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Revisiting The Cliche of Community Service Order in Hong Kong: Non-Custodial Sentence in The Turmoil

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ABSTRACT: *Community service order ("CSO") has been introduced to Hong Kong for over 30 years. It has become one of the popular non-custodial sentences often imposed by the courts. Hong Kong judges almost always refer to the R v Brown case in considering granting CSO, and often the presence of remorse is a crucial factor. Recent cases in relation to the 2019 Hong Kong Protest however demonstrate the courts' reluctance in granting CSO. This article argues that the straitjacket application of the system and the law of CSO in Hong Kong has derailed from the original intention of the introduction of this sentencing option. The application of the letter but not the spirit of the law calls for reflection and reform of the practice of CSO in this jurisdiction.*

KEYWORDS: Hong Kong, community service order, sentence, China, non-custodial, sentencing

INTRODUCTION

Imagine this situation: you are charged with conspiracy to defraud. During trial, you duly exercised your right to defence with your legal representatives. At the end, the judge convicted you but indicated that he is minded to pass a non-custodial sentence, i.e. a Community Service Order ("**CSO**"). You are remanded pending the hearing for sentence while, at the same time, you will be interviewed for a community service report. Your counsel then informed you that the judge's reasoning is full of loopholes and the chance of a successful appeal is high. However, he also advised you to show remorse during the interview in order to get the CSO. At this premise, two questions arose: (1) How can you suddenly become remorseful for the offence after defending vigorously? (2) Will the signs of remorse constitute any form of detriment to the prospect of your

potential appeal? Perhaps these all boil down to an elephant in the room - is the CSO system in Hong Kong functioning properly?

This article critically examines the current practice of the granting of the CSO by the courts in Hong Kong, with a touch over the socio-political turmoil the city has been facing lately. The thrust of this article consists of three parts. In the first part, we will give a brief summary of the background of the CSO. The history, the purposes of CSO being an alternative to imprisonment, and the introduction of the CSO into Hong Kong will be outlined. In the second part, we will discuss the application of the CSO in Hong Kong. Based on recent judgments, we will respectfully argue that the CSO has been misapplied by Hong Kong courts, which mistook the CSO as a more lenient sentencing option than imprisonment, from three perspectives, namely: (1) the Hong Kong courts have been dogmatically applying the six factors in the *R v Brown* case, (2) remorse is wrongfully made a precondition for the granting of the CSO, and (3) the current practice of CSO is prejudicial to the offender's right of appeal against conviction. Eventually, in the third part, we will propose directions to reform the application of CSO in Hong Kong.

BACKGROUND

Brief History of CSO

The origin of CSO has been a topic of academic debate. Some schools of thought argue that the CSO is not a new form of sanction that only emerged in recent years. For instance, the European Committee on Crime Problems suggested that the concept of community service "*could be traced a long way back into penal history in various jurisdictions*".[1] Scholars in this circle believe that slavery, transportation, penal servitude and houses of correction can all be categorised as community services' "*less reputable forebears*".[2] In particular, it is noted that the CSO has a close link of impressment and the service of public works became a substitute for short terms of imprisonment when impressment and transportation fell into desuetude.[3] Peace suggested that the CSO has a strong linkage with the notion that "effort expiates evil", with an origin traced as earlier as in 1547 the slavery statue with the rationale that "Devil made work for idle hands to do" by providing vagrants who refused to work to be enslaved by their former masters for two years.[4] If no master could be found, these vagrants could be enslaved by the borough and employed on public works such as road building.[5] In the 16th century, institution such as the Bridewell Palace in London were set up throughout the country for the vagrant and petty criminals as houses of correction.[6] Their aims were to reform the inmates by means of compulsory labour and discipline, to discourage vagrancy and idleness, and to ensure inmates' own self-sufficiency by means of

[1] European Committee on Crime Problems, "Alternative Penal Measures to Imprisonment", (1976).
[2] Ken Pease, "A brief history of community service", *Community Service by Order* (1980).
[3] Ken Pease, "Community Service Orders", (1985) 6 *Crime and Justice* 51, 56-57.
[4] *Ibid*.
[5] *Ibid*.
[6] *Ibid*.

labour.[7] The CSO can therefore be said to come from a serious ancestral background of the aforementioned forms of discouraging "Devil made work for idle hands to do" situation.

Furthermore, as mentioned, the CSO finds its ancestral root as a serious penalty from the form of impressment. While impressment serves as supplying the forces to safeguard Britain from external threats, it also serves as a "weapon against those thought to threaten security at home".[8] Queen Elizabeth appointed a Commission of 1602 for the arrangement of offenders (except those convicted of wilful murder, rape and burglary) to be exempt from execution and impressed to the navy as penalty.[9] Pease posited that such 17th century sentiment was reflected in the recommendation made by the British Advisory Council on the Penal System ("**the Council**") in the 1970s. The Council opined that the CSO to be a more constructive and cheaper alternative to short sentences of imprisonment, and could be seen as a new dimension in the penal system as an emphasis on reparation to the community while at the same time giving effect to the old thought that the punishment should fit the crime.[10] With the above rationale in mind, it is also suggested that transportation is another ancestor of the CSO, in which offenders were sent to British colonies overseas to provide the Empire with free labour.[11] The CSO, hence, can be traced as having a severe deterrence effect with the state wishing to "utilise" the offenders' labour to serve the public good. This kind of intuitive appeal of unpaid work by offenders was combined with the need for alternatives to custody derived from the issue of prisonovercrosing and the costs of building new prisons in the 1970s to hasten the development of the CSO in the 20th century.[12]

On the other hand, other schools of thought advocate that the contemporary mechanism of the CSO consists of something more than the simple marshalling of work-based penal dispositions.[13] Factors including the growth of voluntary and participatory programmes in the 1950s and 1960s, desire to combat the *anomie* associated with advanced industrial capitalism, and the perception of leisure as a right of each individual as a separate and distinct component of daily routine contribute in the introduction of the modern CSO system.[14] Therefore, instead of viewing from the standpoint that the CSO is an option evolved from the ancient notion of contract between individual and society that requires redress for harm and to provide the society with free labour, it is said that CSO is structured by commitment and value choices which is distinct from earlier periods in history.[15] In other words, these schools of thought believe the CSO is a brand new sentencing

[7] *Ibid*.
[8] *Ibid*.
[9] *Ibid*.
[10] *Ibid*.
[11] *Ibid*.
[12] *Ibid*., at 59.
[13] Shane Kilcommins, "The Introduction of Community Service Orders: Mapping its 'Conditions of Possibility" (2014), *The Howard Journal of Criminal Justice* Vol 53 No 5, 490.
[14] *Ibid*., 504.
[15] Shane Kilcommins, 'Impressment and its genealogical claims in respect of community service orders in England and Wales' (1999) *Irish Jurist* 34, 223–255.

option unrelated to ancient history. It arose from the contemporary notion that rehabilitation of offenders requires human beings to establish a form of connection and belonging to the society, which the CSO option can redress the missing link between the offender and the community.

Notwithstanding its controversial origin, it is important to bear in mind that CSO did not come in vain. The birth of the CSO comes from a colourful background and is evolved from both historical and social background of human society. Whether it evolved from ancient history of impressment or modern societal reform on new value choices, it is worthy to explore the true original nature of CSO as a serious sentencing option and alternative form to imprisonment. It is also suggested there has been a lack of conceptual clarity of the CSO of whether it was a tough punishment, an alternative to custody, employment therapy, reparation, or rehabilitation.[16] The CSO can nevertheless be regarded as a penal jack-of-all trades and combine all different objectives.[17] In other words, the notion that the origin of the CSO being an alternative to custody and tough punishment has never been ruled out, even if one advocates for a greater role of rehabilitation of the CSO or non-equivalent effect of deterrence when it is compared to imprisonment.

On the public policy side of allocation of resources, in the 1970s the United Kingdom faced the problem of overcrowded inmate population in prisons.[18] With this public administration policy concern in mind, the CSO was introduced in England and Wales as an alternative to a custodial sentence in cases where the public interest is not an overriding consideration demanding that the offender should be imprisoned.[19] The CSO is regarded as demonstrating the offender that society is involved in his delinquency and to show society that an offender can contribute to the public good when properly supervised.[20]

As will be discussed in section 2.2 below, the British CSO system has been introduced to Hong Kong as a former British colony. Indeed, other former British colonies shared similar historical context as introducing the CSO as an alternative to imprisonment; some even based on policy administration purposes. For instance, when the Zimbabwe Ministry of Justice, Legal and Parliamentary Affairs explored alternatives to prison which could be less costly, the CSO was introduced to be an appropriate measure to suspend or postpone the passing of sentence on condition that offenders carried out unpaid work for the community.[21] In fact, the colonies do not always follow the same legal principle from Britain, which as we shall discuss later in this paper

[16] T. Wing Lo and Robert J. Harris, 'Community Service Orders in Hong Kong, England, and Wales: twins or Cousins' (2002) 48(3) *International Journal of Offender Therapy and Comparative Criminology* 373-388, 375.
[17] *Ibid.*
[18] W H Pearce, 'Alternative to Prison: Development of Community-Based Treatment Programmes for Offenders (in England and Wales)' (1973) 41(4) *Medico-Legal Journal* 142, 142.
[19] *Ibid.*, 146.
[20] *Ibid.*, 146.
[21] Vivien Stern, "Alternative to Prison in Developing Countries Some Lessons from Africa" (1999) 1(2) *Punishment and Society* 231-241, 232-233.

the inconsistency of Hong Kong with that of England whereas the former disregard the nature of the CSO.

In other jurisdictions such as the US it is also said community service is often categorised as symbolically retributive that the offenders is required to render services related to his/her offence.[22] The CSO therefore can be deemed to incorporate the maxim of "eye for an eye".

At this point it shall be stated that over the years Hong Kong put more emphasis on the rehabilitation and reintegration of the CSO while England and Wales located the CSO on the more retributive end with little to do with restorative justice but punishment of body.[23] With this difference in mind we shall explore how the CSO was introduced to Hong Kong and the reasons of the Hong Kong derailing from English jurisprudence.

Purposes of CSO as an Alternative to Imprisonment

Being a former British colony, it appears essential for us to visit the idea and intention of introducing modern CSO in England and Wales in first place before the discussion of CSO in Hong Kong. In fact, the origin of CSO can be traced back to the Report on Non-custodial and Semi-custodial Penalties by the Advisory Council on the Penal System in 1970. The system of CSO became operative officially in England and Wales upon the enactment of the Criminal Justice Act in 1972.

In contrast to the restrictive nature of imprisonment, the CSO regime offers constructive unpaid work in a participative environment which is believed to be able to provide a means of altering the outlook of offenders.[24] It was also envisaged that the work of the offenders would be carried out in association with volunteers, as the performance of such service by groups consisting entirely of offenders "*would be likely to give the whole scheme too strong a punitive flavour, and would cut off offenders both from the more constructive and imaginative activities, and from the wholesome influence of those who choose voluntarily to engage in these tasks*".[25]

It was envisaged that the CSO regime would embody the maxim of "working with the community" as opposed to "work for the community".[26] The intention was that by associating the offender with the members of the public, the salutary experience that they were sentenced to perform would

[22] Lawrence Travis III and Bradley D. Edwards. *Introduction to Criminal Justice* (Taylor & Francis Group, 2011) 389. See also discussion of California jurisdiction in section 5.1 below.
[23] Lo and Harris, above n. 16, 385
[24] Home Office, "Non-custodial and Semi-custodial Penalties: Report of the Advisory Council on the Penal System" (1970).
[25] *Ibid.*
[26] Sue Winifield, "What has the Probation Service done to Community Service" (1977) *Probation Journal* Vol 24 No 4 (1977), 128.

encourage them to foster a sense of social responsibility.[27] At the end of the day, the work relationships with volunteers, supervisors, and those in need of assistance could be cultivated in an *esprit de corps*, in the sense of restorative justice where it would enable the offender to make reparation to the community and enhance his/her self-esteem.[28]

The CSO can be viewed as a product of response to the judicial dilemma in sentencing by providing judges to have an extra non-custodial option.[29] Over the course of development since its introduction, the CSO option enables judges to exercise their discretion in deciding the appropriate cases for this sentencing option. For instance as we shall see in the case of R v Brown[30]in Section 4(a) below, the English court is provided with great leeway to formulate the appropriate legal principles of imposing the CSO which at the same time generates future long-lasting debates in the common law system. The English court has at least as early in the 1980s developed a practice of taking into account all the circumstances of a case instead of focusing on a straight jacket approach in imposing a CSO. In *R v Paul McDermot*, a 18-year-old young offender was convicted of a count of unlawful wounding using a piece of wood.[31] Although the Court of Appeal recognised the nature of the offence was serious, the Court nevertheless imposed a CSO indicating it is appropriate in that case the CSO to be an alternative to a custodial sentence. The learned judge in particular placed emphasis on the fact that the defendant surrendered himself to the police and he was also serving an apprenticeship which was still open to him.[32] It shall be emphasised that the English Court of Appeal has yet imposed any straight guideline on the CSO which we submitted to be the practice of Hong Kong magistrates recently. Case such as *Brown* and *Paul McDermot* demonstrated factors such as employment, clear criminal record, stable home background etc. have been developed in a piecemeal approach to serve justice of individual cases.

Occasionally the offence may call for a custody sentence but the judge may yet feel uneasy about committing the offender to custody for other reasons.[33] In other words, CSO apparently can be treated either as an alternative to custodial sentences, or as some may suggest to be a middle-ground sanction between incarceration and probation.[34] In practice, some actual case precedents the court seems reluctant to rule out the possibility that CSO can be treated as an effective alternative imprisonment. A Hong Kong example of CSO being treated by the judiciary as an alternative imprisonment can be found *HKSAR v Choy Yau Pun,* counsel for the appellant submitted CSO to be an equivalent to imprisonment or at least a very real and effective alternative

[27] Shane Kilcommis, "Cultural determinants and penal practices: an analysis of the introduction of community service orders" (2000) *Mountbatten Journal of Legal Studies Vol 4 (1&2)*, 20-54.
[28] *Ibid*.
[29] Allen, G. Frederick, and Harvey Treger. "Community Service Orders in Federal Probation: Perceptions of Probationers and Host Agencies." (1990) Federal Probation 54 (3), 8.
[30] (1981) 3 Cr App R (S) 294.
[31] [1985] Crim. L.R. 245.
[32] *Ibid.*, at 379.
[33] Frederick and Treger, above n. 29.
[34] *Ibid*.

to imprisonment and is not to be regarded in any way as a soft option or as a let off.[35] As a response the learned judge said the followings in which we argue that she impliedly suggested that under certain circumstances CSO can be regarded as an alternative to custodial sentence for certain offences:

> *"I am prepared to accept that community service is not a soft option or let-off. But there is a very real difference between community service and any form of custodial sentence. As to community service being an alternative to a custodial sentence, there are cases where it is more appropriate than a custodial sentence. But even where the circumstances of the offender make him a viable candidate for a community service order, there must be most unusual circumstances before such an order or any other form of non-custodial sentence can be regarded as an appropriate **alternative** to a custodial sentence for an offence against s 161 [of the Crime Ordinance (Cap 200)] …"*[36] (emphasis added)

At this juncture, we shall seize the chance to reiterate that the purpose of CSO being an alternative to custodial sentence shall not be forgotten.

Introducing CSO from the UK to Hong Kong

At this juncture, it is high time to visit how and why CSO was introduced to the then colonial Hong Kong. The crucial document to be discussed is the Law Reform Commission of Hong Kong's Report on Community Service Orders published in 1983 ("**the Report**").[37] The Law Reform Commission of Hong Kong ("**the Commission**") was established under the guidance of the then Governor of Hong Kong Sir Murray MacLehose and the Report was the first of the several reports of its kind published by the Commission. The recommendations proposed in the Report were implemented in full by effect of the enactment of the Community Service Order Ordinance (Cap 378) ("**CSOO**") in 1984 to become part of the law of Hong Kong (further discussion in Section 3(a) below).[38]

While it is impractical to refer to the Report in full in this article, there are certain crucial features in it which shall be highlighted. First of all, the Report has made clear that the nature of the CSO is both punishment *and* rehabilitation.[39] It has never been the intention of the Commission to introduce the CSO as a form of rehabilitation sentencing option alone without regarding the punitive nature of it. Second, the CSO is expressly stated suitable to offences neither very serious nor very minor and, in particular, to offences which involve elements of anti-social behaviour such

[35] [2002] 4 HKC 309, §9.
[36] *Ibid*. (emphasis added).
[37] See full Report available at: https://www.hkreform.gov.hk/en/publications/rcommunity.htm.
[38] "Implementation", *The Law Reform Commission of Hong Kong*, Last revision date: 12 November 2020, visited 5 December 2020, available at https://www.hkreform.gov.hk/en/implementation/index.htm#f1.
[39] Law Reform Commission of Hong Kong, *Report: Community Service Orders* (1983), p 2. (emphasis added)

as criminal damage and less serious assaults.[40] Third, while the Commission indicated that the CSO should not be used as an alternative to imprisonment simply for the purpose to reduce prison population, instead it should be regarded as an additional sentence in the range available to the judiciary.[41] Fourth, the Commission stressed that the CSO should be available for offences for which the offender is liable to punishment by imprisonment.[42] Fifth, the Commission suggested the intended legislation introducing the CSO to Hong Kong should be left silent on the degree of gravity of criminal conduct which warrants a CSO.[43] Lastly, the Commission suggested that the courts should by way of precedent indicate the types of offences and offenders which they found suitably subject to the CSO.[44]

It is noteworthy that the Report did not discuss or put down any threshold or requirement for the determination of the suitability for a person to be made subject to CSO. In other words, the principles which were discussed by the court in *R v Brown*[45] and other related cases were not the requirements settled by the Commission. The principles of *R v Brown* will be discussed in Section 4(a).

Application of CSO in HK

Legal principles for the granting of CSO

As mentioned above, Hong Kong courts' power to make CSO is governed by the CSOO enacted in 1984. In summary, the CSOO empowers a sentencing court to make an order which requires a convicted person of 14 years old or above to perform unpaid work for a specified period not exceeding 240 hours.[46] The CSO can be made either in addition to or in lieu of the other sentence imposed,[47] and can only be made with the consent of the convicted person after considering a report from a probation officer.[48] It shall be noted that the Court of Appeal has once commented that *"it is plain from section 4 of the CSOO … that a community service order is an alternative to a custodial sentence*."[49] By no means, therefore, the legislation intended the CSO to be a sentencing option more lenient than that of imprisonment. However, as we shall see in Section 3(b)

[40] *Ibid*., 3.
[41] *Ibid*., 22. But also see the comment made by Nazareth VP in *HKSAR v Chow Chak Man* [1999] 2 HKC at 663C which is discussed in Section 3(c), indicating community service order is an alternative to a custodial sentence indeed.
[42] *Ibid*., 22, 27.
[43] *Ibid*., 22.
[44] *Ibid.*
[45] (1981) 3 Cr App R (S) 294.
[46] Section 4(1).
[47] Section 4(2).
[48] Sedition 4(3).
[49] *HKSAR v Chow Chak Man* [1999] 2 HKC 659, 663C.

below, it is doubtful as to whether in practice the courts have borne in mind the aforementioned legislative intention.

Further, the line of modern case law in relation to the granting of CSO in Hong Kong can be said to have originated from the English case *R v Brown*.[50] In that case, the English Court of Appeal took into account a basket of six factors in considering whether to grant a CSO upon a defendant convicted of the offence of burglary, namely: (1) whether the defendant is a first-time offender, (2) whether the defendant comes from a stable home background, (3) whether the defendant has a clear work record, (4) whether the defendant is in employment or has a realistic prospect of employment, (5) whether there is apparently genuine remorse, and (6) whether the risk of re-offending is slight.[51] In Sections 3(b) and 4(a) below we shall critically examine how the courts in Hong Kong adhere to the factors laid down in *Brown*.

Recent application of CSO in Hong Kong (since 2019)

The socio-political unrest in 2019 marked an unprecedented page in Hong Kong history. With hundreds of protesters arrested, many of them are facing various charges and some have even been convicted and sentenced accordingly. In fact, the difficulties in analysing the reasons for sentencing are that many of these cases are on magistracy level which come with no reported judgement unless the magistrate's decision is appealed. However, as shown hereinafter there is a trend that the courts are quite reluctant to grant the CSO.

At the time of writing this article, one of the most recent judgments is a magistracy appeal case, *Secretary of Justice v Chung Ka Ho*.[52] In *Chung Ka Ho*, the learned judge reviewed a sentence of CSO for 160 hours passed by the magistrate and quashed the CSO by substituting with an order for three months imprisonment. *Chung Ka Ho* concerns an unlawful assembly occurred on 31 October 2019 in the middle of the anti-extradition bill unrest. The defendant pleaded guilty to the charge of unlawful assembly. However, in the review of sentence requested by the Secretary of Justice, the Court of Appeal ruled that the magistrate has erred in principle in undermining the seriousness of the case. The learned judge criticised the magistrate for not having a complete grasp as to the particulars of the charge, the harm to public interest of unlawful assembly, the risk of violence arising from the facts in question etc.[53] Further, the Court also rejected the argument by defence counsel that CSO is already the appropriate sentence, as the Court found that the defence counsel has only formed her opinion based on the watered down criminality of unlawful assembly and the defendant himself.[54]

[50] (1981) 3 Cr App R (S) 294.
[51] *Ibid.*, 294.
[52] Unreported, CAAR 4/2020, [2020] HKCA 990, 3 December 2020 (Chinese judgment).
[53] *Ibid.*, §76.
[54] *Ibid.*, §74.

More importantly, the Court of Appeal posited that the magistrate after erred in principle, had granted an over lenient sentence, i.e. CSO, and that imprisonment is the only appropriate sentencing option.[55] The reasoning of the Court of Appeal (and so do other learned magistrates) apparently premised on the fact that CSO is a more lenient sentencing option than imprisonment. However, as we have illustrated earlier in this article, the historical background of the CSO (either from medieval time or in the modern time) never suggested that the CSO was meant to be a lenient sentence. In fact, it is an option equivalent (if not, at least akin) to imprisonment.

The cases streamed from the anti-extradition bill movement have been contributing to the jurisprudence of the application of CSO in Hong Kong. We shall discuss some of the recent cases whereas the learned judges/magistrates granted or did not grant CSO in order to provide with the readers a practical taste of the application of the CSO in Hong Kong. Most of these cases are on magistracy level whereas some appealed to the Court of First Instance.

HKSAR v Chu Ka Yin is a pre-2019 social protest case in which the defendants are charged with assaulting police officers in execution of duty and/or obstructing police officers in due execution of duty.[56] The Court of First Instance allows the appeal against sentence by substituting a custodial sentence with a CSO report. It is a post-trial case and the learned judge ruled that CSO can be imposed even though a custodial sentence is also appropriate as the offender can spend her private time on performing unpaid community service as reparation for the harm her crime has done to the community.[57]

Recently in late 2020, CSO have been granted to non-social movement related common assault cases (whereas the defendant pleaded guilty before trial) concerning: (1) off duty police officer assaulting his colleague[58] and (2) assault occasioning actual bodily harm by a lorry driver against a restaurant staff.[59] For social movement related cases, CSO was granted post-trial for offences such as: (1) disorder in a public place of complaining against police for releasing tear gas (despite the case was appealed successfully with conviction quashed)[60] and (2) disorder in a public place

[55] *Ibid.*, §77.
[56] [2017] 2 HKLRD 1046.
[57] *Ibid.*, §119.
[58] Common assault in contravening section 40 of the Offences against the Person Ordinance (Cap 212); see "Off Duty Police Convicted for Attacking Colleague; sentenced to 160 hours Community Service 休班警襲擊同袍罪成判 160 小時社會服務令)" *News.now.com* (10 November 2020), available at https://news.now.com/home/local/player?newsId=412332 (visited 27 December 2020)
[59] Assault occasioning actual bodily harm in contravening section 39 of Cap 212; see unreported case TMCC 1227/2020; see "Court: Driver after refusing to wear a mask and assaulting shopkeeper got CSO 法庭: 拒戴罩 襲店員 司機判社服" *orientaldaily.on.cc* (7 November 2020), available at https://orientaldaily.on.cc/cnt/news/20201107/00176_082.html (visited 27 December 2020).
[60] Unreported, HCMA 145/2020, [2021] HKCFI 24, 5 January 2021; In contravening section 17B(2) of Public Order Ordinance (Cap 245); see also "Tear-gassed for nothing mumbled 'f**k you popo' middle-aged man's appeal

by a 15-year-old young offender throwing a plastic water bottle at the police during a protest.[61] It is noteworthy that, in the latter case, the magistrate commented that the defendant showed no sense of remorse for him insisting wrongful conviction by the court and a custodial sentence would not have been inappropriate and disproportionate if the defendant was not remanded for 21 days already.[62] Another 28-year-old offender pleaded guilty for a charge of disorder in the public place by setting up a roadblock. In sentencing her to a CSO for 240 hours, the magistrate stressed the importance of the demonstration of remorsefulness.[63] In a case concerning desecrating the national flag, the original sentence of CSO granted by the trial was later substituted with five weeks imprisonment by the same magistrate under review application by the prosecution, in which the learned magistrate said she had taken into account aggravating factors.[64] Similarly in *Secretary for Justice v Law Man Chung*, a case also about the desecration of the national flag, the Court of Appeal substituted the CSO with 20-day imprisonment.[65] The Court indicated despite that CSO is not a lenient punishment and the defendant satisfied *Brown*'s requirement, it is not appropriate to impose a CSO for a serious offence which calls for a deterrent sentence and the Court of Appeal commented that the CSO imposed by the trial judge is manifestly inadequate and falls beyond the appropriate range of sentence.[66] Further, in ***律政司司長 v Chu Anson Pui Pang (朱沛恒)***[67], the Court of Appeal substituted the CSO ordered by the magistrate with a training centre order, stressing again the importance of remorse as the prerequisite element for CSO. Treating the CSO as a more lenient sentence to imprisonment, the Court doubted the remorse demonstrated by the

allowed for obstruction charge **無端中催淚彈抱怨「X 你老母死差佬」 中年漢擾亂秩序罪成上訴得直**" *hk.appledaily.com* (21 December 2020), available at https://hk.appledaily.com/local/20201221/57GHXBUKHRFFLH2M7NIBZ3OIHE (visited 27 December 2020).

[61] "Young boy lack of remorse convicted of throwing water bottle at police CSO granted after 21-day detention **男生向警擲水樽罪成悔意欠奉　惟已還押 21 天終獲判社服**" *orientaldaily.on.cc* (20 November 2020), available at https://hk.on.cc/hk/bkn/cnt/news/20201120/bkn-20201120122608012-1120_00822_001.html (visited 28 December 2020).

[62] The Compendium Project, available at https://hkcompendium.org/case/525?charge=&keyword=%E6%B0%B4%E6%A8%BD&sidebar=0 (visited 31 October 2021).

[63] "Ex-judiciary female staff sentenced to 240-hour CSO for disorder in public **司法機構前女職員公眾地方擾亂秩序 被判 240 小時服務令**" *881903.com* (22 October 2020), available at https://share.881903.com?article_id=2362830&article_column_id=11&fallbackurl=/news/local/2362830 (visited 28 December 2020); The Compendium Project, available at https://hkcompendium.org/case/63?charge=%E6%93%BE%E4%BA%82%E7%A7%A9%E5%BA%8F&keyword=&sidebar=0 (visited 31 October 2021).

[64] Unreported, [2020] HKCA 262; [2020] 4 HKC 322; CAAR 4/2019 (24 April 2020).

[65] [2020] 4 HKLRD 954.

[66] *Ibid.*, §45.

[67] Unreported, [2021] HKCA 605; CAAR 2/2021 (29 April 2021).

defendant and went as far as to say that the remorse and apologies staged for the purpose of getting a more lenient sentence are not genuine despite the frequency of remorse shown.[68]

By passing, although not a direct CSO case, in ***律政司司長*** *v LHY* [69], a 15-year-old was convicted after trial of the offence of assaulting a police officer in his execution of duty. He was granted a probation order by the trial magistrate. Upon the request for a sentencing review by the Secretary for Justice, the Court of Appeal quashed the probation order and asked for a report for the rehabilitation centre, pending which the defendant was detained. In allowing the review, the Court emphasised in quite strong words that the lower courts "*were erroneous*" in granting probation order which is a "*less severe sentence*" given the defendant's lack of remorse.[70]

As mentioned before, while most cases concerning the political movement are tried in magistrate courts which will not come with any official written judgment, an online database known as the "Compendium Project" was set up in June 2020 by a group of Hong Kong law students and lawyers in June 2020.[71] The Compendium Project aims to record the results of cases related to the recent social movements by summarising public information online and cross-checking it with verbal exchanges in magistrate courts. While it is more difficult to analyse the magistrates' thinking for sentencing without detailed official written reasons, with the help of the systematic and verified record of the Compendium Project, the above cases demonstrated a clear trend that although the courts did not completely reject the idea of sentencing the offender to CSO, cases such as common assault, assault occasioning actual bodily harm and assaulting police officers are more likely to be granted CSO whereas unlawful assembly cases are less likely to get the same. We respectfully argue that this trend is incorrect as we shall see in the *Wong Chi Fung* case in Section 4(a) below. How can one draw the fine line to grant the CSO or not? If it is about the seriousness of the offence, we would respectfully argue that the court is misconceived in impliedly suggesting offences like common assault, assault against police officers etc. are less serious than that of unlawful assembly. In fact, the court emphasised the need of remorsefulness in determining the granting of CSO. In contemporary Hong Kong, it is not uncommon that people choose to break the law in order to show social injustice and/or to raise awareness of structural injustice in society. When these people are convicted, it is almost for sure that the court would not find them remorseful as they are not as criminally-minded as traditional criminals in the strict sense.

In the following section, we shall look further into the requirement frequently adopted by the courts when considering the appropriateness of CSO and discuss whether the court has been dogmatically applying these principles and derailed from the original intent of introducing CSO as a serious sentencing option. In other words, we shall discuss whether the principles such as those in *R v*

[68] *Ibid*., §70.
[69] Unreported, [2021] HKCA 155; CAAR 10/2020 (10 February 2021).
[70] *Ibid*, §37.
[71] 《香港裁判法院示威案件判例匯編》, available at https://hkcompendium.org/ (visited 31 Oct 2021).

Brown have limited the discretion or become a hurdle for the court to consider the granting of the CSO to offenders (mostly in social movement cases) who may otherwise be granted with such order instead of custodial sentence.

The Problem of Dogmatical Application of the CSO in Hong Kong

The Problem of R v Brown Principle

The six factors in *R v Brown* are frequently found in the judgments of Hong Kong courts in relation to their consideration of imposing the CSO. In *HKSAR v Chow Chak Man & Another*,[72] the Court of Appeal observed the six factors are alternatives. However, in *HKSAR v Wong Yiu-kuen*,[73] the Court of Appeal ruled all six factors must be present before a Court considers the granting of CSO. Mayo VP posited *Chow Chak Man,* which referred to the third edition of Cross and Cheung's *Sentencing in Hong Kong*, which indicated that any one of six factors present would make an offender suitable for CSO, is "*quite wrong*" and in fact all six factors must be satisfied.[74] The learned judge nevertheless did not provide any detailed analysis as to why the learned authors of the authoritative book is "*quite wrong*" but only indicated that "*unfortunately, it seems that the same error was made when this Court adopted the guidance from R v Brown, by referring to the six factors as requiring individual consideration as opposed to requiring cumulative consideration*".[75] In fact, in the latest ninth edition of Cross and Cheung's *Sentencing in Hong Kong*, there is simply no suggestion by the learned authors as to whether all six factors must be present or not before a court would grant CSO.[76] It is also enigmatic that Mayo VP decided to derail from Cross & Cheung, as cited in *Chow Chak Man* (despite being a practitioner text with no binding authority), without providing any rationale but vaguely saying it "*seemed*" that an error was made in *Chow Chak Man* in this regard. In another practitioner's text, it is also mysteriously indicated that *Brown*'s guidelines are not exhaustive and should be read conjunctively despite the author cited *Wong Yiu-kuen* in support.[77] The issue remains unsettled even after *Wong Yiu-kuen.* In another Court of Appeal case of *HKSAR v Wan Ka-kit*, Stuart-Moore VP indicated although there was indeed an "*unfortunate error*" in the third edition of *Sentencing in Hong Kong* and that error has been fixed in the fourth edition, still that *R v Brown* was not in the true sense a guideline case at all.[78] The learned judge in *Wan Ka-kit* went further to say:

> "*The Court, in other words, was not restricting the factors to be taken into account for the purposes of making a CSO to the six which they had mentioned. Nor was it insisting that*

[72] Unreported, [1999] 2 HKC 659.
[73] [2002] 1 HKLRD 712.
[74] *Ibid.*, 717H-I.
[75] *Ibid.*, 717J (emphasis added).
[76] See Grenville Cross and Patrick WS Cheung, *Sentencing in Hong Kong* (Hong Kong: LexisNexis, 9th edn, 2020) [8.14].
[77] See Audrey Campbell-Moffat, *Magistrates' Court Manual* (Hong Kong: Sweet & Maxwell Asia, 2003), 75.
[78] [2006] 3 HKLRD 9, §27.

> *all six factors would necessarily be present, although we would think that in the vast majority of cases where such an order was appropriate most, if not all, of these factors would be present*."[79] (emphasis added)

Hence, at least on the Court of Appeal level, the Court has not reached an exclusive conclusion as to whether *Brown*'s six factors are alternatives or that they all have to be present before a CSO would be granted.

Remarkably among other cases, in the recent case *Secretary for Justice v Wong Chi Fung*,[80] the Court of Appeal revisited the six factors in its discussion about the suitability of granting CSO for the offence of unlawful assembly. The Court acknowledged that the six factors "*provide a useful and working guideline*" in this regard.[81] The *Wong Chi Fung* case was later appealed to the Court of Final Appeal.[82] The Court of Final Appeal endorsed the Court of Appeal's approach on the principles of imposing a CSO and the factors to be considered in determining if an offender is genuinely remorseful (for discussion on genuine remorsefulness, see Section 4(b) below).[83] A side note to be added is that the Court of Appeal in *Wong Chi Fung* did cite and endorse *Wang Ka Kit*:

> "*These six criteria or factors provide a useful and working guideline, and are frequently found in the majority of cases where community service orders were deemed appropriate. However, when the court is considering the suitability of a community service order,* ***not*** *all six factors have to be present; nor should the relevant consideration be restricted to these six factors only: HKSAR v Wan Ka Kit [2006] 3 HKLRD 9, per Stuart-Moore V-P at [27]. Stuart-Moore V-P continued to say....*"[84] (emphasis added)

Since the Court of Final Appeal's judgment of *Wong Chi Fung* has not been revisited by the same court at the moment, one could safely conclude therefore the most updated and good law in Hong Kong is the principles as cited in the Court of Appeal's judgment in *Wong Chi Fung*. As will be seen from the analysis of magistrate case database and newspaper articles below, it is problematic therefore for cases on magistracy level (especially those concerning public order offences) seemingly have been adopting a straitjacket approach towards the granting of CSO different from that stated in *Wong Chi Fung*.[85]

The problem with Hong Kong court's application of *R v Brown* is that the six factors are not stated in the judgment in an explicit way that they themselves constitute a guideline for the factors for consideration in determining the suitability of granting CSO. In delivering the two-page *R v Brown*

[79] *Ibid.*, §28 (emphasis added).
[80] [2018] 2 HKLRD 699.
[81] *Ibid.*, §141.
[82] (2018) 21 HKCFAR 35.
[83] *Ibid.*, §122.
[84] *Wong Chi Fung* (n. 57 above), §141, citing *Wan Ka Kit*, §27 - 28(emphasis added).
[85] See Sections 3(b) and 4(a).

judgment, McCullough J simply gave a holistic discussion on the appropriateness of granting CSO by highlighting some of the characteristics of the defendant without compiling them into a list. In other words, from a reasonable reading of the judgment, it does not appear that the English Court of Appeal in *R v Brown* ever intended to produce a list of factors. This view is also share by Stuart-Moore VP at *Wan Ka Kit*, who indicated all that the English Court of Appeal said was:

> "*But this case is tailor-made for a community service order. We have here a first offender — indeed the position would have been the same if he had had what I might call a "light" criminal record; he came from a stable home background with a wife and a young child; he had a good work record; and it now appears that a job is available to him. There is apparently genuine remorse and the risk of reoffending appears slight.*"[86]

Therefore, on that note, we would respectfully point out that the Hong Kong courts have read too much between the lines of the judgement of *R v Brown* by treating the factors discussed therein as an authoritative guidance for the consideration of the appropriateness of granting CSO. As a consequence of the straitjacket application of *R v Brown*, the practice of granting CSO in Hong Kong started to derail from what the CSO was meant to achieve in the first place. There are indeed two further problems in particular this article would like to address: (1) the over-emphasis on remorsefulness and (2) the potential prejudice to right of appeal for appropriate cases. We shall address them in turn below.

Remorse

A clear line of authority in Hong Kong indicates that the local courts have been taking the remorse of the convicted person as an element of consideration with substantial weight, if not a prerequisite, for the suitability of the granting of CSO.[87] Recently, the Court of Appeal in *Wong Chi Fung* reiterated that "*the court has always considered genuine remorse as a precondition for receiving a community service order*", and that "*if no genuine remorse is demonstrated, the court would normally refuse to make a community service order*".[88] One shall note that the Court of Appeal did not suggest that, in the absence of genuine remorse, the CSO would not be followed as a matter of course. While the learned judge suggested what the normal consequence would be, he actually implied that there can be a situation where CSO can still be granted without having regard to the existence of remorsefulness.

[86] [2006] 3 HKLRD 9, §27.

[87] See, for example, *Secretary of Justice v Ting Kong-ho 律政司司長 對 丁江河*, unreported, CAAR 9/ 2000, 3 July 2001, (Chinese judgment) §12; *HKSAR v Wong Yiu Kuen* [2002] 1 HKLRD 712; *HKSAR v Buk Chui Ying* [2008] 5 HKLRD 185, §§22-25; *HKSAR v Chu Ka Yin* [2017] 2 HKLRD 1046, §§119, 124; *HKSAR v Pau Chin Hung Andy* [2014] 1 HKLRD 587, §36(5).

[88] *Wong Chi Fung* (n. 57 above), §146 (emphasis added).

The Court simply highlighted one element that they are looking for, in favour of granting CSO, is genuine remorse. In *Secretary for Justice v Leung Hiu-yeung and Ors*, the Court of Final Appeal indicated that the absence of genuine remorse was plainly a relevant factor weighing against the imposition of CSO.[89] Yet the Court did not suggest in any way that remorse is a conclusive factor, as it held that it was just a relevant factor.

Genuine remorse means "*the offender acknowledges that he has committed an offence and shows remorse for what he has done and caused*".[90] In assessing whether a convicted person's remorse is genuine, the Court of Appeal has provided detailed guidelines in *Wong Chi Fung*. In summary, pleading guilty is generally an indicator of genuine remorse and whether a guilty plea has been entered in a timely manner is a major consideration for the Court.[91] The Court would examine one's claim of remorse more carefully if he/she pleads not guilty, and expresses his/her remorse only after he/she is tried and convicted.[92] The Court will not reject one's indication of remorse simply because he/she has contested his trial, but the court will not easily accept that he/she is genuinely remorseful for what he has done.[93] A person is entitled to ask the prosecution to prove its case or to dispute the conduct does not constitute an offence under presumption of innocence, but the court is not bound to accept after he has so conducted such defence he/she is genuinely remorseful.[94] If a convicted person considers that his/her prosecution is unjustified and maintains this view after conviction, the court will not accept that he/she is genuinely remorseful.[95] Moreover, if a convicted person insists that he/she is innocent or expresses firmly that he/she has not done anything wrong after the conviction, the court will find him/her having no genuine remorse.[96] Even if one says he is willing to accept legal responsibility and punishment in light of the above circumstances, he/she is still regarded as not possessing genuine remorsefulness.[97]

Bearing the guidelines in mind, it is argued that the remorse of the convicted person should not be made an element, let alone a precondition, for the granting of CSO.

First, it is impractical for the sentencing court to seek genuine remorse in the context of a post-trial conviction if the defendant simply exercised his/her right to defence. In *Chu Ka Yin*, the Court of First Instance made an enigmatic statement:

> *"A person who is convicted may not necessarily have no remorse after the conviction and may not necessarily refuse to perform a community service order. Of course, imprisonment*

[89] Unreported, [2018] 6 HKC 99, §31.
[90] *Wong Chi Fung* (n. 57 above), §147.
[91] *Ibid.*
[92] *Ibid.*
[93] *Ibid.*, §147(1).
[94] *Ibid.*, §147(2).
[95] *Ibid.*, §147(3).
[96] *Ibid.*, at §147(4)
[97] *Ibid.*

will be inevitable if the 3rd appellant in fact shows no remorse or is not willing to perform community service order." [98] (emphasis added)The court's statement of "*of course, imprisonment will be inevitable if the 3rd appellate […] shows no remorse*" premises on the fact that remorsefulness is the only (if not, at least a major) consideration for CSO, notwithstanding that no authority or reason was provided to lay such foundation. As noted in *Wong Chi Fung*, the court may not realise a plea of not guilty in itself, followed by a contested trial, is a strong indication of one's absence of remorse. As a matter of common sense, however, we must note that it is very unlikely that the defendant, after arguing for his/her innocence in the proceedings, would all of a sudden become remorseful upon conviction. Even if he/she indicates so, it is hardly imaginable that the court, after hearing all the exculpatory evidence from the defendant, would find him/her genuinely remorseful about the offence at the final stage of sentencing. In addition, given the court's exceptionally cautious approach (as enunciated in *Wong Chi Fung*) in dealing with the convicted person's remorse expressed after conviction, the requirement of a genuine remorse is too high a hurdle for convicted people suitable for rehabilitative justice but denied so because of the court's determination of the absence of genuine remorse. In fact in *HKSAR v Chan Kwai-hung*, a magistracy appeal case of behaving in a disorderly manner in a public place, the learned judge substituted a CSO for the sentence of imprisonment imposed by the magistrate.[99] The learned judge said:

"*While the magistrate appears to have rejected the option of a community service order on the grounds that the appellant was convicted after trial and that he had demonstrated no remorse, I am not satisfied that those factors should necessarily preclude the making of a community service order in appropriate circumstances although I bear in mind the remark of Stuart-Moore Ag CJHC in Secretary for Justice v Buk Chui Ying (alias Buk Hui Kwan), CAAR 4/2007 that :*

> *"… it is unlikely that a community service order will ever be appropriate unless remorse has been shown."*

In this case while the appellant pleaded not guilty, he did not give or call evidence. He simply put the prosecution to proof of the charge against him. He is a senior officer in the Correctional Services Department. He is married and his career and possibly his pension are at stake. The consequence of conviction will affect not only him but his family. In such circumstances it does not seem to me to be just that the option of a community service order be denied him because he has not demonstrated his remorse by pleading guilty, but has simply exercised his constitutional right to have the case against him proved. I have no reason to suppose that privately he does not feel extreme remorse for what he has done,

[98] *HKSAR v Chu Ka Yin* [2017] 2 HKLRD 1046, §119 (emphasis added).
[99] Unreported, HCMA 1108/2006, 15 October 2009; in contravention of section 17B(2) of the Public Order Ordinance, Cap 245.

> *particularly as his arrest appears to have led to a separation from his wife.*"[100] (emphasis added)

Therefore, while the presence of remorse may be a relevant consideration, it shall be assessed in light of the exercise of right of defence for post-trial convicted defendants.

Second, in fact when McCullough J said in the *Brown* case that it is tailor-made for a CSO, there was no indication that other factors or in the absence of any suggested factors in that case would render the CSO more or less favourable. *Brown* concerns a pre-trial pleaded guilty case, and arguably whether it shall be treated as a bible even for a post-trial convicted case is questionable. Further, the exact wording in *Brown* for remorsefulness is:

> "...*There is apparently genuine remorse.*"[101] (emphasis added)

At this juncture, it seems that the post-*Brown*'s court often overlooked the factual matrix and the jurisprudence laid down by McCullough J and unduly expanded the application of *Brown* into requiring remorsefulness in every case where questions of CSO arise.

Third, the courts overlook the nature of remorse and the difficulties of proving it. It has not been disputed that remorse should play a role in sentencing in the common law world.[102] However, what is the definition of "remorse"? Difficulties often arise when the court demands genuine remorse: how does one know the existence of remorse? What sort of evidence is required to prove remorse? In fact as mentioned, it begs the question of how a convicted person becomes remorseful suddenly after trial: it generates a paradoxical situation where the mere fact of not pleading guilty and defended until the end of trial may be interpreted as lacking remorse throughout the judicial proceeding. While looking into the psychological and/or philosophical aspect of remorse is outside the scope of this paper, we submit that judges and legal practitioners shall not disregard the wide range of aspects on the issues of remorse. Perhaps due to the time pressure in handling cases swiftly, case law often does not discuss the nature of remorse in detail. "Downcast", "sad", "morose" "shame", "guilt" are associated terms and concepts relevant with remorse; it casts difficulties to discriminate between remorse and any of them.[103]

It seems that the uncertain nature of remorse can also be seen from the ways by which remorse is usually proved in court. It is suggested that such ways can be put into three categories: demeanours that express or indicate remorse, verbal expressions of remorse, and actions expressing or

[100] *Ibid.*, §§35-36.
[101] (1981) 3 Cr App R (S) 294, 295 (emphasis added).
[102] See Michale Proeve and Steven Tudor, *Remorse: Psychological and Jurisprudential Perspectives* (Farnham: Ashgate Publishing Limited, 2010), 116, 136-138; citing examples from Australia, Canada, England and Wales, New Zealand, Singapore, and USA.
[103] *Ibid.*, 95.

motivated by remorse.[104] For demeanours, it is common sense that purely outward signs throughout the trial may be difficult to be precise to show genuine remorse. Or as mentioned, the fine line between human feelings of anger, sadness, regret, shame and guilt etc. are difficult to be drawn from demeanours. Studies indeed show that there is no good evidence that remorse can be evaluated through facial expression and body language, and evaluation of remorse is influenced by racial, ethnic and culture factors.[105] Even when it comes to verbal expression, it is not helpful as the defendant always has the right to not give evidence in trial. The exercise of such right shall not be used against any indication of remorse. For express action, it is mindful that the court shall not be too strict about remorse to be made manifest.[106] Sometimes remorse cannot be regarded as not genuine even if it arrives late and only after the defendant has faced with police and witnesses, sometimes a defendant may not have a clear grasp of the reality of his action until he learned from other witnesses in the court, or sometimes the defendant's realisation of serious setting in a courtroom may cause himself to see things differently and showed remorse after trial.[107]

Furthermore, offenders of victimless crime such as use of illicit drugs may find it more difficult to show remorse, despite that other feelings such as guilt or shame may arise.[108] Put it under Hong Kong context, one can argue that offences such as behaving in a disorderly conduct in public or unlawful assembly may, depending on the facts, concern victimless crime. The issue of whether the principle of genuine remorse can be truly applicable to these offences hence arise.

In Hong Kong, judges place well consideration over probation officer's reports on whether an offender shows remorse or not, despite such officers not participating in previous courtroom proceedings. Indeed given the above discussion, evaluation of remorse is not an easy task that can be outsourced to officers. Perhaps Hong Kong courts shall be wary as to not fall under the following criticism: "until there is evidence that remorse can be identified or evaluated, a legal system concerned about the integrity of its procedures and outcomes hinge on such shaky evaluation".[109]

Fourth, the absence of remorse shall not act as an aggravating factor in sentencing. There are different reasons for an absence of remorse in the defendants: (1) due to non-acceptance of guilt, (2) due to presence of some other retractive emotions, (3) due to non-culpable mental incapacity for remorse, (4) due to of culpable incapacity for remorse, and (5) due to the presence of some positive emotions such as one conceive what he/her has done brings a prideful sense of satisfaction

[104] *Ibid.*, 95.
[105] Susan A Bandes, "Remorse and Demeanour in the Courtroom: Cognitive Science and the Evaluation of Contrition," in Jill Hunter and Paul Roberts (eds.), *The Integrity of Criminal Process: From Theory into Practice* (Oxford: Hart Publishing, 2006), 309-326.
[106] Proeve and Tudor (n. 102 above), 97.
[107] *Ibid.*
[108] *Ibid.*, 118.
[109] Bandes (n. 105 above), 326.

after fulfilling a good or admirable deed.[110] Nevertheless, it is said to be reasonably clear not all remorselessness cases are morally blameworthy and that any general policy that maintained that the mere absence of remorse was enough to aggravate sentences would be too indiscriminate and impulsive.[111] The court shall consider the reasons of the defendant's lack of remorse before deciding whether the absence of remorse shall be treated as an aggravating factor.[112]

As a result, we argue that the court shall not take a dogmatic approach in merely looking at whether remorse was demonstrated from the probation officer's report and/or the timely plea of guilty. Difficulties arise in the proving of remorse and there are many reasons for the absence of remorse - the fact of lacking remorse shall not be conclusive as to refusing CSO. In fact, our legal system shall promote sincere, non-instrumental remorse instead of alluring an offender to show so-called remorse simply advocating for a more lenient sentence.[113] If remorse must first be shown before the CSO can be granted, then our system is looking for form over substance. In short, we shall reiterate the importance of a showcase of remorse remaining to be a relevant consideration for the grant of the CSO but it shall not be a conclusive factor given the difficulties in proving remorse and the variety of reasons behind any lack of remorse of a defendant.

One shall also not forget the original purpose and rationale of the CSO as discussed in Section 2 above. The CSO has an ancestral root from impressment and transportation, which is deemed to be a severe form of punishment. It serves as an alternative form to custodial sentence to reflect a deterrence effect under the context with efficient public resources allocation to prevent overcrowding of prisons and reduce the costs of imprisonment. Overemphasising the importance of remorsefulness to be a central prerequisite not only creates the difficulties in measuring remorse but also blatantly disregard the historical context and social policy reasons behind the CSO.

People who participate in civil disobedience movements deliberately break the law which they consider unjust and are willing to face all corresponding legal consequences that come with the offences committed in the course of the social movements.[114] Unlike other kinds of criminals, activists in social movements become "criminals" not because of personal interest but because of their pursuit of justice and a better community that, in their mind, are worth sacrificing freedom and time to fight for.[115] This, a fortiori, reflects that remorse should not be treated as the prerequisite element for imposing CSO because the convicted activists of the social movements certainly would not be remorseful given their intent in the first place. In contrast to imprisonment,

[110] Proeve and Tudor (n. 102 above), 140-144.
[111] *Ibid.*, 145.
[112] *Ibid.*
[113] Bandes (n. 105 above), 314.
[114] Lee, Francis LF, "Social movement as civic education: Communication activities and understanding of civil disobedience in the Umbrella Movement." Chinese Journal of Communication 8.4 (2015): 393-411, 399.
[115] Tai, Benny Yiu-ting, "Civil disobedience and the rule of law." *Civil Unrest and Governance in Hong Kong*. Routledge, 2017. 141-162.

it is precisely because of their eagerness to serve and change the community that CSO should be the more appropriate form of punishment for this kind of offenders.

Prejudicing the Right of Appeal against Conviction

The current straitjacket application with an over-emphasis over remorsefulness are detrimental to the right of appeal against conviction in the broad sense. In a context where a defendant is convicted after trial, encouraging the convicted to show remorse towards probation officers in order to receive a positive Suitability Report for CSO may hinder the chance of successful appeal.

It is trite law that there is no right of appeal in criminal proceedings at common law.[116] However, such a right might be implied in the sense that the Basic Law of Hong Kong safeguards the application of Article 14(5) of the International Covenant on Civil and Political Rights, which is also provided by Article 11(4) of the Bill of Rights, that said:

> "*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law"*[117]

The right of appeal carries with the implication the convicted has a right to a fair hearing.[118] It is beyond argument that one aspect of a fair hearing is that the court should only determine the outcome based on evidence produced in trial and should not be premised on any pre-trial advantage or disadvantage in relation to the parties. However, as discussed hereinabove, with the straitjacket application of *R v Brown* by the Hong Kong Courts, the convicted person is usually enticed into showing remorse during the CSO report interview even if he/she does not feel the same way in order to get CSO instead of imprisonment. Even in the event that the chance of conviction is low, the defendant may nonetheless be advised to show remorse just to "play safe" so that in case he/she was convicted, he/she would at least have a chance to get a CSO instead of imprisonment. Of course, the above situations in itself would not be problematic if the convicted person ultimately feels content with the outcome and does not seek to appeal against the same.

In contrast, in the event that the convicted person is not satisfied with the result, he/she is likely to appeal against it. In such circumstances, the constitutionally-guaranteed right of fair hearing is very likely to be infringed. While in theory, the judge(s) sitting for appeal against conviction will not read the papers in relation to sentencing, in practice they will nonetheless review the papers. As such, the appeal judge(s) would become aware of the fact that the convicted person indicated that he/she was remorseful of having committed the offence during the CSO interview, and would ask rhetorically the question that if the appellant was really remorseful about what he/she had done, why would he/she appeal now? Did he/she otherwise lie to the interviewer during the first trial for

[116] Andrew Bruce, *Criminal Procedure* (Hong Kong: LexisNexis, Issue 44, 2018), VIII 1.
[117] *Ibid.*, VIII 1A, citing Article 14(5) of the International Covenant on Civil and Political Rights and Section 8, Article 11(4) of Hong Kong Bill of Rights Ordinance (Cap 383).
[118] *Ibid.*, citing *Laing v R* [2013] UKPC 14, [2014] 1 Cr App R 2.

the sake of getting CSO? The unfortunate consequences is that the appeal would inevitably be premised on a disadvantaged footing against the appellant.

As a result, the current approach by Hong Kong courts in adopting a straitjacket approach and/or with an over-emphasis on the element of remorsefulness is prejudicial to the defendant's right of appeal in the sense that he/she is deprived of a fair hearing.

Proposed Reform

A Brief Survey of References from Other Jurisdictions

As a type of sentencing option introduced from the UK, CSO has a foreign origin. We suggest the development of CSO in Hong Kong shall also take into account its cousins in the common law world and other legal systems. In particular, other jurisdictions seemingly did not suggest CSO shall be granted under a dogmatic approach of *Brown* and that the possibility of CSO as an alternative to imprisonment has not been ruled out.

For instance, in *R v Burton* which concerns criminal damage, the New Zealand Court of Appeal has as early as in 1982 (i.e. one year after *Brown*) indicated that CSO can be a form of non-custodial penalty alternative to imprisonment, without referring to any principles laid down in *Brown*.[119] Woodhouse P even commented CSO is a form of sentence intended by parliament as very real and effective alternatives to imprisonment and the impact and severity of CSO can be severe.[120]

In the same year, the English court has already indicated in *R v Clarke* that when considering whether suspended sentence of imprisonment is applicable to a convicted person, the court shall ask itself:

> "*First of all, is this a case where a custodial sentence is really necessary? If it is not, it should pass a non-custodial sentence; but if it is necessary then the court should ask itself, second, this: can we make a community service order as an equivalent to imprisonment, or can we suspend the whole sentence?[...]*"[121] (emphasis added)

In other words, the English court after *Brown* did not suggest CSO cannot be an equivalent to imprisonment. In fact, the English court is satisfied that justice can be done instead of sending the convicted to sentence if appropriate hours of the CSO is granted for the particular case.[122] In R v Paul McDermot (as discussed in Section 2.2 above), Otton J place an emphasis on the young age of the defendant (i.e. 18-year-old), his promising apprenticeship, and support of family:

[119] [1982] 1 NZLR 602.
[120] *Ibid.*, 604.
[121] [1982] 3 All ER 232, 236 (emphasis added).
[122] Cross and Cheung (n. 76 above), [8-30], citing *R v West* (1983) 5 Cr App R (S) 206, 207.

> "... A custodial sentence was not wrong in principle in this case, in view of the nature of the attack and the weapon used. However this is a classical example where a period of community service could, and should, have been considered by the learned judge as an alternative to a custodial sentence . We take into account all the circumstances of the case and in particular the fact that he has only one year to complete an apprenticeship. We are impressed also that his father and another member of his family have troubled to come to the Court today…"[123] (Emphasis added)

Brown was not mentioned in Paul McDermot despite some elements such as family background and promising employment resonate. It shall be noted that Paul McDermot also did not overemphasise the importance of remorse other than stating the fact that the defendant surrendered himself to the police. In fact, further English cases demonstrated the court did not treat Brown as setting up rigid guidelines. In Attorney-General's Reference nos. 48, 40 and 50 of 1995, a case concerning several young offenders (aged between 15 and 16) committed conspiracy to rob, burglary and assault occasioning actual bodily harm, the Court of Appeal refused to follow Brown and Paul McDermot to impose CSO. [124] The learned judge indicated the reason of refusal being the facts in those two cases that are not sufficiently similar to the case in question, while indicating where circumstances allow the CSO can nevertheless be treated as alternative to custody in particular to young offenders.[125] In summary, the English court did no lay down any unalterable guidelines from Brown but rather focused on facts of individual cases. This resonates with the cliché: sentencing is an art but not a science.

In California, the judges have controversial views over whether the CSO can be imposed in lieu of jail.[126] However, compare to the judges in Hong Kong Californian judges have more discretion in specifying where the defendants have to complete their CSOs and to tailor sentences for the offenders including to make specific placements for offenders, e.g. sentence graffiti offenders to clean up graffiti.[127]

The Irish experience is more economically based. In the 1980s, Ireland faced challenges of overcrowding and deteriorating prison. The Irish government therefore introduced a CSO system from England by the Criminal Justice (Community Service) Act to alleviate the problem, in which it was suggested to be a direct alternative to custody.[128] Throughout decades the CSO system in

[123] [1985] Crim. L.R. 245, 379.
[124] [1996] 2 Cr. App. R. (S.) 184.
[125] *Ibid*., 187-188.
[126] Belinda McCarthy and Bernard McCarthy, Jr, *Community-Based Correction* (Belmont: Wadsworth Publishing Company, 1997), 3rd edn, p 148-161. Citing Jon'a Mayer and Paul Jesilow, "Judicial Attitudes Toward Community Service Sentences", *IARCA Journal* (April 1993), 10-12.
[127] *Ibid.*
[128] Dierdre Healy, "The evolution of probation supervision in the Republic of Ireland: Continuity, challenge and change", in Gwen Robinson and Fergus McNeill (eds.), *Community Punishment: European perspectives* (London: Routledge, 2016), 141.

Ireland has been complimented as a cost-effective alternative to imprisonment despite concerns over managerial issues.[129] Acknowledging the financial benefits of CSO, the Irish government further allowed judges to sentence people to CSO instead of prison for crimes on default on payment of fines and as an alternative for prison sentences of 12 months or less respectively through Fines Act 2010 and Criminal Justice (Community Service) Amendment Act 2011.[130]

In Zimbabwe, CSO are to be made only to offences that would attract a prison sentence of up to 12 months (up to 18 months for suspended sentence). Also, the magistrates must give reasons for not making a community service order where a sentence of this length is imposed, despite that the majority of Zimbabwe prisoners are serving sentences which would have otherwise qualified them for CSO.[131]The judges in Zimbabwe nevertheless play a more active role in the implementation of CSO. Zimbabwean magistrates are expected to visit local organisation executing CSO and inspect the management of the offenders' placements.[132]

This article cannot provide a complete overview on all common law jurisdictions given its limitation. It is nevertheless the authors' intention to demonstrate some references Hong Kong courts can draw when considering the meaning and implementation of the CSO.

Converge (of the Six Elements)

At this juncture, the authors would once again emphasise CSO shall not be viewed from the angle that *Brown* is a straitjacket, which such view has also been shared by the court before.[133] Each case shall depend on its own facts and the defendant's own personal circumstances.[134] In fact, the Court of Appeal, although criticised *Chow Chak Man*'s reference to the six criterias in *Brown* as alternatives as erroneous, has nonetheless indicated:

> "*If the judge was slavishly going down the road of saying that <u>because</u> the six criteria (or 'factors' as we would prefer to call them) were in place, <u>therefore</u> the respondents <u>must</u> be given community service orders, he would have been wrong to do so. But we do not think the judge was doing anything of the kind*." (Emphasis by the court)[135]

[129] *Ibid.,* 144.
[130] *Ibid.,* 144-145.
[131] Robert J. Harris and T. Wing Lo, "Community Service: Its Use in Criminal Justice" (2002) 46(4) *International Journal of Offender Therapy and Comparative* Criminology, 438.
[132] Vivien Stern, "Alternative to Prison in Developing Countries Some Lessons from Africa" (1999) 1(2) *Punishment and Society*, 234.
[133] *HKSAR v So Oi-kwan*, unreported, HCMA 482/2004, 24 September 2004, §18.
[134] *HKSAR v Lee Hon-yung*, unreported, HCMA 69/2000, 5 October 2000. In this case, Deputy High Court Judge To (as he then was) took into account the defendant has already served 14 days imprisonment and the clang of the prison gate was enough for the court to substitute imprisonment with a CSO for 200 hours.
[135] *Secretary for Justice v Lin Min-ying and Anor* [2002] 3 HKC 415, §21.

In other words, the Court of Appeal has indicated judges shall avoid the conclusion that simply because all six *Brown* factors exist then a CSO shall be granted. Each case shall be treated separately. *Brown* is not and shall not be a binding guideline or a bible to be rigidly followed. The six factors are supportive but not conclusive indicators for CSO; they are descriptive but not prescriptive.

Therefore, plowing on the judgment of *Lin Min-ying*, we would suggest that the Hong Kong courts should cease the practice of over-emphasising the individuality of the six factors. The court may consider to converge these elements as a general consideration for the CSO without indicating them as criteria. Further, it is also suggested that courts should treat the cases on an *ad hoc* case bearing in mind the factual matrix and the defendant's personal background of each case. After all, the purposes of CSO can be better served only when the courts consider it best to grant such to the convicted persons without excessive constraints on the exercise of its sentencing discretion.

Back to the Origin - the CSO as a Severe Sentence Akin to Imprisonment

It is high time to emphasise the need of suggesting the courts to remind themselves of the original intents of the introduction of CSO. As discussed in Section 2(c), the Report never suggested CSO shall not be a sentencing option as severe as that of imprisonment. Indeed, one factor often overlooked by judges and advocates is that the breach of CSO terms can attract imprisonment. If a CSO is imposed as an alternative to imprisonment, the defendant in breach of the CSO's terms can expect the court will not be lenient but to impose a prison term.[136] Section 8 of the CSOO provides the court power to deal with a defendant in breach in any manner in which the offender could have been dealt with for that offence by the court who made the order if the order had not been made.[137] In other words, an offender in breach will be re-sentenced to imprisonment had the CSO not been granted in first place for the offence punishable by imprisonment. Moreover, a breach of the CSO has to be proved to the criminal standard, i.e. beyond reasonable doubt, for every element of such breach.[138] Therefore, the design of the CSO system provides mechanics to secure the severity of the CSO same as an imprisonment. The fact that the breach of the CSO conditions invite the court to sentence the offender to imprisonment again shall not be forgotten.

On the other hand, one shall not overlook the fact that the court has big discretion in ordering the length for a CSO. The variation of length reflects seriousness of the sentence and it is a sliding scale. Cases demonstrate that it would be erroneous to impose the maximum period (i.e. 240 hours) of CSO for circumstances that would not otherwise have imposed imprisonment.[139] The hours of the CSO shall reduce accordingly from the maximum period if imprisonment would not have been imposed. In contrast, the number of hours should be substantial (and/or close to that of maximum

[136] Cross and Cheung (n. 76 above) at [8.36].
[137] Section 8(3) and (4).
[138] Cross and Cheung (n. 76above) at [8.37], citing *West Yorkshire Probation Board v Boulter* [2006] 1 WLR 232.
[139] *HKSAR v Law Man-lok*, unreported, HCMA 602/2002, 6 March 2007; *R v Barley* (1989) 11 Cr. App. R. (S.) 158

period) if a CSO is intended to be an alternative to imprisonment.[140] We would therefore propose that more emphasis shall be pressed upon the fact that the CSO is a flexible sentence. The length of hours to be served are to be assessed more closely by the court. The design of the CSO system inherently suggested it ought to be a sentence in lieu of imprisonment in some circumstances.

On a side note, it shall be noted that the CSO is perceived by certain social group, e.g. youth offenders, to be as severe as that of imprisonment. The CSO generates guilt feelings and has a shaming function on young first offenders. It shall be noted the concept of guilt and remorse are not equivalent. Guilt covers a wide range and a person may feel guilty about something he knows not brought about himself, while remorse often refers to a person who feels responsible for what he actually did himself.[141] For young offenders, the court may consider whether such offenders truly understand the meaning and relationship between pleading not guilty and feeling remorse. It would be outside the scope of this article to discuss the psychological and jurisprudential aspect between remorse and guilt. As shown in Section 4(b) above, this article however would like to highlight the difficulties for the court in considering factors such as remorse in the context of CSO, which affects the perception of whether the CSO is perceived as being as severe as that of imprisonment.

Furthermore, with regard to youth offenders, one shall bear in mind rejecting imprisonment does not mean rejecting detention.[142] Although it is not sending one to prison, the CSO does deprive one's personal freedom in return for defending him/her committing social services. This is in particular important for youth offenders, who may find the first-time court experience to be intimidating and the taste of the CSO sentences disrupt his/her normal way of living. Detaining young offender through the CSO can serve justice in the same way as imprisonment (or even better) in some circumstances. A further comment is that public opinion may have a weight in affecting whether non-custodial sentences shall be imposed if they reflect genuine public interest by providing adequate retribution for the offence and protection from further offending at a cost not out of proportion to that spent on other social programs.[143] Again, while this article does not focus on analysing the shaping of jurisprudence through public opinion, the authors would like to reiterate the impose of CSO shall not be considered out of the touch of reality. In Hong Kong context, social movements cases are highly politically sensitive and the court shall bear in mind the public perception in the judiciary when the CSO is being granted or not for these cases. While the authors understand the courts are apolitical, we would nonetheless stress the cliche "justice must not only be done but must also be seen to be done".

[140] Cross and Cheung (n. 76 above) at [8.29].
[141] Gabriele Taylor, "Guilt, Shame and Shaming" in Ido Weijers and Anthony Duff (eds.), *Punishing Juveniles: Principle and Critique* (Oxford: Hart Publishing, 2002), 185.
[142] Anthony Duff, "Punishing the Young" in Ido Weijers and Anthony Duff (eds.), *Punishing Juveniles: Principle and Critique* (Oxford: Hart Publishing, 2002), 133.
[143] Ian Brownlee, *Community Punishment: A Critical Introduction* (London: Longman, 1998), 194-195.

Perhaps it is high time for Hong Kong courts to remind themselves of the nature of the CSO and the design of the CSO which reflects it being a sentencing option meant to be in lieu of imprisonment for certain circumstances. The existing practice in Hong Kong courts of not imposing CSO based on lack of remorse is misconceived. The power of probation officers in recommending the CSO and, if the CSO is imposed, the power of probation officers to design suitable services shall be respected. However, more discretion and power may be given to sentencing judges at the sentencing stage to tailor make appropriate CSO hours and contents to a particular offender based on the offence and background of the offenders, taking reference to the practice in other jurisdictions such as California practice as illustrated above.

CONCLUSION

This article revisited the history and purpose of CSO and reviewed the introduction of CSO into Hong Kong in the 1980s. By looking into some recent applications of the CSO in Hong Kong, the authors have demonstrated that how the system of CSO has been misconceived by the Hong Kong courts by seeing it as a more lenient sentencing option than imprisonment. In particular three problems arise from the current practice of imposing CSO: (1) the Hong Kong courts have been dogmatically applying the six factors in the *Brown* case, (2) remorse is wrongfully made a precondition for the granting of the CSO and (3) the consequential prejudicial effect to the offender's right of appeal against conviction.

Due to the limitation of the length of this article, the authors cannot offer a comprehensive proposal for the CSO reformation in Hong Kong. However and more importantly, it is the authors' hope that the courts in Hong Kong would reacquaint themselves with the true nature of the CSO and abandon the dogmatic application of *R v Brown* in future cases. Only by doing so will the system of the CSO achieve its goals and justice be served.

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