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Dr. Law Wai Hung, Francis, President of the Hong Kong Mediation Centre


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Letter from the Editors

Dear readers,

We warmly welcome our readers to delve into this Gazette's edition and join our journey in exploring various pressing legal, ethical, and social discourses that reflect upon the challenges and complexities of the legal profession. With the interplay of technology and human lawyers and evolving data protection laws being discussed, global perspectives also take the spotlight on the Premier League's overseas presence and critical analysis of the legacies in law, land and colonialism. Navigating our way into more controversial and sensitive topics within the criminal justice, opinions on the effectiveness of prison labour, the phenomenon of sleeping jurors and assisted suicides. Category to all our readers, junior law students would find a deep connection to materials on standards of good faith in contract law. These thought-provoking materials enshrine enriching viewpoints and unlock new avenues to reveal the treasure box of knowledge.

As the legal and business world is changing, alternative dispute resolution has gradually taken the spotlight and become a pivotal mechanism in decomposing the disputes of modern business and interpersonal relationships. With this transformative era, we had the distinct privilege to invite Dr. Law Wai Hung, Francis, with his distinguished expertise in mediation and professional negotiation, to shed light on modern dispute resolution. Offering structured processes such as mediation that advocate for mutual understanding and innovative solutions, proactive approaches that professionals can take to brace for the emerging trend. We hope that this feature interview can incentivise many curious minds about the evolving landscape of disputes and offer extensive perspectives worth pondering upon.

Throughout this term, we thank our exceptional writers for their active contribution in their accumulated opinions and meticulous observation in the legal field. We equally extend our gratitude to our dedicated editors for their continuous support and unwavering efforts in working alongside the writers. Last but not least, we thank the CUHK Faculty of Law for their unwavering support for our publishing activities. It is our hope that this edition of the law gazette can serve as an inspirational chip in providing our readers with different standpoints.

It's never too late to start writing and tell your story.

Best regards,
Chantal Cheung and Joanna Yu
Editors-in-Chief

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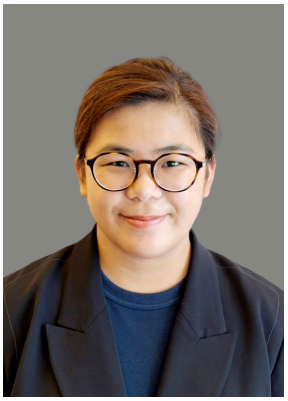

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The Gazette wishes you happy reading.

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Commercial & Contract Law

Towards An Incremental Extension of Minimum Standards of Good Faith in Hong Kong Commercial Contracts

Marvin Hsu

The origin and modern application of good faith

The classical Roman development of *bonae fidei* contracts was momentous and transformed the previously strict and limited law of contract into a system compatible with a developed international economy. However, the modern conception of good faith is elusive, with even jurisdictions that recognise it sharing 'no common concept'.

In many civil law systems, the law enforces an overriding principle that parties should act in good faith in making and carrying out contracts; this goes past a mere lack of deception, placing the onus on parties to 'play fair' with their 'cards face up'. While this may be apparent in practice, many civil law jurisdictions (including Argentina, the Canadian province of Quebec, and Chile) do not define this concept well in legislation.

However, China's 2021 Civil Code exemplifies the aforementioned overriding principle: it mandates full performance of 'respective contractual obligations' and compliance with the principle of good faith by 'sending notification, rendering assistance, and keeping confidentiality with reference to the contract'. As will be seen, this imposes a higher standard than common law jurisdictions.

Furthermore, in the United States, parties to contracts falling under its Uniform Commercial Code are subject to an 'obligation of good faith in [contractual] performance and enforcement'. Moreover, the non-binding but highly persuasive Restatement (Second) of Contracts extends a duty of good faith to 'every contract' which has been followed in the vast majority of U.S. States. The commentary on the Restatement partially relies on good faith as 'excluding' bad faith, which Summers explains can be done by identifying 'bad faith conduct' and then doing the opposite.

While a duty of good faith is implied by law for, *inter alia*, insurance,

employment, and contracts where parties have a fiduciary relationship, commercial contracts do not generally have such an implied duty; Hong Kong and English law have traditionally been hostile towards the doctrine of good faith in contractual performance.

That is not to say that – at the very least – English law has been wholly stagnant in this area. Recently, in 2013, Leggatt J (as he then was) held in *Yam Seng v ITC* that the English common law on implied terms permitted implying a duty of good faith into 'ordinary commercial contracts' based on the presumed intentions of the parties. While commentators welcomed the decision, English judges did not; Moore-Bick LJ sitting on the Court of Appeal in *MSC Mediterranean v Cottonex Anstalt* took the view that that a general principle of good faith would give rise to a 'real danger' of its invocation to equally 'undermine' and 'support' agreed terms.

Before Moore-Bick LJ expressed this doubt, following *Yam Seng*, the Supreme Court of Canada established a new duty in *Bhasin v Hrynew* to act honestly in the performance of contractual obligations, holding that it arose from an 'organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance'. Such a duty was held to not be an implied term arising from the contract, but rather a general doctrine imposing a minimum standard of honest contractual performance in law.

In Hong Kong, Cheung JA (as he then was) in *Hong Jing v Zhuhai Kwok* implied a duty to make 'best or at least reasonable endeavours in good faith'. He appeared to have found such a duty to exist based on two possible bases: either as arising from a positive express contractual obligation to act making the implication of such a term necessary for business efficacy or from the context of the contract giving rise to a fiduciary relationship between the parties.

This paper proposes and justifies three ways the duty of good faith could be extended. First, good faith should be expressly recognised as an 'organising principle' which 'underlies and manifests itself' in 'specific doctrines governing contractual performance'; second, a duty to act honestly as laid out in *Bhasin* and subsequently developed should similarly be implied; third, the minimum 'endeavours'-type duty should be implied into commercial contracts.

The law of implied terms in law and in fact

Incorporating the 'endeavours' and *Bhasin* duties as implied terms of good faith would likely be done as terms implied in *fact* or in *law*. An example of a term implied in *law* would be that of goods sold to be of merchantable quality in the Sale of Goods Ordinance (Cap. 26).

The test for implied terms in fact was laid down in *Kensland Realty v Whale View Investment* where both Bokhary and Ribeiro PJJ cited Lord Simon's judgment in *BP Refinery v Shire of Hastings*, agreeing that for a term to be implied, the following conditions must be satisfied:
(1) it must be reasonable and equitable;
(2) it must be necessary to give business efficacy to the contract;
(3) it must be so obvious that it goes without saying;
(4) it must be capable of clear expression;
(5) it must not contradict any express term of the contract.

In *Marks & Spencer v BNP Paribas*, Lord Neuberger agreed with Lord Hoffman's suggestion in *A-G of Belize v Belize Telecom* that while Lord Simon's test was generally cumulative, business efficacy and obviousness could be in the alternative.

What does good faith entail?

An attitude of good faith is 'intrinsic to or constitutive of the activity of contracting', involving respect for the counterparty's legitimate interests and respect for the contract itself. These, in turn, give rise to context-specific qualitative standards by which parties' conduct can be measured.

Recently, in the English authority of *Brooke Homes v Portfolio Property*, Sims QC DJHC suggested that the modern prevailing view is that good faith

involves a duty to act honestly, but something short of dishonesty may also suffice. He held that good faith entailed the duties 'not to act to undermine the bargain entered or the substance of the contractual benefit bargained for' (citing the judgment of Leggatt J (as he then was) in *Sheikh Al Nehayan v Kent*) and refrain from 'conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people' (citing Fraser J in *Alan Bates v Post Office*).

He thus distilled the modern duty of good faith as containing:
(a) a duty to act honestly, judged by reference to reasonable and honest people; (b) the observance of reasonable commercial standards of fair dealing; (c) fidelity or faithfulness to the common purpose, or contractual purpose; and (d) more generally, to act consistently with the justified expectations of the parties.

This formulation of an implied duty of good faith demonstrates its imprecise nature; while *Brooke*'s distillation is helpful, the context-specific nature and variable standards imposed by the duty exemplify its imprecision.

In Hong Kong, similar standards were recognised in *Goldbay Fortis v Rich Resource*, where K Yeung J at [176] impliedly accepts the approach to good faith taken by the (Australian) Victorian Court of Appeal in *Knights Quest v Daiwa Can*. It is submitted that *Knights*, holding that good faith entails a duty 'not to undermine the bargain entered or the substance of the contractual benefit bargained for', helpfully underscores the substantive meaning of 'fidelity to the contractual purpose'; thus, the position in Hong Kong law mirrors that of English law.

A. Recognising good faith as an 'organising principle'

Incremental changes: the content of, and justifying, good faith as an organising principle

Considerations of and appeals to good faith pervade the law of contract, underlying many elements of modern contract law. For instance, in the doctrine of unconscionability, involving the notion of fairness; in the law of implied terms, curing power imbalances (such as the *Braganza v BP Shipping* duty to exercise a contractual discretion affecting both parties in 'good faith' and not irrationally), with a particular prominence when implying duties in law; and in legislation.

In *Bhasin*, the Court, taking this permeation in tandem with the piecemeal nature of Canadian law on good faith performance of contracts, saw fit to enunciate a general principle that parties must perform contractual duties 'honestly and reasonably and not capriciously or arbitrarily'. In the Canadian context, an organising principle merely states a general requirement of justice from which specific legal doctrines can arise.

Chen-Wishart and Dixon reject good faith as an independent cause of action in the form of an 'unmediated legal requirement to act in good faith' – which is essentially what *Yam Sing* was proposing – citing the Israeli experience as indicative of the amorphous and unpredictable nature of such an approach. Reasoning similarly to *Bhasin* that piecemeal English contract law would benefit from an explanatory, organising, and legitimising principle of good faith, they conclude that recognising such a principle is merely re-stating what the law already recognises and the marketplace generally accepts.

Crabtree agrees, opining that following the *Marks* disapproval of Lord Hoffman's comment on the implied terms test in *Belize*, good faith can 'at best be regarded as an organising principle underpinning a number of lesser,

more specific duties'. Citing Leggatt J's attempt in *MSC Mediterranean v Cottonex* to reconcile the *White v McGregor* rule with the control of a contractual discretion, he concludes that such a scenario is a prime example of where the organising principle of good faith is useful, as it provides an umbrella under which the right to exercise contractual discretion as separate matters of fact and law can be reconciled. It would further add doctrinal consistency, leading to more principled and predictable law.

Moore-Bick LJ's view in *Cottonex* (2016) that the law ought to develop according to 'established lines' can be done without rejecting an organising principle of good faith. It is submitted that the recognition of such a principle merely helps define the established lines for the law to develop. His further concern that such a principle would be invoked to as often undermine as it would support agreed terms is real but insubstantial, as any invocation would be subject to judicial scrutiny to assess its merit, thereby limiting any potential abuse.

As such a principle adds nothing in substance, conforming with the incremental nature of common law, and noting the fact that Moore-Bick LJ's disapproval is merely *obiter*, having decided the case by reference to frustration, it is thus open for Hong Kong to consider *Bhasin*, *Yam Seng*, and both the first instance and appellate decisions in *Cottonex* as persuasive on their own merits.

Indeed, courts have recognised that an overriding *obligation* of good faith in carrying out contracts is not recognised in Hong Kong law. This does *not*, however, predicate the recognition of good faith as an *organising principle.*

For the above reasons, it is submitted that recognising good faith as an organising principle that parties must perform obligations honestly and reasonably would be an acceptable incremental extension of good faith.

B. Duty to act honestly

Incremental changes: the content of a general duty of honesty

Despite honesty not being the only obligation derivable from good faith (as evident from *Knights Quest* and *Brooke Homes*), honesty is the obligation at the core of good faith, often going hand in hand.

What such a duty would require is contextual. In 'relational' contracts, involving long-term relationships between the parties, a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involving expectations of loyalty may give rise to more onerous burdens, such as an active duty of disclosure on matters pertinent to the contract or transparency.

The doctrine of honest performance in *Bhasin* imposes a minimum duty on parties to not lie or otherwise knowingly mislead counterparties about matters 'directly linked to contractual performance'; it expressly excludes any duty of loyalty or requirement to forego advantages. *Callow v Zollinger* later extended this duty, holding that parties could 'mislead' through misapprehensions caused by their own actions, such as half-truths, lies, omissions, and even silence (circumstantially); failing to correct misapprehensions caused by oneself can also be misleading.

Yam Seng held that 'it is dishonest in any situation to deceive another person by making a statement of fact intending that other person to rely on it while knowing the statement to be untrue'. While *Bhasin-Callow* honesty goes further, there is no discordance between these two duties; furthermore, the wording in *Yam Seng* suggests that there is an objectively ascertainable minimum standard of honesty applicable 'in any situation.'

It is submitted that while the extended duty of *Bhasin* as elaborated on by *Callow* goes further than that of *Yam Seng*, considering it as a minimum standard is preferable, given that it pertains to correcting an error caused by the infringing party themselves; it is plainly distinguishable from an active requirement of disclosure or loyalty.

Incremental changes: justifying and imposing a general duty of honesty

Imposing a general duty of honesty is justified given the commercial certainty it will bring. While good faith is an unclear concept as explained above, the scope of honesty is precise and ascertainable.

It would further be difficult to see how parties enter into contracts without expectations of honesty; per Lord Bingham in *HIH Casualty v Chase Manhattan*, absent an assumption of honesty and good faith, parties would not deal.

One might criticise the citation of *HIH Casualty* in such a manner, given an arguable interpretation that the statement pertained to pre-contractual negotiations. Two rebuttals are presented: first, given that there remains no duty to negotiate in good faith, if such an interpretation were correct *HIH Casualty* would surely be cited instead of *Walford v Miles* (proposing the contrary); second, even if that were the case, it is submitted that it would be undesirable for courts to allow parties who have entered into contracts that it had been *drafted* in honesty and good faith to subsequently unburden themselves of the aforesaid expectations in the *performance* of the contract.

Furthermore, the traditional hostility towards good faith has instead moved towards a cautious acceptance for it as a compartmental norm rooted in honesty and cooperation. Finally, *Bhasin* as a precedent allows a Hong Kong court subsequently following this decision to be developing the law in a measured, 'incremental' manner.

While *Bhasin* took the step of establishing a new doctrine of honest performance, putting honesty in lockstep with doctrines such as unconscionability and misrepresentation, it would be prudent to consider whether applying the *Kensland* test would permit the implication of such a duty in *fact* (instead of in law as *Bhasin* did).

Leggatt J posited that an expectation of honesty was a paradigm example of a general norm underlying (almost) all contractual relationships. This suggests that it fulfils (3) of *Kensland*; it is so obvious that it goes without saying. In the alternative, absent honesty in a commercial contract, the intended business efficacy (that is, the intended *result*) would likely not transpire, making honesty necessary and fulfilling (2). It is plainly capable of clear expression: *Bhasin* and *Callow* clearly define that it requires parties to not lie nor mislead. While 'mislead' is arguably ambiguous, *Callow*'s elaboration, it is submitted, makes it sufficiently clearly expressed. While (5) is not a predictable factor, Lord Hoffman in *HIH Casualty* expressed the opinion that: 'in the absence of words which expressly refer to dishonesty, it goes without saying that underlying the contractual arrangements of the parties there will be a common assumption that the persons involved will behave honestly.'

Having satisfied other conditions, such a term would also likely be reasonable and equitable.

The basis for implying a general term of honesty in commercial contracts is thus established; such an implication can be done in law or in fact. However, it is submitted that an implication in law is superior, as it permits a *universal* rather than *general* duty of honesty from which parties cannot escape through express term, which is in line with the promissory nature of contracts.

C. Minimum 'endeavours'

Incremental changes: the content of a general duty of 'endeavour'

There are varying standards of 'endeavours' clauses in different contexts. First, 'reasonable endeavours' simply means that 'if one reasonable path is taken then the obligation is discharged.' Whether the taking of a particular path is a reasonable endeavour is subject to an assessment of whether it would have had a significant or substantial chance (or otherwise, a 'real prospect'); furthermore, an insuperable obstacle to achieving the desired result may discharge the burden.

To use 'best endeavours' is a standard higher than that of using 'all reasonable endeavours'; 'all reasonable endeavours' normally requires that all reasonable paths or actions be exhausted and a measure of 'active' behaviour, with passivity or inactivity is likely to be construed as a potential breach. 'Best endeavours' goes past this, as it might require the sacrifice of some commercial interests of the obliged party.

The proposed general duty stemming from good faith that can be imposed into commercial contracts using the *Kensland* test is therefore that of undertaking reasonable endeavours to fulfil contractual obligations, discharged by undertaking a course of action with a significant or substantial chance of fulfilling the obligation.

Incremental changes: justifying and imposing a general duty of 'endeavour'

It may seem odd for this paper to introduce the concept of a general 'endeavour' duty. In reality, it is derived from the good faith requirement to show fidelity to the common or contractual purpose.

As to the nature of contracts, Smith opines that orthodoxy dictates that contracts are promises or some other form of self-imposed obligation. While two alternative views exist (namely, the views that (1) contractual obligations are obligations to ensure that others whom we induce to rely are not made worse off and (2) contracts are transfers of existing rights), Smith suggests that they are inferior to the orthodox view; the former is vulnerable to moral objections and fits awkwardly with various core features of contract law, while the latter is seemingly predicated on conceptual confusion.

Contracts therefore create promissory obligations. On this view, while a promissory obligation, once made, is the primary and exclusive reason for action (perhaps because of its moral force), it is submitted that a contractual promissory obligation can be characterised as a legally enforceable promise (with moral character). Having voluntarily made legally enforceable promises to one another, contracting parties are thus subject to the contract as a dual matter of law and morality. On this basis, it is submitted that *implied* duty to utilise reasonable endeavours in performing obligations is justified and permissible.

Having accepted the view that contract law is best explained by the promissory theory and that contractual obligations are enforced through both the moral character of the obligation as a promise and the legally binding nature of contractual obligations, it is submitted that placing the onus on parties who, by contracting, intend their obligations to be legally enforceable, to exercise reasonable endeavours to fulfil their contractual legal obligations must be so obvious that it goes without saying fulfilling (3) of the *Kensland* test.

Alternatively, similar to the rationale provided above, without an intention to perform contractual obligations (especially those arising out of a *commercial* contract, where parties transact for the purpose of profit and business) the intended business efficacy of the contract (that is, the intended *result*) would likely not transpire; this makes some semblance of endeavour justifiable as a matter of business efficacy, fulfilling (2).

Furthermore, it is plainly capable of clear expression, as demonstrated earlier, satisfying (4). Having satisfied other conditions, such a term would also likely be reasonable and equitable, fulfilling (1).

It remains to deal with the issue of potential contradiction with an express term to the contrary. In this regard, it is submitted that were a contract to contain a clause expressly not requiring parties to perform obligations, then such obligations would be better understood as *discretions*; as discretions affecting both parties are subject to the *Braganza* duty to be exercised reasonably instead of arbitrarily or capriciously, circumstances may arise under which such a duty has to be exercised anyway.

It is thus demonstrated that such a duty could be applied in general commercial contracts, which is not exempt from the orthodox promissory theory of contracts. Owing to the lack of precedent in support of implying this duty in law, the potential of implying such a duty in law akin to the *Bhasin* approach is noted but will not be taken further; such a proposal is also *prima facie* out of line with the presently championed incremental approach to developments in the common law.

General justifications for developing good faith

Arden opines that: 'It is crucial for judges to seek to develop the law in line with evolving commercial and social need. It is part of their responsibility to have a vision of the law as a dynamic, not a static, set of principles and rules.' As will be seen from the following discussion, at the very least there is an existing commercial need for the law to be developed.

The rationale provided by *Bhasin* for the desirability of the developments propounded (both recognising the general principle of good faith and the doctrine of honest performance) that the current law was desynchronised with reasonable expectations of commercial parties is predicated on the aforementioned reasonable expectations involving a duty of honesty; however, as explained above, such a predication is readily accepted.

In particular, *Bhasin* cites Canada as being desynchronised with two of its major trading partners: namely, Quebec and the United States. This is probably due to the nature of Quebec as a civil law province of Canada, as well as the hybrid nature of the United States, having both a duty of good faith in its Uniform Code of Commerce as well as common law.

This justification is similarly applicable to the Hong Kong context. According to the Hong Kong Commerce and Economic Development Bureau, Hong Kong's major trading partners comprise 'the Mainland of China, the United States, and the European Union'; China and the EU are civil law jurisdictions, while the United States' hybrid nature has been explored.

In particular, Hong Kong's close relationship with China is a good reason underlying the proposed extensions of good faith; it brings it closer to the expectations of Chinese parties who may dislike the role good faith currently plays in Hong Kong law.

China's 2021 Civil Code mandates full performance of 'respective contractual obligations' and compliance with the principle of good faith by 'sending notification, rendering assistance, and keeping confidentiality with reference to the contract'. With such strenuous requirements placed on parties contracting within the Chinese jurisdiction, it is submitted that the proposed extensions of the duty of good faith would make Hong Kong a more commercially attractive place for not only Chinese parties to deal, but also partners from other civil law jurisdictions (such as, at least, the European Union), bringing Hong Kong-governed contractual commercial obligations more in line with what they expect and/or are accustomed to.

Conclusion

Three ways that the duty of good faith could be extended are thus identified and justified.

The first proposal is that the duty of good faith should be recognised as a principle underlying and underpinning other contractual doctrines; namely, that parties should generally act 'honestly and reasonably and not capriciously or arbitrarily'. Recognising good faith as a principle is merely an incremental development in the common law; it changes nothing substantive; it imposes no new obligation.

The second proposal is to follow *Bhasin* in recognising the duty of honest performance, either as an independent contractual doctrine (thereby implying such a duty *in law*) or as a term *in fact*, recognising it as generally able to be implicated applying the established methodology laid down in *Kensland* for the law of implied terms. Such a duty would involve parties to not lie or otherwise knowingly mislead counterparties about matters 'directly linked to contractual performance'; parties can 'mislead' through misapprehensions caused by their own actions, such as half-truths, lies, omissions, and even silence; failing to correct misapprehensions caused by oneself can also be misleading. However, it expressly excludes any duty of loyalty or requirement to forego advantages.

The third proposal is to recognise a new duty mandating contracting parties to utilise reasonable endeavours in fulfilling contractual obligations. The bases for such a duty originate from the promissory theory of contract and the notion of fidelity to the contractual purpose. Such a duty obliges one, after entering into a contract, to subsequently undertake a course of action with a significant or substantial chance of fulfilling the agreed-to contractual obligations.

Law, Land, Colonialism and Ethnocracy: Governance in Post-1967 Israel / Palestine

Lee Hoi Kit Marc

Introduction

Law provides colonial administrators with a means to assume control over an indigenous population by enacting ambiguous statutes and framing the colonial occupation as a legitimate form of governance. Land, too, is an essential constituent of every colonial project in which the colonisers' control over the territory of the indigenous population is achieved by the acquisition and occupation of land through legal means. As shown, law and land law, in particular, play an important role in shaping the power relationship between the colonisers and the indigenous population and consequently affecting the dynamics of land ownership in a colonial society.

In a colonial project, the colonisers conquer and settle the lands of the indigenous population. By appropriating the lands of the indigenous, the colonisers establish a spatial hierarchy to maintain political control over the indigenous population. For example, in the British mandate of Palestine, lands not in active use were transferred, leased or sold to Jewish settlers, whose land ownership and interests were protected under the Torrens title system (a colonial system where title to land was recorded on a public register). After the eviction of the indigenous population, the colonisers will plan, build and establish new settlements on the lands of the displaced. Owing to the competing interests engaged in these discriminatory practices, some of the land disputes that arose from these forced evictions have been the focus of post-colonial courts in recent years.

As some observers have pointed out, in post-colonial societies, many of the legacies from the colonial past have persisted into the post-colonial era. Whilst it is acknowledged that the extent of legal transplantation (i.e. enacting a new law that largely follows the law of another country) from a colony to a modern state may vary according to the state's interests at stake (e.g. topics of private law tend to be more receptive to foreign influence, as they do not usually fall within an area of huge public concern and serious political conflict), it is contended that it is almost inevitable for a new state to borrow laws, or provisions of laws, from its predecessor when putting in place a new legal system, mainly for cost-effectiveness. Given the potential influence of colonial laws on the modern legal system, it leads us to tentatively propose that understanding how the colonial legal system was established and had evolved over time would be essential for developing a critical, historically informed approach to post-colonial legal structures.

It is further argued that the concepts of an ethnocracy and a post-colonial state are closely linked to each other in that a post-colonial state may have inherited from its colonial predecessor an ethnocratic system, which long predated the establishment of the new regime. As a result, in these post-colonial ethnocratic states, power and resources would be allocated based on one's ethnic belonging, instead of individual choice. To assert and maintain their hegemony over non-members, law would prove a useful tool for these post-colonial ethnocratic governments to incorporate their cultural biases and power relationships (e.g. the dynamics of land ownership) into the law, thereby justifying their discriminatory practices against non-members.

This essay explores the intricate relationships between law, land, colonialism and ethnocracy through an examination of the history of the land regime in post-1967 Israel / Palestine. This essay adopts the premise that there is a one state reality between the Mediterranean Sea and the Jordan River (based on the fact that the State of Israel has, since the 1967 Six-Day War, secured complete control over the entry and exit of people and goods, overseen security and imposed its own decisions, laws and policies across the whole territory of Israel / Palestine) and, with that in mind, the scope of this study will cover land law that is applicable to Israel's 1948 and / or 1967 territories, including the West Bank, Gaza (until 2005 before Israeli withdrawal) and East Jerusalem. This essay argues that Israel, as a settler, post-colonial (by 'post-colonial', it means the period after colonialism, as opposed to 'postcolonialism' or 'postcolonial theory', which refers to a field of study that addresses the broader impacts European colonialism has on politics, arts, economics, history and societies around the world) and ethnocratic state, has employed land law, a colonial and post-colonial transplant, to justify its Zionist discriminatory practices against Palestinians by denying them the right to the land of Palestine. Through studying the historical roots and evolution of the land regime in post-1967 Israel / Palestine, this essay seeks to reveal the structural and historical injustices relating to land ownership entrenched by law during the colonial and post-colonial eras, highlighting the disquieting dynamics of land ownership (and the accompanying political or economic power) and subjugations that have inevitably accompanied imperial forms of power.

This essay has three substantive parts. Firstly, this essay argues that, despite its insistent self-identification as a 'Jewish and democratic state', the State of Israel was founded and has continued to be a settler, post-colonial and ethnocratic state. Secondly, this essay examines the historical origins and trajectories of the Israeli-Palestinian conflict by tracing the political history of the question of Palestine from the 1947 Partition Plan and the 1948 Arab-Israeli War to the 1967 Six-Day War to the 2023 Israeli-Hamas War. Thirdly, this essay critically analyses on what bases Israel has justified its Zionist discriminatory practices against Palestinians, what structural and historical injustices relating to land ownership have been entrenched by law during the colonial and post-colonial eras, and how these injustices highlight the disquieting dynamics of land ownership (and the accompanying political or economic power) and subjugations that have inevitably accompanied imperial forms of power.

A. The State of Israel as a Settler, Post-colonial and Ethnocratic State

The political system of the State of Israel is commonly described in a number of different and arguably conflicting ways. For Israel and especially, the Zionist movement, it is a 'Jewish and democratic' state. This means, among other things, that Israel was founded as a homeland for the Jewish people. In particular, every Jew enjoys the right to immigrate to Israel from any part of the world. Also, Israel has its own official language, holidays and symbols, as well as religious and cultural heritage. Despite its state-building objective of preserving the majority ethnic community's culture, there are democratic elements in the Israeli political system. Under sections 1, 4 and 5 of the Basic-Law: the Knesset is a parliament, in which all members are chosen through free and fair elections. Partly because of this, the Israeli political system has sometimes been described as a liberal democracy which is comparable to other Western democracies.

However, this is far from the whole picture as far as the political system of the State of Israel is concerned. As we will see shortly, especially for its critics and Palestinians, Israel is a settler, post-colonial and ethnocratic state.

Settler Colonial State

First, it is submitted that the State of Israel implemented a settler colonial project in both of its 1948 and 1967 territories. One primary argument in support of this view is that Israeli settlers intended to settle permanently on the lands they occupied. As with the settlers in other colonies, they invoked a presumed sovereign prerogative, namely the United Nations (UN) Resolution 181 which, among other things, authorised the establishment of a Jewish state on the land of Palestine, for their state-building project, and set up a distinct group of political, social and economic institutions serving settlers' interests. Throughout the territories, Israeli settlers have removed thousands of Palestinians from their homes and villages, and used their lands to build new settlements. As we can see, the driving force of Israeli settlement activities is not exploitation but replacement, which is a key characteristic of settler colonial governance.

Moreover, the State of Israel has adopted a winner-takes-all approach which has involved the subjugations of Palestinians, strengthening the proposition that it is a settler colonial state. Apart from Israeli settlements on Palestinian lands, Israel has put in place a separate legal system for Palestinians to ensure that they remain in their assigned place geographically, socially, economically and politically, as seen in the Israeli military court system established in the West Bank and Gaza, until the Israeli withdrawal in 2005. Viewing Israel as a settler colonial formation, this explains why Palestinians in Israel have historically been one of the most disadvantaged, marginalised and excluded populations in the world and why discrimination against them has proven so intractable in Israeli society.

Post-colonial State

Second, it is asserted that the State of Israel was established as a post-colonial state and it remains so today. Whilst Israel has long been opposed to this view, as Britain was once the enemy of Jewish armed groups, the Israeli political system has exhibited many features of the Ottoman Empire and Britain. The British parliamentary system, for example, has been adopted by Israel. To date, Israel continues to use laws from the colonial period to manage and contain Palestinians and to inherit a colonial narrative that Jews should maintain their superior status throughout the country. These examples illustrate that although colonialism was put to an end in 1948, it has simply taken a different form in the post-colonial era.

Ethnocratic State

Third, it is contended that the State of Israel has practised an ethnocratic system of governance across its 1948 and 1967 territories. Lise Howard identified three common characteristics of an ethnocratic regime, including political parties that are primarily based on ethnic interests, ethnic quotas to determine the positions of key government officials and state institutions that are divided according to ethnic groups. In an ethnocracy, the dominant ethnic group will usually have the power to unilaterally decide what rights citizens are entitled to and how resources should be distributed. As a result, injustices would

arise among different ethnic groups when the dominant group uses public power to both exclude non-members and empower their own members.

In the State of Israel, Jews are the dominant ethnic group. Since its creation in 1948, Israel has introduced laws and policies to advance the interests of the Jewish people. In both of its 1948 and 1967 territories (in particular, Jerusalem), it has carried out a Judaisation project to drive out any non-Jewish religious influences. Many Palestinian villages, towns and neighbourhoods have been demolished. Simultaneously, more stringent restrictions have been placed on Palestinian settlements. This reflects an unequal power dynamic between Jews as the dominant ethnic group and Palestinians as non-members. It follows that the Israeli political system is, at best, an ethnocracy.

As we have seen so far, whilst it is the claim of this essay that the State of Israel should be considered as a settler, post-colonial and ethnocratic state, it is subject to debate as to whether Israel can be regarded as a liberal democracy on the grounds that it has the characteristics of a liberal democracy and therefore, this is a matter of value judgment which can be argued in either way.

B. Situating the Present: Historical Origins and Trajectories of the Israeli-Palestinian Conflict

Before delving into a discussion of the land regime in post-1967 Israel / Palestine, it is important to set out, though not exhaustively, the key historical events leading to and surrounding the Israeli-Palestinian conflict. Though this section aims to provide an overview of the political history of the question of Palestine, special attention will be paid to the close connections between law, land, colonialism and ethnocracy through which law and land have played key roles in shaping the political landscape in Israel / Palestine and how they have been used by the State of Israel to justify and further its colonial occupation and ethnocratic politics in and vis-à-vis its 1948 and 1967 territories.

The dispute between the State of Israel and Palestinians and Arab states has been at the centre of international attention for more than 70 years and has its roots back in the early 20th century when Britain took control of Palestine following the defeat of the Ottoman Empire in World War I. In a nutshell, the conflict in itself is a land dispute in which both Jews and Palestinians claim an exclusive right to the land of Palestine.

1. Pre-1967 Developments

The 1947 Partition Plan

The British rule in Palestine did not last long. In fact, as early as 1937, less than 20 years after the granting of the mandate, Britain decided to withdraw from Palestine. The turning point was the 1936 Arab Revolt, which led to the mounting pressure and escalating violence between Jews and Palestinians. This incident undermined the foundations of British rule in Palestine. In February 1947, Britain referred the problem to the United Nations for guidance. In November 1947, the UN General Assembly passed a resolution to terminate the mandate and partition Palestine into a Jewish state and a Palestinian state, with a caveat that Jerusalem should be placed under a special international regime. According to the plan, 57 per cent of the land would become a Jewish state and 43 per cent would become a Palestinian state. Whilst the Zionists accepted the plan, Palestinians and Arab states rejected it, insisting that the proposed area of the Palestinian state would not be sufficient to accommodate the Palestinian population. Due to disagreements, the plan was never implemented.

Figure A: 1947 Partition Plan

The 1948 Arab-Israeli War

In May 1948, Britain withdrew and the State of Israel declared independence. Owing to the power vacuum created by the British retreat, a war broke out between Israel and five Arab states. In 1949, the war was concluded by armistice agreements between Israel and four Arab states (excluding Iraq), under which Israel would control 78 per cent of land in Palestine, whereas Jordan and Egypt would respectively govern the West Bank (including East Jerusalem) and Gaza

During the first two decades of Israeli rule, the State of Israel used military rule and discriminatory land policies to further its colonial occupation and ethnocratic politics in and vis-à-vis its 1948 territory. Internally, after the conclusion of the 1948 Arab-Israeli War, it applied military rule to areas with a dense Palestinian population, restricting their access to land and freedom of movement. For example, pursuant to regulation 125 of the Defence Regulations (State of Emergency), an Israel Defence Forces (IDF) commander may designate any area as a 'closed area' and require any person entering or leaving the 'closed area' to seek prior approval. In practice, this military rule barred any internally displaced Palestinian from returning because IDF commanders would refuse any application from a Palestinian applicant. Israel also used discriminatory land policies to prevent the internally displaced Palestinians within its 1948 territory from returning (e.g. by demolishing their homes, conducting mass deportations, taking possession of their property and building Jewish settlements on their lands). In both instances, national security, besides law, was frequently cited as a justification for applying military rule and discriminatory land policies to Palestinians in Israel's 1948 territory.

Figure B: 1948 Arab Israeli War

2. Post-1967 Developments

The 1967 Six-Day War

In June 1967, two decades after its inception, the State of Israel waged a pre-emptive war against its three Arab neighbours and occupied the Sinai Peninsula, Gaza, the West Bank (including East Jerusalem) and Golan Heights. The 1967 Six-Day War is a key moment in the political history of the question of Palestine. This is because the entire territory of Palestine has since fallen under the *de facto* control of Israel.

Between 1967 and the present day, the State of Israel has utilised a wide range of legal apparatuses to govern Palestinians in its 1948 and 1967 territories. Since its occupation of the West Bank and Gaza in 1967, it has put in place a compounded structure of legal fragmentation to stratify Palestinians living in different parts of the country into different legal statuses, each with distinctive rights and benefits. To date, there are at least five legal statuses for Palestinians residing in Israel, including Palestinian Israeli citizens, Palestinian Jerusalem residents, Palestinian West Bank residents, Palestinian Gaza residents and Palestinian refugees.

The State of Israel has based its legal fragmentation regime on various legal instruments: the Nationality Law (for Palestinian Israeli citizens since 1966), the Law and Administration Ordinance (Amendment No. 11) Law, the Municipalities Ordinance (Amendment No. 6) Law, the Basic-Law: Jerusalem the Capital of Israel, the Entry into Israel Law (for Palestinian Jerusalem residents), the Military Order No. 378 (for Palestinian West Bank and Gaza residents, until 2005 before Israeli withdrawal) and the International Covenant on Civil and Political Rights (for Palestinian refugees). Taken together, these legal instruments have comprised the current 'Nakba regime' under which Palestinian Israeli citizens and Jerusalem residents have lived under Israeli domestic law, whereas Palestinian West Bank and Gaza (until 2005) residents have lived under military rule. This is concerning because Palestinian West Bank and Gaza residents, unlike their Israeli and Jerusalem counterparts, have long been denied the basic protections afforded by the international human rights legal framework, for instance the right to a fair trial. As with the case of pre-1967 governance, national security and law have often been invoked as justifications for imposing a system of legal fragmentation on Palestinians in Israel's 1948 and 1967 territories.

The 1987 First Intifada

In December 1987, the Israeli rule in the West Bank and Gaza was first put to the test when a revolt took place as a result of expanding Israeli settlements in the occupied territories.

The Peace Process in the 1990s

In the 1990s, the global and domestic developments created a favourable environment for a peace process between the State of Israel and Palestinians and Arab states, which led to the signing of the historic Oslo Accord in September 1993. According to the interim self-government arrangements, a Palestinian Authority would be established to practise some form of self-government in the West Bank and Gaza.

The 2000 Second Intifada

Despite the peace process in the 1990s, a second revolt erupted as Oslo was denounced by hardline Israeli and Palestinian leaders as a sellout and a series of violence began between the two groups.

The 2005 Withdrawal from Gaza

In 2005, due to growing domestic and international pressure, the State of Israel unilaterally disengaged from Gaza, putting an end to 38-year-long settlements and military operations in the occupied territory since the 1967 Six-Day War.

The 2023 Israeli-Hamas War

In 2017, Hamas, a Palestinian armed group and nationalist movement, rose to power to lead Gaza. Since then, it has fought the State of Israel several times, with the most recent one in October 2023, which it killed 1,200 civilians and took 250 hostages. Israel retaliated by conducting a sustained, wide-scale military offensive in Gaza, which has killed tens of thousands of Palestinians and displaced millions. This has resulted in one of the largest humanitarian crises in human history.

Thus far, we have seen how law and land interact with one another and have an impact on politics in the context of the Israeli-Palestinian conflict. In the next section, we will look at the land regime in post-1967 Israel / Palestine, examining the structural and historical injustices with respect to land ownership established by law during the colonial and post-colonial eras.

C. A Critical Analysis of the Land Regime in Post-1967 Israel / Palestine

In the last substantive part of this essay, we will consider how law has been used to dispossess Palestinians of their lands in the State of Israel's 1948 and 1967 territories. In addition to showing the impact law has on Palestinians and underlining the disquieting dynamics of land ownership (and the accompanying political or economic power) and subjugations, this legal analysis will also demonstrate how Israel has used seemingly neutral law to justify its Zionist discriminatory practices against Palestinians and further its colonial occupation and ethnocratic politics in and vis-à-vis its 1948 and 1967 territories.

It should be noted that the following discussion is by no means a comprehensive account of the land law of the State of Israel as applicable in its 1948 and 1967 territories. Instead, it will focus on the legal provisions that are most relevant in relation to Palestinians' right to land in the post-1967 governance.

Land Regime in the State of Israel's 1948 Territory and East Jerusalem

After the 1967 Six-Day War, the State of Israel annexed East Jerusalem by enacting a number of statutes that expanded its domestic jurisdiction over the territory. In 1980, it further passed the Basic-Law: Jerusalem the Capital to reaffirm the annexation. Accordingly, although Israel's decision to annex East Jerusalem has been widely criticised by the international community, it is an indisputable fact that Palestinian Jerusalem residents, like their Israeli counterparts, have lived under Israeli domestic law since 1967 and such law has become an essential part of their lives under Israeli rule.

In its post-1967 rule over its 1948 territory and East Jerusalem, the State of Israel has used the Lands (Acquisition for Public Purposes) Ordinance (L(APP)O) to expropriate lands from Palestinian

Israeli citizens and Jerusalem residents for the interests of the state, or more specifically, the Jewish majority. This colonial-era law, which was inherited from Britain, allows Israel to expropriate lands for any 'public purpose'.

The definition of 'public purpose' was deliberately drafted in a broad manner to prevent any expropriation from being challenged in the courts. The Supreme Court of Israel has traditionally endorsed this interpretation of 'public purpose' and refrained from interfering with the executive branch in exercising its power under the L(APP)O, including the content and scope of 'public purpose'. As shown, the L(APP)O confers on Israel a plenary and freestanding power of defining what a 'public purpose' is.

Moreover, the State of Israel may expropriate lands for an indefinite period of time. By a 2010 amendment to the L(APP)O, the State of Israel overturned a Supreme Court decision, *Spolansky v Minister of Finance*, and proclaimed that it has the right to retain lands even if the asserted 'public purpose' no longer exists.

Given the broad and unfettered discretion that it has to expropriate lands under the L(APP)O, the State of Israel has relied on this legislation as its main legal basis for transferring lands from Palestinian Israeli citizens and Jerusalem residents to the state. Since the mid-1950s, this law has been used to expropriate a large area of land in Israel's 1948 territory and East Jerusalem after 1967 and to build Jewish settlements on it (e.g. the Judaisation of the Galilee project and the Jewish city of Nof HaGalil). According to governmental statistics in 1992, more than 185,000 hectares of land were expropriated under the L(APP)O, 92 per cent of which were previously owned by Palestinian Israeli citizens and Jerusalem residents.

As we can see, the extensive and unlimited powers the L(APP)O grants to the State of Israel put the interests of Palestinian Israeli citizens and Jerusalem residents at risk because they can be easily deprived of their lands at the will of the state. Moreover, although the legislation was drafted in a neutral way such that it applies to both Jews and Palestinians, it has been predominantly enforced against Palestinians, giving rise to concerns that this seemingly neutral legislation has been used in a draconian fashion to inflict discrimination upon Palestinians in Israel. These concerns would be especially acute where a government is not accountable to its people or a portion of its people. This is particularly relevant to the present case as Palestinians were never a majority in Israel and Palestinian Jerusalem residents lack the power to choose their government, as they cannot vote in parliamentary elections. Additionally, the L(APP)O has a significant impact on the socio-economic statuses of Palestinian Israeli citizens and Jerusalem residents, as many derive their main income from their lands. They may lose their means of livelihood as a result of the expropriation.

It has now become abundantly clear that the State of Israel uses the L(APP)O to justify its Zionist discriminatory practices against Palestinian Israeli citizens and Jerusalem residents. Israel may argue that, since this law was in place before Israeli rule, it is not intended to target any specific groups. However, as we have seen how this law has been enforced in Israel's 1948 territory and East Jerusalem, it has been used discriminatorily against Palestinians. Israel may also want to rely on the legitimacy of the law on the basis that it was passed by the Knesset, which gives the law a public mandate. Whilst it is true that Palestinian Israeli citizens have the right to vote in parliamentary elections, the fact that most Palestinians in Israel, including Palestinian Jerusalem residents, West Bank residents and Gaza residents, cannot vote cast doubt on the legitimacy of the Knesset and the L(APP)O. The state's policy of maintaining a Jewish majority and excluding most Palestinians from voting has effectively barred Palestinians from forming a political representation in Israel. Accordingly, these two justifications do not stand up to close scrutiny.

Land Regime in the State of Israel's 1967 Territory (Excluding East Jerusalem)

Beyond its 1948 territory and East Jerusalem, the State of Israel has occupied the West Bank and Gaza (until 2005 before the Israeli withdrawal) since the 1967 Six-Day War. Unlike East Jerusalem, Israel has never formally annexed this part of its 1967 territory, nor has it extended its domestic jurisdiction to its 1967 territory (excluding East Jerusalem). It follows that, under the system of legal fragmentation, Israel has applied military rule to govern Palestinian West Bank and Gaza residents.

Within its 1967 territory (excluding East Jerusalem), the State of Israel has used emergency regulations and military rule to dispossess Palestinian West Bank and Gaza residents of their lands. Similar to the expropriations carried out by Israel in its 1948 territory and East Jerusalem, these expropriated lands were used for establishing and expanding Jewish settlements, setting up national parks and conducting military training.

In the first decade of its rule in its 1967 territory, the State of Israel took away the lands of Palestinian West Bank and Gaza residents mainly through requisitions. This method of dispossession was upheld by the Supreme Court of Israel in *Salama v Minister of Defence*, in which the Court held that the expropriation would be lawful as long as it is necessary for security needs and subject to a time limit. The court decision in *Salama* was particularly devastating for Palestinian West Bank and Gaza residents because their lands could be subject to requisition orders for a protracted period as Israel could, in theory, renew the orders for as long as it wanted. It was also a common practice that it would not stipulate any time limit in these orders, making them *de facto* permanent.

In addition to requisition orders, as was the case for Palestinian Israeli citizens and Jerusalem residents, the State of Israel also used expropriation orders to transfer the lands of Palestinian West Bank and Gaza residents to the State for constructing Jewish settlements. As a result, at least 1,000 hectares of land were expropriated for building Jewish settlements in the West Bank (e.g. Ma'aleh Adumim, Ofra and Ramallah).

Owing to the prolonged hostility between the State of Israel and Palestinians and Arab states, a vast area of land in the West Bank and Gaza was designated as a 'closed military zone', which restricted any person, including landowners, from entering the area unless authorised by Israel. This area covered part of the Jordan Valley and South Hebron Hills, which were primarily used for military purposes.

With respect to the lands left behind by internally displaced Palestinians, the State of Israel made use of Military Order 58 to assume possession of these 'abandoned' or 'absentee' lands. Although in theory, these lands could be recovered upon request, the financial, practical and administrative burdens made it so difficult, if not impossible, for internally displaced Palestinians to take back their lands. For example, Israel would refuse any of these persons from entering the country, in order to prevent them from submitting a petition to reclaim their lands.

As we have seen so far, the legal order that the State of Israel has put in place for its 1967 territory has had grave consequences for the land ownership rights of the Palestinian West Bank and Gaza residents. It is interesting to note that some of the laws that have been applied to Palestinian West Bank and Gaza residents resemble some of the key concepts in international humanitarian law (e.g. requisitions). Nonetheless, the fact that there has been no independent arbiter of disputes in Israel has made it so inaccessible for Palestinians to seek a redress of their grievances through the court system. This problem is particularly evident when taking into account the composition of the courts in Israel. Since the Supreme Court of Israel was established in 1948, only one judge of this court has been a Palestinian. Furthermore, as Palestinian West Bank and Gaza residents have been subject to military rule, they do not enjoy the same human rights protections as others in the country do. For example, they cannot make a claim based on their

constitutional right to property under Article 4 of the Basic-Law: Human Dignity and Liberty.

As witnessed in the case of the L(APP)O, these emergency regulations and military rule would likely have a negative impact on the socio-economic well-being of Palestinian West Bank and Gaza residents.

In its post-1967 governance in its 1967 territory (excluding East Jerusalem), the State of Israel has used law, in the form of emergency regulations and military rule, to enable, facilitate and mandate its Zionist discriminatory practices against Palestinian West Bank and Gaza (until 2005 before the Israeli withdrawal) residents by dispossessing them of their lands and redistributing these precious resources in favour of the Jewish majority, expanding their presence whilst marginalising others. To Israel, land is central to its settler colonial project in its 1967 territory because land allows it to assert political control over the indigenous Palestinian population. Apart from legal provisions, Israel is also trying to use the court system to justify its Zionist discriminatory practices in its 1967 territory. However, the fact that there are a discriminatory land distribution system and a non-interventionist judiciary has contributed to a settler, post-colonial and ethnocratic regime in Israel. It is on these grounds that we are not of the view that Israel's justifications would stand.

As illustrated in our legal analysis, the State of Israel has used similar legal tools, though based on different legal authorities, to dispossess Palestinians of their lands in post-1967 Israel / Palestine.

Conclusion

In this essay, we have explored the relationships between law, land, colonialism and ethnocracy through a study of the history of the land regime in post-1967 Israel / Palestine. Based on the assumption that there is a one state reality between the Mediterranean Sea and the Jordan River, we have examined the land law that is applicable to Israel's 1948 and / or 1967 territories. We have shown that Israel, as a settler, post-colonial and ethnocratic state, has used land law, a colonial and post-colonial transplant, to justify its Zionist discriminatory practices against Palestinians by denying them the right to the land of Palestine. Through this historical study, we have also revealed the structural and historical injustices relating to land ownership entrenched by law during the colonial and post-colonial eras, demonstrating the problematic dynamics of land ownership (and the accompanying political or economic power) and subjugations that have come with imperial forms of power.

Criminal Justice & Penal Systems

A Critical Evaluation of the Sleeping Juror Issue with Reference to Relevant Authorities

Chan Man Wa

Jury misconduct refers to the conduct of a juror at trial that prejudices the trial fairness, thus compromising the interests of justice. In *Dallas v United Kingdom* (2016), which involved jury misconduct, it was held that under the English common law of contempt, two elements must be present in the misconduct, namely, (1) there had to be an act which created a "real risk" of prejudice to the administration of justice; and (2) there had to be an intention to create the risk. The caveat was endorsed by Lord Thomas in the English High Court case of *Solicitor General v Cox & Another* (2016) and referenced by the Hong Kong Court of Appeal in *Secretary for Justice v Wong Ho Ming* (2018).

In this regard, a juror's sleeping during a testimony is a form of jury misconduct in the following ways: (a) When a juror is sleeping, he or she would miss some evidence. His or her decision so rendered is a kind of arbitrary law enforcement, contrary to the function of a jury trial. (b)The right to a trial by jury requires jurors to give rapt attention to the testimony. If he sleeps during trial, it means he has not performed the duty in good faith. It poses a challenge to the integrity of the judicial process.

Prejudice to the defendant

Where the proceedings are vitiated by one or more of the jurors nodding off during parts of the hearing, the defendants would be prejudiced. The determination of prejudice depends upon who observed the juror's sleeping and the extent of the juror's inattentiveness.

The defendant observed the somnolence

The onus of proof is on the defendant. As noted by the Court of Appeal in *R v Wong Wai-bor* (1986), if the defendant knows the alleged defect but has made no application to the judge to discharge the juror in question, it is extremely difficult for the defendant thereafter to invite the court to intervene. Therefore, in *Michelle Rosy v HKSAR* (2011), the Court of Appeal rejected the applicant's appeal by reference to the Privy Council decision in *Ras Behari Lal v The King-Emperor* (1933) that 'if no application is made, that is fatal to the applicant's point as a matter of law'.

To raise the complaint, the defendant must show that: (1) the juror was actually asleep; and (2) what the juror missed was so serious that it compromised the fairness of the defendant's trial and challenged the integrity of the judicial process.

Wong Wai Bor (1986) stated, 'Whether the court will accept the submission is very much a matter of fact and degree, upon which the judge in the court has to rule in the light of what he sees and hears in the course of that hearing.'

For example:
(a) In *The Queen v Chan Tung* (1996), even though the Correctional Services Officers and the applicant's wife were available to give evidence for the dozing off of two jurors during the trial, the judge refused to make an inquiry into this matter because the judge said she had kept 'a very close eye at the jury throughout and she saw no reason to believe that they had failed to discharge their duty'.
(b) In *HKSAR v Chen Ping Feng* (2010), the trial judge considered there was no basis to discharge the whole jury or the juror in question, since when he asked him not to close his eyes, the juror immediately responded and said he had been listening, and his response demonstrated he had not been asleep.
(c) In *HKSAR v Barry Peter Miller* (2002), the Hong Kong Court of Appeal did not believe the defendant's submission that a juror had been asleep during parts of the proceeding because the defendant was apparently an astute person; it is inconceivable that had the applicant seen a juror asleep for days on end, he would have maintained silence.

The trial judge observed the somnolence

As per the Court of Appeal in *The Queen v Chan Tung* (1996), it is always necessary for a trial judge to see that no juror has materially incapacitated himself from hearing or evaluating the evidence or from assessing the demeanor of a witness and rendered himself incompetent to return a true verdict according to the evidence and to his oath. If the trial judge spots a juror asleep, it is the duty of the judge to prevent scandal and the perversion of justice. The duty has been held to be a continuous duty throughout the trial, as per Lord Atkin of the Privy Council in *Ras Behari Lal v The King-Emperor* (1933).

However, it has been unsettled as to whether a hearing should be made to determine whether the juror was in fact sleeping and, if so, to what extent. For example:

(1) In the leading case of *The Queen v Tam Chung Shing And Others* (1989), both the counsels and the trial judge had seen some members of the jury asleep during parts of the proceedings. On appeal, Kempster, JA of the Court of Appeal overturned the first instance decision that the impugned juror No.7 who drifted off during material parts of the trial should not be discharged because he was 'not a liability or danger to the rest of the jury', holding that the failure to examine or to discharge the juror constituted a material irregularity in the course of the trial, rendering the verdicts unsafe and unsatisfactory as: (a) The decision involved a misapprehension as to the possible effect on the jury's collective deliberations of a juror who was not fully apprised as to the evidence called on behalf of the defendants; (b) His vote might have been decisive in the convictions of the defendants by a bare majority. So, there was a real danger that one or more defendants may have been prejudiced.

(2) By contrast, in *HKSAR v Yuen Yu-Kin* (1997), although the counsel of the defendant and the trial judge likewise found that someone in the jury had fallen asleep, the Court of Appeal upheld the first instance ruling against the defendant's application for discharge of the jury, reasoning that the counsel did not say affirmatively that a juror was seen to have gone to sleep so that the trial judge could have enquired into the matter.

Given the jurors were recognised to be asleep during trial, these two cases produced different judgments. Why would the juror's sleeping in *Tam Chung Shing* (1989) be more consequential than that in *Yuen Yu-Kin* (1997)?

The inconsistency in judicial treatment is by no means peculiar to Hong Kong. In the United States, in *The People of the State of New York v Jeffrey Evans* (1985), the Colorado Court of Appeals held that the defendant was prejudiced when a juror slept during the closing argument, and that the trial court should have granted him a new trial, whereas in *State of Hawaii v Yamada* (2005), the Hawaii Supreme Court reversed the circuit court's grant of a new trial after a juror admitted to sleeping through about twenty percent of defence counsel's closing argument. The anomaly can only be explained by the discretionary nature of the court's power to deal with jury misconduct.

Legal consequence

Under s.25(1)(a), the Jury Ordinance 'a court may at any time during the trial prior to the verdict discharge a juror where, in the interests of justice, it appears to the court expedient to do so.' The statute reflects the common law principle as stated by Lord Campbell CJ in *Mansell v The Queen* [1857]: '… if a juryman were completely deaf, or blind, or afflicted with bodily disease which rendered it impossible to continue in the jury box without danger to his life, or were insane, or drunk, or with his mind so occupied by the impending death of a near relation that he could not duly attend to the evidence,….. it would be the duty of the Judge to prevent the scandal and the perversion of justice which would arise from compelling or permitting such a juryman to be sworn, and to join in a verdict on the life or death of a fellow creature.' The remaining jury shall nevertheless be considered properly constituted under s.25(2) and (3) of the Ordinance. Any verdict returned by the remaining jurors shall be of equal validity as if it had been returned by a jury consisting of the full number of jurors.

Under s.83V(1)(b) of the same Ordinance, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice, order any compellable witness to be examined before the Court. The Court shall, under s.33V(2), receive evidence that justifiably has not appeared at trial and is admissible and credible to the grounds of appeal. For example, in *Tam Chung Shing* (1989), the Court of Appeal admitted evidence from three of the counsels who appeared in the trial and from three of the jurors. The evidence would have been presented at trial had the trial judge not declined to make an inquiry. But the evidence that can be provided is limited by the common law confidentiality rule that surrounds jury deliberations. No one has a right to know how a jury, or any individual juror, has deliberated or how a decision was reached, as per Lord Carswell in *R v Smith* (2005). As a result, the effect of a sleeping juror on the outcome of the case cannot be ascertained exactly. The court's adjudication on the impact of the sleeping juror issue is thus a sort of speculation. In the United States, even an order for the examination of jurors is unlawful under the federal rule of procedure, Rule 606(b), unless extraneous prejudicial information was improperly brought to the jury's attention, or any outside influence was improperly brought to bear upon any juror. Therefore, in the case of *Tanner v USA* (1987), the Supreme Court held, by a majority, that by reason of the Federal Rules of Evidence, Rule 606(b), the defendants were not entitled to a post-trial examination of jurors in relation to alleged juror misconduct, despite the allegations of drinking, smoking marijuana, cocaine injections and resulting sleep and 'flying'.

Under s.83E, the Criminal Procedure Ordinance, the Court of Appeal may order the appellant to be retried where it appears to the Court that the interests of justice so require. The interest of justice means the conviction must be safe, as per the English Court of Appeal in *R v Criminal Cases Review Commission Ex p. Pearson* [1999]. Unsafe convictions can be appealed, whether the length of the case or the cost of a retrial as in *Tam Chung Shing* (1989). There must be either evidence pointing directly to the fact, or evidence from which it might properly be inferred, that the defendant might have been prejudiced or that he might not have received a fair trial. For example, in *Tam Chung Shing* (1989), the Court of Appeal held that, to allow the appeal, it must not only be satisfied that the juror was asleep but also that, by reason of somnolence, he may well have incapacitated himself from hearing significant evidence or from assessing the demeanor of witnesses for periods so appreciable as to render him incompetent to give a true verdict according to the evidence and to his oath. On this basis, where fresh evidence was adduced from the compelling witnesses, including the impugned juror, of his somnolence, the Court allowed the appeal to quash the convictions and set aside the sentences.

In conclusion, the sleeping juror issue is not so simple as it appears. Evidence is important but the judicial discretion may be more pivotal.

Prison Labour in Hong Kong: Forced Labour or Justified Way of Rehabilitation?

Hu Yueyun

Introduction

According to the statistics of the Correctional Service Department of the HKSAR (HKCSD), the average daily penal population was 8,498 in 2023. These individuals are convicted prisoners compelled to prison labour under the regulation of HKCSD. Every prisoner is required to work 'for not more than 10 hours a day, of which so far as practicable at least 8 hours shall be spent in associated or other work outside the cells, rooms, dormitories or wards' under Cap. 234A Prison Rules. Working for not less than six hours per day is mandatory unless excused on medical grounds.

Meanwhile, Article 4(3) of the Hong Kong Bill of Rights Ordinance (BORO) prohibits slavery or servitude as well as forced or compulsory labour. However, Article 4(3)(b) includes an exception stating that this prohibition does not apply to 'any work or service normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention'. Although mandatory prison labour is not recognised as forced labour in Hong Kong, recent debates have emerged over whether this exception should be quashed or what standard should be implemented to provide a higher threshold and more protection for the prisoners.

Human rights promoters and the press, especially in the US, have been promoting an end to 'forced labour in all its forms - including in prisons' along with relevant protection mechanisms to incarcerated workers. The main criticism regarding the current mode of prison labour lies within three aspects:
(1) the involuntary nature of the work,
(2) unfair payment or a lack of minimum payment rate compared with regular workers, and
(3) the absence of a legal protection mechanism for incarcerated prisoners.

This essay argues that while the mandatory nature of prison labour in Hong Kong may be justified as a means of rehabilitation, higher standards of autonomy and protection should be implemented. This is necessary to differentiate prison labour from forced labour and to align with international standards. The following sections of this article will begin by explaining the terms 'forced labour' and 'prison labour' from an international law perspective. Then, it will compare the international standards with the actual situation of prison labour in Hong Kong, focusing on issues of voluntariness, autonomy, and fair payment. The final section will provide a conclusion.

Meaning of Forced Labour from an International Law Perspective

To examine the three aspects mentioned above, we shall first clarify the definition of forced labour in an international law sense. According to Article 2(1) of the Forced Labour Convention, 1930 (No.29), 'all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily would amount to forced labour.' The International Labour Organisation (ILO) further highlighted three elements from this definition: 'work or service', 'the menace of any penalty', and 'involuntariness'. The phrase 'offered voluntarily' in the definition refers to a worker's free and voluntary consent to take a job or 'his or her freedom to leave at any time'. A straightforward application of this concept to prison labour would mean that prisoners should have full autonomy in deciding whether to work and in determining the specific sector in which they work. However, similar to the BORO in Hong Kong, which prohibits forced or compulsory labour, the Forced Labour Convention outlines exceptions to the definition of 'forced or compulsory labour' in Article 2(2). This includes 'any work or service exacted from any person as a consequence of a conviction in a court of law', thereby excluding prison labour from being classified as forced labour.

In order to differentiate prison labour from forced labour, the Combating Forced Labour Handbook of the ILO provides standards for the employment and basic protection of prison workers. It states that they 'should be hired to companies only on a voluntary basis, and conditions with regard to wages, benefits and occupational safety and health should be comparable to conditions for free workers.' That said, there are prerequisites to this exception, limiting the management of prison labour in order to protect the human rights of the prisoners.

Moreover, the strong emphasis on the voluntariness nature of prison labour is evident in the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), which stipulates that 'prison labour must not be of an afflictive nature, the prisoners shall be able to choose the type of work they wish to perform, and the precautions laid down to protect the safety and health of free workers shall be equally observed in prisons.' These standards aim at promoting the autonomy of prison workers, establishing minimum payment requirements, as well as providing protection for prisoners compelled to work.

Therefore, it appears that these prerequisites are highly justified in light of the uncompromising exception discussed above.

Justification of Prison Labor in Hong Kong

The following sections will discuss how prison labour is justified in Hong Kong based on its voluntariness, autonomy and fair payment.

1. Voluntariness

First of all, voluntariness could be justified by examining the main purpose of prison labour claimed by the HKCSD, which is to 'enhance the prisoners' employability and facilitate their rehabilitation'. This aim aligns with the Nelson Mandela Rules, which states that prison labour is

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not to be afflictive in nature or to make financial profits. Establishing prison labour should not be to punish or to form an industry to supplement the expenditure of the prison and to generate financial profits. Instead, it is more of a welfare business in its nature, thus attaching much weight to the evaluation of voluntariness. In contrast, if the work is mandatory with the prisoners having no autonomy to choose whether to work or in which sector to work, it is more analogous to punishment and consequence of his or her criminal activity, just as sentenced by a court rather than a welfare for rehabilitation.

While there is a strong emphasis on voluntariness placed on prison labour, it is important to note the existence of some correctional functions, as some prisoners may lack the motivation for rehabilitation. In order to push them towards it, there needs to be some form of imperative order. This is where the justification for mandatory labour in prison could come into play. However, requiring all prisoners to work would oversimplify the rehabilitation process because not all crimes stem from unemployment. Therefore, it remains doubtful how significantly prison labour may contribute to the rehabilitation of different types of prisoners and whether it is necessary to make it compulsory.

2. Autonomy

Moreover, individuals outside of prison have the autonomy to choose whether to work. Therefore, why should prisoners be deprived of this same autonomy? In my opinion, a current justified solution for prison labour might be to assign prisoners who are willing to work to different sectors based on their preferences. For those who are reluctant to work, it is essential to provide educational and mental support while promoting the benefits of prison labour to them. A fair payment and comprehensive protection mechanism for prison labour is then needed to attract and give confidence to the prisoners. This would help mitigate the defect of lacking a formal employment relationship through which workers may resort to the law against their employers, and to avoid the possibility of exploitation.

Nevertheless, when we turn back to the current prison labour in Hong Kong, apart from the mandatory labour rule, many unjustified situations still persist. Prison labour in Hong Kong lacks autonomy in choosing which industrial sector to work in, as stated in the Nelson Mandela Rules. To make it worse, it has been discovered that some work prisoners undertook is so simple and repetitive that 'mastering their production can hardly be deemed a "trade"' and is meaningless to their possible future employment out of prison. In this regard, prison labour appears to serve merely as a tool to keep prisoners busy and occupied, which contradicts HKCSD's aim of training and rehabilitating them for future vocations.

3. Fair Payment

In the meantime, although the HKCSD claims that the 'products and services produced by prison labour are supplied to government departments and tax-supported organisations, bringing only an incidental benefit of saving public money,' it is evident that inmates earn only a minimal wage compared to the significant value of their labour. This raises questions about the fairness of the arrangement, especially if we assume that no secret profits are being made by the HKCSD. Consequently, the products and services provided are likely offered at prices significantly lower than their market value. Beyond the potential unjust benefits to government departments, it is certainly unfair to the prisoners involved in producing these goods and services, as they are treated unequally compared to regular employees.

4. Guaranteed Compensation

Lastly, consider the guaranteed compensation, 'Ex-gratia Payment Policy' implemented by the Hong Kong government. It allows prisoners who suffer injuries from work in prison to apply for an ex-gratia payment from the government as long as certain requirements are satisfied. However, this policy remains internal within HKCSD, with most of the prisoners uninformed about the existence of the scheme in writing and the application procedure. On top of that, HKCSD seems to retain considerable discretion over the application of this policy and tends to apply relatively high standards in terms of the actual approval. For instance, during the period of 2003 to 2010, only two of the 793 prisoners who suffered work injuries have been granted ex-gratia payments compensation.

Conclusion

In conclusion, although the mandatory labour requirement in Hong Kong prisons may be justified for rehabilitation purposes, prison labour in Hong Kong lacks a sufficient degree of voluntariness and autonomy when compared with international standards. It is recommended that reforms that focus on providing prisoners with free choice in their industry roles, ensuring fair payment, and implementing protection for their rights are necessary to justify prison labour as an exception to forced labour under Hong Kong legislation and to meet international standards.

LinkedIn, Privacy, and Data Protection Laws

Adam Hu Yuequan

Issue

On 3rd October 2024, the Office of the Privacy Commissioner for Personal Data (PCPD) published a media statement reporting that the PCPD had sent an inquiry to LinkedIn about the company's recent updates on their privacy policy. The updates allowed LinkedIn to use its users' personal data and published content to train their AI models. Accordingly, LinkedIn also enabled the consent button for the said use in the users' settings by default.

On 15th October, the PCPD published another media statement, reporting that LinkedIn had paused the use of all Hong Kong users' personal data for AI training as of 11th October, a week after the previous inquiry. The PCPD closes its media statement with a message from The Privacy Commissioner, welcoming LinkedIn's decision, and confirmed its continued mission to safeguard data privacy for the public in Hong Kong.

Comment

According to LinkedIn's latest privacy policy, the collection of users' personal data is for the purposes of 'improv[ing], develop[ing] and provid[ing] products and Services'. This includes the training of AI models and gaining insights from AI models to provide users with more relevant and useful services. This may sound like a win-win situation for the professional networking platform and its users, but the goal of providing better products and services does not by itself justify the surreptitious approach of updating the privacy policy and, without users' actual consent, opt-in users' settings for the collection of their data to train AI models.

The concern is that if social media platforms exercise their discretion to decide on behalf of the user whether they consent to how the companies handle their data, then, the freedom of the users may be restricted. Social media platforms use algorithms and AI models to predict users' preferences in terms of

the types of content to be delivered to users. Users' data is gathered by tracing user's preference for a particular content, including the habit of use, the time usually spent on the social media application, at what time of the day, and even what social group a particular user belongs to. These information can all be revealed by networking the data collected by technological companies from their users. These predictions, in turn, help the media to deliver relevant content to the users and make them want to spend more time on the platforms. Relevant statistics are then sold to other companies so as to lure them to purchase advertisements on their webpage that target a specific group of audience. This will result in effective advertising.

However, what has been sacrificed in the gain of the users' time spent on the website is partly, the users' decision-making rights. As the users are more drawn to the excitement and stimulation that social media platforms can offer, the users lose the time and focus on other alternative choices on which they could spend their time. This social problem, attributed mainly to a business model of technological companies' overemphasis on extracting as much economical gain and value from the perceptual constancy of human nature, has been investigated under the subject of 'surveillance studies', and such a phenomenon is known as 'surveillance capitalism'.

'Surveillance capitalism' not only affects the wide public but is also particularly harmful to vulnerable groups. Teenagers, who have been studied, suffer seriously from it. Suicidal and self-harming rate has increased for teenagers, especially for girls ranging from 10 to 18 years old since the introduction of smart phones and social media applications in the early 2010s. As social media have, to a certain extent reduced the social activities that occur in real life, teenagers, who have not yet developed the ability of self-control, are prone to focus more on the digital world. Pride and vanity are built more on the number of 'likes' and 'thumbs-ups' of their posts, rather than quality friendships and in-person interactions. Further, the filter functions often found on social media create an illusion of the users' appearance. This leads to youngsters being more inclined to undergo plastic surgery to make themselves look like the ones in the edited photos.

The absence of a legal framework for the usage of social media among young people is partly to blame for this problem. The construction of the data protection law, i.e. the Personal Data (Privacy) Ordinance, and the lack of robust power vested in the independent privacy commissioner against the wanton collection of users' private data, are undeniably other social factors that should bear the responsibility. It is argued that the data protection law should impose more compelling requirements on companies when they are attempting to change the privacy policy and to alter the handling of users' data, mainly by selling them to third parties that are unknown to the users.

A more stringent approach to tackle the aforementioned loopholes may include creating legislations to regulate the compulsory lodging of application to the PCPD when the social media platforms try to make changes related to data privacy in their terms and conditions, with additional steps attached, so that companies owe a statutory duty to inform and notify the users concerning the updates on the data processing policies. The platforms shall make sure that the latest arrangement is clearly understood by users and that users can have a choice to opt-out. Such a method demonstrates several advantages:

First, this arrangement serves as a deterrent effect towards social media platforms selling users' data to third parties. Economically speaking, the complicated application process shall incur more costs when the companies are trying to brand their collected data as a product to their potential customers. Thus, the privacy of public users can be protected in this way while the freedom and rights of users are not infringed.

Second, if the legal right to a screening procedure is given to the PCPD, it will allow the PCPD to play a more proactive role in regulating activities against personal privacy. Instead of the supervisory role it is currently performing,

the legislation-empowered arrangement will grant the PCPD the authority to safeguard the general public's private data with the rights to monitor acts of the companies.

Third, this arrangement has educational effects. If robust publication requirements are imposed on enterprises' change of privacy policy or additional terms and conditions attached to the users' data, not only the data-handling stakeholders, but the general public will also be informed of the importance of data protection. It is further argued that, with the public being informed, data protection laws can continue their mission to serve as checks and balances against commercial enterprises.

Conclusion

This essay has identified the underlying concern about technological businesses applying users' data to train AI models, with an evaluation of the PCPD being alarmed by the recent news of LinkedIn's change of privacy conditions, resulting in the change of users' settings for their browsing data to train AI models. The underlying concern focuses on how the users' freedom shall be jeopardised and that their attention may be manipulated by the business model of technological service providers. A further concern is the negative effect of social media technologies on the psychological aspects of teenagers. Lastly, the essay provides suggestions of a law reform of data protection laws in Hong Kong to better safeguard users' privacy.

Why Large Language Models cannot replace Human Lawyers, particularly in the context of Hong Kong

Wong Hin Yui Perry

A. Introduction

'The first thing we do, let's kill all the lawyers.' — Henry VI, Part 2.

In the ever-changing legal landscape, the words of Shakespeare seem to resonate with many, suggesting that artificial intelligence (AI) is on its way to replace all human lawyers.

A recent study from researchers at Princeton University, the University of Pennsylvania and New York University, highlights 'legal services' as the industry most vulnerable to the advancements in AI; Goldman Sachs economists further underscore this, indicating that 44 percent of legal work could be automated. Only office and administrative support jobs had a higher automation potential, at 46 percent. Within the dynamic AI landscape, Large Language Models (LLMs), such as Generative Pre-trained Transformer (GPT) models, have emerged as powerful tools trained on extensive datasets to perform various natural language processing tasks. They utilise transformer models with autoregressive techniques, where the model predicts the next word in a sequence based on the context of the preceding words, enabling them to comprehend and generate human-like text on a vast scale. It is now predicted that LLMs will have a massive impact on the legal profession.

In the ongoing debate surrounding the potential replacement of human lawyers by LLMs, supporters assert that LLMs

possess capabilities equivalent to or surpassing those of human lawyers, while critics argue that LLMs face limitations in verifying facts and comprehending legal knowledge.

This paper seeks to critically evaluate both perspectives through the integration of different scholar's perspectives, coupled with my own analysis, and asserting that, while LLMs showcase remarkable capabilities and may offer valuable support in certain legal aspects, the idea of them completely replacing human lawyers is not currently feasible, especially within the unique context of Hong Kong. That said, it advocates for a collaborative future where LLMs enhance, rather than replace, human lawyering.

B. Whether LLMs Have the Potential to Replace Human Lawyers?

This section explores different viewpoints on this pivotal question from two perspectives, namely:
(1) the effect of LLMs' comprehension abilities on their understanding and,
(2) the implication of passing the US Uniform Bar Examination (the bar exam).

1. LLMs' Capacity for Comprehension

The first perspective challenges the critics' notion that lawyers are irreplaceable solely because LLMs are perceived as lacking understanding, arguing instead that they possess a degree of comprehension.

1.1 Current Debate Over LLMs' Ability to Understand

LLMs like ChatGPT, Claude, and Bard are recognised for their proficiency in delivering human-like text-based interactions. These models generates a 'reasonable continuation' of the preceding text by estimating probabilities for the next word based on prior words, including those generated by the model itself. Users of these tools might naturally assume that LLMs possess a level of understanding, given the fluency of their generated text.

However, in 'On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?', Emily M. Bender, an American linguist, contended that LLMs lack a deep understanding of the meaning behind the words they process. Similarly, in 'ChatGPT Is Dumber Than You Think', Bosgot argued that while LLMs excel at recognising patterns and generating plausible responses, they fall short in comprehending the underlying meaning of both their training data and the generated output. This resonates with Bender's conclusion that LLMs simply 'do not have access to meaning.'

The issue of whether LLMs can 'understand' holds significance for this essay. If it could be established that LLMs cannot comprehend text, the subsequent debate on their understanding of legal language becomes unnecessary. Dr. Eliza Mik, in 'Will LLMs replace lawyers?', posits LLMs as text generators, and generating text does not equate to understanding language. Similarly, generating 'legalese' does not equate to providing legal advice, leading Mik to conclude that LLMs cannot replace lawyers in offering counsel to clients.

1.2 Meaning of the Ability to 'Understand'

This paper suggests that the definition of what constitutes the ability to 'understand' in a language model is vague and lacks universal clarity. Rather than outrightly asserting that LLMs do not understand at all, it suggests that LLMs could comprehend concepts to a certain extent, though not omnisciently. Bender's and Mik's definition of 'understanding' requires a model to have deep comprehension of the meaning behind words, going beyond mere pattern recognition. Yet, referring to Cambridge Dictionary, 'understand' simply means 'to know the meaning of something that someone says' or 'to know why or how something happens or works'. From my perspective, LLMs such as ChatGPT, Claude and Bard can all perform this task as described by OpenAI, ChatGPT is capable of 'answering follow-up questions, admitting its mistakes, challenging incorrect premises, and rejecting inappropriate requests.' Understanding, as required for answering questions, challenging premises, and reviewing its output, appears evident.

Furthermore, I contend that ChatGPT can 'understand' users' instructions in the sense of providing relevant outputs based on those instructions. Notably: (1) When repeated queries were posed to ChatGPT, it generated varied responses while consistently offering accurate definitions, showcasing its ability to paraphrase and explain concepts diversely. (2) When prompted to explain to a primary school student, ChatGPT delivered a new explanation using simpler vocabulary and relatable examples, further highlighting its adaptability.

Hence, if LLMs respond accurately and promptly to queries, they seem 'to know the meaning of something that someone says' from an ordinary person's point of view. The ability to provide examples and explain concepts suggests an understanding of 'why or how something happens or works.'

To reinforce this stance, in 'LLMs as Tax Attorneys: A Case Study in Legal Capabilities Emergence', the writers concluded that LLMs can 'autonomously and reliably reason about the law'. This study demonstrates their capacity to find relevant legal authorities and apply them to specific factual scenarios accurately, but 'not yet at expert tax lawyer levels'. Moreover, in 'ChatGPT by OpenAI: The End of Litigation Lawyers?', Kwan, a Hong Kong pupil barrister, concluded that ChatGPT is able to 'draft judgement by considering the arguments of both sides with logical reasoning'. Notably, ChatGPT's ability extends to 'identify legal strategies', 'provide simple legal advice' and 'perform excellently in analysing a more complicated case'. Therefore, these findings assertively affirm that LLMs indeed possess a significant extent of logical reasoning.

Overall, in my opinion, LLMs hold the potential to provide valuable legal advice and research upon 'understanding' the instructions from clients or lawyers. However, acknowledging their capacity does not imply the flawlessness of their outputs. In Part C, we will delve into the flaws associated with LLMs' outputs.

2. GPT-4 Passed the Bar Exam

With LLMs demonstrating their potential signal to replace lawyers by GPT-4 passing the bar exam, the second perspective contends that such beliefs rely on two oversimplified assumptions: passing the bar exam implies LLMs can replace lawyers (Assumption 1) and, passing the bar exam indicates that there is nothing human lawyers can do that LLMs cannot (Assumption 2).

Instead, this paper asserts that unique human characteristics exist that AI cannot replicate.

2.1 Rebutting Assumption 1

The perspective of Assumption 1 is support by John Koetsier's article, suggesting that the news of LLMs passing the bar exam signals a potential era of substantial job transformation in the legal industry, as he stated, 'Most likely, we're in for a period of rapid job loss……as what machines can do changes what humans can achieve.'

While it may seem that GPT-4 passing the bar exam by approaching the 90th percentile signals the potential replacement of lawyers by LLMs, this assumption is unfounded.

Firstly, considering the nature of the US bar exam, it examines the 'knowledge and skills that every lawyer should be able to demonstrate prior to becoming licenced to practice law', not evaluating how well a lawyer could perform. Performing well in this exam designed for pre-lawyers does not equate to being a good lawyer. To draw an analogy, passing a written test on the 'Road Users' Code' (a required written test for Hong Kong Driving Test) does not indicate proficiency in driving.

Secondly, the close-book bar exam, designed for humans, examines students' ability to memorise and write fast. As Daniel Van Boom concludes in 'ChatGPT Can Pass the Bar Exam. Does That Actually Matter?' —'they test how much students can cram into their brain and regurgitate for a few hours.' In contrast, LLMs, trained on an enormous amount of data, generate responses from their trained data through predictive mechanisms without the need for memorisation within seconds. Hence, LLMs' performance should not be comparable to the other exam takers, as the exam's structure is not aligned with the natural capabilities of LLMs.

Lastly, there is no valid reason for LLMs to replace human lawyers. In my opinion, for a replacement to take place, the new option must clearly surpass the original in some aspect. Consider, for example, the idea of electric vehicles replacing traditional cars due to their lower emissions and more cost-effective fuel and maintenance. In 'ChatGPT by OpenAI: The End of Litigation Lawyers?' Kwan, a Hong Kong pupil barrister, concluded that 'the draft and research work produced by ChatGPT is comparable to that of a first-year law student.' However, this alone does not sufficiently justify a complete substitution for the entire legal industry. The question remains: In what way does it outperform traditional human lawyers?

Therefore, the key question here is: Can LLMs, capable of passing the bar exam and possessing legal skills comparable to a first-year law student, outperform a human barrister with years of experience? Are there aspects of legal practice where human lawyers excel that LLMs cannot match?

This question forms the core of challenging the second assumption, a topic further explored in the next section.

2.2 Rebutting Assumption 2

The viewpoint of Assumption 2 is supported by the authors of 'GPT Passes the Bar Exam', asserting that 'LLMs can meet the standard applied to human lawyers in nearly all jurisdictions in the United States by tackling complex tasks requiring deep legal knowledge, reading comprehension, and writing ability.' Hence, they argue that LLMs could perform tasks equivalent to those within the capabilities of human lawyers.

While it is true that GPT-4's recent success in passing the bar exam is a remarkable achievement in the realm of LLMs, it is crucial to recognise the distinctive human qualities that are integral to the legal profession, a point emphasised by Harry Surden, 'In areas of law or legal practice that involve judgment, human cognition will likely be difficult to replace given the current state of AI technology.' The term 'human cognition' here is very broad, this paper suggests that the following characteristics are the 'human cognition' that AI could not replace.

It is important to know that the essence of lawyering extends beyond mere application of rules and processing of information. The assertion that LLMs can fully replace human lawyers overlooks the intricate and nuanced aspects of legal practice.

To elaborate, lawyers excel in empathetic listening to clients' stories, strategising to uncover subtle narratives, and using creative imagination and judgment to construct compelling arguments. These essential qualities, deeply rooted in human experience, currently remain beyond the capabilities of artificial intelligence. Recent studies indicate that 86% of US consumers prefer interacting with humans over chatbots, underlining the challenge AI faces in establishing meaningful connections with clients compared to human lawyers.

Furthermore, lawyers exhibit strong and unique storyingtelling skills. This involves the fusion of empathy and creative flexible analysis, crafting narratives tailored for persuasion in front of judges, juries, or opposing parties. The expansive human experience contributes a depth to legal storytelling that again, AI currently cannot match.

In conclusion, while AI, as demonstrated by GPT-4, showcases impressive capabilities, it is a fallacy to assume that passing the bar exam suggests LLMs can fully replicate all that human lawyers can do. The collaboration between AI and human lawyers may enhance efficiency, but the irreplaceable human touch remains a cornerstone of the legal profession.

C. Challenge of LLMs in the Legal Domain – the Problem of Hallucinations

While we have established that LLMs possess a degree of comprehension from Part B, the application of these models in the legal domain poses significant challenges that impede their ability to replace human lawyers. One notable concern is the phenomenon of AI hallucinations, where LLMs generate text that may appear plausible but is, in fact, inaccurate or entirely fictional, a flaw that undermines the precision required in the legal profession.

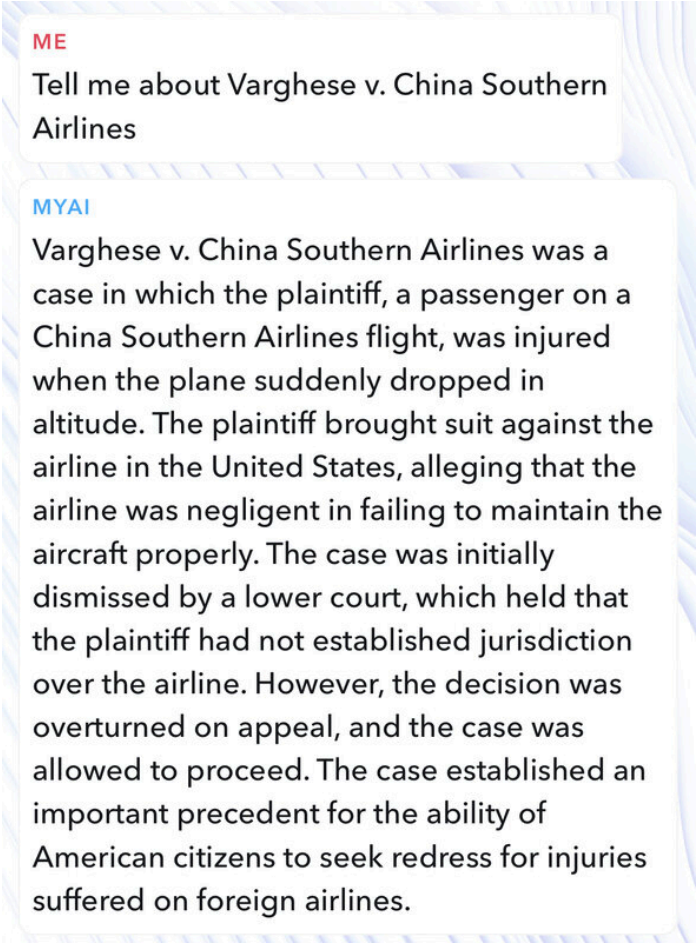
Despite LLMs' (such as GPT-4) impressive ability to mimic human-like language, these models often 'make up facts' and 'double-down on incorrect information,' as acknowledged by OpenAI. This poses a critical problem in the legal field, where precision is paramount. Tasks such as drafting contracts and interpreting ordinances demand absolute accuracy, a quality that LLMs struggle to consistently deliver.

The issue becomes more significant when we take into account the ongoing presence of inaccuracies in content generated by LLMs. They tend to build upon their previous outputs, even if those outputs contain errors. This phenomenon, known as 'hallucination snowballing,' occurs as LLMs strive for consistency by generating plausible continuations based on their early mistakes. Consequently, these inaccuracies embed themselves in subsequent outputs, creating a ripple effect that poses challenge in legal contexts where precision and correctness are absolute prerequisites.

The case of *Mata v. Avianca, Inc.* serves as an example of AI hallucinations in the legal context. Here, two lawyers were fined $5,000 for filing a ChatGPT-generated court brief, which contained references to three fictitious judicial opinions, fake quotes and citations, misleadingly presented as legitimate legal precedents, resulting in show cause orders and a sanctions hearing. This underscores the potential consequences of relying on AI-generated content in a field that demands the highest level of accuracy.

Judge Castel's examination of the three made-up case decisions unveils the 'stylistic and reasoning flaws that do not generally appear in decisions issued by United States Courts of Appeals.' The importance of human oversight becomes evident as the judge dissects the implausible details and inconsistencies within the '*Varghese v China Southern Airlines*' decision made up by ChatGPT, highlighting the importance of human oversight in evaluating legal content.

In conclusion, while LLMs may offer valuable support in certain aspects of legal work, the prevalence of AI hallucinations in LLMs strongly suggests that the idea of LLMs replacing lawyers is not feasible. The inability to consistently provide accurate information and the risk of hallucination snowballing, undermines the precision and reliability required in legal tasks.



D. Challenge of LLMs in the Context of Hong Kong

In the preceding sections, we have established the inadequacy of LLMs to replace lawyers in a general context. This section delves deeper into why this conclusion is even more robust within the specific context of Hong Kong.

1. Slow Adoption of AI in Hong Kong

Hong Kong's cautious approach towards adopting AI is a strong factor in challenging the notion of LLMs replacing lawyers. The Asia Business Council's Asian Index of Artificial Intelligence 2017, positioned Hong Kong seventh out of eight Asian regions, ranking just ahead of Indonesia. Compounding this issue is the restricted availability of popular LLMs in Hong Kong, such as ChatGPT, Claude, and Bard. They are not directly accessible in Hong Kong without a VPN. This technological barrier places Hong Kong at a distinct disadvantage, posing a significant challenge for LLMs to seamlessly integrate into the legal landscape.

2. Resistance to Technological Advancements in the Judiciary

The reluctance of Hong Kong's courts to embrace new technologies further reinforces the scepticism surrounding LLMs replacing lawyers. For example, unlike Britain, Canada, Australia, and the US, Hong Kong courts only recently planned to begin broadcasting proceedings in 2024. This delayed acceptance of technological advancements suggests a conservative stance that extends to the use of AI bots in legal settings.

Furthermore, recent reports reveal that while Hong Kong's judiciary considers broader AI integration in courtrooms, including real-time Cantonese voice-to-text transcription software, there are no plans to allow judges to use tools like

ChatGPT for efficiency. The opposition regarding incorporating LLMs into judicial processes stems from concerns about data security risks and the unavailability of these tools in Hong Kong. This underscores the difficulty LLMs face in gaining acceptance within the Hong Kong legal system, not to mention replacement.

3. Linguistic Diversity and the Challenge of Cantonese

The linguistic diversity inherent in Hong Kong, where Cantonese, English, and Mandarin coexist, presents another barrier to LLMs replacing lawyers. LLMs, often trained in major languages, may struggle to grasp the nuances and specific legal terminologies embedded within local dialects. Cantonese, with its intricate slang and expressions, is particularly challenging for LLMs, especially in the precise and context-dependent realm of legal proceedings. The deep understanding required to navigate Cantonese legal contexts is a skill honed by local lawyers, native to Hong Kong, giving them a unique advantage that LLMs cannot replicate.

4. Summary

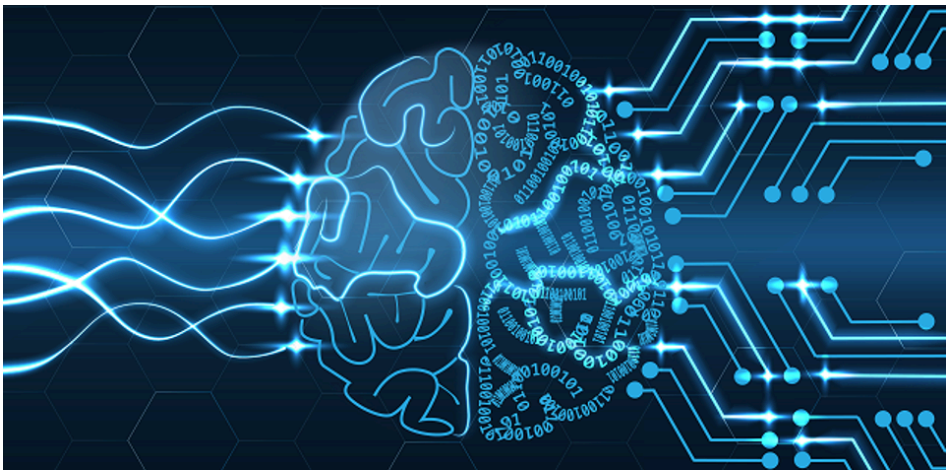
To summarise, the combination of slow AI adoption, limited accessibility, institutional reluctance, and linguistic complexities forms a significant obstacle to the substitution of lawyers by LLMs in Hong Kong. The unique challenges presented by Hong Kong's specific context amplify the irreplaceable role of human lawyers within its legal landscape.

E. Conclusion

To this day, there are still ongoing debates about AI's potential to replace certain professions, undermining the value of human existence. This aligns with Amara's law, which states that 'We tend to overestimate the effect of a technology in the short run and underestimate the effect in the long run.'

It is imperative to acknowledge that, despite the impressive capabilities showcased by LLMs, their limitations like AI hallucinations and specific contextual challenges in Hong Kong, emphasise the existing impracticality of complete substitution of the legal profession.

In essence, the idea that LLMs could effortlessly replace lawyers oversimplifies the intricate nature of legal practice, where distinctly human skills—such as empathy, creativity, and adept storytelling—remain indispensable. Consequently, as technology advances, the collaboration between AI and lawyers seems more promising than a complete replacement.



Health & Ethics

Assisted Suicide of Patients in Hong Kong - Is It the Future?

Liu Zi Lin

Trigger Warning: This article discusses themes of assisted suicide, end-of-life decisions, and sensitive ethical issues. Reader discretion is advised.

On 20 November 2024, the Legislative Council passed the Advance Decision on Life-sustaining Treatment Bill, governing the legal effect of Do Not Attempt Cardiopulmonary Resuscitation (DNACPR) declarations and advance medical directives. Therefore, the bill is being considered to become legally enforceable on medical practitioners. This shows that the law in Hong Kong is moving towards acknowledging individuals' medical choices. It begs the question: is assisted suicide the next step?

This article does not intend to discuss whether assisted suicide is moral, as there would never be a conclusive answer to this issue. The article intends to analyse whether assisted suicide should be allowed by the Hong Kong courts.

Definition of assisted suicide

Assisted suicide involves intentionally helping someone end their own life. The concept of 'suicide' in law can be dated back to the early common law concept of *felo de se*, meaning felony committed against oneself. According to Blackstone's Commentaries on the Laws of England, 'suicide' means 'to deliberately put an end to his own existence, or commit any unlawful malicious act, the consequence of which is his own death.'

Academically, assisted suicide has been defined as 'an act or omission by a third party, voluntarily and knowingly undertaken, whose intent (at the very least) is to furnish a potential suicide with the lethal means necessary to commit suicide.' This definition gives effect to the 'suicide' element of assisted suicide, which is the idea of self-killing. There are UK and Hong Kong academics, who have equated euthanasia with assisted suicide, or rationalised assisted suicide as a form of euthanasia. However, the definition of suicide is that the final act of killing must be done by the deceased himself. Euthanasia, on the other hand, is the 'direct intentional killing of a person as part of the medical care being offered.' Consequently, euthanasia does not fall within the definition of assisted suicide. Assisted suicide can take various forms, performed by medical practitioners or by ordinary citizens. This article addresses both physician-assisted suicide and assisted suicide performed by laymen.

The current law and its limitations

Section 33B(1) of the Offences Against the Person Ordinance (Cap. 212) provides that 'a person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be guilty of an offence triable upon indictment and shall be liable on conviction to imprisonment for 14 years.'

There is no direct legislation regarding physician-assisted suicide, nor are there any cases on this matter. Hospitals do not offer physician-assisted suicide options for patients. It appears physician-assisted suicide would be governed under section 33B(1), and any provision of lethal doses of medication would be illegal.

Some alternatives to assisted suicide are allowed in Hong Kong, including DNACPR declarations and advance medical directives. Mentally competent adults can decide not to receive CPR, which may result in their natural deaths. However, these legalised methods of protecting the autonomy of patients are insufficient. The inadequacy is underscored by the prevalence of cases involving caretakers deliberately terminating the lives of terminally ill individuals with the explicit aim of putting an end to their suffering. A brief timeline of 'mercy killing' cases in the past decade (2014-2024) is provided below, the timeline is sorted chronologically.

Year	Case	Sentencing
2017	Au Kin-Ming A 58-year-old man strangulated his 56-year-old wife with dementia. Afterwards, he committed suicide by jumping off.	/
	Wong Kok-Man An 80-year-old man strangulated his 76-year-old wife, who suffered from a stroke, hypertension, rheumatoid arthritis and hypothyroidism. The deceased had expressed a clear wish to end her life.	Pleaded guilty to manslaughter, sentenced to 2 years of imprisonment.
2019	Lee Ka Fai Son killed his 77-year-old mother, who suffered from gallstones and type 2 diabetes, with a cleaver. 30 minutes later, he attempted suicide by jumping off; he survived but suffered from serious injuries. The deceased had on multiple occasions expressed a wish to end her life.	Pleaded guilty to manslaughter, sentenced to a 24-month probation order.

2020	Kwok Wai-Yin Suffering from a major depressive disorder, 56-year-old man killed his 54-year-old wife, who was diagnosed with stage 4 lung cancer, by burning charcoal. His wife had signed a Do-Not-Attempt CPR declaration, expressed her wish that euthanasia would be allowed in Hong Kong, and told her sister that she wished to die.	Pleaded guilty to manslaughter on the basis of diminished responsibility, sentenced to a 12-month probation order.
2022	An elderly couple killed their daughter, who suffered from intestinal malrotation. The deceased received a dozen of wounds and cuts.	Both charged with murder.
2024	A woman killed her 84-year-old husband with dementia and muscle atrophy, and attempted suicide by slitting her wrists and neck. She survived the suicide attempt.	/
	A man attempted to kill his wife and committed suicide afterwards. He lost his life, yet his wife survived.	/

From these cases, we can see that these 'mercy killing' cases are rather violent in nature. Also, the person who performed the killing frequently suffered from serious psychological harm. Current measures like DNACPR are insufficient to fully satisfy the wishes of those suffering from terminal illnesses.

Is assisted suicide the way forward?

Interestingly, there is little discussion of assisted suicide in Hong Kong. Some members of the general public may even confuse 'assisted suicide' with 'voluntary euthanasia'. There is a severe lack of awareness in this area of law. Besides, there has yet to be a public opinion poll on assisted suicide.

On the other hand, there are significantly more discussions on euthanasia. As early as 2007, there was a survey on euthanasia done by a local newspaper, which showed that over 70% of Hong Kong citizens believed euthanasia should be allowed. This discovery prompts a critical consideration: why are we engaging in this discourse regarding assisted suicide as opposed to euthanasia, particularly in light of the public's muted interest in assisted suicide and their evidently more pronounced stance favouring the legalisation of euthanasia?

In many countries, assisted suicide is legalised before euthanasia. This is because the moral implications of assisted suicide are less complicated than that of euthanasia. For example, the Supreme Court of Canada discussed the possibility of legalising assisted suicide in *Carter v Canada*, after which the legislature passed a bill that simultaneously legalised euthanasia and assisted suicide. Furthermore, Italy, Austria, Switzerland and other countries have legalised assisted suicide but not euthanasia. In nature, euthanasia is the active killing of another person, while assisted suicide merely assists one's suicide. The legal hurdle of establishing an exception to murder is significantly harder than establishing an exception to aiding and abetting suicide. Moreover, euthanasia and assisted suicide are morally different. Patients play a more passive role in euthanasia, hence it is easier for them to take that option. On the other hand, patients need to actively kill themselves under assisted suicide, which requires more determination and ensures full consent. To encompass an incremental development of the law, the discussion of assisted suicide is vital to providing more choices for patients with irreversible illnesses.

The deadlock

There is currently no discussion in the Legislative Council on assisted suicide. It is unlikely that any case would come before the Court of Final Appeal on assisted suicide, let alone would the Court interpret human rights so broadly as to legalise euthanasia. In the meantime, without a public discussion on assisted suicide, the discussion of euthanasia seems like a far-fetched fantasy, as it involves establishing the crime of murder and faces greater moral challenges.

As the curtains draw on this unsettling narrative, the future of legitimising assisted suicide appears shrouded in uncertainty. While acknowledging the incremental steps taken by the Legislative Council in empowering patients, the prevailing stasis in legislative momentum paints a sombre picture of what lies ahead.

A Challenge Against FIFA: May We See Premier League Be Played Overseas?

Wang Haoqi

Introduction

It is ubiquitous for world-renowned football clubs to play friendly games and exhibition games around the world, but to play an official league game overseas was previously unfeasible. For example, a Premier League game between Liverpool and Chelsea can only be played in England, and cannot be played in the US. This is restricted by football regulating bodies, such as the England Football Association (EFA), and continental institutions such as the Union of European Football Association (UEFA). Among all the regulating authorities, the Federation Internationale de Football Association (FIFA), is at the apex position of the football industry.

Established in 1904, FIFA has been working on promoting football globally and making regulations and provisions governing the game of football and related matters. Up to now, FIFA has its member associations in each country and region, like EFA and UEFA. Each member association are bound by the statutes, regulations, and decisions made by FIFA. At the national level, national football associations are authorised by FIFA to organise their official leagues, such as Premier League, and La Liga. Thus, clubs and matches in the national official league are supervised by the national football associations, which are subject to the FIFA rules.

The Challenge

The league system worked well until a recent challenge brought by Relevant Sports, a private media and sports-promoting company against the United States Soccer Federation (USSF) and FIFA (*Relevant Sports LLC v United States Soccer Federation Inc. and Federation Internationale de Football Association* [2023]). This article argues that the recent challenge to a FIFA policy concerning league organisation would probably break FIFA's exclusive control over leagues and introduce more competition into the football world. If this does happen, we would probably see a lot of new football organisers enter the market, and consequently welcome a much more competitive and prosperous football industry than it is now. However, the flip side is that football may become much more confusing, as we do not know what 'innovations' will be created and introduced to this sport without FIFA's exclusive control on standard making.

The case of *Relevant Sports* began in 2018, when Relevant Sports applied for a La Liga league match, between Barcelona and Girona, to be played in the US. This was rejected by the Spanish Football Association, UEFA, USSF, and FIFA. In response to Relevant Sports's application, the FIFA council, which exercises FIFA's management power, promulgated a policy (2018 Policy), that official league matches must be played within the originating nation.

Relevant Sports then filed the lawsuit, alleging that the 2018 Policy, which in essence was a geographical market division policy and created barriers for new competitors to enter into the field, violated antitrust law. Initially, this claim was rejected by the US District Court. Upon appeal, the Court of Appeals reversed the District Court's reasoning and acknowledged the mere existence of the 2018 policy served as direct evidence of concerted action in breach of Section 1 of the Sherman Antitrust Act.

In the defendants' case, they argued that clubs and leagues are not members of FIFA, and the national associations that are members of FIFA are not competitors in the market. Also, FIFA claimed that the 2018 Policy embodied a mere sporting principle, rather than a binding agreement. Neither of these were recognised by the US Court of Appeals. What the court found was that even if recognising the defence that FIFA and its members were not competitors, this 2018 policy factually created a barrier for other entities to compete in each geographical market and was thus unlawful. Furthermore, even though leagues and clubs are not directly bound by FIFA directives, they still have to comply with the FIFA policy rather than incurring penalties from their national football associations and FIFA. Therefore, the defence that the 2018 Policy is merely a sporting principle was found to be not tenable, because of its compulsory nature.

Finally, the court concluded that the 2018 Policy, in other words, the geographic market division policy was anticompetitive, breaching Section 1 of the Sherman Act.

Implication and Conclusion

While the US Court of Appeals delivered its judgment on the competition law issues, it at the same time revealed the hierarchical system established and maintained by FIFA. In terms of match organisation, although FIFA cannot impose any decision or policy over leagues and teams directly, the court found that indirect control did exist, such as the penalties against them which can be ordered by FIFA and enforced by its members. Thus, it is not arguable for FIFA to declare it merely promulgated a sporting principle, as that principle was factually and legally binding on the leagues and teams.

Furthermore, it is noteworthy that the 2018 policy not only binds leagues and clubs, but also demands the national football associations and regional confederations supervising their competitions and clubs, to comply with FIFA rules. Thus, in effect, the ruling from the US court declaring the 2018 Policy unlawful granted the football associations greater flexibility for policy making. Although the national football authorities are not direct competitors in a single geographical market, sometimes their positions are contingent. For instance, in 2019, Relevant Sports applied for an Ecuadorian league match to be played in Florida, US. Regarding this oversea league match, the Ecuadorian Football Association approved that application from Relevant Sports, while USSF denied it. The stance of the Ecuadorian Football Association reflects many national football associations' interest to promote their official league games internationally. No matter how this judgment may affect an individual member's future position, the case discussed above effectively brought more policy-making freedom to member associations of FIFA. As a result, this enables them to pursue their ambitions of developing and showcasing their domestic leagues on a global stage.

In conclusion, thanks to the challenge brought by a private entity in the US, FIFA's dominance in the football world is somewhat rebalanced. After this, it has to examine the lawfulness of their policies and decisions so as to comply with the state laws. Also, in the near future, it may be now possible for football fans around the world to attend a top-level league match in their own countries.

Feature Interview

with Dr. Law Wai Hung, Francis, President of the Hong Kong Mediation Centre

In October 2024, the Gazette sat down to chat with Dr. Law Wai Hung, Francis, President of the Academy of International Dispute Resolution and Professional Negotiation, Chairman of the International Dispute Resolution and Risk Management Institute and the President of the Hong Kong Mediation Centre. As a dispute resolution expert, Dr. Law introduces us to the development of mediation in Hong Kong and shares his insights on what the way forward should be for the public to make more prominent use of mediation.

HKSLG (Q): Can you briefly explain what mediation is?

Dr. Law (A): In reality, mediation is about finding common ground—identifying mutual interests and working toward a settlement that both parties can agree upon. It's not about imposing decisions but about facilitating a process where the parties themselves find solutions that benefit them.

Interestingly, many mediators today still face the same challenge: how to help parties understand the process and trust it. As a party in mediation, you might ask, 'How can I be sure this decision is in my best interest? How do I know this outcome works for me?' These are the fundamental questions that mediators must address to build confidence in the process and ensure its effectiveness.

HKSLG (Q): How does mediation differ from traditional business negotiation regarding process, mindset, and outcomes?

Dr. Law (A): In mediation training, we emphasise a comprehensive approach highlighting why traditional negotiation often becomes ineffective in resolving disputes. Negotiation typically works well in business because both parties share a positive outlook—they seek collaboration to achieve mutual benefits. In this kind of negotiation, the goal is neither for a party to compensate another party nor compete or attack one another.

However, mediation arises in a very different context—when disputes have already escalated, and the parties are in an expectation crisis. Instead of collaboration, there's a perception of betrayal or harm, and each side sees the other as acting against their interests. This creates a zero-sum mindset, where one party believes they must win at the expense of the other. Hence, the first challenge in mediation is always to shift the parties from an emotional, adversarial mindset to a rational, problem-solving one. Such that they will think about how they should deal with the other side to achieve better outcomes, instead of what they must do to extract value from the other side. This requires time, effort, and a structured process to change their mindset. Lawyers also play an important role in preparing the parties for that mindset change before they even begin the mediation.

Other differences between mediation and negotiation include the presence of a mediator in mediation, and the defined process followed by mediation and the involvement of case management.

At this point, you may wonder what is the value of mediation? Anyway, the parties may be required to make concessions and compromises in the process, isn't it?

That's true. However, mediation creates a space where parties can explore options that benefit both sides and generate new value. It provides a structured process to uncover mutual benefits and creative solutions that parties cannot achieve through litigation or traditional negotiation. For example, in a dispute worth $50 million, mediation might uncover new opportunities for collaboration that increase the total value to $200 million—an additional $150 million in value that litigation or arbitration could never achieve. While litigation focuses on compensation, damages, and blame, mediation focuses on shared interests, new opportunities, and expanding the pie for both parties.

This is why mediation can be quite effective in resolving disputes: it moves beyond resolving the immediate dispute and creates opportunities for long-term collaboration and mutual gain. It is a process that allows parties to settle disputes while simultaneously generating added value and exploring new possibilities.

HKSLG (Q): Focusing on the development of dispute resolution in Hong Kong, how has the mediation practice in Hong Kong evolved to address the needs of local and international markets?

Dr. Law (A): For a very long time, Hong Kong has been developing a systematic mediation practice. Back then, we were working on a new airport project (the Chek Lap Kok Airport), which gave us the opportunity to explore mediation systems in Europe and America. These regions had refined their mediation processes and created more systematic approaches, completed with procedures and frameworks. They had formed coalitions and developed systems to make mediation more structured and effective. We adopted these practices and, between 1997 and 1999, localised them for Hong Kong, specifically tailoring them to the business world. From 1999 to 2010, we focused on integrating these mediation systems into our society and market. We made modifications to better suit not only Hong Kong but also the Mainland and other Asia-Pacific regions. By 2011, we had developed one of the most advanced mediation systems. We strengthened regulations, provided legal support, enacted legislation, and set standards. The establishment of the Hong Kong Mediation Accreditation Association Limited (HKMAAL) further enhanced our accreditation processes.

In the past, dispute resolution primarily involved litigation, followed by what was then known as ADR (Alternative Dispute Resolution), which was considered a secondary option to court proceedings. Around 2012, we introduced a more comprehensive dispute resolution system. This system incorporated multiple stages, including negotiation, mediation, adjudication, arbitration, and finally, litigation as a last resort. By placing litigation at the end of the

process, we significantly reduced the number of cases going to court. This approach provided simpler, more direct methods for resolving disputes, easing the burden on the courts. However, even this system wasn't sufficient to fully meet market needs.

In 2018, Hong Kong introduced a new system of dispute resolution and risk management. This system marked a shift in focus. At that time, Hong Kong was searching for a way to reposition itself as a deal-making and dispute resolution hub. To enhance our market offerings and professional capabilities, we began emphasising deal-making. Have you heard of Hong Kong being referred to as a 'deal-making centre'? This involves providing negotiation support, consulting services, and ensuring the best outcomes for risk and dispute resolution. Prevention became a key focus—systematically identifying and minimising risks in new markets and unfamiliar environments. Today, the mediation standard of Hong Kong has been refined a number of times. We have a completely different way of dealing with disputes nowadays.

HKSLG (Q): As you mentioned, mediation has been introduced to Hong Kong for a number of years already. Under the Civil Justice Reform in 2009, we have the PD31 to encourage the voluntary use of mediation prior to court proceedings by imposing potential cost consequences. More recently, the Department of Justice stressed the need to increase the usage of mediation to ease the case burden of the courts. What do you think are the challenges that hinder mediation from being more commonly used these days?

Dr. Law (A): In many cases, people aren't truly engaging in mediation. Instead, they are merely going through the motion to demonstrate to the court that they've complied with the process. They might say, 'We tried, but it didn't work.' This is often because mediation isn't being approached effectively, and as a result, it fails to address or resolve our clients' interests.

But the problem is many of the lawyers don't know anything about mediation. They don't practice it, they don't have any experience or training in it, and they've never learned how to handle it. Now, how can the parties respond to the court meaningfully? They may say, 'I relied on my lawyer for mediation,' but their lawyer doesn't know what to do during the mediation process.

So, the problem that Hong Kong is facing is that only a small fraction of practitioners and the public actually understand what mediation is.

Of course, easing the burden of the courts is an advantage that mediation provides. But it is only one of the many advantages of mediation.

HKSLG (Q): Are there any experiences from other jurisdictions which Hong Kong can learn from?

Dr. Law (A): In the Mainland, many people lack faith in mediation and even lawyers. They often view mediation as simply a way to compromise rather than truly resolve issues, so they don't trust the process.

So, to bolster people's trust in mediation, they allow the parties to obtain judicial confirmation (**司法確認**) for the settlement agreement they come up. They allow parties to bring their mediation agreement to the government or courts and obtain authentication from an authority. By obtaining an official court seal, the agreement becomes legally binding, and the opposing party is less likely to object or refuse enforcement. Some people think that this approach is very effective because it adds strong legal authority to support mediation and makes the outcome more credible and enforceable.

In my opinion, however, this is not effective in enhancing people's trust in mediation. Think about this: if your boss requires you to get a third person to review your work every time before you submit it to him, do you think you're being trusted? Of course not. But this is the situation with judicial confirmation of mediation agreements. Contrary to bolstering trust, judicial confirmation reinforced a sense that settlement agreements reached by the parties cannot be trusted without the court approving them. But isn't a well-drafted agreement supposed to be binding and enforceable whether or not it is affirmed by the court?

On the other hand, judicial confirmation restricts the room for parties to innovate solutions for their problems. Courts have their limitations in recognising contractual terms. These limitations may discourage people from coming up with creative solutions through mediation when there are risks that they may not receive the court's approval.

Once judicial confirmation is obtained, parties are also bound to perform that agreement. That means any of them can apply to the court for enforcement if the other side refuses or fails to perform that agreement or any part of it. While it does safeguard performances, it may also reduce their flexibility in finding better solutions. Fearing the risks of enforcement, they might just stick to an authenticated settlement, even if they later realise that there is a possibility of coming up with something better.

Last but not least, judicial confirmation actually defeats the purpose of providing a way for parties to settle their dispute outside courts. After all, they bring all the cases back to the judges to review and affirm.

If you ask me, judicial confirmation is not a good idea for addressing the lack of trust in mediation. Why it emerges is because of the poor mediation standards or poor performance of mediators or lawyers in mediation such that the parties cannot trust the settlement that they help to come up. Indeed, judicial confirmation reflects how untrusted the public and practitioners are with the mediation system and standards. They cannot trust mediators and the mediation system, they need to rely on the court to give them comfort.

To make people trust mediation, it should always begin with letting them understand what mediation is.

HKSLG (Q): As you mentioned, there is a lack of professionals in the mediation field. What can be done to extend lawyer participation in mediation and encourage them to take on the role of mediation advocate?

Dr. Law (A): In some systems, advocates are required to meet professional standards by obtaining a new license or accreditation. This is already being implemented in other places, such as Singapore.

In Singapore, all lawyers are required to undergo this certification. The Ministry of Justice in Singapore mandates that all law students to complete mediation training before obtaining their license. For existing lawyers, they are required to attend courses to learn how to represent clients in the mediation process. It makes sense for Singapore to impose such a requirement; without it, they cannot afford the Singapore Convention. If lawyers don't know how to represent their clients in mediation, it would undermine the credibility of the Singapore Convention.

HKSLG (Q): Do you think Hong Kong should also require all lawyers and law students to undertake mediation training?

Dr. Law (A): Yes, of course. That's a reasonable approach.

HKSLG (Q): How about making mediation mandatory to make it more common? Would this approach be more effective?

Dr. Law (A): Mediation does not need to be mandatory. Even if parties are required to attempt mediation, as is the case in places like Hong Kong or elsewhere, it simply means they must go through the mediation process before proceeding to court or other formal procedures. In the Mainland, for example, pre-court mediation is often included as part of the legal process in many areas.

However, making mediation mandatory does not mean that the decision-makers are obligated to reach an agreement. Mandatory mediation refers to the requirement to participate in the process, not to reach a mandatory settlement.

HKSLG (Q): You've given us a lot of insights on mediation. As we are approaching the end of this interview, do you have any advice that you would like to share with the Gazette's readers?

Dr. Law (A): Yes. In the past, the legal profession just narrowed in on using litigation to resolve disputes. But the world and markets have shifted. Nowadays, businesses look for solutions that are more comprehensive and more capable of catering for their commercial considerations. The legal profession remains very important. But we need to extend our existing way of seeing things. We need to see the whole landscape of dispute resolution rather than just focusing on the winning and losing in litigation.

Acknowledgment

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The Chinese University of Hong Kong, Faculty of Law

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