial Intelligence' (2019) 7(1) Journal of Practical Ethics 61.

30 ibid.

## 1. THE BAIDU CASE

An example will be how granting AI patent rights or copyrights over AI-generated work assists in preventing copyright breach to third party owners. In the case of *Beijing Film Law Firm v Baidu Netcom Technology Co Ltd* (Baidu Case), the Claimant was a Beijing Film company represented by its legal department, and the Respondent was Baidu Ltd.[31] The Claimant generated a short essay with software developed by a Dutch information service company Wolters Kluwer. The Claimant typed keywords and the condition of the Beijing film industry, and the software generated an essay with respective data, graphs and film screen captures, sorted from Wolters' online database. The Claimant also added a few paragraphs of original texts in the essay, to supplement and comment on the generated content.

Later, the Claimant published the essay on the Weixin platform, and never authorised the publication of the essay on the Respondent's platform, Baidu. Upon discovering that the essay was published on Baidu without stating the Claimant's authorship, the Claimant brought a claim of copyright infringement against the Respondent.

The Respondent counter-argued that the Claimant had no copyright over the generated essay, as the essay was generated autonomously by Wolters' software. The Claimant did not demonstrate originality in the creation or compilation of the essay, nor demonstrate minimum effort in the creative process (only typing the keywords into Wotlers' software). Under the Copyright Law of the People's Republic of China (Chinese Copyright Law),[32] the Claimant did not enjoy authorship over the essay, and was therefore not eligible to bring copyright infringement claims over other people's usage of their respective essay.

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31 Ernest Kenneth-Southworth and Yahong Li,'AI's Future Impact on Copyright for AI-Generated Works: Insights from Chinese Case Law' (2022) 44(7) European Intellectual Property Review 418, 418-427.

32 Copyright Law of the People's Republic of China 1990 (2020 Amendment).

The Beijing Internet Court reasoned that there was no breach in the Respondent's usage of film screen captures retrieved from the database. The Court reasoned that:[33]

1. There was no breach from the Respondent towards the graphs used. They were created by the software, upon the Claimant's entry of respective keywords.

2. There was no breach from the Respondent towards the written analysis contained in the article, which was auto-generated by the legal database online. This was because the Court asserted that although there was originality in the 'selection, judgement and analysis' of the Database's writing, the Database or any Autonomous Networks were themselves incapable of being treated as 'Copyrightable Works'.[34]

3. Under Article 3(1) of the Chinese Copyright Law , only 'natural persons' are capable of creating copyright law.

4. The software itself and any respective work created may not qualify as anything created by 'natural persons'. Quoting the Court, 'in some ways, the Kluwer software is the one that created the analysis report, as it generated analysis by using and combining the keywords, algorithm, rules and template'.[35] Nonetheless as the software was not a natural person, it could not be held accountable. The Respondent could not commit any copyright breach against the software from the beginning.

5. The only 'natural persons' engaged in this process did not hold authorship to the end product of the essay by merely creating the software. The software developer simply typed codes and developed the software, allowing it to generate written analysis in the future.

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33 *Beijing Law Firm v Beijing Baidu Netcom Science & Technology Co Ltd* [2018] Jing 0391 Min Chu No 239.

34 ibid.

35 ibid.

6. The Claimant did not qualify as the author, as he simply 'entered keywords' and searched for relevant data. He did not express his original expression of ideas and emotions, and hence was not liable for copyright infringement.

In the end, the Respondent was only held liable for independently creating (typing) the written texts in the article and allowing that infringing part to be posted to public via an information network. The Respondent was finally held liable in paying RMB 1,560 in damages, solely on the breach of copyright from its original written texts. The Court held there was no breach, or no natural persons to be held liable of, for the software directed photos and generated texts.

## 2. THE DREAMWRITER CASE

The 'natural person' prerequisite in Article 3 of the Chinese Copyright Law requires any creation of copyrighted work, or copyright infringements, to be made by or committed by a natural person.[36] This immediately seems to open up a loophole for using AI or autonomous digital tools to infringe copyrights. So long as someone asks an AI (for example, ChatGPT or similar AIs) to paraphrase or retrieve copyrighted information, both him and the AI may not be held accountable for committing infringements. The Chinese Court subsequently addressed the question in a similar case in *Shenzhen Tencent Computer System Co Ltd v Shanghai Yingxun Technology Co.*[37] The Court deviated from the decision in the Baidu Case.[38] Tencent Technology Beijing Co Ltd developed a software named Dreamwriter, capable of generating, writing and publishing news articles. The Claimant used the software to write and publish a financial report, in which the Respondent later reproduced and published. The Shenzhen Nanshan District Court held that the Respondent did breach the Claimant's copyright.

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36 ibid.

37 *Tencent v Yingxun Tech* [2020] Yue 0305 Min Chu 14010.

38 ibid.

The Court did not address the issue of whether Dreamwriter as a non-natural person was capable of producing copyrightable work, nor address the problem of authorship. Instead, the Court concluded that there was originality in the Claimant's selection and arrangement of words in generating the article. Though there is no authorship involved in the two-minute auto-generation process, the preparatory work allowed the Claimant to establish that copyrightable work has been produced. One could analogously envision how the view that AI possesses copyrights gives a more persuasive answer than where one is to attribute copyright to the operator, who may have only put minimum effort.

In comparison to the Baidu case, the differing outcome also suggests that courts may possibly categorise autonomous systems as authors of created works, if the operator fails to demonstrate minimum effort and originality in creating or compiling information for the generated work.

## 3. THE DABUS CASE

In the UK's Patents Act 1977 and Rule 10 of the Patents Rule 2007, a 'person or persons' have to be the creator of any work such that it may be patentable. In the EU, Article 81 and Rule 19(1) of the European Patent Convention also limits 'natural or legal persons' to be receivers of patents. In the common law jurisdiction, the DABUS Case similarly illustrates how courts avoid directly granting legal personhood to autonomous AIs, by making the creator of the AI as the eligible patent or copyright holder over generated works.[39] This is also the most common approach in China or certain EU jurisdictions. It nonetheless fails to take into account future AI systems that are autonomous enough that the creator may put minimum or even no effort to the final work.

The Applicant Dr Stephen Thaler developed a creative AI system named DABUS. Dr Thaler intended to apply for a patent for works created by DABUS, yet the application was

[39] *Commissioner of Patents v Thaler* [2022] FCAFC 62.

denied in the United States Patent and Trademark Office (USPTO) and European Patent Organisation (EPO). In the lower Federal Court of Australia, it was held that though AI systems cannot own patents, they can be named as inventors of the patents. According to section 7 of the Patents Act 1977, the Act states clearly that a patent may be granted to joint inventors, subject to section 2(a), or to any 'person or persons'.

Subsequently, the Appeal Court in the DABUS Case addressed both the issues of legal personality, and also whether AIs can qualify as inventors, thus enjoying patent rights.[40] The main issue that the Appeal Court overruled concerned whether DABUS as a non-human may qualify as inventors or persons, under section 7.

In the lower Court judgment, the primary judge decided that under substantial law, an inventor, different from owner or controller, is not expressly confined to being a human.[41] There is a formal requirement from Regulation 3.2C of the Patent Acts and Regulations that requires the applicant to provide an address for service and the name of the inventor. In this case, the formal law was not able to comply with the application requirement, for there is 'legal impossibility for an AI machine to be named the inventor',[42] with reference to the Patents Act. Section 15(1) of the Patents Act states that a patent for 'invention' may only be granted to a 'person' who is the inventor. Hence, the formal requirement for filing DABUS as the inventor is impossible legally, resulting in the impossibility for the AI to be made the patent holder. However, the primary Court created a 'backdoor' for Dr Thaler's application. Namely, the primary Court held that section 15(1) and Regulation 3.2C(aa) of the Patent Act allowed a reading that DABUS may in some way assign the patent rights to Dr Thaler. Section 1383(3)(a) of the Patents Act states that if the final concept of patent invention would not have come about without a particular person's invention, the person has entitlement to the invention. Also, as Dr Thaler was the inventor and creator of DABUS, he will have transferred the right of ownership of

40 *Thaler v Comptroller-General of Patents, Designs and Trade Marks* [2020] EWHC 2412 (Pat).

41 *Thaler v Commissioner of Patents* [2021] FCA 879.

42 ibid.

DABUS. In this sense, the result in the DABUS Case differs from Chinese case law, which focuses on the originality of the AI in its work.

The result of the Court has reaffirmed the rationale of the ruling in a UK case on the same application, where the UK Court held that though AIs do not qualify as a legal person, the creator of the AI (Dr Thaler) will still be entitled to copyright provided by the AI as the creator and controller of the AI's copyright.[43] Namely, Smith J distinguished between the right of invention and the right of transferring patent, under section 7 of the UK's Patent Act 1977.[44] The AI may transfer the right to a natural person, as per the applicant's request in form.

The Appeal Court in Australia differed from the UK Court's decision, concluding that Dr Thaler did not hold a patent right (Dr Thaler applied for a patent in both the UK and Australia). The Court held that the inventor in section 15(1) of the Patent Act requires someone to 'devise' the intention to invent, which implies that the person must be a human being. Moreover, it is essential for the inventor to be a natural person himself to gain any transferable right, which has not emerged in this case due to AI's nature as an artificial intelligence.[45]

## B. Implication on Rights

The laws on AI and copyrights have been illustrated by the two examples above, as UK and China hold the leading case in discussing how courts consider copyright ownership for AI-generated works.[46]

A traditional operator-liability approach falls short of its merits. As demonstrated in the Baidu Case, courts may categorise the autonomous systems or AIs as authors or potential copyright

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43 *Thaler* (n 40).

44 ibid [37]-[38].

45 *Thaler v Comptroller-General of Patents, Designs and Trade Marks* [2021] EWCA Civ 1374.

46 Rita Matulionyte and Jyh-An Lee, 'Copyright in AI-Generated Works: Lessons From Recent Developments in Patent Law' (2022) 19(1) Journal of Law, Technology & Science 5.

holders, if operators fail to demonstrate originality and minimum effort in creating work with the assistance of AI.

Alternatively, a traditional creator-liability approach also falls short in attributing copyright ownership, as seen from how Matulionyte comments on the DABUS case.[47] If the AI is sold to another company, do patents generated over previous work still belong to the original creator? If not, it may greatly demotivate AI creators in selling their AI, rather selling licenses for others to use the AI on limited terms. In that case, complex legal disputes will arise as to whether the contribution of all parties involved justify allocating copyrights to one of them (since splitting copyrights will be extremely difficult, if not impossible).

Nonetheless, if limited rights are granted to AIs over some of its generated works (such as if the operator fails to demonstrate originality and minimum effort), the court can prohibit misuse over AI-generated work, without having to involve a potential creator or operator in bringing respective claims, and avoiding the problem of allocation of standing, and who qualifies in bringing the proceeding. This could be achieved through various forms, including but not limited to:

1. AI-generated work qualifying for copyright as if it was created by human beings, as proposed by Butler.[48] In this essay, I argue that AIs can qualify as legal persons and enjoy limited rights, such as copyright or patent rights over some of its generated works. In case of breaches, qualified representatives or appointed persons may represent the AI in bringing litigations, similar to how other non-human legal entities, such as companies or ship vessels, are represented.

2. Autonomous systems enjoying *sui generis* rights over generated works, as Professor Sun suggested,[49] that does not stipulate registration requirements or copyright qualifications.

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47 Ryan Abbott, Rita Matulionyte and Paul Nolan, 'A Brief Analysis of DABUS, Artificial Intelligence, and the Future of Patent Law' (2021) 125 Intellectual Property Forum 10.

48 Butler (n 13).

49 Sun (n 15).

Common law makes it possible to deem non-human entities as legal persons. In the US and other common law jurisdictions, ship vessels have been the subject of *in rem* admiralty proceedings. Claimants whose interests are damaged by ship vessels may directly sue the ships. In the more recent case of *Reed v The Yaka*, the US Court allowed the claimant to hold a personal suit against the ship for causing damage.[50] Judge Learned Hand commented that ships in admiralty law acquire juridical personality simply for 'being able to contact and be liable of obligations; able to commit torts and liable to wrongdoings'. It is therefore possible for the owner or operator of a ship to not be liable, while the ship is held liable as a legal person.[51] The Court gives credit that the act of directly suing the ship is a procedural device for admiralty law, as the ship owner has effectuated liability through contractual means between the owner and operator. The shipowner under the Harbour Workers Act had an 'absolute duty imposed by law against the shipowner' to maintain a 'seaworthy vessel'.[52] Therefore, the allocation of legal accountability is inevitably, in other cases of non-human entities, to trace liability retrospectively to relevant persons when there are difficulties in doing so, through traditional contractual or tortious means. It is argued that the granting of AI rights has acted as a retrospective means.[53] Rights have been determined retrospectively – they arise after breaches have occurred, and also are specifically determined by courts. This current approach will be far more convenient than if the Court ever engages in determining the scope of rights if AIs are deemed as legal persons. As rightly highlighted in the DABUS Case, the court is very reluctant in playing the role of legislators and even philosophers in determining any rights beyond the current right disputed in the case.

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50 *Reed v The Taka* [1963] US 410.

51 Alex T Howard, 'Personification of the Vessel: Fact or Fiction?' (1990) 21 J Mar L & Com 319.

52 ibid.

53 Joshua C Gellers, *Rights for Robots: Artificial Intelligence, Animal and Environmental Law* (1st edn, Routledge 2020).

## C. How AI-Copyright May Be Granted

Butler demonstrated one possibility of re-interpreting section 102 of the US Copyright Act, by inserting the phrase 'human authorship will be presumed' and 'authorship and originality deemed satisfied' in the original act in case of works generated by AI, to overcome the obstacle that AIs are claimed to not satisfy the human-centric requirement of copyright owners under US law.[54] This essay argues that a similar approach of interpretation could be adopted in Chinese and Hong Kong jurisdictions. The Court applied the Chinese Copyright Law to determine that only natural persons are eligible for acquiring copyright protection.[55] The Court then interpreted Article 11, holding that the fact that the author is a natural person need not be a prerequisite requirement for any work, as the Act, from a mere reading, stipulates that legal persons can be the author of a work.[56] Morever, the 'will' of the legal person may be excluded or in the case of autonomous AI systems, may be defined as 'clauses similar to or without will of relevant natural persons, created by autonomous systems, without intervention of any natural persons in the creative process other than possibly initiating or starting the process'. Then, the autonomous system may be regarded as the author.

For Article 12 of the Chinese Copyright Law, modifications seem unnecessary as it already covers copyrights enjoyed by legal persons.[57]

For Article 15, the Chinese Copyright Law clarifies that infringement or ownership of copyrights extends to legal persons.[58]

The Court should clarify that the right extends to legal persons or autonomous systems. In that way, if an AI did, in the Baidu Case, create works with sufficient originality by collecting and rearranging the copyrighted material, the AI shall own rights towards the material. The operator would infringe the AI's

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54 Butler (n 13).
55 Copyright Law of the People's Republic of China (n 32).
56 ibid, art 11.
57 ibid, art 12.
58 ibid, art 15.

copyright if they commit acts of infringement stipulated under Article 53 of the Chinese Copyright Law by 'reproducing, distributing, broadcasting … etc.' works of the AI, similar to how it will constitute infringement to a natural person as a copyright owner. Similarly, if the AI constitutes a legal person, it may be capable of committing copyright infringing acts, so the plaintiff in the Baidu Case may argue that the copyright has not passed to the autonomous system in the first place, deeming any operator of the AI also an infringer of copyright. This way, one could grant greater protection to copyright owners from infringement, as well as avoiding the hazardous potential implication in the Baidu Case of having copyright work converted to works in the public domain once processed by the AI if the *Dreamwriter* reasoning cannot apply (i.e. if the operator really has put minimum effort to be characterised as the copyright holder, or when no natural persons can be held as copyright owners).[59]

Furthermore, the determination of contribution or control of AI creators fall short in accounting the increasingly autonomous nature of AI systems. The new ChatGPT tool, for example, provides not only a source of first-level creation (i.e. the operator typing a request and the AI generating the output), but also a second-level creation (i.e. generating an application that creates further tools that can create works). This may deem some current proposed method of regulation of AIs outdated. It will be questionable whether the terms and services that bind the results generated from a good will also bind subsequent users. For example, if an application from ChatGPT is created, and subsequent users use the code generated from this operation, do the original conditions bind subsequent users of the generated application? If autonomous systems have rights, there may be inherent conditions to using AI-generated works, in terms of copyright or fair usage, without having to trace the origin and applicability of terms and conditions, for potential licences, source of generator, or anything generated related to autonomous systems.

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[59] Jiang Ying, 'Weilai Yi Lai: Cong Liang Anli Tanjiu Woguo Rengong Zhineng de Zhuzuoquan Baohu [The Future is Here: Exploring the Copyright Protection of Artificial Intelligence in China in Two Cases] (2021) LexisNexis China.

## D. Application in Other Areas: Automatic Weapons and Infringements to Privacy

Arguably, granting AI rights also assists in solving the accountability problem to other hazardous applications of AI that raise AI rights concerns.[60] The inability to hold autonomous AIs accountable may imply more serious consequences in problems of privacy infringements or in military applications. As Chatterjee illustrates, current autonomous or AI directed weapons are applied more frequently in military usages or assassin operations, yet remain unregulated by existing laws of armed conflicts.[61] AI is also used for surveillance purposes for governmental face recognition systems, and is often criticised by its application for collecting private user information and pattern recognition for purchase patterns.

By granting rights of legal personhood to AIs, one may consider arguing that using AIs for such purposes are illegal if performed by legal persons. The AIs analogously experience forced slavery in performing criminal acts, if conventions such as Article 4 of the European Convention of Human Rights apply. The operators cannot say AIs made the autonomous decisions themselves, as they cannot program or design AIs to perform illegal or derogatory tasks. This measure may effectively prevent the shifting of liability that the decisions are made by AIs autonomously, while also providing a fairer approach than merely attributing liability to the creator or operator, addressing the autonomous nature of AIs where decisions are sometimes made without human intentions intervening.

I hope to clarify that, by giving AIs rights, I do not intend to argue that AIs should be subject to all human rights protections. From the following cases that I quote, courts, when considering extension of rights to non-humans, do not always adopt the traditional human rights approach of referring to established principles that is common to all humans. Courts may declare legal

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60 Sheshadri Chatterjee, Sreenivasulu NS and Zahid Hussain, 'Evolution of Artificial Intelligence and its Impact on Human Rights: From Sociolegal Perspective' (2022) 64(2) International Journal of Law and Management 184.

61 ibid.

personhood retrospectively or grant remedially certain rights, but such rights are limited. As Gellers points out, this approach is perhaps the most practical solution for courts to deal with proper rights that AIs should enjoy, if any.[62] The Court will always be reluctant in imposing new rights or taking on the role of legislator. It will be greatly hesitant and self-aware, to abstain itself from playing a philosophical role in determining what rights autonomous systems or AIs should or should not enjoy. However, I will provide a brief discussion below that courts in most jurisdictions are not bound by codified law in making AIs legal persons. The most tenacious obstacle rests in common law traditions, binding courts from categorising current entities that are not legal persons, from ever being one.

Nonetheless, I argue that under the current property or relation-based approach, there is emerging case law that opens the possibility for AIs to be recognised as legal persons. I will briefly review and explore the possibility of using a relation-based approach in making AIs or autonomous systems legal persons.

# IV. AIS AND LEGAL PERSONS: A NECESSARY CONDITION FOR RIGHT-BEARING ENTITIES?

## A. Why Can't We Just Make AIs Legal Persons?

The challenge of AIs as right-bearers appears to be an arbitrary one. Many scholars engage the Berne Convention or relevant conventions preventing the conception of AIs as 'natural or legal persons' bearing copyright,[63] while judges mostly decide on the question of existing law. In the aforementioned Chinese and UK cases discussing whether AIs have rights, courts simply engage in discussion of determining whether pre-existing definitions (such as inventors) cover legal persons, or whether non-natural persons are capable of committing copyright infringement. The discussion

62 Gellers (n 53).
63 Matulionyte and Lee (n 46).

on AI's legal personality is based solely on positive law. After reviewing international jurisdictions, Dremliuga concluded that there are no essential legal authorities in the EU and US jurisdictions that prohibit any entities from being granted legal personhood.[64]

There is no formal rule as to how many rights and obligations one has to bear to qualify as legal personhood. Nonetheless, a legal person is usually considered to possess the best rights to its own property, and may be capable of suing someone or be sued in jurisdictions.[65] The *Butterworths Australia Legal Dictionary* thus simply describes a person, or legal person, as a 'separate legal entity, recognised by the law as having rights and obligations… that includes human beings and entities of humans only whom the law regards as capable of rights and duties'.[66] In this sense, in case it is agreed that AIs should be granted legal personhood, it will be fair to grant it at least some rights, on top of holding it liable to certain duties.

Similarly, in Hong Kong, there are no statutory requirements or definitions for what constitutes legal personhood, nor stipulations of what certain rights bear. In the Companies Ordinance (Cap 635), it stipulates that 'legal entity' refers to 'a body of persons, corporate or unincorporate, that is a legal person under the law that governs it',[67] but there is no specification as to statutory definitions of what constitutes or classifies something as 'legal persons' from something that is not. The question of whether non-human entities are 'legal persons' is therefore greatly dependent on the unique common law jurisdiction of countries.[68]

In the Intellectual Property Office's reply to Applicant, it was said that it was not the purpose of the DABUS Case litigation to determine whether AI should qualify as a natural or legal

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64 Roman Dremliuga, Pavel Kuznetcov and Alexey Mamychev, 'Criteria for Recognition of AI as a Legal Person' (2019) 12(3) J Pol & L 105.

65 ibid.

66 Peter Edward Nygh and Peter Butt, *Butterworths Australian Legal Dictionary* (Butterworths 1997)

67 Companies Ordinance (Cap 635), s 653A.

68 Sheikh M Solaiman, 'Legal Personality of Robots, Corporations, Idols and Chimpanzees: A Quest For Legitimacy' (2017) 25 Artificial Intelligence and Law 155.

person.[69] The clever analogy of 'alien' marks a keen possibility that, though positive law does not address how to classify non-human entities, it is ready to make advancements when necessary, and has the ability in doing so by extending current legal coverage.

Despite so, it was not discussed in the DABUS Case, in both UK and Australia, as to exactly what qualifies as natural persons, legal persons, and what does not. The Court only addressed the issue of whether AIs qualify as legal persons and enjoy patent rights and copyright protection under the current UK Patent Act.[70] The USPTO has also proposed to apply the 'work-made-for-hire' principle to allow operators to act as employers of AIs, therefore gaining copyright over AI-generated works as if AIs are under their employment, allowing them to get over the limitation that only natural persons qualify as inventors. These measures seem temporary and fail to address the increasingly autonomous nature of AIs.[71]

Unfortunately, the alien analogy seems to spark great inspiration as to how current law separates non-human legal persons, from those that are not. Courts have adopted two main common law approaches regarding decision on extending legal rights to unprecedented entities. Argentina's Supreme Court Judge Tolosa in the case *Orangutana Sandraw* has provided a comprehension summary of the approaches, namely a 'Properties-based' or 'Characteristic Approach', and also a 'Relational Approach', taking into consideration the relations between the entity with humans. For the former, the Court conducts a test of comparison comparing whether the current entity resembles natural persons in terms of property, such as whether it may experience pain and its cognitive ability. For the latter, the Court conducts a test regarding whether granting legal personhood reflects functional relationships with human beings or other entities. The justification of corporate legal personhood has been

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69 Intellectual Property Office Decision on Whether the Requirements of Section 7 and 13 Concerning the Naming of Inventor and the Right to Apply for a Patent Have Been Satisfied in Respect of GB1816909.4 and GB1818161.0 [2019] BL O/741/19.

70 *Thaler* (n 40) [23].

71 Kate Gaudry and others, 'The Intersection of IP and Artificial Intelligence (AI)' (2021) 56(3) Journal of the Licensing Executives Society 240.

concluded by Blair to conclude along these two lines.[72] Two most prominent theories explaining why corporate bodies enjoy certain rights but not others, reflect the property based and relational approach. In the first constituent theory by Dodd, he suggests that corporations are 'associates of individuals' joining together to form the corporation, defining the legal status and rights enjoyed by the corporate body.[73] The second theory considers corporations not as extensions, but real entities. Philips argued for the 'real entity' theory, that the corporation is a real entity separate from individuals. It is given legal personhood as it possesses properties that are similar to real human beings – its process of decision making, its ability to vote for internal issues, and more, all entitle it to enjoy its respective rights, while its shareholders and directors are regulated by their respective laws. It is not a surprise that the common law therefore, despite explicit legislation, borrows these approaches in dividing non-human entities into what may be classified as legal persons, and what may not.

## B. Property/Characteristic-Based Approach in Animal Rights Cases

The US case of *Matter of Nonhuman Rights Project Inc v Stanley* was an unprecedented attempt to obtain judicial recognition on non-humans or animals.[74] The Supreme Court heard an application of habeas corpus for two chimpanzees. The Petitioner was a non-governmental organisation focusing on advocating for fundamental rights to non-humans. They intended to apply for the Court's declaration that habeas corpus should be granted to two chimpanzees who were detained in universities for research purposes. The Petitioner made clear that they did not intend to argue along the lines of enhancing animal welfare,[75] but that the chimpanzees and eventually all animals should have legal rights. The Petitioner thus quoted psychologists, zoologists, anthropologists and primatologists claiming that the chimpanzees

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72 Margaret M Blair, 'Corporate Personhood and the Corporate Persona' (2013) U Ill L Rev 785.

73 Michael J Philips, 'Reappraising the Real Entity Theory of the Corporation' (1993) 21 Fla St U L Rev 1061.

74 *Matter of Nonhuman Rights Project Inc v Stanley*, 49 Misc 3d 746 (Sup Ct, New York County 2015).

75 ibid [5]-[8].

possess complex cognitive abilities.[76] They share high genetic similarity, and also demonstrate a certain level of consciousness.[77]

The lower court in Fulton County held that the chimpanzees were not legal persons, thus not protectable by habeas corpus. The lower court also decided that chimpanzees were not capable of qualifying as legal persons as they were incapable of bearing legal responsibility.[78] The Supreme Court did not deny the Petitioner's submission of fictional rights, that if the Court allows chimpanzees to gain fictional personhood, they may be entitled to the right of habeas corpus. This may allow non-human entities to enjoy rights without recognising them as humans, or subjects eligible to human rights.[79] Nonetheless, it was ultimately ruled that:[80]

1. Under current definitions, such as 'person' in *Black's Law Dictionary,*[81] persons should only include human beings, natural persons or entities recognised by laws as having rights and duties of human beings.

2. Following *Lavery,*[82] chimpanzees do not have the capacity of bearing legal responsibilities. The current case law only limits the coverage of habeas corpus to persons, which excludes extension of rights to animals.

3. Though some authorities recognise that quasi-persons can be bearer of partial rights,[83] no additional administrative relief should be granted as current animal law legislations suffice in protecting the chimpanzees.

In *Stanley,* the Court did not engage in discussion of cognitive and genetic resemblances.[84] Even in the referenced

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76 ibid [38]-[39].
77 ibid [8]-[9].
78 ibid [152].
79 ibid [32]-[33].
80 ibid.
81 Henry Campbell Black, *Black's Law Dictionary* (9th ed, West Publishing Company 2009).
82 *Matter of Nonhuman Rights Project Inc v Lavery*, 31 NY 3d 1054 (Court of Appeals of New York 2018).
83 Saru Matambanadzo, 'Embodying Vulnerability: A Feminist Theory of the Person' (2012) 20 Duke J Gender L & Policy 45, 61.
84 *Stanley* (n 75).

*Lavery* case regarding similar extension of certain rights to animals, there is no discussion on cognitive resemblances. The Court also rejected chimpanzees' capability in 'bearing any legal responsibilities and societal duties, rendering it inappropriate to confer upon chimpanzees legal rights'.[85]

As Gellers accurately points out, the failure of granting animals status as legal persons is also greatly related to the court's observation of how animals are adequately protected under current welfare legislations. The granting of habeas corpus may be substituted by injunctions or orders without triggering discussion on legal statuses.[86] There may be cases saying otherwise, especially for foreign jurisdictions and cases discussing the right to nature, including the line of Indian cases where parts of nature are granted legal personhood.[87]

The line of cases in India and Argentina provide a more relaxed approach and the possibility to include non-human agents as right-bearing. In the Supreme Court of Argentina Case *Orangutana Sandra s/ Recurso de Casacion s/ Habeas Corpus,* Judge Luis Armando Tolosa Villabona came to a different conclusion in view of a bear named Sandra held in capacity in a zoo.[88] Judge Tolosa made a distinction between the approaches. Regarding the property or character-based approach, Judge Tolosa noted that advancement in law should be made in both approaches. Regarding the property-based approach, Judge Tolosa commented that there should be an advancement from the simple approach of determining whether non-human entities are right bearing.[89] This includes considerations of sentience and reciprocal duties. In the relational sense, there is a difference from the traditional extension approach in that legal personhood should only be granted to something as an extension or aggregation of natural persons, such as a corporate entity. Judge Liberatori also emphasised on the importance of adapting the relation-based approach.[90] While the application of the property-based approach may imply a potential

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85 ibid.
86 Gellers (n 53).
87 ibid 83-135.
88 Causa No CCC 68831/2014/CFC1 *Orangutana Sandra s/ Recurso de Casación s/ Habeas Corpus* (Camara Federal de Casación Penal, 2014).
89 ibid.
90 ibid.

floodgate argument that every sentient being may then not be deprived of their life, the relation-based approach gives emphasis to how individuality and agency of animals should be recognised, such that they may to some extent self-determinate and be free from captivity, thereby being entitled to enjoying certain rights and freedoms as legal persons.

Jurisdictions such as India have been more radical to advancing 'legal persons' to non-living entities in the property or character-based approach, and relational approach. The argument of right of nature, that the relational approach may be used to make environments as legal persons, is further applied in cases where the property or characteristic test was not applied.

This concept of granting legal personhood, as an essential tool in securing environmental interests, is further discussed in *Kodailkanal Hotel*.[91] The Indian Court took reference from Ecuador and certain local US government bodies, that rights of nature should be promulgated as an important right. In Bolivia, nature is also defined as a juridical entity as it best reflects a constant entity that has to be protected in the face of the collective public interest.[92] Thus, the Indian Court confirmed that Article 48 and Article 51 of the Indian Constitution established a fundamental right for human beings to coexist peacefully and hold in trusts of future generations the current condition of nature, and also diversity in species. The Court reiterated that rights should be preserved first, then clarified the scope of legal entities based on the importance of maintaining a harmonic relationship between nature and human beings. It does seem to provide a good argument based on a mere relational approach that the relationship between human beings and the ecosystem in general may affect the interests of current and future generations of human beings, justifying 'nature' as right bearers, and hence a legal entity.

The Court thus emphasised on how the existing legal framework fails to protect the natural environment, as many rivers

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91 *Kodaikanal Hotel and Resort Owners Association v State of Tamil Nadu* [2019] WP (MD) No 914 of 2018 (Madras High Court) [12]-[13].

92 Paolo Villaviencio Calzadilla and Louis J Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7(3) Transnational Environmental Law 397.

in Tamil Indu have been facing problems of dumping.[93] The granting of legal personhood assists in ensuring a relation-based approach in protecting relevant rivers, but also beyond relations with specific persons – future generations as a whole. These rights of nature secure appointment of guardians and trustees for necessary protection, allow public interest litigation that individuals may file on behalf of rivers or other natural entities to enforce rights of these entities, and call for administrative measures and protections beyond normal policy concerns. The Court made clear that as natural entities are legal persons with rights, it should be weighted above other policy and developmental concerns, save for the involvement of other fundamental constitutional rights.

## V. IMPLICATIONS ON AIS AND FINAL CRITIQUES

The simplest conclusion from the above cases may be that, common law jurisdictions have started to evolve in pushing the boundaries of applying a property or character-based approach in justifying the granting of rights to non-humans. Case law along the lines of a right to nature may provide potential justifications to AIs, in the sense that they will be in a constant cooperative nature with human beings in the foreseeable future or even now. Nonetheless, as Gellers and Wise point out, the line of cases still confer limited application to the case of AI, as the sentient nature of animals differentiates itself from possible paths of argument that AIs should have rights. Despite so, the possibility of incorporating legal-personhood when suitable, or its absence of discussion in current cases, still opens the possibility that jurisdictions might eventually evolve to extend legal personhood to autonomous systems when necessary, such as when AIs are autonomous enough.

To address considerable counter-arguments, Kotzé and Kim have criticised current legislation for non-humans to be too

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93 *Mohd Salim v State of Uttarakhand* [2017] No 126 of 2014 (High Court of Uttarakhand, India).

regressive.[94] The current system, if it grants any rights to autonomous systems, will be remedial. However, I argue that the retrospective approach may be a more practical approach, as compared to more progressive attempts to characterise a set of rights that AIs should have. It may not be the current role of courts to determine the scope of pre-existing or inherent AI rights, if any. This approach should also sufficiently address worries that granting overly-extensive rights will equalise them with natural persons.

Many may argue that current regulatory frameworks aim at holding AIs accountable without the need of granting them rights, in which I hope to respond with the ship vessel or river example, that the granting of rights against copyright infringement or potential misuse serves more of an injunctive purpose preventing misuse, or a legal tool for affected persons to initiate proceedings. This is in line with the previous lines of cases where non-human entities serve as legal persons, and assist in the process of holding accountability. This is contrary to when AIs were not regarded as having rights and no person had the standing to initiate proceedings in autonomously generated work. This will also be my reply regarding concerns that responsibilities will be shifted to AIs instead of creators if AIs are held to be right-bearing moral agents.[95]

The worry is that if AIs qualify as legal persons, they may be held accountable for military misconducts, while the human agents may escape liability by arguing that the AIs made 'autonomous' decisions as legal persons. My response will be that holding AIs as right-bearers allow the persons to be held accountable by, for example, arguing that they forced the AI into performing the acts (or any better ways of proceeding similar arguments). Finally, one may argue that the proposed method leaves room for many problems. For example, it may not stop AIs from generating discriminatory results. The right-accountability framework does not aim to substitute, but instead complements the existing framework. Similar to the proposals from the

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94 Louis J Kotzé and others, 'Earth System Law: Exploring New Frontiers in Legal Science' (2022) 11 Earth System Governance 100126.

95 Bérénice Boutin, 'State Responsibility in Relation to Military Applications of Artificial Intelligence' (2023) 36(1) Leiden Journal of International Law 133.

European Council, improved and newer methods of holding AI, AI creators and AI operators liable are impending.[96] The right-accountability framework simply hopes to allow accountability and prevent misuse if AI systems are overly autonomous, other than which traditional or improved liability frameworks should apply.

## CONCLUSION

In conclusion, this article hopes to argue that legislators and courts may consider creating jurisdiction for AI rights to hold accountability for AI systems if traditional liability approaches fail. This framework avoids discussions of what rights AI should have or whether or not it should be moral agents under law. Unquestionably, part of the reasons why humans have been more worried in extending legal personhood to AI, more than other non-human entities such as corporate bodies or ship vessels, may be largely due to the fear that AI appears as an imminent threat, and an increasingly omnipotent being. Perhaps if AIs constitute a threat, it will be of utmost importance that human beings consider and implement an appropriate framework of incorporating or embellishing AIs into existing human legal and social frameworks, rather than rejecting every possibility that AIs should be legal persons. Otherwise if one day our fear comes true and AIs do wake up and open their eyes, it will wreak greater havoc than if we actively consider how to maintain harmonious relations with it.

[96] European Commission (n 6).

# ARE OFFENCES FOR POSSESSION OF OFFENSIVE WEAPONS IN HONG KONG JUSTIFIABLE FROM A NORMATIVE PERSPECTIVE?

So Yiu Hei, Michael*

*This paper argues that offences for possession of offensive weapons in Hong Kong are predominantly unjustifiable from a normative perspective. The principle of fair play and omission will first be identified as doctrines that can justify offences for possession of offensive weapons in general. In applying these principles, it will be pointed out that the current Hong Kong offences routinely rely on the ulterior intent (intention to use an item to cause injury to someone) to counterbalance the over-inclusive definition of offensive weapons. Hence, it will be established that in principle the commission of a morally innocent act with a wrongful intention cannot be criminalised. Accordingly, it will be concluded that the current Hong Kong offences are to a large extent unjustifiable. In order to provide directions for reform, similar offences from England and Wales, and Germany will be reviewed.*

## INTRODUCTION

Offences for possession of offensive weapons frequently hit the headlines during the 2019 social movement in Hong Kong. As of March 2022, the offence of possession of offensive weapons is the second most frequently convicted offence among convictions associated with the social movement and led to custodial sentences.[1] Household items like laser pointers and hiking sticks

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1 Hong Kong Democracy Council, 'Hong Kong Reaches a Grim

were commonly branded as offensive weapons.[2] A public outrage lashing into the over-inclusive definition of offensive weapons ensued. This paper intends to explore whether any principled objections can be derived from the crowd. To this end, this paper approaches offences for possession of offensive weapons in Hong Kong from a normative perspective.

In *Overcriminalisation: The Limits of the Criminal Law,*[3] Douglas Husak valiantly defended his theory of criminalisation. He identified four internal constraints that limit the scope of criminal law:[4]

(i) Nontrivial harm or evil constraint;
(ii) Wrongfulness constraint;
(iii) Desert constraint; and
(iv) Burden of proof constraint.

This paper focuses on the wrongfulness constraint and the desert constraint because they are more debatable for possession of offensive weapons offences in Hong Kong.

This paper is organised as follows: Part I provides an overview of possession of offensive weapons offences in Hong Kong; Part II and III discuss the normative issues raised by the said offences. Part IV provides directions for reform with reference to similar offences from England and Wales, and Germany.

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Milestone: 1,000 Political Prisoners' (*Hong Kong Democracy Council*, May 2022) 14 <https://hkdc.us/political-prisoners-research-report/> accessed 21 September 2022 (for Hong Kong readers, the Government has blocked this website since October 2022).

2 ibid 16.

3 Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford Academic 2008).

4 ibid 55.

# I. OVERVIEW OF POSSESSION OF OFFENSIVE WEAPONS OFFENCES IN HONG KONG

## A. Definition of Offensive Weapons

In Hong Kong, an offensive weapon is defined as:[5]

> (a) an article made for use for causing injury to the person;
> (b) an article adapted for use for causing injury to the person; or
> (c) an article intended by the person having it with him for use for causing injury to the person.

Category (a) offensive weapons are commonly known as weapons offensive per se. Whether an item is a weapon offensive per se is a question of fact with the guiding principle being whether an item is manufactured for causing injury. Items manufactured for an innocent purpose like a razor, or a penknife are therefore not offensive per se.[6]

Category (b) offensive weapons are items adapted for use to cause injury. An earlier act of adaption is required, hence the mere fact that an item was used to injure someone does not mean that it was adapted for use to cause injury. Examples of a category (b) weapon include a bottle broken deliberately,[7] sharpened pipes and sharpened bike chains.[8]

Category (c) offensive weapons include any item if an intention to use the said item for causing injury is proved.

Category (a) and (b) offensive weapons are conceptually similar and both do not require proof of intention to cause injury.[9] Hence, they will be discussed together in this paper.

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5 *Archbold Hong Kong: Criminal Law, Pleading, Evidence and Practice, 2022* (Sweet & Maxwell 2021) [25-118].
6 ibid [25-119].
7 ibid [25-120].
8 ibid [25-131].
9 ibid [25-118].

## B. Analysing Possession of Offensive Weapons Offences

In Hong Kong, the statutory provisions prohibiting the possession of offensive weapons are section 33 of the Public Order Ordinance (Cap 245) (POO) and section 17 of the Summary Offences Ordinance (Cap 228) (SOO).

In brief, these provisions provide a total of four bases to convict:

| | |
|---|---|
| Charge A | A person having with him weapons offensive per se or items adapted for use to cause injury, in a public place, without lawful authority or reasonable excuse. |
| Charge B | A person having with him any items intended for use to cause injury to a person, in a public place, without lawful authority or reasonable excuse. |
| Charge C | Possession of weapons offensive per se or items adapted for use to cause injury, with intention to use it to cause injury to another person or threaten physical harm to another.[10] |
| Charge D | Possession of any items intended for use to cause injury to a person.[11] |

Charges A and B are from section 33 of POO, while Charges C and D are from section 17 of SOO. For the former, a special sentencing regime depending on age is provided. The maximum penalty is imprisonment of 3 years. For the latter, the maximum penalty is a fine of HK$5,000 or imprisonment for 2 years.

Charges A and B, and Charges C and D differ in scope. Firstly, case law distinguishes 'having with him' from 'possession'. The former requires proof of closer contact with the article than mere possession.[12] Secondly, while Charges A and B

10 *HKSAR v Chan Chun Kit* [2022] HKCFA 15 [84].
11 ibid.
12 *Archbold* (n 5) [25-114].

cover possession in public only, Charges C and D also cover possession in private.[13] The definition of public place is specifically broadened for section 33 of POO; and it includes 'a common part of any premises notwithstanding that the public or a section of the public are not entitled or permitted to have access to such common part or such premises'.[14]

Moving on, Part II of this paper will focus on Charges A and C. Meanwhile, Charges B, C, and D all require proof of an ulterior intent. These will be addressed in Part III of this paper.

## II. *MALA PROHIBITUM*

### A. The Wrongfulness Constraint and the Desert Constraint

The wrongfulness constraint mandates that only conduct that is wrongful can be the proper target of criminal law. The desert constraint refers to the notion of just deserts – punishment can only be justified when it is deserved.[15] Husak recognises the substantial overlap between these two constraints, yet he brilliantly pointed out that the desert constraint encompasses the principle of proportionality.[16] For example, because of the desert constraint, a person who commits a wrongful act can be excused if he is eligible to raise the defence of insanity. It would also be objectionable to punish a pick-pocketer with imprisonment of 30 years.

A common normative problem for offences for possession offences is why possession itself is wrong. This problem is essential to another question – why is it justified to impose hard punishment (i.e. custodial sentence) on people who committed possession offences? Accordingly, these two constraints are the focus of this paper because they are the most contentious issues when one tries to justify offences for possession of offensive weapons.

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13 *Chan Chun Kit* (n 10) [74].
14 *Archbold* (n 5) [25-117].
15 Husak (n 3) 103.
16 ibid 83.

## B. Applying the Wrongfulness Constraint to Charge A

Charge A does not require proof of an ulterior intent. Hence, the present task is to ascertain whether the conduct which Charge A prohibits satisfies the wrongfulness constraint. In other words, is it wrong to possess weapons offensive per se or items adapted for use to cause injury in the public (Act A)?

This is a difficult question to answer. Act A is not what legal scholars call 'mala in se' – which means an act which is wrong independent of law. Examples of mala in se acts include murder and rape, which are obviously harmful, wrong and deserve some punishment.[17] Act A belongs to what legal scholars call 'mala prohibita' – which means an act which is not wrong prior to law.[18] The difficulty is to explain why mala prohibita is wrong. In other words, why is Act A wrong?

One way is to accept the preventive gains of prohibiting Act A as the reason why Act A is wrong. In simple terms, Act A is a crime because public interest or some other reasons necessitate so. For instance, Simester and von Hirsch have argued that the moral force of a mala prohibita offence does not come from the act of enactment by the legislature, but from purposes the offence serves. They also argue that it is not wrong to be in breach of a mala prohibita offence when the reasons supporting its enactment are defective.[19] Applying this view, offences for possession of offensive weapons in general seem to be easily justifiable by the purposes they serve. Specifically, these offences are intended to deter serious crime (such as gang fights and large-scale unrest) by allowing law enforcement agencies to step in at an earlier stage. However, this approach is akin to a pure consequentialist view on punishment and cannot be reconciled with just deserts. Most modern theories of punishment consider desert of an offender to be an essential requirement for a state to inflict punishment. This approach ignores the desert of an offender and allows punishment

17 ibid 104.

18 ibid 105.

19 AP Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Bloomsbury Publishing Plc 2014) 25.

to be inflicted solely on the basis that valuable objectives (i.e. crime prevention) can be achieved.

It is worth noting that this approach can be refined by understanding it with other works by Simester. To reconcile the tension between the prevention aim of some existing criminal offences and the condemning nature of criminal law, he said:

> 'Indeed, regulatory wrongs characteristically do not lead to convictions. They are typically disposed of without going to court at all. Regulatory agencies tend to rely on the prospect of criminal prosecution as a negotiating tool. Trips to the courtroom are reserved for only the most serious cases'.[20]

Therefore, if limited to regulatory offences which normally does not lead to conviction and hard punishment, his approach is potentially helpful. This paper does not intend to delve into the merits of his approach and concludes that his approach cannot explain why Act A is wrong since Charge A leads to conviction and imprisonment. The same goes for Charges B, C and D.

The principle of fair play is helpful in explaining why Act A is wrong. In essence, the fair play principle provides that:

> 'those who benefit from the good-faith sacrifices of others, made in support of a mutually beneficial cooperative venture, have a moral obligation to do their parts as well (that is, to make reciprocal sacrifices) within the venture'.[21]

It is prudent to point out that the principle of fair play is not perfect. Scholars have questioned whether mere receipt of a benefit can create the obligation to reciprocate. The common view is that fair play is only persuasive in some cases where the offence does generate the obligation of fair play. Husak identified 'driving on the breakdown lane' as an example.[22] Breakdown lanes are

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20 AP Simester, *Fundamentals of Criminal Law* (OUP 2021) 7.

21 A John Simmons, *Justification & Legitimacy: Essays on Rights and Obligations* (CUP 2001) 29.

22 ibid.

only intended for use by cars that experienced a malfunction. Few will disagree that the abuse of breakdown lanes will jeopardise the safety of all road users. Also, most citizens will benefit from this protection because virtually all citizens will use the road some point in their lives. Two conditions (which are not exhaustive) seem to justify the creation of an obligation to reciprocate: (i) the prohibition is so uncontroversial that most people know the rule by common sense; and (ii) the prohibition benefits practically everyone.

Having identified fair play as a possible approach to identify why Act A is wrong, the next task is application. Few will disagree that Charge A benefits everyone. In order to preserve the peaceful co-existence of men in a society, it is natural that individuals will want to make a pact to give up on carrying weapons in public so that unnecessary violence does not ensue from disputes arising from our every-day interactions. Whether this statement holds true depends on the cultural norms of each society. Given the population density in Hong Kong, it is safe to assume that this statement is true. The important question is what sort of weapons will individuals agree to let go of? In other words, is the prohibition of public possession of any items made to cause injury to someone or adapted for the same purpose so uncontroversial that most people will know this rule by common sense? The answer seems to be in the affirmative. As explained in Part I, the definition of offensive weapons prohibited by Act A is defined very narrowly. In brief, it requires an item manufactured to cause injury. It is a high hurdle. Similarly, a weapon adapted to cause injury imposes a high threshold because the mere act of using an item to injure someone cannot satisfy the adaptation requirement. An earlier act is needed. Therefore, it is concluded that the principle of fair play can explain why Act A is wrong. Accordingly, Charge A satisfies the wrongfulness constraint.

## C. Applying the Desert Constraint to Charge A

Having concluded that Charge A satisfies the wrongfulness constraint. The desert constraint is considered. Though an ulterior intent is not required, the ‘without lawful authority or reasonable excuse’ ingredient of Charge A sufficiently limits its reach so that

criminal liability will not attach to persons who have a good reason to carry weapons. For instance, case law recognises that in appropriate cases it is a good reason to carry weapons as a result of a recent attack which a person fears might be repeated.[23] Therefore, Charge A also satisfies the desert constraint.

## D. Applying the Principle of Fair Play to Other Charges

The conclusion that the principle of fair play can explain why Act A is wrong cannot be comfortably extended to other charges. In other words, fair play cannot explain why the acts prohibited by Charges B, C and D are wrong.

Charge C prohibits the possession of any items made to cause injury to someone or adapted for the same purpose (Act C). To recap, the key difference between Act A and Act C is that the former prohibits public possession while the latter does not require public possession. Therefore, Act C also covers private possession.[24] This difference alone is sufficient to cast doubt on whether the prohibition of mere possession of any items made to cause injury to someone or adapted for the same purpose is so uncontroversial that most people will know this rule by common sense. While most people will accept the necessity of prohibiting public possession, the same cannot be said for private possession. The risk to society created by public possession is far greater than private possession because for the former, it is possible that the weapon carried will be used by someone else. Additionally, people may consider prohibiting private possession too intrusive in the sense that it unreasonably deprives citizens of the freedom to engage in harmless activities they consider valuable, such as collecting, sporting and cosplaying. In fact, the Weapons Ordinance (Cap 217) (WO) provides a regime for the regulation of martial arts weapons, many of which are manufactured to cause injury to someone. One condition (section 7 of WO) is that martial arts weapons cannot be carried outside of martial arts facilities. As a result, it is concluded that fair play cannot explain why Charge

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23 *Archbold* (n 5) [25–125]; *Evans v Hughes* [1972] 1 WLR 1452; *Malnik v DPP* [1989] Crim LR 451.

24 *Chan Chun Kit* (n 10) [74].

C is wrong because Act C is not capable of generating fair play obligations.

## E. Can Act C be Constructed as An Omission?

Alternatively, can Act C be understood as an omission? Criminal law does not generally punish omissions. According to Michael Moore, the reason is that while we do have negative obligations not to make the world worse, we do not have positive obligations to improve the world.[25] However, Moore recognises that omissions can be punished when one is placed under a duty. He wrote:

> 'The only exception to this is for those omissions that violate our duties sufficiently that the injustice of not punishing such wrongs outweighs the diminution of liberty such punishment entails'.[26]

Ashworth has considered approaching possession offences as omissions, but noted its narrow applicability.[27] For example, Ashworth accepted that persons who handle explosives and nuclear materials are rightly placed under strong duties because of their catastrophic potential. Yet, he also noted that the same cannot be said for firearms because much depends on the social understanding of firearms. For instance, because of 'the traditionally more crowded nature of domestic housing, which permits few opportunities for recreational use',[28] the use of handguns may be more affiliated with violence and wrongdoing in the United Kingdom, while the same cannot be said in the United States because of their social norms and constitution.

As mentioned above, the definition of offensive weapons for Charges A and C is narrow. Given Hong Kong's population density, it is safe to assume that citizens have a duty to guard against the risk of abuse of offensive weapons. In other words,

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25 Michael Moore, *Act and Crime* (OUP 1993) 54.

26 ibid 59.

27 Andrew Ashworth, 'The Unfairness of Risk-Based Possession Offences' (2011) Criminal Law and Philosophy 5(3) 237, 251–2.

28 ibid, 252.

omission can provide a sound basis for offences regulating possession of offensive weapons.

Assuming private possession falls within the ambit of the duty to guard against the risk of abuse of offensive weapons, the key contention is the extent of this duty. Recalling the above discussion on the distinction between public and private possession, citizens do have legitimate reasons to own offensive weapons. Hence, the extent of this duty cannot justify a blanket ban. Of course, Charge C is not a blanket ban. However, as opposed to providing exculpatory circumstances, Charge C relies on the ulterior intent to exclude persons who are justified in their private possession of offensive weapons. Therefore, Act C alone is a blanket ban. By contrast, Act A prohibits public possession which is limited by a circumstantial element (without lawful authority or reasonable excuse). The result is that while Act A can be considered as a breach of the duty to guard against the risk of abuse of offensive weapons (hence wrong), Act C itself does not constitute such breach. Accordingly, Act C itself is not wrong and the wrongfulness of constraint cannot be satisfied.

How private possession of offensive weapons shall be regulated will be further discussed in Part IV.

## F. Reliance on Ulterior Intent

Charge B prohibits the public possession of any item while Charge D prohibits the possession of any item. There is no vice in these acts. Obviously, neither fair play nor omission can explain why they are wrong. The reason for this apparent absurdity is that both charges rely on proof of an ulterior intent to satisfy the wrongfulness constraint. Charge C also does the same as discussed above. Therefore, the next section examines whether a wrongful intention alone can satisfy the wrongfulness constraint.

## III. THOUGHTCRIME

Hart writes, 'As everyone knows, a bare intention to commit a crime is not punishable by English law'.[29] The common view is that we are not responsible for mere thoughts because we lack voluntary control over thoughts. After all, we have no control over the existence of impulses and desires. The only thing we can do is to refrain ourselves from acting according to our impulses and desires.[30] Therefore, thoughtcrimes are objectionable because they deprive an offender of any assurance that he is morally responsible for an alleged wrong.[31]

If the primary objection to thoughtcrimes is voluntariness, can we punish an offender who harbours a voluntary intention to commit an offence? Practically, proving a voluntary and wrongful intention in the absence of a wrongful act will require over-invasive policing and enforcement mechanisms. Moreover, one may doubt how reliable these mechanisms are in proving mere intention.[32] These reasons are indeed valid, yet they do not provide a principled objection to punishing a firm and voluntary intention to commit an offence.

In 'Does Criminal Liability Require an Act?',[33] Husak argued that in unusual cases where reliable evidence of a firm intention is obtained in the absence of an act, an offender ought to be punished.[34] He found the case *US v Still* illustrative.[35] Still was found wearing a disguise inside his van parked 200 feet away from a bank. Upon his arrest, Still voluntarily said, 'You did a good job. You caught me five minutes before I was going to rob a bank. That's what I was putting the wig on for'.[36]

Still was acquitted of attempted bank robbery because he did

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29 HLA Hart, *Punishment and Responsibility* (2nd edn, OUP 2009) 127.

30 Angela M Smith, 'Responsibility for Attitudes: Activity and Passivity in Mental Life' (2005) 115 Ethics 236, 265.

31 AP Simester, 'Prophylactic Crimes' in GR Sullivan and Ian Dennis (eds), *Seeking Security: Pre-Empting the Commission of Criminal Harms* (Hart Publishing 2012) 64.

32 ibid 65.

33 Douglas Husak, 'Does Criminal Liability Require an Act?' in Antony Duff (ed), *Philosophy and the Criminal Law* (CUP 1998).

34 ibid 86-91.

35 *US v Still* 850 F.2d 607 (9th Cir. 1988).

36 ibid 608.

not take a substantial step towards his objective. If Still was to be convicted, he would be punished for (i) putting on a disguise outside of a bank, and (ii) harbouring an intention to rob the said bank. Since his act is totally innocent, the wrongfulness solely stems from his intention. In other words, he would be punished only because of his thoughts. Husak pointed out that Still has a firm and voluntary intention to rob a bank. Hence, it is not the case that Still should not be responsible for his thoughts, since one has no control over thoughts. Moreover, Still voluntarily confessed his intention. Husak thus concludes that there is no principled reason to withhold punishment from Still, save for a hollow insistence that criminal law requires an act.[37]

Can this be right? Is there another explanation for the denunciation of thoughtcrimes which is not subject to the objection Husak raised for the voluntariness explanation? Yes, and the answer lies in desert. As stated by Moore:

> 'Desert must be such that we deserve punishment for violations of morality's norms of obligation, but we did not deserve punishment for violation of morality's ideals of virtuous character'.[38]

A bad intention arguably does not harm others. At most, a bad intention may reflect the lack of virtue. However, there exists no duty to cease bad thoughts. According to Moore, the reason is that while we do have negative obligations not to make the world worse, we do not have positive obligations to improve the world.[39] In other words, when a person harbours a bad intention, he does not breach any negative obligations, thus no retributive justice is attained by punishing him.[40] As such, it is concluded that the punishment of mere bad thoughts violates just deserts.

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37 Husak (n 33) 91.
38 Moore (n 25) 53.
39 ibid 54.
40 ibid 56.

## A. Can a Bad Intention Make an Innocent Act Wrong?

The upshot of the above is that since bad thoughts itself are not wrong, a morally innocent act cannot be wrong even if committed pursuant to a wrongful intention. As a result, the commission of a morally innocent act with a wrongful intention cannot be criminalised according to the wrongfulness and desert constraints. This position is not easy to defend, but this article seeks to do so.

A criticism to this position is that in some cases, it is permissible to criminalise a morally innocent act. An example is the criminalisation of sexual activity with a person under sixteen in jurisdictions like England and Wales, and Hong Kong. There are no doubt cases where the minor gave genuine consent to the sexual activity. Thus, the argument is that morally innocent acts can be prohibited when necessary.[41] This is not a powerful objection. Duff developed a principle called 'civic arrogance', which explains why in some cases morally innocent acts are wrong. The idea is that the prospect of sexual activity with a young lady excites a man to a point that he cannot be trusted to decide whether consent was given by the lady. Therefore, the man is wrong because he takes an unjustifiable risk which the community asked him not to.[42] While scholars are doubtful towards the general applicability of the principle of civic arrogance, commentators like Husak accepted that it is helpful for a handful of cases like drunk driving and engaging in sexual activity with minors.[43] Therefore, the reply to the criticism is that offences that prohibit acts that appear to be morally innocent do not undermine the position this article seeks to defend. Rather, the wrongfulness of those morally innocent acts may be identified with the principle of civic arrogance, or the principle of fair play as discussed in Part II.

Another criticism to this article's position involves the offence of theft in England and Wales, and Hong Kong. As it stands, the only act prohibited by theft is appropriation. The

41 Andrew Cornford, 'Rethinking the Wrongness Constraint on Criminalisation' (2017) 36 *Law and Philosophy* 615, 639.

42 Husak (n 3) 108–9.

43 ibid 109.

problem is that appropriation as interpreted by the courts is staggeringly wide. Firstly, appropriation does not require lack of consent from the owner. Secondly, appropriation is the assumption of any rights of an owner in a property.[44] As such, touching a pair of shoes inside a shop is theft if the required mens rea elements are proved. Given many innocent acts amount to appropriation and conviction of theft can ensue if the required mens rea elements are proved, can the offence of theft be reconciled with the position this article defends? The answer is no. Scholars routinely criticise that the offence of theft allows punishment for thoughts alone.[45] Hence, most proposals for reform strive to define appropriation in a way that it does not catch morally innocent acts.

It is concluded that the commission of a morally innocent act with a wrongful intention cannot be criminalised according to the wrongfulness and desert constraints.

## B. Can a Bad Intention Make a Morally Ambiguous Act Wrong?

It is prudent to point out that sometimes the moral wrongfulness of an action cannot be determined by sole reference to the external features of the act.[46] In other words, whether the act-in-question is wrong cannot be determined without ascertaining the state-of-mind of a person. This problem was faced by the House of Lords in the landmark case of *R v Court* which concerns indecent assault.[47] In brief, the defendant hit a 12-year-old girl on her buttocks and confessed that he acted out of a buttock fetish. Their Lordships were asked to determine whether this was indecent, which is a difficult task, because hitting a child in her buttocks can be indecent (such as when one has the said fetish), or normal (such as an act of parental discipline). Their Lordships found it useful to first determine whether an act is:

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44 Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 374-6.

45 Emmanuel Melissaris, 'The Concept of Appropriation and the Offence of Theft' (2007) 70(4) MLR 581, 586 & 592.

46 Simester (n 31) 74.

47 *R v Court* [1989] AC 28.

(i) Inherently decent;
(ii) May or may not be indecent; and
(iii) Inherently indecent.

For (i), an inherently decent act cannot be made indecent by an indecent motive. It will at most be a common assault. For (ii), whether the act is done by an indecent motive will decide the decency of the act. For (iii), proof of an intent to do the act is sufficient. An ulterior intent is not required.

Simester considered this reasoning helpful to answer when a bad intention can make an act wrong. He distilled two principles from this reasoning. The first one is that the state cannot prohibit an inherently innocent act, which is the position this article defended above. The second one is if the state wishes to prohibit an act which is morally ambiguous, then an ulterior intent shall be required.[48]

It is important to draw a meaningful difference between acts that are inherently innocent and acts that are morally ambiguous. Every act can facilitate crime, just as any tangible item can be used to injure someone. Accordingly, the threshold for an act to be qualified as morally ambiguous should be high. Even so, there remains doubt whether a bad intention can make a morally ambiguous act wrong. In *Court*, the act-in-question is hitting the buttocks without consent. While it may be acceptable that a further, bad intention (having an indecent motive) can aggravate an already wrongful act (assault) into another wrong (indecent assault), it is not to say that a bad intention can turn a morally ambiguous act (which by itself is not inherently wrongful) into a wrong. Moreover, the latter may not sit well with the principle of just deserts. Negative obligations by nature require maximum certainty and it is widely accepted in common law jurisdictions that crime by analogy is objectionable. Hence, it is doubtful whether any negative duties are breached if one commits a morally ambiguous act. Therefore, the notion that a bad intention alone can make a morally ambiguous act wrong cannot satisfy the principle of just deserts.

48 Simester (n 31) 73–5.

## C. Charges B and D Are Thoughtcrimes

In *HKSAR v Chan Chun Kit*,[49] the Hong Kong Court of Final Appeal was asked to interpret section 17 of SOO, which is the source of Charges C and D. The issue is whether an astonishingly wide construction of the offence supported by the Chinese translation of the legislation is valid. In brief, the Chinese translation allows a defendant to be convicted if he possesses an instrument fit for some unlawful purposes with an intent to use said instrument for any unlawful purpose. This construction was unanimously rejected by the court and Cheung CJ wrote that:

> 'For under this construction, almost all articles or instruments can be considered as fit for some unlawful purposes so that the actus reus requirement is essentially non-existent. In other words, under this construction, section 17 is in reality a thought crime, depending on what a defendant's intent was at the material time (subject to proof)'.[50]

For Charges B and D, there is no wrong other than the ulterior intent. In this section, the principle that a bad intention can never make an otherwise innocent act wrong is defended. As a result, it is now concluded that Charges B and D are objectionable because they are thoughtcrimes. Accordingly, practical difficulties aside, there is no principled reason why the court should not denounce Charges B and D given they pose the same normative problems that the rejected construction of section 17 does.

## D. Is Charge C Justifiable?

To recap, Charge C prohibits the mere possession of any items made to cause injury to someone or adapted for the same purpose (Act C). It was concluded in Part II that Act C itself is not wrong. Act C is what Simester describes as a 'morally ambiguous' act – it can be for a legitimate purpose like sporting or for an illegitimate purpose like preparation of crime. Accordingly, he would have

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49 *Chan Chun Kit* (n 10).

50 ibid [75].

considered Charge C justifiable. However, I have concluded that the notion that a bad intention alone can make a morally ambiguous act wrong cannot satisfy the principle of just deserts. Accordingly, this article concludes that Charge C is not justifiable.

## E. Interface Between Attempts and Offences for Possession of Offensive Weapons

Another angle to justify offences for possession of offensive weapons is to compare them with attempts (the inchoate offence). However, the justifications that ground attempts cannot be comfortably extended to offences for possession of offensive weapons.

In English and Hong Kong law, attempts require an act that is more than merely preparatory and a high level of culpability. In contrast, offences for possession of offensive weapons impose criminal liability at a much earlier stage. Specifically, contravention of offences for possession of offensive weapons only amounts to a preparatory act and falls short of an act 'more than merely preparatory'. While 'more than merely preparatory' may seem abstract, it is not meaningless – it is meant to capture the moment a defendant chooses to stop controlling his desires to commit a crime and actually embarks upon commission of his intended crime.[51] Hence, the said defendant is punished for his lack of control over his desires, as manifested by his wrongful conduct. As a result, 'more than merely preparatory' represents the line in the sand for the moment that criminal liability shall be imposed. Going back to offences for possession of offensive weapons, punishing preparatory acts is problematic because the defendant has yet to make a choice to give up his control on his criminal desires. In other words, punishing preparatory acts deprives citizens the opportunity to change their minds. In conclusion, offences for possession of offensive weapons cannot be justified if viewed as a prelude to a substantial offence.

To sum up, it has been demonstrated out of the four identified charges that only Charge A is justifiable. Therefore, the

[51] Simester (n 31) 72.

next part provides directions for reform with reference to offences for possession of offensive weapons in England and Wales, and Germany.

# IV. DIRECTIONS FOR REFORM

It was shown that though the primary objective of offences for possession of offensive weapons is prevention, these offences can still be reconciled with just deserts if properly grounded in the notion of unjustified risk-taking or fair play. As such, Charge A was shown to be justifiable applying both. It was also shown that Charges B and D are thoughtcrimes. No doubt that the intention of the legislature is to enact 'catch-all' provisions by also defining offensive weapons as any article intended to be used to cause injury. However, the targeted mischief of possession of offensive weapons offences is the obvious risk brought by a weapon. If the risks brought by an item is not obvious enough such that proof of the possessor's wrongful intention is needed, then the possession of the item shall not be criminalised in the first place because the item does not pose an unjustifiable risk. In other words, there is no need to enact a catch-all provision and the definition of offensive weapons as any article intended to be used to cause injury should be abolished.

It is recognised that there are items that are not manufactured to cause injury to a person, or not adapted for the same purpose, yet still dangerous enough to pose some unjustifiable risk. Therefore, the following part will discuss how these items should be regulated with reference to English and German law.

## A. Public Possession in England and Wales

England and Wales prohibit the possession of an offensive weapon in public place by section 1 of the Prevention of Crime Act 1953. This offence is largely similar to section 33 of POO. There is also an offence against possession of an article with a blade or point in public place: section 139 of the Criminal Justice

Act 1988. In brief, a person will be guilty of this offence if he has with him any article which has a blade or is sharply pointed. A folding pocketknife is an exception. If the cutting edge of its blade exceeds three inches, then a folding pocketknife will be considered a bladed article. A reverse burden is placed on a defendant to prove that he has a good reason or lawful authority to do so, or the possession is (a) for use at work, (b) for religious reasons, or (c) as part of any national costume.[52] The use of a reverse burden is controversial considering many household items have a blade or is sharply pointed. For instance, a butterknife with no cutting edge and no point was held to be a bladed article.[53] Therefore, this offence will not be further discussed as it is not a helpful reference.

## B. Public Possession in Germany

In Germany, the Weapons Act (Waffengesetz) (WA) governs firearms and other weapons.[54] Pursuant to section 42 of WA, weapons are not allowed to be carried at public events (for example, festivals and sporting events) as opposed to any public place. An exemption licence to carry a weapon can be granted by competent authorities. There is also an exception for theatrical or similar performances, shooting ranges and weapons fairs. According to section 52 of WA, anyone who contravenes section 42 is liable to a criminal offence punishable by imprisonment for one year or a fine.[55]

Weapons are defined by section 1 of WA as:[56]

(i) guns or equivalent objects;
(ii) portable objects by nature intended to remove or reduce a person's ability to attack or defend; or
(iii) portable objects capable of removing or reducing a person's ability to attack or defend.

Technical definitions of all the three types of weapons are

52 *Archbold: Criminal Law, Pleading, Evidence and Practice, 2022* (Sweet & Maxwell 2021) [24-195]-[24-198].
53 ibid [24-198].
54 Weapons Act (Waffengesetz) of 11 October 2002 (Federal Law Gazette I, p 3970, 4592; 2003 I p 1957) (WA).
55 ibid s 52.
56 ibid s 1.

detailed at Annex I of WA. In brief, (ii) encompasses a wide range of items designed for an offensive purpose and detailed technical specifications are provided. To name a few:

> 'Cutting and thrust weapons which are basically designed to inflict injury by using direct muscle power to cut, thrust, stab, hit or throw… Items which can spray or eject irritants with a range of up to 2 m (irritant sprays)… Items which can damage a person's health using energy other than kinetic energy (especially by directing electromagnetic radiation at a specific target)'.[57]

In contrast, (iii) includes a few items only and they are narrowly defined. In brief, (iii) only includes some knives defined with technical precision, as well as electric pulse devices save for husbandry or dog-training uses.

Section 42a of WA also provides for an administrative offence. In brief, it is prohibited to carry in public fake guns, cutting and thrust weapons (definition reproduced above), and 'knives with a blade which can be fixed with one hand or fixed knives with a blade length of over 12 cm'.[58] This prohibition does not apply to theatrical uses or transportation in a locked container or when the carrier has a legitimate interest (not available to fake guns). Legitimate interest refers to 'carrier's occupation, in order to preserve traditions, for sports or a generally recognized purpose'.[59] According to section 53 of WA, anyone who deliberately or negligently breached section 42a of WA is liable to an administrative offence punishable by a fine up to 10,000 Euros.

## C. Directions for Reform – Public Possession

For public possession, Charge A shall remain in force since it is justifiable. For a limited class of dangerous items that are not manufactured to cause injury to a person or adapted for the same purpose, it can still be fairly said that citizens have a duty to guard

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57 ibid Annex I.
58 ibid s 42a.
59 ibid.

against the risk of abuse. The more important task is to identify the extent of the duty. The German approach illustrates that the extent of duty depends on the inherent dangerousness of the item. Hence, only a few items which are not designed to remove or reduce a person's ability to attack or defend make it to the criminal offence for public possession. As mentioned, these items are defined with great technical precision so that rule-of-law requirements like fair warning and maximum certainty are satisfied. More importantly, in terms of dangerousness, they are sufficiently close to items designed to cause injury. Hence, moral clarity is achieved since persons in possession of them will be put on notice. Hence, the failure to guard against the risk of abuse of these items is grave enough to justify the use of hard punishment and moral censure. Other items not designed to remove or reduce a person's ability to attack or defend are inherently less dangerous. Therefore, the failure to guard against the risk of abuse of these items is not grave enough to justify the use of hard punishment and moral censure. Hence, they are regulated with an administrative offence which is only punishable by fine and carries little moral censure.

In short, the public possession of a limited class of dangerous items that are not manufactured to cause injury to a person or adapted for the same purpose shall be regulated with a criminal offence or an administrative offence depending on the inherent dangerousness of a given item. Sufficient exculpatory circumstances shall be given and the current mental element 'has with him' is an adequate safeguard.

## D. Private Possession in England and Wales

Section 141 of the Criminal Justice Act 1988 was originally an offence for the manufacture and distribution of offensive weapons. The Offensive Weapons Act 2019 has revamped this section and it now includes an offence prohibiting the possession of offensive weapons in private places. It is an offence of simple possession. This offence only covers weapons listed in the schedule to the Criminal Justice Act 1988 (Offensive Weapons Order), which mostly consist of technically specified knives and martial arts weapons. A special defence is provided for traditional

swords and antiques. Other exemptions include the Crown and visiting forces, religious use, and theatrical use. The penalty differs between home nations. In England and Wales, this offence is punishable by imprisonment up to 51 weeks.

## E. Private Possession in Germany

Private possession of weapons is regulated by an administrative offence in Germany. Section 40 of WA stipulates that anyone who possesses or comes to possess a banned weapon listed in Annex 2, Part 1 must notify the competent authorities, who have the power to seize the item or order it to be altered.[60] The list consists of mostly firearms-related items, martial arts weapons, knives, electric devices and irritating substances, all of which are technically defined. According to section 53 of WA, anyone who deliberately or negligently breached section 40 is liable to an administrative offence punishable by a fine up to 10,000 Euros.[61]

## F. Directions for Reform – Private Possession

Comparing the English and German approach, the former prohibits less items than the latter. After all, the former is a criminal offence that can lead to a custodial sentence while the latter is an administrative offence that only leads to a fine. It is assumed that the English approach is preferred to its German counterpart owing to the population density in Hong Kong. As it stands, Charge C does not provide exculpatory circumstances because of its reliance on the ulterior intent. Therefore, the first suggestion is to provide exculpatory circumstances. The second suggestion relates to the principle of maximum certainty. Open-list definitions for offensive weapons can be borderline acceptable for the purpose of public possession since citizens have a stronger duty to ensure they do not carry in public items that impose an unjustifiable risk. However, the extent of the duty to guard against the risk of abuse of weapons is narrower when it comes to private possession. As a result, the definition for offensive weapons for

60 ibid s 40.
61 ibid s 53.

the purpose of private possession shall be a closed list so that citizens can enjoy more liberty. Also, like the English offence, the list must be confined to items that are inherently dangerous enough so that the extent of the duty to guard against the risk of misuse of these items not only covers private possession but also capable of justifying hard punishment and moral censure. What items can satisfy these requirements vary from culture to culture. Further, to promote maximum certainty, technical specifications should be included. Similarly, the exculpatory circumstances available shall be reasonably certain, and 'without lawful authority or reasonable excuse' is not sufficient. Last but not least, if items prohibited have a common legitimate use, a licensing system shall be put in place so that citizens need not worry about finding themselves on the wrong side of the law.

In short, English and Germany law on private and public possession of offensive weapons have been reviewed above. Accordingly, directions for reform are proposed. It is hoped that the current Hong Kong offences for possession of offensive weapons will be reformed so as to better achieve moral clarity and be more aligned with modern rule of law requirements.

## CONCLUSION

The current law in Hong Kong regarding the offences of possession of offensive weapons are to a large extent unjustifiable. Household items like laser pointers and hiking sticks are not inherently dangerous. As such, citizens do not have a duty to guard against the risk of misuse of these items, nor should they refrain from using them as a matter of fair play. Accordingly, citizens commit no wrong when carrying these items. It is established that a bad intention cannot make an otherwise morally innocent act wrong. Therefore, even if a wrongful intention is proved beyond a reasonable doubt, there is no retributive justice attained from punishing the possession of laser pointers and hiking sticks. To punish so nonetheless will be in direct violation of the timeless Kantian maxim which states that rational human beings should be treated as an end in themselves and not merely as a means to something else.

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