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Should the extended joint enterprise principle be retained? A critical evaluation of the divergent approaches between England and Wales and Hong Kong

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Abstract

The extended joint criminal enterprise principle, also known as parasitic accessorial liability, had been widely recognised as an independent basis for attributing criminal liability in both England and Wales and Hong Kong. The paths of the two jurisdictions diverged in 2016 with the United Kingdom Supreme Court (UKSC) decision in *Jogee* and the Hong Kong Court of Final Appeal (HKCFA) decision in *Chan Kam Shing*. In *Jogee*, the UKSC abolished the application of the extended joint enterprise principle and restated an intention-based account of accessorial liability. In contrast, in *Chan Kam Shing*, the HKCFA refused to follow *Jogee*'s approach and retained the extended joint enterprise principle. This article examines why the HKCFA refused to follow *Jogee* and whether it was correct to do so. It is argued that the UKSC's approach should be preferred and that the extended joint enterprise principle should be abolished.

Keywords: joint enterprise; extended joint criminal enterprise; accessorial liability; parasitic accessorial liability; foresight.

INTRODUCTION

The extended joint criminal enterprise (EJCE) principle,[1] or parasitic accessorial liability, enables the imposition of criminal liability on a secondary party who, in the course of participating in an agreement to commit a (original) crime, foresees that a further crime may be committed. If that foreseen further crime is eventually committed, the

1 Also commonly known as the 'extended joint enterprise principle' in Hong Kong or 'joint enterprise principle' in the UK.

secondary party will be liable for the further crime even without an intention to assist or encourage the further crime.[2]

In 1985, EJCE was unequivocally recognised by the Privy Council as good law in both England and Wales and Hong Kong, in the case of *R v Chan Wing Siu*[3] (*Chan Wing Siu*) (the appeal originated from Hong Kong, which was then under British rule). This position only changed three decades later, when the highest courts of England and Wales and Hong Kong, respectively, reviewed the merits of EJCE in 2016.

In 2016, the UK Supreme Court (UKSC) reconsidered the application of EJCE in *R v Jogee*[4] (*Jogee*). The UKSC held that EJCE, as enunciated in *Chan Wing Siu*, is based on an incomplete and erroneous reading of previous case law and questionable policy arguments[5] and hence held that EJCE was no longer part of English law. In place of EJCE, the UKSC held that the traditional approach to accessorial liability should be of general application. In other words, an accessory must have the (conditional) intent to assist or encourage the principal to commit the offence to be found guilty.[6] Foresight of the further crime is no longer a sufficient *mens rea*. *Jogee* has sparked discussion among common law jurisdictions as to whether EJCE should be abolished. Three months after *Jogee* was decided, the High Court of Australia, in *Miller v The Queen*,[7] declined to follow *Jogee*.[8] Only a further three months later, the Hong Kong Court of Final Appeal (HKCFA) held in *HKSAR v Chan Kam Shing*[9] (*Chan Kam Shing*) that, in agreement with the Australian approach, *Jogee* should not be followed in Hong Kong and that the doctrine of EJCE should continue to operate alongside traditional accessorial liability. In retaining EJCE, the HKCFA relied on three main reasons, namely that: (i) offenders liable under EJCE are gravely culpable; (ii) abolishing EJCE would leave a huge gap in the law of

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2 *HKSAR v Chan Kam Shing* (2016) 19 HKCFAR 640, para 48; *HKSAR v Lo Kin Man* [2021] HKCFA 37, para 53; *R v Jogee* [2016] UKSC 8, para 2; *HKSAR v Sze Kwan Lung* (2004) 7 HKCFAR 475, para 34; *R v Powell and English* [1999] 1 AC 1; *R v Gnango* [2012] 1 AC 827, para 42.

3 *R v Chan Wing Siu* [1985] AC 168.

4 *R v Jogee* [2016] UKSC 8.

5 Ibid para 79.

6 Ibid para 90.

7 *Miller v The Queen* [2016] HCA 30.

8 For an analysis of the decision in *Miller* (ibid), see A Dyer, 'The "Australian position" concerning criminal complicity: principle, policy or politics?' (2018) 40 Sydney Law Review 289–318; and B Krebs, 'Accessory liability: persisting in error' (2017) 76 Cambridge Law Journal 7–11. It should be noted that the constructive murder rule, which may complicate the application of EJCE, currently operates only in Australia, and not in England and Wales or Hong Kong: see Dyer, 'The "Australian Position" Concerning Criminal Complicity'.

9 *Chan Kam Shing* (n 2 above).

complicity; and (iii) *Jogee*'s test of conditional intent is unclear and problematic.

This article will focus on discussing the divergence between the highest courts in England and Wales and Hong Kong with regard to the applicability and merits of EJCE. As will be seen, such divergence has far-reaching implications for the law governing secondary liability. Given that some common law jurisdictions, most notably Australia and Hong Kong, have retained EJCE, the analysis has doctrinal and practical significance for those jurisdictions, as well as others grappling with the future of EJCE and accessorial liability. This article therefore aims to assess whether the HKCFA's decision in *Chan Kam Shing* is correct, whether it should have followed *Jogee*, and what implications follow from that decision.

This article begins by introducing the principles underlying traditional accessorial liability and EJCE. This is followed by an examination of the three main reasons given by the HKCFA for retaining EJCE and refusing to follow *Jogee*. It is suggested that, contrary to the HKCFA's reasoning, EJCE does not better reflect defendants' culpability, its abolition would not leave a gap in the law, and the test of conditional intention as restated in *Jogee* is not conceptually problematic. It is then argued that the approach in *Jogee* should be preferred and EJCE should be abolished.

SECONDARY LIABILITY

Principles of secondary liability

Before examining the reasoning of *Jogee* and *Chan Kam Shing*, this section first introduces the principles relating to secondary liability. It aims to facilitate a better understanding of the extent to which traditional accessorial liability and EJCE overlap, and how the law on secondary liability would operate if EJCE were abolished.

There are different ways in which a person can be liable for an offence that they were involved in but did not physically commit. The first way is through traditional accessorial liability. The person(s) who performs the physical elements (ie *actus reus*) of the offence is the principal(s),[10] and a person who aids, abets, counsels or procures the offence committed by the principal is an accessory (also known as a secondary party). In essence, an accessory is one who assisted or

10 Ibid para 9; *Jogee* (n 4 above) para 1. Where more than one person performs the *actus reus* of the offence, there may be joint principals: *Chan Kam Shing* (n 2 above) para 9.

encouraged the principal(s) to commit a criminal offence.[11] Under traditional accessorial liability, an accessory to an offence is guilty of the same offence as the principal(s).[12] It should be noted that 'principal' and 'accessory' are legal terminologies to distinguish the actual perpetrator from those who provide assistance or encouragement and do not necessarily reflect their respective roles or culpability in the commission of the offence.[13] For example, a gang leader who instructed a gang member to kill another person is an accessory to murder, and the gang member who performed the physical act of killing is regarded as the principal in the eyes of the law. In such a case, the court may see an accessory as more culpable than, or as culpable as, the principal.[14]

Assistance and encouragement can take varied forms, including by words and by actions,[15] and can occur regardless of the presence or absence of the secondary party at the crime scene.[16] While mere presence is not sufficient, presence that 'lend[s] the courage of their presence' to others[17] or to assist when necessary is sufficient to attract accessorial liability.[18] Whether the assistance or encouragement has a positive effect towards the offence is immaterial.[19] However, as accessorial liability derives from the principal's conduct, an accessory

11 See *Jogee* (n 4 above) para 6; *Chan Kam Shing* (n 2 above) paras 10–13; J Smith, 'Criminal liability of accessories: law and law reform' (1997) 113 Law Quarterly Review 453–467.

12 S 8 of the Accessories and Abettors Act 1861 (England and Wales); s 44 of Magistrates Courts Act 1980 (England and Wales); s 89 of the Criminal Procedure Ordinance (Cap 221) (Hong Kong).

13 *Chan Kam Shing* (n 2 above) para 61; *Jogee* (n 4 above) para 1; M Dyson, 'Principals without distinction' (2018) 4 Criminal Law Review 296–320.

14 See *R v Hussain* [2023] EWCA Crim 697, para 97.

15 *Chan Kam Shing* (n 2 above) para 10.

16 Prior to 1967, the law on secondary liability used to distinguish between 'principal in the second degree' who was present at the crime scene, and 'accessory before the fact' who was not. That is no longer the law and both are now known as an accessory: Smith (n 11 above); A Wong, 'Does the basic joint enterprise principle have any value?' (2025) 20(1) Asian Journal of Comparative Law 120–140.

17 *R v Cook* (1994) 74 A Crim R 1, 8–9, cited in *Lo Kin Man* (n 2 above) para 84.

18 *Lo Kin Man* (n 2 above) paras 82–84; *R v Young and Webber* (1838) 8 Car and P 644.

19 *R v Calhaem* [1985] QB 808. As of 2025, the UK Parliament is considering a private members' Bill, the Joint Enterprise (Significant Contribution) Bill, which aims to limit the use of traditional accessorial liability to those who make a significant contribution to the commission of an offence.

cannot be held liable if the principal did not perform the physical elements of the offence.[20]

In relation to the mental element, an accessory must (i) have knowledge of essential facts regarding the criminal conduct[21] and (ii) intend to assist or encourage the principal to commit the offence (with the principal having the requisite mental element for the offence).[22] An accessory can be found guilty even if they did not know the specific form in which the crime would be committed or whether the crime would eventually be committed,[23] so long as there was knowledge of essential facts and the offence committed is within the range of offences which the accessory intentionally assisted or encouraged.[24]

Another way through which a person can be liable for an offence of which they have not physically performed the *actus reus* is the doctrine of joint criminal enterprise. There are two forms of joint criminal enterprise, basic and extended, which are said to originate from the common law.[25] The basic joint criminal enterprise principle criminalises participation in an agreement to carry out a crime.[26] When the planned crime is carried out, all participants of the agreement are

20 Smith (n 11 above). Even when the crime is not carried out, liability may still arise under incitement or conspiracy: see *Lo Kin Man* (n 2 above) para 30. Note that in England and Wales, the common law offence of incitement has been abolished by s 59 of the Serious Crime Act 2007 and is replaced by the offences of encouraging or assisting an offence under the Serious Crime Act 2007, ss 44–46. The England and Wales Court of Appeal has, however, criticised the new offences for being more complex than the common law offence of incitement and being drafted in a 'tortuous fashion': *R v Sadique* [2013] EWCA Crim 1150, para 30.

21 *Johnson v Youden* [1950] 1 KB 544; *R v Maxwell* [1978] 1 WLR 1350; *Jogee* (n 4 above) para 9; *Chan Kam Shing* (n 2 above) para 11.

22 *Jogee* (n 4 above) para 11.

23 *R v Bryce* [2004] EWCA Crim 1231; *Jogee* (n 4 above) para 90.

24 *Maxwell* (n 21 above); *Jogee* (n 4 above) para 14.

25 *Chan Kam Shing* (n 2 above) para 41; *Lo Kin Man* (n 2 above) para 51. *Jogee* (n 4 above) challenged this assertion by holding that EJCE has no historical foundation. However, *Jogee* appears to be incorrect, as evidence shows that the EJCE is long-rooted in the common law since the sixteenth century: see F Stark, 'The demise of "parasitic accessorial liability": substantive judicial law reform, not common law housekeeping' (2016) 75(3) Cambridge Law Journal 550–579. The basic joint criminal enterprise principle, also known as the doctrine of common intention, on the other hand, does not appear to have a secure historical foundation in common law: see Wong (n 16 above).

26 *Brown v The State (Trinidad and Tobago)* [2003] UKPC 10, para 8; *Lo Kin Man* (n 2 above) para 52; *Chan Kam Shing* (n 2 above) para 41; *R v Seed* [2024] EWCA Crim 650; *R v ARU* [2024] EWCA Crim 1101.

guilty as principals, no matter who performed the *actus reus* of the offence.[27]

The more controversial extension of liability, which forms the basis of this article and is also the main focus of *Jogee* and *Chan Kam Shing*, is the extended form of joint criminal enterprise (namely, EJCE). Under EJCE, a person who did not perform the physical elements of an offence nor provide assistance or encouragement to the offence committed by another can still be liable as if they committed that offence – it is therefore also termed as parasitic accessorial liability.[28] It refers to the situation where defendants (eg A and B) agree to carry out a crime, and in the course of carrying out that agreed crime, one of them (B) commits a further offence. If a defendant (A) foresees the possibility that their co-perpetrator (B) may commit the further (collateral) offence with the requisite *mens rea*, and the defendant (A) continues to participate in the (original) joint enterprise to commit the agreed crime, then the defendant (A) will also be guilty of the further offence as a principal.[29]

As an example, if A gives a gun to B for B to commit a bank robbery, A is of course liable under both traditional accessorial liability and the basic joint criminal enterprise principle for the crime of robbery. Consider further that A only intends B to use the gun to threaten others in the course of the robbery (and not to fire the gun under any circumstances), but B uses it to kill a security guard of the bank. In this case, A is not guilty of murder under traditional accessorial liability or the basic joint criminal enterprise principle because A did not intend to assist or encourage B (and did not make an agreement with B) in relation to the murder. However, under EJCE, if A does foresee that B may use the gun to commit the murder, such foresight coupled with the continued participation in the crime of robbery is sufficient to render A guilty of murder. This explains how liability is 'extended' based on foresight of the further crime under EJCE.

However, if the foresight of such a possibility only appears fleetingly or is dismissed by the defendant as altogether negligible, it would not

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27 *Chan Kam Shing* (n 2 above) paras 33 and 63; *Lo Kin Man* (n 2 above) para 52. For criticism of the principle, see Wong (n 16 above). While the HKCFA firmly classified all defendants convicted under the basic joint enterprise principle and EJCE as principals, the UKSC has expressed divergent views as to whether such defendants should be classified as principals or accessories: see *R v Gnango* (n 2 above).

28 Smith (n 11 above).

29 *Chan Kam Shing* (n 2 above) para 48; *Lo Kin Man* (n 2 above) para 53; *Jogee* (n 4 above) para 2; *Sze Kwan Lung* (n 2 above) para 34; *Powell and English* (n 2 above); *Gnango* (n 2 above) para 42.

suffice to attract criminal liability.[30] EJCE may overlap with traditional accessorial liability and in some cases both doctrines can serve as a basis to establish the defendant's guilt.[31]

The divergent decisions of *Jogee* and *Chan Kam Shing*

In *Jogee*, the UKSC reviewed the authorities cited in *Chan Wing Siu*, which were then used to support EJCE.[32] The UKSC came to the conclusion that none of them provided proper support to the historical roots of EJCE.[33] *Jogee* also held that the application of EJCE results in 'over-extension on the law of murder and reduction of the law on manslaughter'.[34] As a result, *Jogee* reversed *Chan Wing Siu* and held that EJCE should no longer form part of the law of England and Wales. In place of EJCE, the UKSC held that the only appropriate way to attach liability to a person (A) involved in an offence committed by another person (B), where the person (A) did not perform the physical elements of the offence, is through traditional accessorial liability. *Jogee* went on to clarify and restate the principle of accessorial liability. In particular, an accessory can only be found guilty if they assisted or encouraged the commission of an offence, and that they intended to assist or encourage the principal to commit the crime with the requisite intent.[35]

Furthermore, the UKSC emphasised that an intention to assist or encourage an offence may be conditional. For example, an accessory to robbery may intend only to assist/encourage the use of firearms to kill if resistance is met.[36] In such a case, if the principal uses the firearms to kill customers of the bank when they face no resistance, the accessory does not have the conditional intent to assist/encourage such murders.[37] *Jogee* made clear that foresight is not the same as intention, but foresight is evidence, possibly even strong evidence, from which a jury may infer the presence of the requisite intention to assist or encourage the offence.[38] The UKSC found that this approach better reflects the culpability of a secondary party.

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30 *Chan Kam Shing* (n 2 above) para 52; *Chan Wing Siu* (n 3 above) 179C. In other words, the risk must be 'real' rather than fanciful. Yet, it is arguably difficult to persuade the court to regard a foreseen risk which materialised as fanciful, as the foreseen crime must have occurred when it was brought up to a criminal court.

31 *Chan Kam Shing* (n 2 above) paras 33 and 100.

32 See *Jogee* (n 4 above) paras 31–33, 39–45, 62–72.

33 Ibid para 79. This proposition of the UKSC has been persuasively criticised: see Stark (n 25 above).

34 *Jogee* (n 4 above) para 83.

35 Ibid paras 89–90.

36 Ibid para 92.

37 See A Wong, 'Speculative leap in inferring conditional intent' (2023) 82 Cambridge Law Journal 228–231.

38 *Jogee* (n 4 above) para 83.

Half a year after *Jogee* was decided, the HKCFA held in *Chan Kam Shing* that *Jogee* should not be followed in Hong Kong. The HKCFA '[does] not agree with the decision in *Jogee* for three main reasons',[39] namely that: (i) a defendant guilty under EJCE should be regarded as gravely culpable;[40] (ii) abolishing EJCE would '[create] a serious gap in the law of complicity';[41] and (iii) *Jogee*'s restatement of the concept of conditional intent is difficult to understand and 'gives rise to significant conceptual and practical problems'.[42] The HKCFA therefore held that EJCE, as enunciated in *Chan Wing Siu*, remains good law in Hong Kong. This leads to the question of whether the HKCFA's approach is preferable to that of the UKSC.

ANALYSING THE HKCFA'S CRITICISMS OF *JOGEE*

Does EJCE better reflect culpability?

One of the main reasons the HKCFA gave for not following *Jogee* was its view that those liable under EJCE are 'gravely culpable'.[43] The HKCFA explained that the defendants' culpability 'lies in the mutual embarkation on a crime with the awareness that the incidental crime may be committed in executing their agreement'.[44] Essentially, it was suggested that continuing to participate in crime A while foreseeing the possibility of the commission of crime B creates a sufficient moral link between the defendant and crime B, which justifies the conviction of crime B.[45]

The HKCFA also supported EJCE on the ground that the secondary party has tacitly agreed or authorised the commission of the further crime.[46] The HKCFA believed that, by foreseeing a possible further crime and yet continuing to participate in the original joint enterprise, the secondary party impliedly authorised the actual perpetrator to act as their agent to 'deal with the foreseen exigencies' in carrying out the joint criminal enterprise.[47]

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39 *Chan Kam Shing* (n 2 above) para 58.
40 Ibid paras 58, 65.
41 Ibid para 58.
42 Ibid.
43 Ibid para 65.
44 Ibid para 64, citing *Clayton v The Queen* [2006] HCA 58, para 20.
45 *Chan Kam Shing* (n 2 above) paras 64–65.
46 Ibid paras 67–70; see also *Miller* (n 7 above) para 31.
47 *Chan Kam Shing* (n 2 above) para 70.

In an article cited by both the HKCFA and the Australian High Court,[48] Andrew Simester argues that, in entering into a joint criminal enterprise, a person changes their normative position. It was suggested that '[w]hereas aiding and abetting doctrines are grounded in [the secondary party]'s contribution to another's crime, joint enterprise is grounded in affiliation … As such, joint enterprise doctrines impose a form of collective responsibility, predicated on membership of the unlawful concert'.[49] Building upon this idea, the Australian High Court explained (as endorsed by the HKCFA) that 'in joint enterprise cases, the wrong lies in the mutual embarkation on a crime'.[50] In other words, EJCE places the defendant in a package deal grounded in affiliation with the original joint enterprise. Thus, even though the defendant may not be able to control the autonomous act of their co-perpetrator in committing the further offence, the defendant still assumes the risks for the further offence.[51]

To sum up, supporters of EJCE propose that, in the course of carrying out an offence, the defendant's foresight regarding a further offence necessarily (i) creates a sufficient moral link between the defendant and the further offence; (ii) means that the defendant gives tacit authorisation towards the further offence; and (iii) implies that the defendant assumes the risks for the further offence. These arguments are unconvincing, as will be demonstrated by the three examples below.

The first example is the assumed facts in *R v Crilly*.[52] In this case, Crilly, together with two others, was hoping to commit burglaries in unoccupied houses. When Crilly knocked on the door of the victim's house, no one answered. The intruders broke in and found that the victim, a senior citizen with hearing impairment, was in the house. Crilly suggested to the other two that they should all leave, but the two refused and punched the victim after nothing valuable was found. Crilly again suggested that they should leave but the others refused again. Crilly then helped the others to search the bedroom and look for valuables. Since nothing valuable was found, the others punched the victim again, which led him to fall to the floor. Crilly helped the victim to get back to his feet and onto a chair. The group then left. The victim was later found dead.

Crilly was convicted of murder under EJCE. This is presumably because he foresaw that at least grievous bodily harm might be caused

48 A Simester, 'The mental element in complicity' (2006) 122 Law Quarterly Review 578–599, cited in *Chan Kam Shing* (n 2 above) para 36, and *Clayton* (n 44 above) para 20.

49 Simester (n 48 above) 599.

50 *Chan Kam Shing* (n 2 above) para 36, citing *Clayton* (n 44 above) para 20.

51 Simester (n 48 above).

52 *R v Crilly* [2018] EWCA Crim 168.

when he saw the others hitting the victim, and yet he continued to participate in the joint criminal enterprise of burglary.[53] His appeal post-*Jogee* was allowed because, if the assumed facts were true, Crilly had no intention to assist or encourage the others to commit the further crime of murder (or even to cause any harm to the victim). Indeed, Crilly actively discouraged the others from committing any further crime, and cannot be said to have authorised or assumed the risk for the further offence of murder.

The second example is an adaptation from a hypothetical example provided by the HKCFA in *HKSAR v Lo Kin Man* (*Lo Kin Man*),[54] in the context of public order offences. A, B and C are among numerous others who take part in an unlawful assembly. A and B participate in the unlawful assembly only by standing in the crowd.[55] During the unlawful assembly, C, whom A and B do not know, throws a petrol bomb at the police officers, causing the death of a police officer. If A and B foresee, as a possible but unlikely incident, that a co-perpetrator of the disturbance may assault a police officer with the intent to cause at least grievous bodily harm, they can be found guilty of murder on the basis of EJCE. Even if A and B oppose the use of petrol bombs or even causing bodily harm to anyone, or believe that there is only a small chance that a police officer would be injured on that day, they can still be convicted of murder under EJCE.

A third hypothetical example is that X sees an online advertisement, where Y promises to offer a generous payment if anyone is willing to 'lend out' their bank account to Y. X does so for payment, with no idea how Y will use the bank account, but suspects that the account could be used for criminal purposes, for example to conduct scamming activities. As a result, X has committed the offence of dealing with property known or suspected of representing criminal proceeds (commonly known as money laundering) and is part of this joint enterprise.[56] In fact, this factual scenario is prevalent in Hong Kong, as observed by both the

53 See B Krebs, 'Joint enterprise, murder and substantial injustice: the first successful appeal post-Jogee: R v Crilly [2018] EWCA Crim 168' (2018) 82 Journal of Criminal Law 209–211.

54 *Lo Kin Man* (n 2 above) para 72.

55 They would be guilty of unlawful assembly as they 'lend the courage of their presence' to the unlawful assembly: *Lo Kin Man* (n 2 above) para 84; citing *Cook* (n 17 above) 8–9.

56 Contrary to the Organized and Serious Crimes Ordinance (Cap 455), s 25(1). See also *HKSAR v Harjani Haresh Murlidhar* (2019) 22 HKCFAR 446 for the requisite *mens rea* of the offence.

57 *HKSAR v Chau Yu Tung* [2025] HKCA 1135; Hong Kong Government, 'LCQ11: Preventing bank accounts from being used for money laundering' (6 December 2023).

Legislative Council and the courts.[57] Consider further that X has no knowledge of any illegal activities that Y may be involved in, but X is imaginative and thinks of a wide range of possibilities that Y may be using the account for, including making payments to a contract killer, receiving ransom money, and funding terrorist activities. X believes and hopes that the actual criminal activity involved will be much less serious (eg scamming activities). If Y eventually uses the account for all the aforementioned purposes, X would be liable under EJCE for all the foreseen possible crimes, namely murder, kidnapping, terrorist activities, and fraud.

These examples show that the three arguments advanced in support of EJCE are unconvincing. First, foresight of the further offence and the continued participation in the original offence do not by themselves create a sufficient moral link between the defendant and the further offence.[58] In *Crilly*, all the defendant intended was to commit burglary in an unattended house. While he at one point foresaw that his co-perpetrator might inflict violence on the victim, he never intended to assist or encourage such acts. He even took steps to discourage the others from doing so. In such a case, it is difficult to see how the defendant, by virtue of such foresight and continued participation in the burglary, could be regarded as morally culpable for the further crime of murder.

Similarly, when participants in an unlawful assembly do not support the use of violence against persons, convicting them as murderers represents an over-extension of the criminal law. Without the intention to assist or encourage the use of violence, the fact that the defendants foresee a possibility that someone may (or may not) cause at least grievous bodily harm does not put the defendants' culpability on a par with that of the actual perpetrator who formed such murderous intent or an accessory who intended to assist or encourage such an offence. Such a conviction under EJCE goes against the principle of fair labelling because the charge of murder is disproportionate to the nature and magnitude of the defendants' law-breaking,[59] which may be adequately reflected by the charge of unlawful assembly (or riot).[60]

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58 J Horder, *Ashworth's Principles of Criminal Law* 8th edn (Oxford University Press 2016) 449; B Krebs, 'Joint criminal enterprise' (2010) 73 Modern Law Review 578–604; B Krebs, 'Hong Kong Court of Final Appeal: divided by a common purpose Chan Kam Shing [2016] HKCFA 87' (2017) 81 Journal of Criminal Law 271–274.

59 J Chalmers and F Leverick, 'Fair labelling in criminal law' (2008) 71 Modern Law Review 217–246; B Krebs, 'Mens rea in joint enterprise: a role for endorsement?' (2015) 74 Cambridge Law Journal 480–504.

60 The defendants may be liable for manslaughter: see below discussion on 'overwhelming supervening act'.

In the money-laundering example, X has minimal knowledge about the further crimes, including whether they would be committed or whether they are being contemplated by Y. X's foresight is merely speculative in nature, and all X does is lend out their bank account. To convict X of serious crimes such as murder, kidnapping, or terrorist activities under EJCE, which X essentially takes no part in, would be grossly disproportionate and fundamentally unfair.

Second, it is a weak argument to suggest that foresight of the further crime equals tacit authorisation of it.[61] In *Crilly*, while the defendant foresaw that his accomplices might hurt the surprise victim, he clearly did not give tacit authorisation for any form of assault against the victim. He explicitly opposed the use of violence. Similarly, those who participate in an unlawful assembly by standing in the crowd cannot be said to be tacitly authorising or lending support to the use of petrol bombs or the murder of a police officer. They may well oppose the commission of any further crime, rather than tacitly authorising it. In the money-laundering example, X has no knowledge of the further crimes that will be committed, let alone giving their tacit authorisation. As such, it cannot be concluded that foresight equals tacit authorisation.

Third, foresight does not necessarily imply an assumption of risks for the further offence. In fact, a defendant's action may occasionally reduce (rather than increase) the risk of a further offence being committed.[62] For example, Crilly's continued participation in the criminal enterprise by searching the bedroom could also be interpreted as hoping to find valuables so that the others would stop attacking the victim. In this regard, to suggest that Crilly has, by his acts, assumed or increased the risk of the further crime of murder is inaccurate.

While Simester rightly described that EJCE imposes 'a form of collective responsibility' which is 'grounded in affiliation', it is the very nature of such a 'package deal' that appears undesirable.[63] Defendants who agreed to participate in a crime (ie joined a criminal enterprise in EJCE's terms) should not be seen as unconditionally giving up all of their autonomy to the group, especially when they took no action to assist or encourage, and did not support, the commission of the further crime. They should only be seen as having given up part of their autonomy to a crime that they intentionally assisted or encouraged.[64] The criminal law's general rejection of the imposition of vicarious liability on natural persons, and its deep unease with strict or absolute liability, reflect the fundamental belief that criminal conviction and

61 Dyson (n 13 above).

62 See Krebs, 'Joint criminal enterprise' (n 58 above).

63 Simester (n 48 above) 599.

64 D Baker, 'Unlawfulness's doctrinal and normative irrelevance to complicity liability: a reply to Simester' (2017) 81 Journal of Criminal Law 393–416.

punishment should only be based on an individual's own conduct and culpability, not merely by their affiliation or membership in a group. EJCE, which imposes a form of liability closely analogous to vicarious liability, cannot be justified.[65] If Simester's argument that convictions under EJCE can be justified on the ground of 'collective responsibility' is accepted, such an argument could equally support the sixteenth-century law of 'guilt by association', under which all members of an unlawful enterprise would be liable for any crimes committed by a co-perpetrator in the course of carrying out that joint enterprise, regardless of their intention or foresight towards the further offence.[66] Guilt by association and EJCE are undesirable because they fail to make liability commensurate with the defendants' actions and intentions, bringing disproportionately harsh convictions.[67]

In *R v Powell and English*,[68] the House of Lords offered an additional justification for EJCE. It was suggested that, by foreseeing the risk of the commission of the further crime, the defendant was reckless towards the further crime, and hence morally culpable.[69] Yet, in a typical EJCE scenario, A, who foresees that B may (or may not) commit a further offence in the course of committing a different offence, may have no control over B's choice (as in *Crilly*). It appears somewhat incongruous to suggest that A is reckless for B's deliberate and intentional choice to commit the further offence. Without giving any assistance or encouragement, A does not take any risk towards the further crime; the further crime is intentionally committed by B, not recklessly caused by A.

It may be said that A remains reckless for taking the risk of assisting or encouraging the further crime by joining the original criminal enterprise while realising that B may commit the further crime. Even so, it might be more accurate to classify A as recklessly assisting/encouraging the further crime rather than recklessly committing the

65 Ibid; A Bois-Pedain, 'Complicity' in L Alexander and KK Ferzan (eds), *The Palgrave Handbook of Applied Ethics and the Criminal Law* (Palgrave 2019); *Miller* (n 7 above) para 100.

66 Stark (n 25 above).

67 E Grigg, 'Joint enterprise liability: recent developments and judicial responses' (2019) 83 Journal of Criminal Law 128–135.

68 *Powell and English* (n 2 above).

69 Applying the modern test of *R v G* [2003] UKHL 50, it might be said that no reasonable person would participate in a criminal enterprise and, as a result, such participation is always unreasonable. Cf Dyson who argues that the 'it is unreasonable to take the risk' test can provide a more rigorous and justifiable level of fault: M Dyson, 'Might alone does not make right: justifying secondary liability' (2015) Criminal Law Review 967–985.

further crime.[70] The culpability of risking to encourage another to commit the further crime is not on a par with intentionally encouraging another to do so. Indeed, this is the reason why recklessness is not a sufficient *mens rea* for traditional accessorial liability. Whether an extra offence (eg reckless encouragement) could be enacted to address such situations warrants further research. However, it should also be noted that A foreseeing that B may commit a further crime does not equate to A foreseeing that their participation in the original crime would encourage B in committing the further crime.[71] This point can be illustrated by the case of *Crilly*, as Crilly could not be regarded as having foreseen that his continuation in looking for valuables would encourage his co-perpetrators to attack the victim. Overall, the concept of recklessness does not lend support to retaining EJCE.

As articulated by Jeremy Horder, mere foresight is 'too insubstantial a moral and legal basis' for imposing criminal liability.[72] A better approach is that taken in *Jogee*. It is only with (conditional) intent, but not mere foresight, that the defendant has necessarily (i) voluntarily associated and connected themselves with the further crime;[73] (ii) an accepting mindset toward risk-taking;[74] and (iii) tacitly authorised the crime,[75] by way of providing (conditional) voluntary and intentional assistance or encouragement to the further crime. Whether the concept of conditional intention is problematic will be returned to later in this article.

Would abolishing EJCE create a huge gap in the law?

The HKCFA worried that following *Jogee* and abandoning EJCE would limit the ability of the law to deal with 'dynamic situations involving evidential and situational uncertainties which traditional accessorial liability rules are ill-adapted to addressing'.[76] In support of this position, the HKCFA quoted Lord Steyn's comment in *R v Powell*, that:

> it would in practice almost invariably be impossible for a jury to say that the secondary party wanted death to be caused or that he regarded

70 S Kadish, 'Reckless complicity' (1997) 87 Journal of Criminal Law and Criminology 369–394; D Baker, 'Reinterpreting the mental element in criminal complicity: change of normative positive theory cannot rationalize the current law' (2016) 40 Law and Psychology Review 119–161.

71 Baker (n 70 above).

72 Horder (n 58 above) 449; see also Dyson (n 13 above); Dyson (n 69 above); *Miller* (n 7 above) para 92.

73 G Virgo, 'Joint enterprise liability is dead: long live accessorial liability' (2012) 11 Criminal Law Review 850–870.

74 Krebs (n 59 above).

75 R Williams, 'What is the theoretical basis for accomplice liability?' in B Krebs (ed), *Accessorial Liability After Jogee* (Hart 2019).

76 *Chan Kam Shing* (n 2 above) para 71; see also *Miller* (n 7 above) para 35.

> it as virtually certain. In the real world proof of an intention sufficient for murder would be well nigh impossible in the vast majority of joint enterprise cases.[77]

However, this does not accurately reflect the law as stated in *Jogee*. *Jogee* held that it is sufficient to prove the defendant's (conditional) intent to assist or encourage the further offence. As *Jogee* explains:

> as a matter of law, it is enough that D2 intended to assist D1 to act with the requisite intent … example might be where D2 supplies a weapon to D1, who has no lawful purpose in having it, intending to help D1 by giving him the means to commit a crime (or one of a range of crimes) … .[78]

The intention to *assist or encourage* the principal to commit a particular offence with the requisite *mens rea*, being the requirement of *Jogee*, should not be confused with the intention that the offence will be committed.[79] Suppose that A and B plan to rob a bank together. B tells A that B will need a gun and will use it to kill anyone who resists during the robbery. A expresses to B that A objects to hurting anyone. B is, however, unpersuaded. A, who only cares about profiting and has no intention for anyone to get killed (even if someone resisted), still assists B with the robbery by giving B a gun. Here, while A does not intend murder, by passing B a gun and knowing that B would use it to kill anyone who resists, A still has the (*conditional*) intention to assist B in committing murder (when B deems it necessary). The *intention to assist* or encourage the principal to commit the offence, rather than the intention to commit the offence (or for the offence to be committed), is the essence of accessorial liability. Therefore, in finding accessorial liability for murder, there is certainly no need to prove that an accessory, as per Lord Steyn, 'wanted death to be caused or … regarded it as virtually certain'.

In *R v Anwar*,[80] the England and Wales Court of Appeal opined that they 'find it difficult to foresee circumstances in which there might have been a case to answer under the law before *Jogee* but, because of the way in which the law is now articulated, there no longer is'.[81] While this statement might not be entirely correct as shown by the case of *Crilly*, it reflects that, in general, *Jogee* has not significantly increased

77 *Powell and English* (n 2 above) para 14.

78 *Jogee* (n 4 above) para 90.

79 Ibid paras 10 and 90; see also *Chan Kam Shing* (n 2 above) para 11; M Dyson, 'Ever working in practice, but never in theory? The new English law of criminal complicity' (2017) 129(1) Zeitschrift für die gesamte Strafrechtswissenschaft 232–263.

80 *R v Anwar* [2016] EWCA Crim 551.

81 Ibid para 20.

the difficulty for the prosecution to establish secondary liability. In this regard, the HKCFA's concern may be overstated.

The HKCFA also feared that if *Jogee* is followed, once the principal is acquitted or convicted of a lesser crime, the accessory must also be acquitted due to the derivative nature of traditional accessorial liability.[82] The HKCFA believed that, for example, a conviction of murder against a secondary party would no longer be possible if the principal is acquitted of murder or convicted 'of the lesser offence of manslaughter'.[83]

This proposition appears incorrect.[84] Authorities beginning from the twentieth century suggest that accessorial liability can be found as long as the principal has performed the *actus reus* of the offence,[85] and it is not necessary for the principal to be convicted before finding an accessory guilty under accessorial liability. As the UK Law Commission explained:

> [T]he extreme version of the derivative theory of secondary liability has long disappeared. Nowadays, D can be convicted even if P [the principal] is not apprehended or has previously been tried and acquitted.[86]

In *DPP v K & B*,[87] the victim was raped by an unidentified boy who 'left the scene and has never been traced'.[88] The England and Wales Court of Appeal upheld the convictions of two girls for procuring rape, notwithstanding that the boy could not be located and had never been convicted. Similarly, in *R v Anthony*,[89] the England and Wales Court of Appeal upheld the appellant's conviction for counselling or procuring robbery, even though the named principal was acquitted after trial. The Court held that there was no such principle of law that would acquit the accessory unless the principal is convicted.

Another rule of relevance is the doctrine of innocent agency, which treats an accessory who uses an innocent agent to commit the offence as

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82 The HKCFA cited *R v Stewart and Schofield* [1995] 1 Cr App R 441, which held that an accessory can be guilty of a lesser offence under EJCE. This case, however, cannot conversely lend support to the HKCFA's proposition that an accessory cannot be convicted of a lesser offence under traditional accessorial liability.

83 *Chan Kam Shing* (n 2 above) para 74.

84 The HKCFA's statement of the law only reflects the historical position in the nineteenth century: D Lanham, 'Accomplices, principals and causation' (1979) 12 Melbourne University Law Review 490–515.

85 *R v Anthony* [1965] 2 QB 189; *R v Gianetto* [1997] 1 Cr App R 1; *DPP v K & B* [1997] 1 Cr App R 36; Dyson (n 79 above).

86 Law Commission, 'Participating in Crime' (Law Com No 305 2007) para B.13.

87 *DPP v K & B* (n 85 above).

88 Ibid 40.

89 *R v Anthony* (n 85 above).

a principal.[90] For example, in *R v Bourne*,[91] the defendant compelled his wife to have sex with a dog. Even though the wife, if charged, would have been acquitted as she was acting under duress, the defendant's charge of abetting buggery was upheld. Similarly, in *R v Millward*,[92] the accessory remained liable for procuring reckless driving causing death, even though the principal lacked the *mens rea* for reckless driving. Also, in *R v Cogan and Leak*,[93] Leak's conviction of procuring Cogan (the principal) to rape his wife was upheld, even when Cogan was acquitted because Cogan may have thought that Leak's wife consented.

Under traditional accessorial liability, an accessory may also be convicted of a more serious offence as compared to the offence that the principal has been convicted of.[94] In *R v Howe*,[95] the House of Lords held that where an accessory has procured the principal to commit murder but the principal was convicted of manslaughter, 'the mere fact that the actual killer may be convicted only of the reduced charge of manslaughter for some reason special to him does not … result in a compulsory reduction for the other participant'.[96] The High Court of Australia also endorsed this view.[97]

Similarly, contrary to the HKCFA's suggestion,[98] under traditional accessorial liability, it is possible for an accessory to be convicted of a lesser crime as compared to that of the principal.[99] As *Jogee* explained:

> if D2 encourages D1 to take another's bicycle without permission of the owner and return it after use, but D1 takes it and keeps it, D1 will be guilty of theft but D2 of the lesser offence of unauthorised taking.[100]

Pre-*Jogee*, the Law Commission also expressed the view that 'where P [the principal] commits a more serious offence than the offence that D intended or believed that P would commit … [i]t does not offend the derivative theory of liability to hold D liable for the lesser offence'.[101]

In addition, as recognised by both *Jogee* and *Chan Kam Shing*, when it is certain that two defendants were involved in a crime but which of the two was the principal and which was the accessory cannot be identified, it is sufficient to prove that the defendant(s) must have

90 See Law Commission (n 86 above) para 1.28.
91 *R v Bourne* (1952) 36 Cr App R 125.
92 *R v Millward* [1994] Crim LR 527.
93 *R v Cogan and Leak* [1976] QB 217.
94 Wong (n 16 above).
95 *R v Howe* [1987] AC 417.
96 Ibid 458.
97 See *Clayton* (n 44 above) para 101.
98 *Chan Kam Shing* (n 2 above) para 73.
99 See also *R v BHV* [2022] EWCA Crim 1690, paras 29-30.
100 *Jogee* (n 4 above) para 90.
101 See Law Commission (n 86 above) fn 34.

'participated in the crime in one way or another'.[102] Thus, in cases involving situational uncertainties, the defendants could be charged as either an accessory or a principal.[103] For example, in *R v Gianetto*,[104] it was sufficient to prove that the defendant was either a principal who killed his wife, or an accessory who hired a contract killer to kill his wife. Under such an approach, an accessory can be convicted even when the principal is not identified, not found, or even acquitted. Hence, traditional accessorial liability is not strictly derivative of the principal's liability and may be established as long as the conduct element of the offence has been performed.[105]

In *Chan Kam Shing*, the HKCFA also voiced public policy concerns about the reduced flexibility of the criminal law in the absence of EJCE. The HKCFA quoted Lord Steyn's observation in *R v Powell* that 'joint criminal enterprises only too readily escalate into the commission of greater offences'.[106] The Court also referred to Simester's argument that '[i]n principle, having two distinct channels of complicity liability affords the law greater flexibility and moral sensitivity'.[107] Simester has written that:

> there is reason to treat collective wrongdoing as a special case. Criminal associations … present a threat to public safety that ordinary criminal prohibitions, addressed to individual actors, do not entirely address … A group is a form of society, and a group constituted by a joint unlawful enterprise is a form of society that has set itself against the law and order of society at large … .[108]

These policy considerations were brought into sharper focus in *Lo Kin Man*, where the HKCFA was called upon to consider the application of EJCE in the context of riot-related offences. During the 2019–2020 anti-Extradition Bill movement, initially peaceful protests gradually escalated into prolonged city-wide riots, resulting in over 10,000 arrests.[109] Against this backdrop, the HKCFA may have perceived a strong need to discourage any threats to public order and, accordingly, found EJCE's deterrent effects particularly appealing. The Court

102 *Chan Kam Shing* (n 2 above) paras 23–25; *Jogee* (n 4 above) para 88.

103 *Chan Kam Shing* (n 2 above) paras 23–25; *Jogee* (n 4 above) para 88; D Ormerod and K Laird, *Smith and Hogan's Criminal Law* 14th edn (Oxford University Press 2015) 206.

104 *R v Gianetto* (n 85 above).

105 Law Commission (n 86 above) para B.13.

106 *Chan Kam Shing* (n 2 above) para 30; see also *Powell and English* (n 2 above); Simester (n 48 above).

107 *Chan Kam Shing* (n 2 above) para 96.

108 Simester (n 48 above) 599.

109 E Cheng and S Yuen, 'Hong Kong anti-extradition movement (2019)' in *The Wiley Blackwell Encyclopedia of Social and Political Movements* 2nd edn (Wiley 2022).

provided hypothetical examples in support of the principle's utility in *Lo Kin Man*:

> A, B and C may be among numerous other persons taking part in a riot … and C then proceeds to commit a further offence – say, of murder, by deliberately stabbing someone to death. If A and B … foreseen that C might commit murder, meaning his assaulting a victim with intent to kill or with intent to cause grievous bodily harm as a possible incident of the execution of their planned participation in the riot, they could be found guilty of murder on the [EJCE] basis.[110]

The HKCFA gave a further example:

> [A] group of persons agreed to take part together in a riot, intending to destroy public property and to erect barriers stopping traffic, while knowing that some amongst them would take along petrol bombs … If … the petrol bombs … were then used to cause serious injury, the [EJCE] doctrine might apply to fix the rioters who foresaw the intentional infliction of such injury as a possible incident … with liability for the more serious offence.[111]

It may be acknowledged that judicial reasoning can be partially informed by contemporary policy priorities and evolving socio-political dynamics, such as the pressing need to safeguard national security and public order during times of turbulence.[112] Even if not explicitly referenced in *Lo Kin Man*, at a time when '[t]he courts were criticized by some for not doing enough to uphold public order',[113] the imperative to suppress widespread riots at the time may be a natural policy consideration underpinning the HKCFA's continued support for the EJCE.

However, there are four reasons why such public policy arguments fail to justify the continued retention of EJCE. First, Hong Kong, widely regarded as one of the safest cities in the world, is not currently facing an acute law and order crisis. Following the promulgation of the Hong Kong National Security Law (HKNSL) in 2020, the anti-Extradition Bill movement has been swiftly suppressed, and social stability has been

110 *Lo Kin Man* (n 2 above) para 72.

111 Ibid para 73.

112 For an analysis of how judicial reasoning in Hong Kong may be shaped by broader political and institutional dynamics, see J Yam, 'Approaching the legitimacy paradox in Hong Kong: lessons for hybrid regime courts' (2021) 46 Law and Social Inquiry 153–191. For discussion in the UK context, see also W Jennings et al, 'Moral panics and punctuated equilibrium in public policy: an analysis of the criminal justice policy agenda in Britain' (2017) 48 Policy Studies Journal 207–234.

113 Yam (n 112 above) 182.

largely restored.[114] As articulated by Siu-kai Lau, the promulgation of the HKNSL and its rigorous enforcement

> made [the opposition] deeply aware of the central authorities' great determination, courage and ability in safeguarding national security, the 'One Country, Two Systems', and the prosperity and stability of Hong Kong. At the same time, it instills into them a clear understanding of the hefty price that Hong Kong and themselves will have to pay when engaging in and supporting illegal and violent acts.[115]

The subsequent enactment of the Safeguarding National Security Ordinance in 2024 introduced multiple new offences, including treason, insurrection, and external interference endangering national security, further strengthening efforts to safeguard national security and public order. As a result, it is highly unlikely that any large-scale riots would re-emerge in Hong Kong in the foreseeable future.

In 2023, Hong Kong's violent crime rate per 100,000 population was just 134.[116] In comparison, in the same year, England and Wales's violent crime rate per 100,000 population reached over 3400.[117] Moreover, in Hong Kong, over 90 per cent of those imprisoned were sentenced to a prison term of less than three years, suggesting that the majority of convicted persons did not commit a very serious offence.[118] Hence, the alleged social problem is not sufficiently severe in Hong Kong to warrant the exceptional legal response of lowering the *mens rea* threshold.

Second, the goal to deter the easy escalation of group crimes cannot justify the injustice of lowering the *mens rea* threshold to mere foresight. Notably, in *Powell*,[119] Lord Hutton acknowledged that 'there are practical considerations of weight and importance related to considerations of public policy which justify the [EJCE] principle ...

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114 For a discussion on HKNSL's effective enforcement, see A Chen, 'The National Security Law of the Hong Kong Special Administrative Region: a contextual and legal study' in H Fu and M Hor (eds), *Hong Kong's National Security Law: Restoration and Transformation* (Hong Kong University Press 2022).

115 S Lau, 'The National Security Law: political and social effects on the governance of the Hong Kong Special Administrative Region' (2021) 24(3) Public Administration and Policy 234–240, 236.

116 Census and Statistics Department, 'Crime Situation of Hong Kong in 2023' (January 2025) chart 2.

117 The police recorded violent crimes in England and Wales reached 2.1 million: Office for National Statistics, 'Crime in England and Wales: year ending September 2023' (25 January 2024), s 6. The population of England and Wales was around 60.9 million in 2023: Office for National Statistics, 'Population estimates for England and Wales: mid-2023' (15 July 2024).

118 A Wong, F Wong and W Chui, 'Offender rehabilitation in Hong Kong: current practice and service development' in C M Chu and M Daffern (eds), *Approaches to Offender Rehabilitation in Asian Jurisdictions* (Routledge 2024).

119 *Powell and English* (n 2 above).

and which prevail over considerations of strict logic'. This admission highlights that EJCE is grounded not in principled legal reasoning, but pragmatic policy concerns. Such over-reliance on public policy grounds risks undermining the fairness of the criminal justice system. As analysed above, EJCE does not necessarily reflect the culpability of the secondary party, as it could attach the defendant with the label of murderer and portray them as having killed another when what they actually did was no more than foreseeing that serious injury might occur.[120] In the examples raised by the HKCFA in *Lo Kin Man*, those hypothetical defendants can fairly be categorised as rioters but not as murderers, for they have not taken any steps in associating themselves with the murders. Empirical research in England and Wales also indicated that EJCE has been widely perceived as unfair by the public and convicted defendants.[121] Several prisoners who were interviewed described that they were struggling to reconcile the enduring label of 'murderer', which misaligned with their own sense of culpability.[122] Some lawyers also believed that EJCE 'oversimplified the reality of the ways in which young people become implicated in violence', and has led to 'unfair labelling and disproportionate punishment of secondary parties'.[123] Injustice and citizens' loss of confidence towards the criminal justice system, as well as the waste of the criminal justice system's resources involved in unfair convictions, are by themselves grave social harms.

Third, arguments along the lines that group crimes threaten the 'law and order of society at large' vilify defendants in a joint enterprise as 'enemies within' and 'dangerous others'[124] in an otherwise peaceful and ordered society.[125] It may also be noted that the offences of unlawful assembly (Hong Kong), violent disorder (England and

120 S Hulley and T Young, 'Joint enterprise in England and Wales: why problems persist despite legal change' (2025) 37 Current Issues in Criminal Justice 134–153.

121 Research found that 82% of men and 75% of women who performed a secondary role and were convicted under the joint enterprise principle consider themselves as being unfairly convicted of murder: S Hulley, B Crewe and S Wright, 'Making sense of "joint enterprise" for murder: legal legitimacy or instrumental acquiescence?' (2019) 59 British Journal of Criminology 1328–1346; see also B Crewe, A Liebling and B Virgo, 'Joint enterprise: the implications of an unfair and unclear law' (2015) 4 Criminal Law Review 252–269.

122 Hulley et al (n 121 above).

123 Hulley and Young (n 120 above) 147.

124 H Carvalho, 'Joint enterprise, hostility and the construction of dangerous belonging' in J Pratt and J Anderson (eds), *Criminal Justice, Risk and the Revolt against Uncertainty* (Palgrave 2020) 118.

125 A Green and C McGourlay, 'The wolf packs in our midst and other products of criminal joint enterprise prosecutions' (2015) 79 Journal of Criminal Law 280–297.

Wales) and riot (Hong Kong and England and Wales) were created precisely in recognition of the potentially enhanced harm caused by the assembling of groups. If a specific group crime is proven to have brought greater harm to society, such facts could be taken into account as a relevant sentencing factor.[126] It is unacceptable to employ moral panic to exaggerate the fear towards group crimes in justifying the unfair convictions associated with EJCE.[127]

Fourth, traditional accessorial liability is sufficiently well-equipped to address the complexities and dynamic nature of group criminal activities. For example, in the context of public order offences, the HKCFA explained that:

> [t]he 'mastermind' who remotely oversees the situation and gives commands or directions to the participants on the ground would be guilty of incitement or as counsellor and procurer of the criminal assembly. So would the persons who fund or provide materials for the unlawful assembly or riot; or who encourage or promote it on social media. Those who provide back-up support to the participants in the vicinity of the scene, collecting bricks, petrol bombs and other weapons; or who act as lookouts in the vicinity of the riot may either be 'taking part' as principals … or liable as aiders and abettors if present at the scene; or, if not present, liable as counsellors or procurers … .[128]

Furthermore, post-*Jogee* cases demonstrated that there continues to be flexibility for the law to deal with dynamic and unpredictable situations, as will be further discussed.

Is the concept of conditional intent problematic?

According to *Jogee*, an accessory is only guilty if they (conditionally) intend to assist or encourage the principal to commit a crime with the requisite *mens rea*. In cases where a further crime is committed during a criminal venture, such intent could be conditional.[129] The HKCFA in *Chan Kam Shing* criticised the concept of conditional intent as being highly problematic.[130]

The HKCFA quoted *Jogee*'s judgment, which stated that if:

> D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose.[131]

126 For example, in Hong Kong, legislative provisions allow the prosecution to apply for an enhancement of sentence against persons convicted of specified offences: Organized and Serious Crimes Ordinance (Cap 455) s 27.

127 Green and McGourlay (n 125 above); Carvalho (n 124 above).

128 *Lo Kin Man* (n 2 above) para 69.

129 *Jogee* (n 4 above) para 92.

130 *Chan Kam Shing* (n 2 above) para 76.

131 *Jogee* (n 4 above) para 94.

First, the HKCFA is of the view that, under *Jogee*, liability is not based on proof of intentional assistance or encouragement, but rather on 'envisaging commission of a further offence',[132] which is the same as EJCE. Second, the HKCFA opined that foresight and conditional intent are both mental states, and, accordingly, after drawing an inference from foresight, there could be no further evidence to be relied on in concluding that D has conditional intent. Thus, *Jogee*'s proposition that finding foresight is merely evidence of conditional intent was found difficult to understand.[133] Third, it is said that intention means desiring to cause the crime or foreseeing the crime as a virtual certainty. The requirement for the prosecution to prove conditional intent towards the further offence, meaning that the defendant 'intended, that is, desired or believed as a virtual certainty, that [the further offence] should contingently occur', imposes an unjustifiably high burden on the prosecution.[134]

As to the third criticism, the HKCFA's objection must have been based on the misunderstanding that *Jogee* requires proof of intention towards the commission of the further offence, rather than the (conditional) intention to assist or encourage the principal to commit the further offence. *Jogee* has provided another example to illustrate that only the latter is required:

> [i]f D2 joins with a group which he realises is out to cause serious injury, the jury may well infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary. In that case, if D1 acts with intent to cause serious bodily injury and death results, D1 and D2 will each be guilty of murder.[135]

This approach does not place an unjustifiably high burden on the prosecution.

The first and second criticisms of the HKCFA are in essence proposing that, once foresight is proven, conditional intent would necessarily follow, and hence *Jogee*'s approach does not really alter the law on EJCE. Indeed, in most circumstances of premeditated crimes, these two concepts may overlap. For example, when A and B plan to assault C, A's foresight that B may use a knife to attack C is strong evidence that A has the intent to assist B in causing at least grievous bodily harm to C. However, the concepts of foresight and conditional intent have significant differences, as already demonstrated by the examples discussed in relation to *Crilly*, unlawful assembly and money

132 *Chan Kam Shing* (n 2 above) para 77.
133 Ibid para 78.
134 Ibid para 79.
135 *Jogee* (n 4 above) para 95.

laundering. In these examples, the defendants have foresight, but not conditional intent in relation to the further crimes.

Furthermore, as they are distinct concepts, to ask 'what level of foresight will be required for a jury to infer intention'[136] could be futile and may bring confusion to the task of ascertaining (conditional) intent. Consider that A and B plan to kidnap C. A implements the plan, foreseeing that B might kill C in the very unlikely event that the ransom is not paid. B eventually kills C as the ransom is unpaid. In this example, the very low level of foresight as to the occurrence of the killing should not affect the assessment that A has conditional intent to assist in B's killing if the ransom is, very unexpectedly, not paid. In contrast, in *Crilly*, the defendant's high level of foresight as to the occurrence of the further crime (that the victim may be seriously injured) is not particularly helpful in establishing his intent to assist or encourage the further crime. Thus, while foresight can often be used as evidence to establish intent, the two concepts can be meaningfully distinguished and are certainly not the same. Accordingly, the HKCFA's criticism that conditional intent is indistinguishable from foresight and brings confusion is misplaced.

Additionally, Simester argued that an accessory's intention to assist/encourage a further crime cannot be conditional.[137] According to Simester, once assistance/encouragement is rendered, the accessory's part is done. He suggested that, as '[the secondary party] can't intend [the principal's] action', the further crime cannot be conditionally intended by the accessory.[138] He also believed that only the principal's intention can be conditional because the future act is up to the principal, not the accessory. Simester provided an example that, when a gun is passed to the principal, 'that help is either intended or not' and such help 'cannot be conditionally intended'.[139]

It is true that an accessory may not intend the principal's action, but as discussed, the crux is whether the accessory intends to assist/encourage the principal's action. Conditional intent to assist/encourage simply means that the accessory's intention to assist/encourage the principal in committing the further (future) crime could be qualified by conditions.[140] For example, when passing a gun to the principal, an accessory may well have no intention to assist in any act of killing if no

136 Grigg (n 67 above) 134.

137 A Simester, 'Accessory liability and common unlawful purposes' (2017) 133 Law Quarterly Review 73–90.

138 Ibid.

139 Ibid 85.

140 W Wilson and D Ormerod, 'Simply harsh to fairly simple: joint enterprise reform' (2015) 1 Criminal Law Review 3–27; Wong (n 37 above); *Miller* (n 7 above) para 89.

one resists during the bank robbery. The accessory's intent to assist in murder, therefore, is conditional upon resistance being met during the robbery. Whether such conditional intent exists is assessed at the point when such assistance/encouragement is rendered. Consider another example, where A asks B to kill C only if C is found to be an undercover police officer. Here, A has no general intention to encourage B to kill C. Yet, A has a qualified intent to encourage B's killing of C, conditional upon the discovery of C's identity as an undercover police officer.[141] The fact that an accessory has no control over the principal's action or what turns out at a later point is beside the point and not detrimental to the existence of conditional intent at the point of assistance/encouragement.

WHY *JOGEE* SHOULD BE FOLLOWED BY THE HKCFA

The above discussion has established that: (i) EJCE does not better reflect defendants' culpability; (ii) abolishing EJCE will not leave a gap in the law of complicity; and (iii) the test of conditional intent is not conceptually problematic and is practically workable. The reasons given by the HKCFA for rejecting *Jogee* are therefore unconvincing. Moreover, there are additional reasons in support of *Jogee*'s approach and for abolishing EJCE.

EJCE creates an anomaly in requiring a lesser *mens rea* from the secondary party

EJCE is objectionable for creating an anomaly in allowing a secondary party to be convicted with a lesser *mens rea* as compared to the actual perpetrator.[142] Under EJCE, a secondary party can be convicted on the basis of foresight of the further crime, whereas the principal cannot be convicted unless their intention to commit the further crime can be established.[143] For example, if, in an unlawful assembly, A throws a petrol bomb and causes a police officer's death, A is only liable for murder if A has the intention to cause at least grievous bodily harm (and A could be liable for manslaughter if A lacks such intent). On the other hand, B, who participates in the unlawful assembly but opposes the use of violence against any person and does not intend to assist or encourage A's use of a petrol bomb, can be convicted of murder simply because B foresees that someone may cause grievous bodily harm with the requisite intent.

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141 G Sullivan, 'Law reform in the Supreme Court: the abolition of joint enterprise liability?' in Krebs (n 75 above).

142 M Dyson, 'Shorn-off complicity' (2016) 75 Cambridge Law Journal 196–199.

143 *Jogee* (n 4 above) para 84; *Powell and English* (n 2 above).

Consider further the case of X, who participates in another unlawful assembly and causes the death of a police officer by throwing a petrol bomb. If X does so without the intention to kill or cause grievous bodily harm (eg X intends to damage property only), X could only be convicted of manslaughter. This is so even if X foresees a risk that the use of petrol bombs may cause the death of a police officer, because recklessness is not a sufficient *mens rea* for the offence of murder. Only an intention to kill or to cause grievous bodily harm would suffice for principal's liability.[144] When comparing X's and B's respective culpability, it appears unfair that X, who intentionally throws a petrol bomb that leads to the death of a police officer, is only guilty of manslaughter, but B, who opposes the use of any petrol bomb or violence, is guilty of murder.[145] This illustrates the troubling anomaly under EJCE that a person who is clearly less culpable can be convicted of a more serious offence.

The HKCFA responded to this argument in *Chan Kam Shing*, stating that, as liability under joint enterprise 'is not derivative but arises independently by virtue of his or her participation in the joint criminal enterprise', 'there is no *a priori* reason for regarding different *mens rea* requirements considered appropriate to different individuals' participation in the joint enterprise as anomalous'.[146] Simester similarly explained that, since the *actus reus* requirement under joint enterprise liability is different, 'logic does not compel the *mens rea* requirements to be the same'.[147]

With respect, the HKCFA's response is unpersuasive, as the Court failed to provide any positive justification for the differential treatment between different participants in the same joint enterprise, which potentially leads to unfairness. As the HKCFA admitted, the allegation under EJCE is that the defendants have mutually embarked on a crime.[148] As they jointly embarked on the same criminal act, it seems incongruous that the secondary participant can be convicted on the basis of foresight when foresight is not a sufficient *mens rea* for the actual perpetrator.[149] The fact that the HKCFA treats all participants in the joint enterprise equally as principals[150] further highlights the

144 See *HKSAR v Lau Cheong* (2002) 5 HKCFAR 415.

145 See *Chan Kam Shing* (n 2 above) and *Sze Kwan Lung* (n 2 above).

146 *Chan Kam Shing* (n 2 above) para 62; see also *Lo Kin Man* (n 2 above).

147 A Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* 6th edn (Hart 2016) 248.

148 *Chan Kam Shing* (n 2 above) para 64.

149 Even though a secondary participant can be as culpable as (or even more culpable than) the principal (see *Hussain* (n 14 above) para 97), the anomaly of routinely applying a lower *mens rea* standard to those charged under EJCE, without discernment of individual culpability, remains problematic.

150 *Chan Kam Shing* (n 2 above) paras 33 and 63; *Lo Kin Man* (n 2 above) para 52.

anomaly – if every participant is a principal, it is more illogical that proof of intention is required to convict some principals (the actual perpetrators), while for other principals (secondary participants) the mere proof of foresight would suffice.

Furthermore, the differing *mens rea* standards between an accessory under traditional accessorial liability and a (secondary) participant under EJCE may leave excessive discretion in the prosecution's hands, rendering the law arbitrary. When applying traditional accessorial liability, the prosecution is required to prove the secondary party's intention to assist/encourage the offence. However, under the same set of facts and even when charging the same offence, if the prosecution decides to prosecute under EJCE, proof of foresight of the further offence is sufficient.[151] Without formally altering the standards of traditional accessorial liability (if deemed necessary) to make mere foresight a sufficient *mens rea*, the availability of EJCE essentially provides the prosecution with a backdoor by giving it a selective power to disapply the stringent *mens rea* requirement in establishing accessorial liability. Instead, the prosecution, when encountering difficulties in securing a conviction under traditional accessorial liability, can more easily obtain convictions by applying EJCE. The law post-*Jogee* is thus more principled as the backdoor of EJCE is removed and the required *mens rea* to convict the accessory is no longer significantly lower than that required to convict the principal.[152]

EJCE blurs the line between an accessory and a principal

It is a questionable approach for the HKCFA to treat all parties as principals under EJCE.[153] The HKCFA explained in *Lo Kin Man* that '[i]t is taking part in this criminal joint enterprise that makes all participants guilty as principals, whoever the actual perpetrator(s) of the *actus reus* might have been'. In stating so, the accompanying footnote pointed towards *Chan Kam Shing* at paragraphs 33 and 63. These two paragraphs of *Chan Kam Shing*, however, did not suggest that all participants in a joint enterprise should be treated as principals. In any event, this does not sit comfortably with the well-established position in common law that a principal is the person who performs the *actus reus* of the offence.[154]

In England and Wales, it is unclear whether a defendant would be considered a principal or an accessory under EJCE. There was a divergence of opinion among the justices of the UKSC in *Gnango*, based

151 Consider *Crilly* (n 52 above) in which the defendant was initially convicted under EJCE based on foresight.

152 Dyson (n 142 above).

153 See *Lo Kin Man* (n 2 above) para 52.

154 *Chan Kam Shing* (n 2 above) para 9.

on the peculiar facts of the case.[155] Notably, Lord Kerr stated that a 'clear distinction must be drawn between the concepts of joint principal liability and joint enterprise'.[156] His Lordship further explained that:

> [t]he essential ingredient for joint principal offending is a contribution to the cause of the *actus reus*. If this is absent, the fact that there is a common purpose or a joint enterprise cannot transform the offending into joint principal liability.[157]

Similarly, Wong argued that the highest courts of Hong Kong and Australia have misread the authorities in deciding that all participants in a joint enterprise should be treated as principals.[158] Specifically, in *Osland v The Queen*,[159] a case cited by the HKCFA in *Chan Kam Shing*, the High Court of Australia referred to *R v Lowery and King (No 2)*[160] in stating that 'the liability of each person present as the result of the concert is not derivative but primary. He or she is a principal in the first degree.'[161] As Wong argued:

> *Osland*'s reference to *R v Lowery and King (No.2)* is troubling and the latter may have misled the Court [in *Osland*] into thinking all [physically] present parties could be seen as principals ... This article has earlier suggested that ... the doctrine of 'acting in concert' stated in *R v Lowery and King (No.2)*, was possibly a mis-transplant of ... a historical rule [that] treats all present parties guilty of any further crimes committed by their co-perpetrators as 'principals in the second degree'.[162]

As Wong further explained, 'since the law reform in the 1960s ... "principals in the second degree" are now known as aiders and abetters under (and have been absorbed into) traditional accessorial liability'.[163] Hence, the High Court of Australia (in *Osland*) has, through misapplying *R v Lowery and King (No 2)*, inadvertently treated participants in EJCE as 'principals'. A careful reading of the authorities shows that these participants are, instead, treated historically as 'principals in the

155 See *Gnango* (n 2 above) paras 62, 71, 81 and 129. Lords Phillips, Judge and Wilson said it was unnecessary to draw the distinction. Lord Brown believed that it was suitable to classify the defendant as a principal. Lord Clarke was 'inclined to describe this as a form of principal and not secondary liability'. Lord Kerr appears to have suggested that secondary liability should be attributed if the defendant did not contribute to the *actus reus*.

156 Ibid para 127.

157 Ibid para 129.

158 Wong (n 16 above).

159 *Osland v The Queen* [1998] HCA 75.

160 *R v Lowery and King (No 2)* [1972] VicRp 63 (Supreme Court of Victoria).

161 *Osland* (n 159 above) para 72.

162 Wong (n 16 above).

163 Ibid.

second degree', who are now 'accessories'.[164] It is possible that the HKCFA was influenced by *Osland* in arriving at the same erroneous understanding.[165]

Normatively, the HKCFA's justification for treating all participants in EJCE as principals is also unpersuasive. As the UK Law Commission explained, there are sound doctrinal reasons to distinguish a principal from an accessory, namely:

> (1) an accessory is not directly indicated as an offender by the law creating the offence, and a special provision is necessary to make him guilty of it;
>
> (2) the mental element necessary to attract liability to the accessory is different from that required in the case of the principal; and
>
> (3) an accessory is not liable if he has withdrawn from participation.[166]

Given that such a principal–accessory distinction is normatively justifiable and reflects the long-standing common law approach, compelling justifications must be provided to disrupt this distinction and treat all participants in a joint enterprise as principals. Unfortunately, a convincing justification was not provided by the HKCFA in either *Chan Kam Shing* or *Lo Kin Man*.

In *Chan Kam Shing*, the HKCFA endorsed the High Court of Australia's judgment of *Clayton v The Queen*,[167] which states:

> liability as an aider and abettor is grounded in the secondary party's contribution to another's crime. By contrast, in joint enterprise cases, the wrong lies in the mutual embarkation on a crime, and the participants are liable for what they foresee as the possible results of that venture.

Consider that A encourages (counsels or procures) B, by verbal support, to commit burglary. Here, in the first place, A's culpability for encouraging burglary is grounded in A's contribution to B's crime. The HKCFA's position is that, if A also foresees that B may commit a

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164 Ibid. The Criminal Law Act 1967 abolished the distinction between 'accessory before the fact' (who assists a crime before its commission) and 'principal in the second degree' (who is physically present to assist a felony offence): Law Commission, *Codification of the Criminal Law: General Principles – Parties, Complicity and Liability for the Acts of Another* (WP 43 30 June 1972); J Smith, 'Joint enterprise and secondary liability' (1999) 50 Northern Ireland Legal Quarterly 153–162.

165 The HKCFA, in *Lo Kin Man* (n 2 above) para 52, made reference to *Chan Kam Shing* (n 2 above) paras 33 and 63. *Chan Kam Shing*, paras 33 and 63, contain no further citations. *Osland* (n 159 above) is cited in other parts of *Chan Kam Shing*'s judgment.

166 Law Commission (n 164 above).

167 *Clayton* (n 44 above) para 20, cited in *Chan Kam Shing* (n 2 above) para 36.

further crime in the course of burglary, A's culpability for the further offence now 'lies in the mutual embarkation on a crime' (ie burglary). How, by virtue of A's foresight of a possible further offence, has the nature of A's action shifted from 'contribution to another's crime' to 'mutual embarkation on a crime' is unclear. All A does is provide encouragement for the offence of burglary. As it is B who performs the *actus reus* of both burglary and the further crime, it is difficult to see why A should be treated as a principal for both crimes.

The unjustified reclassification of all parties as principals under EJCE, once again, renders the law on complicity illogical and arbitrary. If the distinction between an accessory and a principal remains part of the law, it should be sufficiently certain. Under the same set of facts, it is unacceptable that a secondary party who did not perform the *actus reus* is treated as an accessory if prosecuted under traditional accessorial liability, and yet treated as a principal when charged under EJCE. It cannot be right that such legal classification is based on the basis of prosecution, but not the factual circumstances of the case.[168]

The 'overwhelming supervening act' test is preferable to the 'fundamentally different' test

The approach of *Jogee* in abolishing the 'fundamentally different' rule (which remains applicable in Hong Kong)[169] and substituting it with the test of 'overwhelming supervening act' is also preferable. Pre-*Jogee*, the 'fundamentally different' rule provided that when A and B set out to attack someone, if B suddenly used a weapon (eg a knife) of which A had no knowledge and that the weapon was more lethal than what A had contemplated, B's act should be regarded as fundamentally different from what was foreseen by A, and A would not bear any criminal liability for B's act.[170] In *Powell and English*,[171] English did not know that his accomplice had brought a knife, and it was held that his accomplice's act of killing the victim with a knife was fundamentally different from the plan to attack the victim with wooden posts.[172] The House of Lords held that English should be acquitted of murder as he did not foresee the use of a knife as a possibility. Furthermore, English

168 Wong (n 16 above); Krebs, 'Joint criminal enterprise' (n 58 above).

169 See Hong Kong Judicial Institute, 'Specimen Directions in Jury Trials Volume 2: 2020 Revision of Selected Topics', paras 101-11–101-12, which provides the jury specimen direction concerning a 'fundamentally different act': 'if you [the jury] are not sure that when he [the defendant] joined in the attack, he realised there was a real possibility that a knife [or similarly lethal weapon] would be used, he is not guilty of murder and not guilty of manslaughter'.

170 *R v Rahman* [2009] 1 AC 129, para 68, and *Jogee* (n 4 above) para 98.

171 *Powell and English* (n 2 above).

172 Ibid.

should also be acquitted of manslaughter '[a]s the unforeseen use of the knife would take the killing outside the scope of the joint venture'.[173] In other words, the 'fundamentally different' rule, when applicable, completely exculpates the defendant from all charges arising from the accomplice's act.[174]

Jogee replaced the above with the test of 'overwhelming supervening act' and it is now much harder in England and Wales for a secondary party to be acquitted of a lesser offence. As the UKSC explained:

> If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter … The qualification to this … is that it is possible for death to be caused by some overwhelming supervening act by the perpetrator which *nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history*; in that case the defendant will bear no criminal responsibility for the death.[175] (emphasis added)

The implication of this change can be seen by considering the post-*Jogee* case of *R v Tas*.[176] Tas and two co-accused (K and D) set out to attack T, who was also accompanied by two others (B and N). After Tas punched B, the three (T, B and N) ran off. K and D chased the three while Tas drove his car near them. Eventually, either K or D stabbed N, causing N's death. Tas remained in the car during the stabbing and subsequently drove away with K and D. It was Tas's evidence that he

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173 Ibid 30D.

174 See M Dyson, 'More appealing joint enterprise' (2010) 69 Cambridge Law Journal 425–428. See also *AG Reference No 3 of 2004* [2005] EWCA Crim 1882: when A recruited B to use a gun to threaten C, if, beyond what A has foreseen, B intentionally fires the gun and kills C, A would not be guilty even of manslaughter under the 'fundamentally different' rule.

175 *Jogee* (n 4 above) paras 96–97. In *R v Grant* [2022] 2 WLR 321, para 38, the England and Wales Court of Appeal was convinced that the decision in *R v Gamble* [1989] NI 268 would have been differently decided post-*Jogee*. In *Gamble*, four members of the Ulster Volunteer Force (the defendants) intended to punish the victim (an allegedly delinquent member of the organisation) by kneecapping (ie firing a bullet into the victim's knee, to cripple but not to kill him). They fired two bullets, which was not fatal, and the victim died from having his throat cut instead. Back in 1989, it was held that two of the defendants, who had not participated in cutting the victim's throat, could rely on the 'fundamentally different' rule to be acquitted. In *Grant*, the England and Wales Court of Appeal opined that as the two defendants had intentionally assisted the infliction of grievous bodily harm against the victim by kneecapping, so long as such assistance had not been relegated to history, the unexpected use of another weapon (a knife) by another defendant did not amount to an overwhelming supervening act. As such, the England and Wales Court of Appeal opined that all four defendants would have been guilty of murder under the new test.

176 *R v Tas* [2018] EWCA Crim 2603.

did not know that his co-accused had carried a weapon to the scene. At trial, Tas was acquitted of murder but convicted of manslaughter.

Pre-*Jogee*, since K or D's use of a knife to stab N was a fundamentally different act from what was foreseen by Tas, Tas would have been acquitted of all charges related to the stabbing, including manslaughter.[177] In contrast, post-*Jogee*, Tas could still be convicted of manslaughter, notwithstanding that the use of a knife by K and D was fundamentally different from what Tas had foreseen.[178] As long as the assistance rendered by Tas was not so distant from the action of K and D that relegates Tas's assistance into history (ie K and D did not perform an overwhelming supervening act),[179] Tas would be guilty of manslaughter.[180] Hence, Tas's appeal against his manslaughter conviction was dismissed by the England and Wales Court of Appeal.

The 'fundamentally different' rule operates alongside EJCE to mitigate the harshness of the foresight test.[181] Its effect is to acquit a secondary party who foresaw that the further offence might be committed but did not foresee that the principal would use a more lethal weapon in committing that offence.[182] However, as the root cause of overcriminalisation under EJCE lies in the excessively low threshold of the foresight test, providing a complete defence simply based on the lack of foresight of the specific weapon used appears doctrinally unattractive and problematic. As Krebs argued, the 'fundamentally different' rule was 'more based on policy than logic' in limiting EJCE.[183]

Consider that A encourages (ie enters into a joint enterprise with) B to kidnap C, foreseeing that B may use a baseball bat to cause grievous bodily harm to C. A also has the conditional intention to encourage B to cause such harm if resistance is met. Unknown to A, B then brings a gun and shoots C, causing C's death. Despite not foreseeing that B would use a gun, A has indeed foreseen that B may cause (and has the conditional intent to encourage B to cause) at least grievous bodily harm to C, satisfying the *mens rea* requirement for murder. It cannot be a principled approach that, when prosecuting under EJCE, applying the 'fundamentally different' rule would make A not guilty of the crime of murder that they intentionally encouraged, simply because the

177 *Rahman* (n 170); *Powell and English* (n 2 above); *Gamble* (n 175 above); *AG Reference No 3* (n 174 above); *R v Mendez* [2011] QB 876.

178 *Jogee* (n 4 above) para 90; *Tas* (n 176 above) para 40.

179 The test laid down by *Jogee* (n 4 above) paras 97–98.

180 Ibid paras 27, 90 and 96; *Tas* (n 176 above).

181 Wilson and Ormerod (n 140 above); B Krebs, 'Overwhelming supervening acts, fundamental differences, and back again?' (2022) 86 Journal of Criminal Law 420–440.

182 *Wilson and Ormerod* (n 140 above); *Powell and English* (n 2 above); *Gamble* (n 175 above).

183 Krebs (n 181 above) 431.

weapon used was unforeseen. It is even more surprising and unfair that A could be acquitted of manslaughter under the 'fundamentally different' rule.

Further consider the scenario in *R v Tas*. Tas has intended for his group to cause some harm, falling short of grievous bodily harm, to T, B and N. While it was the unforeseen use of a knife by K or D that caused N's death, Tas could properly be regarded as morally culpable to the extent that he intentionally assisted in the unlawful and dangerous act of assaulting T, B, and N, which escalated and caused N's death. It appears fair for Tas to be liable for unlawful and dangerous act manslaughter, for Tas has taken a more than *de minimis* role in the attack which led to N's death.[184] The approach of excluding all criminal liability under the 'fundamentally different' rule appears unduly lenient and fails to proportionately attribute criminal liability.[185]

The new test of 'overwhelming supervening act' ensures that an accessory will not be convicted when their contribution to the ultimate offence can be regarded as overly remote. For example, in Tas, the England and Wales Court of Appeal referred to *R v Rafferty*,[186] where the appellant took part in beating the victim, but then left the scene to use the victim's debit card to obtain money. In the absence of the appellant, the other co-adventurers drowned the victim to death. In *Tas*, the England and Wales Court of Appeal suggested that in *Rafferty*, the act of drowning by the co-adventurers would amount to an overwhelming supervening act as it was so distanced in time, place or circumstances from the conduct of the appellant. It would therefore be proper for the appellant to be acquitted of both murder and manslaughter.

The new test also allows for the proportionate attribution of criminal liability to those who assumed an accessorial role in supporting a lesser offence, which ultimately led to the commission of a further offence (as their support has not been relegated to history),[187] by convicting the accessory of the lesser offence which they intentionally assisted

184 As explained in B Krebs, 'Joint enterprise murder is dead – long live joint enterprise manslaughter?' in Krebs (n 75 above) 118: 'under the principle of constructive liability governing [manslaughter by unlawful and dangerous act], a party is liable to conviction even though "his fault [in (co-)committing the base crime] does not extend to the causing of death or to the causing of serious injury which he did not foresee and in some cases could not reasonably have foreseen". What matters is that he was directly engaged in perpetrating a base crime which, albeit not most immediately at his own hands, led to someone else's death.'

185 For application of the rule, see *Powell and English* (n 2 above) and *AG Reference No 3* (n 174 above).

186 *R v Rafferty* [2007] EWCA Crim 1846.

187 Otherwise, it would constitute an overwhelming supervening act as per *Jogee* (n 4 above).

or encouraged.[188] It is indeed preferable that an accessory should only be acquitted of all charges when the commission of the further crime represents a radical departure from the lesser crime which the accessory intended to assist/encourage, as only then can the accessory's contribution towards the further crime be regarded as negligible.

The relaxation of the 'knowledge of essential facts' requirement is justifiable

Jogee's test of conditional intent subtly stretched the scope of accessorial liability, as it no longer strictly requires an accessory to have knowledge of essential facts constituting the further crime for a conviction.[189] Pre-*Jogee*, mere suspicion or broad knowledge of some unspecified criminal intention was insufficient for traditional accessorial liability, and there had to be at least knowledge of the principal's intention to commit a specific type of offence.[190] This position is effectively relaxed post-*Jogee*. Suppose A sells tools for B to commit burglary, foreseeing that there is a small chance (eg 10% chance) that B may commit a further offence (or a range of possible further offences) after entering the premises. Foresight that B may have a very small chance of committing a further crime only amounts to speculation or suspicion, and is far from knowledge of essential facts about the further crime. However, under *Jogee*, assuming B eventually commits a further crime, A can be convicted as an accessory to that crime if he had the conditional intent to assist B in its commission. As *Jogee* stated:

> [a]s a matter of law, it is enough that D2 intended to assist D1 to act with the requisite intent. That may well be the situation if the assistance or encouragement is rendered some time before the crime is committed and at a time *when it is not clear what D1 may or may not decide to do*. Another example might be where D2 supplies a weapon to D1 … intending to help D1 by giving him the means to commit a crime (or one of a range of crimes), but *having no further interest in what he does, or indeed whether he uses it at all*.[191] (emphasis added)

In other words, knowledge of essential facts regarding the further crime is no longer strictly required; having conditional intent towards a

188 Ibid para 90: 'if D2 encourages D1 to take another's bicycle without permission of the owner and return it after use, but D1 takes it and keeps it, D1 will be guilty of theft but D2 of the lesser offence of unauthorised taking, since he will not have encouraged D1 to act with intent permanently to deprive'. In Grigg (n 67 above) 133, it was opined that this approach 'strikes an effective balance between instinctive notions of fairness and an exacting approach to derivative liability'.

189 Despite *Jogee*'s (n 4 above) explicit endorsement of *Maxwell* (n 21 above).

190 *R v Bainbridge* [1960] 1 QB 219; *Maxwell* (n 21 above); Horder (n 58 above) 445.

191 *Jogee* (n 4 above) para 90.

suspected further crime would suffice. As suggested by David Ormerod and Karl Laird:

> [i]f the requirement is one of knowledge, strictly speaking, then foresight cannot assist; D cannot know the future no matter what he foresees … Analysed properly, therefore, the requirement is, we suggest, for 'intention', and foresight can therefore have a role to play.[192]

Despite the relaxation, mere foresight or suspicion is not a sufficient *mens rea* and the requirement to prove (conditional) intent to assist or encourage remains. The *mens rea* of conditional intent serves a mediating role to narrow the scope of criminalisation and protects citizens from being held responsible for a wrong performed by another autonomous moral agent where they did not intend to assist/encourage.[193] As a result, the relaxation does not excessively infringe on citizens' liberty and ensures that only those who are sufficiently culpable will be found guilty. It is a pragmatic and necessary solution following the abolition of EJCE to ensure that the restated law in *Jogee* is principled and workable in dealing with foreseeable (but not certain) future crimes.

Admittedly, the test of conditional intent may create some uncertainties as compared to basing convictions on secondary parties' foresight of the further offence. Occasionally, in the absence of additional evidence, whether foresight of a crime is itself sufficient evidence of conditional intent poses difficulties for the court.[194] The inference of conditional intent could, at times, be seen as a speculative exercise.[195] Yet, rather than viewing such uncertainties as more problematic, *Jogee*'s approach can be seen as an improvement in moving away from the rigid foresight test under EJCE, which inevitably leads to a conviction once the defendant is found to have foresight of the further offence. *Jogee*'s approach makes a 'moral elbow-room' available for the court,[196] allowing it to determine whether the label of the further crime (eg murder) can be fairly attributed to the defendant,[197] or whether attaching such a label is too logically distant and would result in overcriminalisation.[198] *Jogee* thus reduced the law's unnecessary rigidity and brought the law closer to justice.

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192 D Ormerod and K Laird, '*Jogee*: not the end of a legal saga but the start of one?' (2016) 8 Criminal Law Review 539–552, 544.

193 See Simester (n 48 above).

194 See Wong (n 37 above); Ormerod and Laird (n 192 above); Sullivan (n 141 above).

195 Wong (n 37 above).

196 J Horder, 'Intention in the criminal law: a rejoinder' (1995) 58 Modern Law Review 678–691.

197 Ibid.

198 C Cowley, 'Jogee, parasitic accessory liability and conditional intention' in Krebs (n 75 above); Krebs (n 58 above).

CONCLUSION

In 2016, the highest courts of England and Wales and Hong Kong took divergent approaches to the continued application of EJCE. In *Jogee*, the UKSC held that EJCE was no longer part of the law of England and Wales and that secondary liability can only be established by resorting to traditional accessorial liability. In contrast, the HKCFA decided in *Chan Kam Shing* that EJCE continues to be good law in Hong Kong and should operate alongside traditional accessorial liability. This article has examined whether the HKCFA was correct in rejecting *Jogee*'s approach and retaining EJCE. It has found the reasoning given by the HKCFA unconvincing.

To sum up, EJCE does not better reflect the culpability of secondary parties. As the discussed examples such as *Crilly*[199] have shown, even when a person has foreseen that a further offence may be committed and yet continues to participate in the original joint enterprise, the person may not be sufficiently culpable to justify convicting them of the further offence. Persons convicted under EJCE may not have (i) an intention to assist or encourage the further offence, (ii) given tacit authorisation for the commission of the further offence, or (iii) assumed the risk of the further offence. It is also difficult to see how, in such cases, an offender's normative position has shifted to such a degree that they can be liable for any further crimes they have foreseen.

The fear that the abolition of EJCE would leave a huge gap in the law of complicity is unfounded. It has long been the law that if the *actus reus* of the offence has been performed, an accessory can be convicted of the offence even when the principal is unidentified or has been acquitted. Even when it is unclear whether the defendant was a principal or an accessory, a conviction will not be precluded. Furthermore, an accessory can be convicted of a more serious or less serious offence than that of which the principal has been convicted. There is therefore no residual value for the excessively wide principle of EJCE to remain in common law.

This article has also shown that the test of conditional intent is not conceptually problematic and is unlikely to deprive the law of flexibility in dealing with cases. Indeed, given that foresight is usually strong evidence of conditional intention to assist/encourage the commission of the further crime, it is unlikely that the outcome of most cases would be different whether the test of conditional intent under *Jogee* or the foresight test under EJCE is applied.[200] Practically, it will generally only make a difference when (i) the alleged accessory disagreed with

199 *Crilly* (n 52 above).

200 See *R v Johnson (Lewis)* [2016] EWCA Crim 1613; *R v Anwar* (n 80 above).

(or sometimes when they were indifferent to)[201] the commission of the foreseen further crime; and further that (ii) the alleged accessory did not perform any act to specifically assist or encourage the commission of the further crime.[202]

There are also additional reasons to abolish EJCE. Abolishing EJCE would remove the anomaly and unfairness of holding a secondary party liable based on the lesser *mens rea* of foresight, when the principal offender could only be convicted if they intentionally committed the crime. It would also eliminate the unjustified re-classification of 'accessories' as 'principals' under EJCE. Abolishing EJCE and applying traditional accessorial liability (as restated in *Jogee*) to determine the liability of a secondary party would bring a more principled approach to the criminal law. Furthermore, by substituting the 'fundamentally different' rule with the test of 'overwhelming supervening act', as well as relaxing the 'knowledge of essential facts' requirement, *Jogee*'s approach has successfully balanced fairness and practicality in framing the scope of secondary liability.

In England and Wales, police officers' reliance on gang narratives and conceptions of risk has turned joint enterprise into what Tara Young and colleagues described as a 'dragnet', pulling peripheral participants in multi-handed violence into the net of criminalisation.[203] Against that background, *Jogee*'s insistence on individualised assessment of secondary liability is not only a doctrinal refinement but also a reminder of the need to resist structural pressures in policing and prosecution, which tend to collectivise responsibility and exacerbate existing social inequalities.[204] Unfortunately, while *Jogee*'s approach could avoid unjust convictions in cases such as *Crilly*, it does not fully resolve the 'dragnet' phenomenon.

In fact, *Chan Kam Shing* is arguably a case where a peripheral participant in multi-handed violence has been criminalised for murder. The facts were that the defendant and fellow triad members were instructed to attack a rival gang and armed themselves with knives and water pipes. When the defendant arrived at the crime scene, the deceased had already been severely injured and was lying on the ground.

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201 Note that eg a seller of weapons, being indifferent as to whether a further crime would be committed but intending to assist in whatever crime that the principal is going to commit, could still be convicted: *Jogee* (n 4 above) para 90.

202 Mere disagreement may not be sufficient to avail an accessory under *Jogee* (n 4 above). For example, if A disagrees with the plan for B to shoot anyone who resists during a bank robbery, but still passes B the gun, A could still be found to have the conditional intent to assist B in the crime of murder.

203 T Young, S Hulley and G Pritchard, 'A "good job" in difficult conditions: detectives' reflections, decisions and discriminations in the context of "joint enterprise"' (2020) 24 Theoretical Criminology 461–481.

204 Ibid.

The defendant then left together with his fellow triad members. Even applying *Jogee*'s approach, it is still likely that the defendant would remain liable for murder, for, in the HKCFA's view, the defendant:

> also acted as an accessory, encouraging the other members of the gang, including the eventual perpetrators, to commit the intended offence, giving them 'the comfort and spur of knowing that [they were] not on [their] own, but had the support of the [defendant] and the reasonable expectation that [he and other members of the gang] would come to his aid if he needed it'.[205]

Whether the defendant's role in *Chan Kam Shing* can be seen as peripheral, and whether, in such situations of multi-handed violence, affixing the label of a murderer to one who had not taken part in the actual use of violence can be justified, is certainly debatable. After all, the very notion of 'intention to assist/encourage the principal in committing an offence' is itself a tricky concept: it requires more than mere intentional engagement in conduct that objectively facilitates the offence, yet less than intending the offence, as committed by the principal, as one's own objective. The difficult cases, including apparently peripheral participation in group violence, tend to arise in this indeterminate space.

At the time of writing, the UK Parliament is considering a private members' Bill, entitled the Joint Enterprise (Significant Contribution) Bill, which proposes to amend the law on traditional accessorial liability so that 'only a person who directly commits, or who makes a significant contribution to the commission of, an offence may be held criminally liable'.[206] While the proposal appears doctrinally appealing, it may be fundamentally challenging or even arbitrary to draw a line on what conduct amounts to a 'significant' contribution, which poses further difficulties in ensuring the fair and consistent application of the law. Regardless, in line with *Jogee*'s spirit in ensuring 'fair labelling of criminal responsibility by matching the conviction offence to the magnitude of law-breaking',[207] whether a 'peripheral' accessory who contributes minimally to the ultimate offence should remain fully liable for that offence, or whether they should be convicted of a lesser offence, or at all, merits further academic discussion.

Overall, there are strong reasons for the HKCFA to abolish EJCE and to adopt *Jogee*'s approach. It is hoped that the HKCFA will reconsider the continued application of EJCE at the next available opportunity. In this regard, the words of Gageler J, who delivered a dissenting

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205 *Chan Kam Shing* (n 2 above) para 100, citing *R v Stringer* [2012] QB 160, para 55.

206 The Preamble of the Joint Enterprise (Significant Contribution) Bill.

207 Wong (n 37 above) 231.

judgment in *Miller v The Queen*[208] in support of the abolition of EJCE, may be worth noting:

> Where personal liberty is at stake, no less than where constitutional issues are in play, I have no doubt that it is better that this Court be 'ultimately right' than that it be 'persistently wrong'.[209]

208 *Miller* (n 7 above).
209 Ibid para 128.