Outraging public decency: In your face and up your skirt – the dynamism and limits of the common law

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at the University of Hong Kong Faculty of Law by

The Hon. Mr Justice Joseph Fok, PJ

Introduction

1. I thank the University of Hong Kong Faculty of Law for the honour of inviting me to deliver this lecture in the Common Law Lecture Series.[1] It is a particular personal pleasure for me to do so as both my father and grandfather studied at HKU and so the university is one with which I have some connection, albeit indirect.

2. Turn towards the back of the standard student textbooks on criminal law and you will find, there, discussion of a collection of discrete offences. Among these are a number of old common law offences, which most students rarely examine closely, except perhaps to amuse themselves over the more colourful facts of some of the cases, and which criminal law syllabuses typically do not cover. One of those offences formed the subject-matter of a case heard by the Court of Final Appeal in 2014, not long after I joined the Court, and which raised an interesting and novel legal issue.

[1] I wish to acknowledge the assistance rendered to me in the preparation of this lecture by Ms Jacquelyn GH Ng, Pupil Barrister, and Mr Jeff HY Chan, Pupil Barrister, both of whom were Judicial Assistants in the Court of Final Appeal (2015-16).

3. The case was *HKSAR v Chan Yau Hei*[2] , to the details of which I shall return. The principal issue raised was whether the common law offence of outraging public decency can be committed by posting a message on an internet discussion forum. As we shall see, the Court held that the public element of the offence (which I shall address in a moment) was not satisfied by a message posted on such a forum. However, we left open the possibility that, by means of the internet, a message might be displayed publicly in a way that would satisfy that element of the offence.

4. The decision is, I believe, correct and it has been so regarded by the Law Commission of England and Wales[3] and by the editors of *Smith and Hogan's Criminal Law*[4].

5. However, one newspaper commentator in Hong Kong was rather less convinced by the judgment,[5] which he described as "staggering" and about which he wrote:

> "The common law offence of outraging public decency, the judges observe, is hundreds of years old, so it constrains them from extending physical or public space to cyberspace. Say what?!
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> You would think given the age of the law written at a time when physical and public space had no cyber connotations, it would be up to the judges, given the famed adaptability and contextualising of British common law, to apply them to a context relevant to our cyberage."

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2 FACC 7/2013, Judgment dated 7 March 2014, reported in (2014) 17 HKCFAR 110 ("*Chan Yau Hei*").

3 Law Commission Paper No. 358, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency*, 2015 ("Law Com No. 358") at [2.46] and [3.121-3.123].

4 OUP (14th Ed., 2015) at p.1224.

5 Alex Lo, *Is outraging public decency OK in Hong Kong in the cyberage?* (South China Morning Post, 12 March 2014): http://www.scmp.com/comment/insight-opinion/article/1446648/outraging-public-decency-ok-hong-kong-cyberage.

6. This comment – regardless of its merits and about which I hasten to add I make no complaint – suggests to me that the case of *Chan Yau Hei* and the offence of outraging public decency might provide a useful context in which to examine both the dynamism and the limits of the common law. Indeed, the "famed adaptability and contextualising" of the common law to which reference was made is more comprehensively expressed by Lord Simon in his speech in *Knuller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions*[6], where he said:

> "… the common law proceeds generally by distilling from a particular case the legal principle on which it is decided, and that legal principle is then generally applied to the circumstances of other cases to which the principle is relevant as they arise before the courts. As Parke B. said, giving the advice of the judges to your Lordships' House on *Mirehouse v. Rennell* … :
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> > 'Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable or inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised.'"

Lord Simon continued:

> "The passage I have cited from *Mirehouse v. Rennell*, 1 Cl. & F. 527, 546 indicates that the fact that the authorities show no example of the application of the rule of law in circumstances such as the instant does

[6] [1973] AC 435 (HL) ("*Knuller*"), cited in the judgment in *Chan Yau Hei* at (2014) 17 HKCFAR 110 at [32] and [33].

not mean that it is not applicable, provided that there are circumstances, however novel, which fall fairly within the rule."

7. I wish therefore, in this lecture, to develop this theme. First, I propose to consider the offence of outraging public decency as an example of the dynamism of the common law by looking at the history and development of the offence. Next, I will address how use of the offence as a means to regulate standards of behaviour discloses limitations of the common law and of the ability of judges to extend its boundaries. Then I propose to address *Chan Yau Hei* itself and in particular the attempt in that case to extend the offence to cover a form of behaviour facilitated and magnified by the internet. Finally, I will briefly consider the case for legislation to address the limitations of the common law, both in relation to the offence itself and in relation to modern technologies.

The elements of the offence

8. Let me introduce my theme, though, by summarising the elements of the offence.

9. As now understood, the common law offence of outraging public decency has two elements, the first concerning the nature of the act done (the indecency requirement) and the second being the public element of the offence (the publicity requirement).[7]

10. The nature of the act element requires that the activity, display or words be lewd, obscene or disgusting to such an extent as to outrage minimum standards of public decency. An obscene act is one which offends against recognised standards of propriety and is at a higher level of impropriety than

[7] *Chan Yau Hei* at [16]-[17]; *R v Hamilton* [2008] QB 224 ("*Hamilton*") at [21].

indecency. A disgusting act is one which fills the onlooker with loathing or extreme distaste or causes the onlooker extreme annoyance. But it is not enough that the act might shock people; it must also be of such a character that it outrages minimum standards of public decency as judged by the jury in contemporary society. [8]

11. To satisfy the public element of the offence, the act must occur in a public place or at least in a place accessible to or within view of the public. Additionally, the act must be in the presence of two or more persons, whether or not those persons actually witness it or are outraged by it; this is known as the two person rule.[9]

12. The mental element of the offence is satisfied if the defendant intentionally does an act which outrages public decency. If he does so, he will be guilty regardless of his state of mind.[10] The offence is one of basic intent so that voluntary intoxication through drink or drugs will provide no defence;[11] although it may well explain the commission of some of the more bizarre acts held to have constituted the offence.

History and development of the offence

13. Let us now examine the history and development of the offence. As we have seen, the nature of the act element contains two limbs. The first limb – that the act is lewd, obscene or disgusting – involves an inquiry into the quality of the act and the second – that it be of such a character as to outrage public decency – involves an examination of the degree to which the act provokes a

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8 *Chan Yau Hei* at [18]-[21]; *Hamilton* at [30].
9 *Hamilton* at [31].
10 *Chan Yau Hei* at [24]; *R v Gibson and Sylveire* [1990] 2 QB 619 at pp.627E and 629D-F.
11 *Rook and Ward on Sexual Offences Law and Practice* (5th Ed.) at para. 15.68 ("*Rook & Ward*").

reaction. A consideration of both limbs of the nature of the act element is illuminating.

14. Over the years, the types of conduct constituting the offence have been wide ranging. The imagination and depravity of some individuals, or perhaps, more often than not, their gross stupidity, appear to know no bounds. The early cases established a general proposition that an offence was committed when public decency was outraged in the presence of people.[12] What sorts of acts, then, have been held to be capable of causing the necessary outrage?

15. The very first reported case of the offence is *Sir Charles Sedley's Case*[13]. In his judgment in *R v Hamilton* (to which we shall return), Thomas LJ (now Lord Thomas CJ) provided a rather anodyne description of the facts of that case, stating: "the defendant, Sir Charles Sedley, showed himself naked on the balcony of a house in Covent Garden in the presence of several people and urinated on them." The report in Keble, volume 1, provides a little more colour, describing Sedley, a well-known rake and libertine of the Restoration period, "shewing himself naked in a balkony, and throwing down bottles (pist in) vi & armis among the people in Convent [sic] Garden, contra pacem, and to the scandal of the Government." The facts of the case, it transpires, are even more lurid than this description – and may well explain why Sedley's actions provoked a riot amongst the onlookers and also why, sensibly, he confessed to the indictment. The salacious details are related by Samuel Pepys in his diary entry for 1 July 1663. Decorum prevents them being read in full on this occasion and I will instead quote from Sir Robert Megarry's *A New Miscellany-at-Law*[14]:

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12 *Hamilton* at [18].

13 (1663) 1 Keb. 620, 83 ER 1146; (1663) 1 Sid. 168, 82 ER 1036 ("*Sedley's Case*").

14 Edited by Bryan A. Garner (Hart, 2005), at p.286.

> "It was left to Pepys to give further and better particulars. On the balcony, Sedley had acted 'all the postures of lust and buggery that could be imagined,' as well as abusing the scriptures and preaching a mountebank sermon. He had then washed his virile member in a glass of wine and swallowed the wine, before drinking the King's health."[15]

Thus, the quality of the act was rather more extreme than mere public nakedness and urinating on passersby, although there can be little doubt that such behaviour would still satisfy the nature of the act element of the offence today.

16. A particular significance of *Sedley's Case* is that it was the first case since the abolition of the Star Chamber in which the King's Bench asserted its authority as "*custos morum*" (guardian of morals) at common law and brought the regulation of immoral behaviour under the jurisdiction of that court.[16] That the case laid down the proposition that the temporal courts had jurisdiction over public morality in general was confirmed by Lord Mansfield CJ in 1762,[17] holding that "the general inspection and superintendence of the morals of the people belongs to this Court, as *custos morum* of the nation".[18]

17. Nevertheless, although the temporal courts exercised jurisdiction, the offence shared a close affinity with Christian standards of propriety. In 1727, the King's Bench held that "religion was part of the common law; and therefore whatever is an offence against that, is evidently an offence against the common law" and that "morality is the fundamental part of religion, and therefore whatever strikes against that, must for the same reason be an offence against the

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[15] See, for the unexpurgated description of the event, the Latham & Matthews edition of the Diary at http://www.pepysdiary.com/diary/1663/07/01/#annotations.

[16] J.H. Baker, *An Introduction to English Legal History*, 118-119; J.R. Alexander, "*Roth at Fifty: Reconsidering the Common Law Antecedents of American Obscenity Doctrine*" (2008) 41 J. Marshall L. Rev. 393, 398-399.

[17] *R v Delaval et al* (1762) 1 Black. W. 439, 440, 96 ER 251; citing also *R v Curl* (1727) 2 Strange 788, 93 ER 849; (1727) 1 Barnardiston K.B. 29, 94 ER 20.

[18] That the guardianship of public morals was within the jurisdiction of the temporal courts and not restricted to the ecclesiastical courts was again confirmed in *R v Lynn* (1788) 2 Term Reports 733, 100 ER 394.

common law".[19] Indeed, in *Hawkin's Pleas of the Crown*,[20] the offence is categorised as "an offence against God".

18. Since *Sedley's Case*, the types of conduct that have been held to be lewd, obscene or disgusting for the purposes of the offence cover a wide range of conduct and behaviour. This demonstrates the adaptability of the common law offence to criminalise different types of behaviour. Many of the cases concern acts of open lewdness or sexual indecency: ranging from public nakedness and indecent exposure[21] to the commission of a medley of sexual activities in public (either real or simulated).[22] They also include publishing a magazine with contact advertisements for gay men,[23] holding indecent pay-per-view exhibitions[24] and procuring girls to be prostitutes.[25]

19. But as Lord Reid observed in *Knuller*[26]: "Indecency is not confined to sexual indecency: indeed it is difficult to find any limit short of saying that it includes anything which an ordinary decent man or woman would find to be shocking, disgusting and revolting." Thus, we see the common law developing the offence to include other acts including: disinterring a corpse for dissection,[27] physically abusing and urinating on a dying woman in the street,[28] and urinating on a war memorial while drunk.[29]

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19 *R v Curl* (1727) 1 Barnardiston K.B. 29, 94 ER 20.

20 7th Ed. (1795), Book 1, ch 5, p.12, section 4 (referred to in *Hamilton* at [19]).

21 E.g., *R v Crunden* (1809) 2 Camp 89; *R v Watson* (1847) 2 Cox CC 376; *R v Holmes* (1853) 1 Dears CC 207; *R v Thallman* (1863) 9 Cox CC 388; *R v Wellard* (1884) 14 QBD 63.

22 E.g. *R v Bunyan* (1844) 1 Cox CC 74; *R v Orchard* (1848) 3 Cox CC 248; *R v Elliot* (1861) Le & Ca 103; *R v Harris* (1871) LR 1 CCR 282; *R v Mayling* [1963] 2 QB 717; *R v May* (1990) 91 Cr App R 157; *Rose v DPP* [2006] 1 WLR 2626.

23 *Knuller*.

24 *R v Saunders* (1875) 1 QBD 15.

25 *R v Delaval* (1763) 3 Burr 1434.

26 At p.458D.

27 *R v Lynn* (1788) 2 Durn & E 733.

28 *R v Anderson* [2008] 2 Cr App R (S) 57.

29 *R v Laing* (2009), The Times, 5.11.09 (cited in *Rook & Ward* at para. 15.26 FN35 and see also, http://www.theguardian.com/uk/2009/nov/26/student-urinated-war-memorial-sentenced).

20. As Lord Reid said in *Shaw v DPP*: "I think that [the authorities] establish that it is an indictable offence *to say or do or exhibit* anything in public which outrages public decency, whether or not it also tends to corrupt and deprave those who see or hear it."[30] So, in addition to outrageous acts, the offence can be committed by means of things displayed or exhibited. Exhibitions which have been held to constitute the offence have included those of: deformed children,[31] a sculpture consisting of a human head with freeze-dried human foetuses as earrings,[32] and a picture of sores.[33] So too, it is an indictable offence to utter obscene language[34] and, in *Knuller*, the offence was held to be capable of being committed by the printing of advertisements.

21. Importantly, whilst the origins of the offence were based on traditional religious norms, the offence came to be treated as separate to offences against religion. Since its first publication in 1822, successive editions of *Archbold* have consistently addressed the topic of "Open and notorious lewdness" as a separate topic and not in terms of an offence against religion.[35] In another treatise published in 1842, "misdemeanors against religion" and "misdemeanors against public morals" were discussed separately[36] and their bases were differentiated, the former being acts "in opposition to the established religion" and the latter being "conduct which has a plain tendency to subvert public morals … [and] to lower the standard of proper conduct".[37] As an American professor of political science has put it: "By the more secularized nineteenth century, the prosecution of immoral behavior reached beyond violations of

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30 [1962] AC 220 ("*Shaw*") at p.281 (emphasis added).
31 *Herring v Walround* (1681) 2 Chan. Cas.110.
32 *R v Gibson and Sylveire* (*supra*).
33 *R v Grey* (1864) 4 F & F 73.
34 *R v Saunders* (1875) 1 QBD 15 at pp.17-19 (Count 4).
35 J. F. Archbold, *A Summary of the law relative to Pleading and Evidence in Criminal Cases*, 1st ed (1822), 2nd ed (1825), 3rd ed (1828), 8th ed (1841), 22nd ed (1900), 26th ed (1922). (In the 22nd and 26th editions, "Open and notorious lewdness" became classified as one of the "Public nuisances").
36 H. W. Woolrych, *A Practical Treatise on Misdemeanors* (1842), Ch IX "Of Misdemeanors against Public Policy", Sect. IV "Of Misdemeanors against Religion and Public Morals", 254-273.
37 *Ibid*, 254.

traditional religious norms … to embrace broader behavioral conventions of public decency and decorum associated with the emerging middle class".[38]

22. So we can see the way in which the common law offence has developed dynamically and flexibly both in terms of the underlying basis of criminality and also in the application of the rules of law deriving from earlier precedents to cater for novel and different factual situations. As Lord Simon in *Knuller* noted: "… the decided cases look odd standing on their own. … They have a common element in that, in each, offence against public decency was alleged to be an ingredient of the crime …; but otherwise they are widely disparate; this suggests that they are particular applications of a general rule whereby conduct which outrages public decency is a common law offence."[39]

23. Similarly, the standard by which the degree of outrage is judged is also capable of change and evolution over time. Returning to Lord Simon in *Knuller*, he observed: "… the jury should be invited, where appropriate, to remember that they live in a plural society, with a tradition of tolerance towards minorities, and that this atmosphere of toleration is itself part of public decency."[40] And as Viscount Simonds put it in *Shaw* (in the related context of the offence of conspiracy to corrupt public morals): "The same act will not in all ages be regarded in the same way. The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society."[41]

24. It is perhaps stating the obvious to say that, just because an act has been held to constitute the offence in the past, this will not necessarily create a

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38 J.R. Alexander, "*Roth at Fifty: Reconsidering the Common Law Antecedents of American Obscenity Doctrine*" (2008) 41 J. Marshall L. Rev. 393, FN26.

39 *Knuller* at pp.492H and 493B-C.

40 *Knuller* at p.495D.

41 [1962] AC 220 at p.268.

precedent for the present if standards have changed. A good example of this is provided by *Knuller*, where contact advertisements in a magazine were held capable of constituting the offence. It may be doubtful whether, as judged by a jury in contemporary society in which dating "apps" like Tinder and Grindr are widely used, this would be regarded as outraging minimum standards of public decency today.

25. More significantly, in the context of a discussion of the development of the common law, the continued legitimacy for criminalising the giving of offence, as opposed to causing physical or economic harm, is now sought to be justified by the Law Commission on one of two views:

(1) First, either on the basis that, on utilitarian grounds, preventing serious offence to individuals is a legitimate goal of criminal law in the same way as preventing any other kind of harm or suffering;

(2) Or alternatively, secondly, on the basis that criminalising the giving of offence can be justified when it takes the form of a recognisable wrong such as invasion of privacy or insulting behaviour.[42]

On either basis, the rationale for the offence is no longer one of guarding against breaches of religious norms but rather to prevent harm or punish conduct where the behaviour is "in your face". So, for example, the publication of contact advertisements for sexual encounters, to take place in private between consenting adults, would probably not cause the onlooker to be filled with loathing or extreme distaste or to be caused extreme annoyance or a jury in contemporary society to conclude that this outrages minimum standards of

[42] Law Com No. 358 at [3.96]-[3.98].

public decency. On the other hand, sexual activity conducted in a public place is the type of flagrant public behaviour squarely caught by the offence; the paradigm case being, perhaps, that of two young university students observed having sex on a pavement at a bus stop in the early hours of the morning (not, I should add, students of this university).[43]

26. This is very different to the earlier expressions of the rationale for the offence. In *Sedley's Case*, for instance, the Court told Sir Charles: "Notwithstanding that there was not any Star Chamber, yet they would leave him to know that the court of King's Bench was the *custos morum* of all the King's subjects and that it was then high time to punish such profane actions, committed against all modesty, when they were as frequent as if not only Christianity but morality also had been neglected."[44] Other early cases also stressed the tendency of the behaviour complained of to corrupt or be injurious to public morals[45] and, as already noted, the offence was categorised as "an offence against God". One would be surprised to find a lawyer seeking to justify the offence on this basis today, yet the common law offence in existence today derives from that found to have been committed by Sir Charles Sedley in 1663.

27. We can therefore see the evolution of the offence from one justified on the basis of regulating behaviour to prevent the subversion of public morals to one based on the suppression of harm to members of the public by reason of offensive, anti-social behaviour. As the Law Commission puts it, "it is not a tool for the enforcement of morals but a protection of the right to enjoy public spaces without annoyance."[46]

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43 http://www.scmp.com/news/hong-kong/law-crime/article/1854336/mainland-chinese-student-19-who-had-sex-hong-kong-street.

44 From the report in Siderfin, volume 1, translated from the French in *Hamilton* at [18].

45 See, e.g. *R v Crunden* (*supra*) at p.90.

46 Law Com No. 358 at [3.97].

28. Yet, the retention in the common law of the offence has not been without debate. In its Report on *Conspiracy and Criminal Law Reform* published in 1976, the Law Commission of England and Wales recommended the abolition of the generic offence of outraging public decency at common law and consequently the offence of conspiracy to outrage public decency.[47] Notwithstanding this, the Criminal Law Act 1977 retained the common law conspiracy to outrage public decency[48] and left the generic offence unaffected. The Law Reform Commission of Hong Kong, in its 1994 Report on *Codification: The Preliminary Offences of Incitement, Conspiracy and Attempt*, recommended the abolition of the offence of outraging public decency.[49] Nevertheless, although the Crimes (Amendment) Ordinance 1996 implemented some of these recommendations, the recommendation for the abolition of the common law offence of outraging public decency was not adopted.

Square pegs in round holes?

29. I now wish to consider in what way the offence may be said to illustrate some of the limitations in the common law. The decision in *Chan Yau Hei* is an example of this which I will address in a moment. But, first, to what extent, in the attempt to fit certain behaviour within the offence has the law sought to push a square peg into a round hole?

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[47] Law Commission, *Conspiracy and Criminal Law Reform* (Law Com No. 76, 1976) at [3.149].

[48] Criminal Law Act 1977, s.5(3)(a); cf. the position in Hong Kong, where there is no equivalent of this provision.

[49] Law Reform Commission of Hong Kong, Report on *Codification: The Preliminary Offences of Incitement, Conspiracy and Attempt* (March 1994) at [3.33].

Up-skirt photography

30. One type of conduct which has been held to fall within the offence is the recent phenomenon of "up-skirt" photography. Up-skirting, itself, is not a new form of voyeuristic behaviour. It was depicted in a French painting[50] in 1767, and it is more than 60 years since the release of the film[51] in which Marilyn Monroe stood above a subway grating and created one of the iconic images of the 20th century. Closer to home, the activity of up-skirting even played a minor part in a public commission of inquiry. The *Report of the Commission of Inquiry on the New Airport* records that the Chairman of the Commission noticed in his visits to the new airport "that the black granite flooring was quite reflective and might cause embarrassment to persons wearing skirts".[52] It is a matter of speculation whether the Chairman's gender-neutral reference to those who wear skirts was deliberate. I would like to think it was; for I know only too well, from my school days in Scotland where part of the prescribed uniform was the kilt, the hazards of this form of attire.

31. Be that as it may, with the advancement of technology, surreptitiously shooting videos or taking photographs up or inside a woman's clothing has become easier and is a growing concern;[53] and it is now firmly established that the taking of still and video images up a woman's skirt of her underwear or groin or genital area constitutes behaviour which satisfies the nature of the act element of the offence of outraging public decency. The leading English case is *Hamilton* in which the defendant placed a digital camera in a rucksack and

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[50] *The Happy Accidents of the Swing* (*Les hasards heureux de l'escarpolette*) by Jean-Honoré Fragonard (The Wallace Collection, London).

[51] Billy Wilder's *The Seven Year Itch*.

[52] *Report of the Commission of Inquiry on the New Airport*, January 1999, at para.16.22; and see also, paras. 8.8, 8.12, 9.36-9.39 and 16.20-16.21.

[53] Alisdair A. Gillespie, *"Up Skirts" and "Down-Blouses": Voyeurism and the Law* [2008] Crim. L.R. 370; and Su-Mei Thompson & Lisa Moore, *Hong Kong needs to outlaw growing practice of upskirting* (SCMP 31 July 2014) http://www.scmp.com/comment/article/1563340/hong-kong-needs-outlawgrowing-practice-upskirting.

manoeuvred it into position in a supermarket so that it was pointed up the inside of the skirts of women while they were in the checkout queue. The English Court of Appeal held that the jury was entitled to find that this activity satisfied the nature of the act element of the offence.[54] The offence is also used to prosecute this type of activity in Hong Kong.

32. However, in sentencing for the offence of outraging public decency in up-skirting cases, the courts have not emphasised the lewd, obscene or disgusting nature of the act or that people would be shocked by it. Rather, the emphasis in such cases (quite rightly) is on the fact that the activity is a serious violation of the victim's privacy and dignity, as well as being degrading and humiliating for her.[55]

33. This raises the pertinent question of whether the offence is really an appropriate means of addressing this obviously serious and prevalent problem: according to one source, in 2015, there were 274 reports of up-skirting to the police.[56] That the real vice of up-skirting is that it violates privacy and dignity, and is degrading and humiliating, is a far-cry from the rationale of the public element of the offence, which is that people should be able to venture out without the risk of outrage to certain minimum acceptable standards of decency.[57] Of course, to see someone surreptitiously filming up the inside of a woman's skirt should fill one with disgust and loathing but is the real victim not the woman being filmed rather than the on-looking member of the public? So much more so when, as we shall see, the public element of the offence does not

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[54] *Hamilton* at [30].

[55] See, e.g., *SJ v Yeung Wing Hong* [2013] 3 HKLRD 800 at [26]-[27], and *HKSAR v Kim Eung-who* [2015] 4 HKC 293 at [6].

[56] See, http://www.scmp.com/news/hong-kong/law-crime/article/1985058/peeping-tom-alert-hong-kong-lawmaker-warns-women-beware. (The wisdom of publicising a list of locations where women are prone to being the target of "upskirting" has been called into question: see, http://www.scmp.com/comment/insight-opinion/article/1985836/dabs-list-top-spots-peeping-toms-disservice-women.)

[57] *Knuller* at p.495A; *Hamilton* at [36].

require anyone to actually witness the act whilst it is being carried out.[58] The focus of the offence of outraging public decency does not, it would seem, correspond with the gravamen of the activity of up-skirting.

34. This lack of correspondence is reflected in the views of the Law Commission, which notes that up-skirting "could be argued to involve a different wrong from most other instances of outraging public decency" and that "the fundamental mischief in these cases is not creating disgusting sights in public but infringing the dignity of individuals".[59] Similarly, a sub-committee of the Law Reform Commission of Hong Kong considered that charging up-skirting as outraging public decency is "not … entirely satisfactory".[60] It recommended that up-skirting be included in a specific statutory offence of sexual assault.[61]

35. In an insightful article, Professor Alisdair Gillespie highlights difficulties in the prosecution of up-skirting as an instance of the offence of outraging public decency. In particular, the need for it to be possible for the offender to have been seen committing the relevant act, in order to satisfy the public element of the offence, may make it difficult to prosecute up-skirting in view of technological advances making it ever easier to film covertly.[62] He argues that stretching the common law of outraging public decency to meet emerging up-skirting behaviour is problematic and may cloud the certainty of the law; and he submits that up-skirting should instead be addressed by statute.[63]

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58 *Hamilton* at [31], [39].

59 Law Com No. 358 at [3.109].

60 Law Reform Commission of Hong Kong Review of Sexual Offences Sub-Committee, Consultation Paper, *Rape and Other Non-consensual Sexual Offences* (Sept 2012) at [6.23].

61 *Ibid*. at [6.25]-[6.26] and Recommendation 20: the offence being to cover any act of a sexual nature which would have been likely to cause another person fear, degradation or harm had it been known to the other person, but irrespective of whether it was known to that other person and irrespective of whether the activity took place in a public or private place.

62 Alisdair A. Gillespie, *"Up Skirts" and "Down-Blouses": Voyeurism and the Law* [2008] Crim. L.R. 370 at p.374.

63 *Ibid.* at p.382.

36. Nevertheless, despite these cogent arguments, the offence of outraging public decency continues to be used to prosecute up-skirting and it might be said that the common law has allowed a square peg to fit into a round hole. This conveniently brings me to *Chan Yau Hei*, in which it was held to be a step too far to extend the offence to fit the facts of that case.

Chan Yau Hei

37. In *Chan Yau Hei*, the appellant (Chan) had posted a message in Chinese on an internet discussion forum that read (in translation), "We have to learn from the Jewish people and bomb the Liaison Office of the Central People's Government # fire #". Having originally pleaded guilty to the charge of outraging public decency,[64] by the time his case came on for sentence, Chan was differently represented and sought to change his plea. The magistrate refused that application, confirmed his conviction and sentenced him to 12 months' probation. Chan's appeal to the Court of First Instance against his conviction was dismissed and, on the Appeal Committee's grant of leave, the appeal came before the Court of Final Appeal.

38. As already mentioned, the question of law for the Court was whether the posting of such a message on a discussion forum on the internet was capable of amounting to the offence of outraging public decency. The principal issue was whether posting the message on the internet satisfied the public element of the offence, although a subsidiary issue was whether the message in question could constitute the offence. The Court concluded that the message satisfied the nature of the act element of the offence but that its posting on the internet did not satisfy the public element. It is the latter point that is of particular interest in the context of this lecture.

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[64] For the particulars of which, see *Chan Yau Hei* at [8].

39. As to the public element issue, the Court held, following *Hamilton*, that there were two parts of the public element of the offence, namely (i) that the offence must be committed in public in the sense of being done in a place to which the public has access or in a place where what is done is capable of public view (I shall refer to this, compendiously, as a public place), and (ii) that the act is capable of being seen by two or more persons who are actually present, even if they do not actually see it.[65] Save for one other first instance decision (in the case of *HKSAR v Chan Johnny Sek Ming*[66]), there was no previous decision holding that the internet is a public place for the purposes of the offence of outraging public decency. This was a novel issue and would amount to an extension of the bounds of the offence. Was this a legitimate extension?[67]

40. The Court held that it was not, essentially for these seven reasons (which I shall summarise):

(1) First, (save for the *Johnny Chan* case) all previous cases of outraging public decency had concerned acts done in an actual physical, tangible place. In *Johnny Chan*, the issue of whether the internet was a public place for the purposes of the offence was not apparently raised in argument and it was not addressed in the judgment, so this provided scant support for the prosecution in *Chan Yau Hei*.[68]

(2) Secondly, Lord Simon, in rejecting the Crown's submission in *Knuller* that it was immaterial whether or not the alleged outrage to decency took place in public provided that the sense of decency of

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65 *Chan Yau Hei* at [22]-[23].
66 [2006] 4 HKC 264 ("Johnny Chan").
67 *Chan Yau Hei* at [30]-[31].
68 *Ibid*. at [38].

the public or a substantial section of the public was outraged, held that, in the offence of outraging public decency, the word "public" refers to the place in which the offence is committed. This was to be contrasted with the meaning of "public" in the context of the offence of conspiracy to corrupt public morals, where it referred not to a place but to persons in society.[69] This distinction strongly suggests a physical, tangible place for the offence of outraging public decency.

(3) Thirdly, in its judgment in *R v Walker*,[70] the English Court of Appeal clearly gave the first part of the public element of the offence (i.e. that the offence must occur in a place where the public are able to see what takes place there) a content of its own quite distinct from the two person rule. If so, it must require more than the sense of decency of at least two people having been capable of being outraged and that additional requirement relates to the public nature of the place where the offence is committed.[71]

(4) Fourthly, it is a fiction to describe the internet as a place in any physical or actual sense. A person can only see a message posted to an internet forum when the relevant URL[72] address of the website is accessed or downloaded in comprehensible form by someone using a computer or mobile internet device. It is at the places where they are when they access or download the offending material that their sense of decency may be outraged, not some

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69 *Ibid*. at [39]-[40].
70 [1996] 1 Cr App R 111 at p.114C-E.
71 *Chan Yau Hei* at [41]-[43].
72 Uniform Resource Locator, commonly informally termed a web address.

virtual place. In short, for the purposes of the offence, the internet is the medium, not the place.[73]

(5) Fifthly, one can test the fiction of regarding the internet as a place by reference to the facts of *Walker*, in which the defendant exposed himself and committed obscene acts in the living room of his house in the presence of two young girls. His conviction was quashed by the Court of Appeal since the living room was a private place and not a place where members of the general public might have witnessed what happened. It would seem anomalous if, had the defendant posted an obscene image of himself on the internet which the girls had accessed in the very same living room, the offence of outraging public decency were held to be established on the basis that the internet is a public place for the purposes of the offence.[74]

(6) Sixthly, it is similarly a fiction to regard persons who surf the internet as being in the same position as reasonable people who venture out physically in public and who are entitled to protection against having their sense of decency outraged.[75]

(7) Finally, the offence being in effect one of strict liability, this was a reason to decline the invitation to develop the common law by extending the offence to a virtual place.[76]

41. The conclusion on this issue was therefore that "the first part of the public element of the offence does require that the *actus reus* (whether it be something said, done or exhibited) be committed in a physical, tangible place and not

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73 *Ibid*. at [45]-[47].
74 *Ibid.* at [47].
75 *Ibid.* at [48].
76 *Ibid.* at [49].

virtually in cyberspace by way of the internet. To hold that the internet is a public place for the purposes of the offence would involve either dispensing with the first part of the public element of the offence or substantially extending its meaning and would therefore amount, impermissibly, to judicially extending the boundaries of criminal liability."[77]

42. The issue in *Chan Yau Hei* was certainly interesting and it cannot be said that the answer the Court arrived at was inevitable. In *Knuller*, the appellants were charged with a conspiracy to outrage public decency by means of the publication of the magazine in question containing the offending articles. Although the magazines were physically visible at the shops where they were sold, a reader would have had to open the magazine to find the offending material inside. The outcome in that case is, I believe, explicable on the basis that the magazines were on sale in public places. Thus, as Lord Morris held, they were sold in the expectation that such public dissemination would result in members of the public who bought them opening the magazines they bought and reading the inside pages.[78] And, as Lord Simon held, it would not negative the offence that the act or exhibit was superficially hid from view, if the public was expressly or impliedly invited to penetrate the cover.[79] The Law Commission has noted that, whilst the cases of *Chan Yau Hei* and *Knuller* can be reconciled because in the latter the magazines were on display in a physical public place, it is hard to find a convincing rationale for the distinction between dissemination through the internet and publication inside a magazine: in both cases, the means of publication used is an ordinary one and it is the option of the reader whether to look inside a magazine or access a website.[80] Nevertheless, the Law Commission considers that the public place requirement

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77 *Ibid.* at [50].
78 *Knuller* at pp.467F-468A, 469A-C.
79 *Ibid.* at p.495B; Lord Kilbrandon agreed with Lord Simon on this part of the appeal (see p.497F-G).
80 Law Com No. 358 at [3.122].

is sound and that changing it would make the offence unacceptably wide.[81] In his speech in *Knuller*, in relation to this count (holding that the offence of conspiracy to outrage public decency was not known to the law), Lord Reid held that to treat the inside of a book or magazine exposed for sale as exhibited in public was going beyond the general purpose and intendment of the offence.[82] This view certainly supports the result in *Chan Yau Hei*.

43. Insofar as the conclusion reached in the case is a correct statement of the law as to the boundaries of the offence of outraging public decency, the decision serves to illustrate the limits of the courts' ability to develop the common law to meet new circumstances and conditions. As the Court's conclusion on the nature of the act issue confirms, the message posted by Chan was otherwise capable of constituting the offence and the message was rightly found to be obscene and disgusting or such as to outrage public decency.[83] As such, one might well think that it ought to have been the subject of some legal proscription. But to convict him of the offence of outraging public decency would not, we concluded, have been a principled development of the offence.

44. *Chan Yau Hei* also highlights the potential for divergence in other common law jurisdictions on a similar issue. In *Chan Yau Hei*, it was pointed out that the law in some jurisdictions has developed differently to that in *Walker*, in that the offence may be committed by acts in private premises seen by others in those same private premises or from other private premises.[84] It was not suggested by the parties in *Chan Yau Hei* that the law in Hong Kong should be otherwise than as reflected in *Walker* and both parties relied on the definition of the elements of the offence in *Hamilton*, which followed *Walker* as to the first part of its public element. However, if the issue that was before the Court in

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81 *Ibid.* at [3.123].
82 *Knuller* at p.458E-F.
83 *Ibid.* at [79]-[84].
84 *Chan Yau Hei* at [44] citing cases from New South Wales and South Africa.

Chan Yau Hei were to come before the courts of one of those other jurisdictions which have diverged from *Walker*, there could potentially be more scope to argue for a different outcome.

45. Before addressing the case for law reform, it is important to stress one point, to prevent confusion. The *ratio* of the decision in *Chan Yau Hei* is that the internet is not a place for the purposes of the public element of the offence and the act must take place in a physical, tangible place. The decision does not, however, mean that the offence can never be constituted by a message posted on the internet. The Court expressly left open the possibility that, treating the internet as a medium for the purposes of the offence, an outrageous posting to an internet forum might constitute the offence if that posting was displayed or accessed in a public place. Two examples were given, that of a message displayed by a hacker on a large public computer display like the airport flight information display or a message accessed on a mobile internet device in a public place like a park, MTR carriage or bus.[85] This therefore left open the possibility that the prosecution in *Chan Yau Hei* might have succeeded had there been evidence to establish that the message was displayed or accessed in a public place and where two or more persons could have seen it. However, on the facts of *Chan Yau Hei*, there was an absence of sufficient evidence as to where and by whom the offending message posted by the appellant was read.[86]

A case for reform?

46. Is there a case for reform? In common law jurisdictions, the courts apply existing legal principles to the facts before them in order to resolve legal disputes. As Lord Bingham and Baroness Hale both noted in *R v Rimmington*

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85 *Ibid.* at [63]-[64].
86 *Ibid*. at [66]-[68].

and Goldstein,[87] it is not the function of the courts to create new offences or to abolish existing offences, which are exercises in law reform.[88] The limitations in the common law offence of outraging public decency that I have addressed both illustrate that there is scope for legislative action to meet the concerns in question.

47. So far as the internet is concerned, Sir James Munby P said in *Re J (a child)*, a case concerning a reporting restriction injunction in the context of care proceedings, that:

> "The law must develop and adapt, as it always has done down the years in response to other revolutionary technologies. We must not simply throw up our hands in despair and moan that the internet is uncontrollable. Nor can we simply abandon basic legal principles."[89]

Whilst I doubt anyone would cavil at the suggestion that the common law should develop and adapt to meet new technologies, the question arises as to whether particular developments and adaptations can take place in keeping with the relevant underlying common law principles. In his concurring judgment in *Chan Yau Hei*, Ma CJ said that:

> "The common law offence of outraging public decency, which has a history going back at least 350 years, is not one that comfortably fits into the modern internet age. Criminal liability in the context of the present case is one that should be determined by legislation."[90]

The growth in use of the internet and its use as a platform for many-to-many communications greatly facilitates the ability of individuals to communicate

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87 [2006] 1 AC 459 at [31] and [58]. These were appeals concerning the ambit of the common law offence of public nuisance.

88 See also, *Knuller* per Lord Simon at p.490G.

89 *Re J (a child)* [2013] EWHC 2694 at [43].

90 *Chan Yau Hei* at [1].

messages and other content to a vast audience. The Court's decision in *Chan Yau Hei* notes that there is "room for arbitrariness between some internet content that will be open to prosecution for the offence and other content that will not simply because of where it is seen" and this is unsatisfactory.[91] Although there are existing statutory offences in Hong Kong addressing the sending and exhibition of lewd, obscene and disgusting material, these do not apply to material posted on the internet and there is a strong case for at least updating or extending the provisions of those offences, if not conducting a comprehensive review of the mischief of the posting of such material on the internet.[92] There is, presently, no Hong Kong equivalent of section 1 of the Malicious Communications Act 1988 or section 127 of the Communications Act 2003 in the UK under which the sending of electronic communications which are grossly offensive, indecent, obscene, menacing or false may be prosecuted. Nor is there an equivalent of section 33 of the Criminal Courts and Justice Act 2015, which creates a specific offence of distributing a private sexual image of someone without their consent and with the intention of causing them distress. This latter behaviour is commonly referred to as "revenge porn", an activity which although it may clearly be conducted in such a way as to outrage public decency, is more pertinently a serious interference with an individual's right to privacy. Clearly, these are matters ripe for consideration in this jurisdiction.

48. In the context of the internet, the Court of Final Appeal has also recently dealt with the common law defence of innocent dissemination in an action for defamation arising from a posting to an internet discussion forum.[93] As Ribeiro PJ has observed, extra-judicially, the internet raises various issues in relation to the law of defamation on which detailed legislative intervention would be

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91 *Ibid*. at [90].

92 *Ibid*. at [91]-[92], referring to ss.12A and 20 of the Summary Offences Ordinance (Cap.228).

93 *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366.

helpful[94] and the present context of the offence of outraging public decency adds to the list of topics for law reform arising from use of the internet.

49. Similarly, there is a strong case for legislation to tackle up-skirting. Although the Law Commission has noted that the abolition of the common law offence would leave a gap in the law in England and Wales as there would be no offence that addresses up-skirting,[95] and considers that there is a need for an offence of outraging public decency, it recommends that the existing common law offence should be replaced by a statutory offence.[96] A number of other common law jurisdictions have addressed up-skirting by way of statutory offence: in New Zealand, amendments in 2006 to the Crimes Act 1961 prohibit the making of an "intimate visual recording" of another person (the definition of such a recording including "up-skirt", and the corresponding activity of "down-blouse", recording);[97] in Australia, various pieces of state legislation make it an offence to film a person's private parts without consent;[98] in Canada, up-skirting is covered by the statutory offence of voyeurism;[99] and in Singapore, up-skirting is prosecuted under a statutory offence addressing insults to the modesty, and intrusions upon the privacy, of a woman.[100] As I have earlier noted, the Review of Sexual Offences Sub-Committee of the Law Reform Commission has recommended that up-skirting be the subject of a statutory offence.[101] Clearly, an amendment of this nature would focus the offence on the real vice of the activity rather than on the ancillary and, it may be said, lesser mischief of outrage to public decency.

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94 *Defamation and the Internet*, HKU Obligations VII Conference (15 July 2014) at [67]-[68]; see also, *Defamation and Internet Intermediaries*, Hong Kong Judicial Colloquium 2015 at [43], [61].

95 Law Com No. 358 at [3.108].

96 *Ibid*. at [3.111].

97 Crimes Act 1961 (NZ) s.216G(1); *Diffin v R* [2013] NZCA 460.

98 Crimes Act 1900 (NSW) s.91L(1); Summary Offences Act 1966 (Vic.) s.41B; Criminal Code Act 1899 (Qld.) s.227A(2); Summary Offences Act 1953 (SA) s.26D; Police Offences Act 1935 (Tas.) s.13A; Crimes Act 1900 (ACT) s.61B(5).

99 Canadian Criminal Code s.162(1).

100 Penal Code s.509; see, e.g., *Public Prosecutor v Chong Hou En* [2015] 3 SLR 222.

101 As at the date of this lecture, the Sub-Committee is yet to publish its report.

Postscript

50. It is interesting to note, by way of postscript, that just over a year after the judgment in *Chan Yau Hei* was handed down, a man was convicted and jailed for six months for posting messages to Facebook calling on others to bring bricks, fire extinguishers, sticks and hammers to Mongkok and the Legislative Council during the Occupy Central protests in 2014.[102] The offences with which he was charged were obtaining access to a computer with intent to commit an offence and incitement to commit offences involving unlawful violence. An appeal is pending in that case and I will therefore not comment on it. However, I mention it to point out that it was not sought to charge the appellant in *Chan Yau Hei* with the offence of incitement to commit violence.[103] There may, of course, have been reasons why, evidentially, it would not have been appropriate to charge that offence.

Conclusion

51. In conclusion, I return to the criticism that was directed at the judgment in *Chan Yau Hei*. The common law is indeed adaptable and contextual; its flexibility is one of its great strengths. The development of the offence of outraging public decency over more than three and a half centuries has undoubtedly demonstrated this flexibility. However, there are clearly limits to its flexibility and it is stating the obvious (albeit mixing metaphors) that, if the rules are bent too far, the fabric of the common law may be damaged. Square

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102 *HKSAR v Ku Ka Ho*, KTCC 4735/2015 (appeal pending in HCMA 151/2016).

103 *Rook & Ward* at §15.60, interestingly, describe Chan as having "posted a message … inciting the bombing of the Hong Kong Liaison Office" and comment (at FN125) that the charge of outraging public decency "was a notably wide application of the offence, which is unlikely to be regarded as appropriate in [England and Wales]".

pegs do not fit comfortably, if at all, into round holes. Plainly, when usage of a new technology like the internet experiences the kind of explosive growth we have seen in the computer-driven information age,[104] there are likely to be many issues arising in many different contexts. Where there is plainly a need to complement the common law, as there would seem to be in the context of the offence of outraging public decency, legislative change is the proper vehicle.

52. Thank you for your attendance today. I hope these remarks may stimulate some interest in a relatively esoteric offence, although one in respect of which there were, in Hong Kong, no fewer than 134 prosecutions in 2014 and 125 prosecutions in 2015. Clearly, there are offenders out there who are getting "in your face" and "up your skirt".

27th October 2016

[104] Cisco Systems estimated a total of 72,521 petabytes (1 petabyte = 1 quadrillion bytes) per month of internet protocol (IP) traffic in 2015: https://en.wikipedia.org/wiki/Internet_traffic#Global_Internet_traffic.