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ARTICLE

Does the Basic Joint Enterprise Principle Have Any Value?

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Abstract

In Hong Kong, the basic joint enterprise principle is recognised as an independent basis for attributing criminal liability. Although the principle has been recognised by the highest courts of the United Kingdom, Australia, and Hong Kong at different times, this article suggests that it does not have a historical foundation in common law. This article further argues that the basic joint enterprise principle (i) has no practical utility as it completely overlaps with traditional accessorial liability and the inchoate offence of conspiracy; (ii) necessarily requires the court to engage in circular reasoning; (iii) is unable to deal with situations of evidential uncertainty; and (iv) unjustifiably disrupts the principal-accessory distinction under common law. It is therefore recommended that the basic joint enterprise principle be abolished.

Introduction

In *HKSAR v Chan Kam Shing*,[1] the Hong Kong Court of Final Appeal (HKCFA) unequivocally declared the two forms of joint enterprise – basic joint enterprise and extended joint enterprise – as good law in Hong Kong. The facts of *Chan Kam Shing* concern a typical scenario of 'basic joint enterprise', in which parties enter into an agreement to commit a crime and then execute it.[2] The defendant and his fellow triad members were instructed to attack members of a rival gang. The group brought knives and water pipes with them as weapons. When the defendant arrived at the scene, the deceased had already been heavily injured and was lying on the ground. The defendant then left. There was no evidence that the defendant injured the deceased or was present at the time of the attack.[3] The defendant was, however, convicted of murder under the basic joint enterprise principle, as he participated in 'an agreement with others to chop the followers of [the rival faction] with knives with the intent to cause such persons grievous bodily harm'.[4]

In dismissing the defendant's appeal, the HKCFA remarked that '[t]he principles of accessorial and joint criminal enterprise liability provide overlapping bases for establishing [the defendant's] guilt'.[5] Under traditional principal-accessorial liability, the person who carried out the *actus reus*

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[1] *HKSAR v Chan Kam Shing* (2016) 19 HKCFAR 640C (HKCFA).

[2] *HKSAR v Lo Kin Man* (2021) 24 HKCFAR 302 (HKCFA) [52]; *Chan Kam Shing* [41]; *Brown v The State (Trinidad and Tobago)* [2003] UKPC 10 (Privy Council) [8].

[3] *Chan Kam Shing* [6].

[4] ibid.

[5] ibid [100].

of an offence is known as the principal.[6] If two or more persons contributed to the *actus reus*, they are joint principals.[7] A person who 'aids, abets, counsels or procures' the principal to commit the offence is regarded as an accessory and would be guilty of the same offence.[8] The essence of accessorial liability is to criminalise those who assist or encourage an offence.[9] Applying the above principle to *Chan Kam Shing*, the defendant is clearly an accessory who assisted or encouraged his fellow triad members to cause grievous bodily harm to the deceased.[10]

Although the defendant's guilt could easily be established under either traditional accessorial liability or the basic joint enterprise principle, the HKCFA was eager to take the opportunity to review the law on joint enterprise. This is because half a year before *Chan Kam Shing* was decided, the United Kingdom (UK) Supreme Court reviewed and abolished the extended joint enterprise principle (also known as parasitic accessorial liability) in *R v Jogee*.[11] It is notable that *Jogee* only dealt with the extended joint enterprise principle and was silent on the basic joint enterprise principle. Yet, the HKCFA has perhaps mistakenly believed that '*Jogee* … decided that joint criminal enterprise, both basic and extended, should be abolished'.[12] In any event, the HKCFA had analysed both the basic and extended joint enterprise principles and approved their continuous application in Hong Kong.[13]

While much of the current literature discusses whether the extended joint enterprise principle should be abolished, little explores the history or merits of the basic joint enterprise principle. Intending to fill this gap in the literature, this article analyses the historical roots and utility of the basic joint enterprise principle. It argues that the principle neither has roots in common law nor provides any supplemental value to traditional accessorial liability.

This article is divided into eight parts. The second part, following this introduction, provides a summary of the basic joint enterprise principle. The third part reviews cases and academic literature and argues that the basic joint enterprise principle did not operate as a standalone basis for attributing criminal liability under common law. The fourth part suggests that the principle lacks practical utility as all defendants who could properly be convicted under the basic joint enterprise principle could equally be convicted under traditional accessorial liability and/or the inchoate offence of conspiracy. The fifth part proposes that the application of the basic joint enterprise principle involves illogical and circular reasoning. The sixth part discusses why the basic joint enterprise principle is unable to deal with evidential uncertainty scenarios. The seventh part suggests there is no value in reclassifying all defendants as principals under the basic joint enterprise principle. The final part concludes.

A Summary of the Basic Joint Enterprise Principle

According to the HKCFA, the basic joint enterprise principle provides an independent basis for attributing criminal liability.[14] Criminal liability can be attributed when defendants enter into an agreement to carry out a crime and then execute that crime.[15] An agreement may take place in

[6]ibid [9].

[7]ibid; Matthew Dyson, 'Principals without Distinction' [2018] Criminal Law Review 296. An example is that two offenders stabbed the victim at the same time and both acts contributed to the victim's death.

[8]Criminal Procedure Ordinance (Cap 221, Laws of Hong Kong), s 89.

[9]*R v Jogee* [2016] UKSC 8 (UK Supreme Court) [6]; *Chan Kam Shing* [10]–[13]. See also Dyson, 'Principals without Distinction' (n 7).

[10]The accessorial conduct consisted of agreeing to participate in the attack and '[lending] the courage of [his] presence' to the actual perpetrators, thereby letting the others know that he would assist when necessary. See *R v Cook* [1994] QCA 227 (Supreme Court of Queensland) 16; *Lo Kin Man* [84].

[11][2016] UKSC 8.

[12]*Chan Kam Shing* [57].

[13]ibid [98].

[14]*Lo Kin Man* [52]; *Chan Kam Shing* [41].

[15]*Lo Kin Man* [52]; *Chan Kam Shing* [41]; *HKSAR v Sze Kwan Lung* (2004) 7 HKCFAR 475 (HKCFA) [33]–[34]; *Brown* [8].

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many forms. It may arise 'on the spur of the moment', and may, for example, be made with a knowing look or nod.[16] In *HKSAR v Lo Kin Man*, the HKCFA summarised that

> [i]t is taking part in this criminal joint enterprise that makes all participants guilty as principals, whoever the actual perpetrator(s) of the *actus reus* might have been. Such liability is *independently based on each defendant's participation in the joint criminal enterprise with the requisite mental state to constitute the offence* relevant to the defendant in question (emphasis added).[17]

In summary, to be found guilty under the basic joint enterprise principle, (i) the defendant must be a party to an agreement to carry out a crime; (ii) the defendant must have the requisite *mens rea* for the crime, and (iii) the agreed crime must have been executed. The below sections evaluate whether the basic joint enterprise principle should be recognised as good law.

Lack of Historical Foundation

In *Chan Kam Shing*, the HKCFA asserted that the basic joint enterprise principle is rooted in common law[18] and mainly referenced four cases in support of the principle.[19] However, a detailed look into these four cases reveals that they do not in fact provide strong support for the HKCFA's position.

Referencing the first case, *Ramnath Mohan v The Queen*,[20] the HKCFA stated that the Privy Council

> upheld the murder conviction on the basis of joint criminal enterprise stating: 'both the appellants were armed with cutlasses, both were attacking [the victim], and both struck him. It is impossible on the facts of this case to contend that the fatal blow was outside the scope of the common intention. The two appellants were attacking the same man at the same time with similar weapons and with the common intention that he should suffer grievous bodily harm.'[21]

The HKCFA ended the quote here, but the Privy Council stated immediately in the next sentence that '[e]ach of the appellants was *present, and aiding and abetting the other of them* in the wounding of Mootoo' (emphasis added).[22]

While the Privy Council used the phrase 'common intention', which may give rise to confusion, it is clear from the context that the Privy Council was referring to the facts of the case, where the intention of both defendants to cause grievous bodily harm could be established under accessorial liability. In upholding the defendants' conviction, the Privy Council also added that 'a person *who is present aiding and abetting* the commission of an offence is without any pre-arranged plan or plot guilty of the offence as a principal in the second degree' (emphasis added).[23] It is therefore clear that

[16] *Lo Kin Man* [56].
[17] ibid [52].
[18] *Chan Kam Shing* [41].
[19] *Ramnath Mohan v The Queen* [1967] 2 AC 187 (Privy Council); *Brown*; *McAuliffe v The Queen* [1995] HCA 37 (High Court of Australia); *Miller v The Queen* [2016] HCA 30 (High Court of Australia).
[20] [1967] 2 AC 187.
[21] *Chan Kam Shing* [44].
[22] [1967] 2 AC 187, 194.
[23] *Ramnath Mohan* 195. 'Principal in the second degree' is a historical term that has been superseded in modern legal terminology, and a 'principal in the second degree' is now known as an 'accessory' under acessorial liability, see Michael Ian Jackson, 'Principals and Secondary Parties', in Kemal Bokhary & Simon NM Young (eds), *Archbold Hong Kong 2022: Criminal Law, Pleading, Evidence and Practice* (Sweet & Maxwell 2021) [17-1].

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the Privy Council convicted the defendants on the basis of traditional accessorial liability, but not on the basis of the basic joint enterprise principle.[24]

In the second case cited by the HKCFA[25] – *Brown v The State (Trinidad and Tobago)*[26] – the Privy Council upheld the trial judge's approach of inviting the jury to consider whether there was a plan between the defendants to kill based on the basic joint enterprise principle. Interestingly, the judgment in *Brown* was delivered by Lord Hoffmann, who also sat in *Chan Kam Shing* as a non-permanent judge of the HKCFA. In *Brown*, after the two defendants were seen abducting the two deceased and gunshots were heard shortly afterwards, the bodies of the deceased were found the next morning. The Privy Council believed that as there was no direct evidence as to which of the two defendants 'had fired the fatal shot', 'it was therefore necessary to find them liable on the basis of joint enterprise'.[27] As will be argued in the below section, this analysis is unconvincing and, with respect, plainly wrong. Suffice for present purposes, the above explained why the Privy Council began to explore the basic joint enterprise principle.

The Court explained that

> [t]he simplest form of joint enterprise, in the context of murder, is when two or more people plan to murder someone and do so. If both participated in carrying out the plan, both are liable. It does not matter who actually inflicted the fatal injury. This might be called the paradigm case of joint enterprise liability. But things become more complicated when there is no plan to murder but, in the course of carrying out a plan to do something else, one of the participants commits a murder … [I]n *R v Powell (Anthony) and English* [1999] 1 AC 1 the House of Lords said that it meant that the other participant realised that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm, i.e. with the intent necessary for murder. Thus the *Powell and English* doctrine extends joint enterprise liability from the paradigm case of a plan to murder to the case of a plan to commit another offence in the course of which the possibility of a murder is foreseen.[28]

The latter part of the above paragraph explains the controversial extended joint enterprise principle, which criminalises a defendant based on his/her foresight that his/her co-perpetrator may carry out a further crime. If that foreseen further crime is eventually carried out, the defendant would equally be liable for that further crime under the extended joint enterprise principle. This principle is indeed established in *R v Powell and English*.[29] However, while *Powell* is the only relevant authority cited by the Privy Council, it relates only to the extended joint enterprise principle. In *Powell*, Lord Hutton summarised the facts as follows:

> In the case of *Powell and Daniels* the purpose of the joint enterprise was to purchase drugs from a drug dealer … [T]he drug dealer was shot dead when he came to the door … [I]t was the *Crown* case that *if the third man fired the gun, the two appellants were guilty of murder because they knew that the third man was armed with a gun and realised that he might use it to*

[24]As will be discussed below, under traditional accessorial liability it is not fatal to the prosecution's case when 'who struck the fatal blow' cannot be identified. It is sufficient to prove that the defendant(s) is/are either a principal or an accessory, provided that the defendant must have 'participated in the crime in one way or another', see *Chan Kam Shing* [24]; *Jogee* [88]; *R v Lewis and Marshall-Gunn* [2017] EWCA Crim 1734 (England and Wales Court of Appeal) [46].

[25]*Chan Kam Shing* [43].

[26]*Brown*.

[27]ibid [7].

[28]ibid [8].

[29][1999] 1 AC 1 (House of Lords). While in England and Wales the extended joint enterprise principle is no longer applicable following *Jogee*, the HKCFA held in *Chan Kam Shing* that the principle continues to apply in Hong Kong.

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> *kill or cause really serious injury* to the drug dealer … In the case of *English* the purpose of the joint enterprise in which he and another young man, Weddle, took part was to attack and cause injury with wooden posts to a police officer, Sergeant Forth, and in the course of the attack Weddle used a knife with which he stabbed Sergeant Forth to death. *It was a reasonable possibility that English had no knowledge that Weddle was carrying a knife* … (emphases added).[30]

As is evident, *Powell and English* only concerns the extended joint enterprise principle, which only operates when a further crime, stemming from the original joint criminal enterprise, has occurred. In *Powell*, 'the purpose of the joint enterprise' was used to illustrate the original crime that the defendants had in mind. However, *Powell* does not demonstrate that there exists a standalone route to secure conviction for the original (underlying) crime by proving that the defendants were in a joint enterprise.

Returning to *Brown*, when the Privy Council explained that '[t]he simplest form of joint enterprise, in the context of murder, is when two or more people plan to murder someone and do so' and '[i]f both participated in carrying out the plan, both are liable' (see above), no case other than *Powell* had been cited to support the proposition that basic joint enterprise has always been a standalone basis to secure conviction in common law. Accordingly, *Brown* cannot be seen as providing any useful support to the HKCFA's position.

The third case cited by the HKCFA is the Australian authority of *McAuliffe v The Queen*.[31] There, the Australian High Court faced an appeal challenging the trial judge's direction in applying the extended joint enterprise principle:

> [The trial judge] instructed [the jury] that to succeed the prosecution had to establish a *common criminal enterprise* on the part of the three youths *to roll or rob someone* … And, he said:
> 'Next, you must be satisfied beyond reasonable doubt that the accused (i.e. Sean McAuliffe) either shared that common intention of inflicting grievous bodily harm upon him *or contemplated the intentional infliction of grievous bodily harm by one or other of them upon him was a possible incident in the common criminal enterprise*' (emphases added).[32]

The allegation in *McAuliffe* was that the appellants participated in the (original) offence of robbery, and the issue was whether they should be convicted of (the further offence of) murder based on their foresight of the possibility that grievous bodily harm may be inflicted, under the extended joint enterprise principle. Before the court decided on the actual issue, the court explained the law on 'the doctrine of common purpose' (which is an alternative term for joint enterprise).[33] The court explained that

> [t]he doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. Such a venture may be described as a joint criminal enterprise … Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. *If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the*

[30][1999] 1 AC 1, 16.
[31]*McAuliffe v The Queen* [1995] HCA 37.
[32]ibid [9].
[33]*Chan Kam Shing* [32].

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> *crime, they are all equally guilty of the crime regardless of the part played by each in its commission* (Author's note: At this point, a footnote has been inserted, referring to *R v Lowery and King (No 2)* [1972] VicRp 63).
>
> Not only that, but each of the parties to the arrangement or understanding is *guilty of any other crime* falling within the scope of the common purpose which is committed in carrying out that purpose … [T]he test has become a subjective one and the scope of the common purpose is to be determined by what was *contemplated by the parties* sharing that purpose … (emphases added).

Here, the Australian High Court first explained what the HKCFA referred to as the basic joint enterprise principle before going on to explain the extended joint enterprise principle. Notably, when elaborating on the basic joint enterprise principle, the only relevant authority cited was the Supreme Court of Victoria's decision in *R v Lowery and King (No 2)*.[34] A look at *Lowery and King (No 2)*, however, reveals that it does not fully support the Australian High Court's position. *Lowery and King (No 2)* did not mention any doctrine of 'common purpose', but instead applied the law of 'acting in concert'.[35] The first paragraph states:

> The law says that if two or more persons reach an understanding or arrangement that together they will commit a crime and then, while that understanding or arrangement is still on foot and has not been called off, *they are both present at the scene of the crime* and one or other of them does, or they do between them, in accordance with their understanding or arrangement, all the things that are necessary to constitute the crime, they are all equally guilty of that crime regardless of what part each played in its commission. In such cases they are said *to have been acting in concert in committing the crime* (emphases added).

Lowery and King (No 2) went on to explain this doctrine of 'acting in concert':

> For people to be acting in concert in the commission of a crime their assent to the understanding or arrangement between them need not be expressed by them in words their actions may be sufficient to convey the message between them that their minds are at one as to what they shall do. The understanding or arrangement need not be of long standing; it may be reached only just before the doing of the act or acts constituting the crime. *Remember, however, that before a person can be found guilty of a crime under this doctrine he must have been present when it was committed and the crime committed must not go beyond the scope of the understanding* or arrangement (emphases added).

Two very interesting points arise from *Lowery and King (No 2)*. First, the court repeatedly emphasised that the doctrine of 'acting in concert' only applies when the relevant defendants are present at the scene of the crime. This is in stark contrast with the current basic joint enterprise principle as pronounced by the HKCFA, which does not require the relevant defendants to be

[34][1972] VicRp 63 (Supreme Court of Victoria). Other authorities cited in subsequent paragraphs of *McAuliffe* – including *Johns v The Queen* [1980] HCA 3 (High Court of Australia), *R v Chan Wing Siu* [1985] AC 168 (Privy Council), and *R v Hui Chi Ming* [1992] 1 AC 34 (Privy Council) – all relate to the extended joint enterprise principle but not the basic joint enterprise principle.

[35]According to the current bench book of the Judicial College of Victoria, 'joint criminal enterprise' and 'acting in concert' were previously thought to be different forms of liability, but are now understood to refer to the same principle: 'Joint Criminal Enterprise (Pre-1/11/14)', in Judicial College of Victoria, *Criminal Charge Book* (last updated 24 Jan 2025) 510 <https://resources.judicialcollege.vic.edu.au/article/1053858/section/861071> accessed 1 Feb 2025.

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physically present.[36] *McAuliffe* was silent on this point. Second, in *Lowery and King (No 2)*, throughout the whole reported judgment, not a single case was cited, making it impossible to trace the roots of the doctrine of 'acting in concert'. With the requirements of physical presence and 'not go[ing] beyond the scope of the understanding', a possibility is that the court was referring to the historical laws on the extended joint enterprise principle that 'when several men [join] an unlawful act they are all guilty of whatever happens upon it … [they are] guilty of all that follows'.[37] As the extended joint enterprise principle has then evolved from 'guilty by association' to requiring 'foresight of the further crime',[38] the former is no longer good law (this will be discussed in detail below). It is possible that the court in *Lowery and King (No 2)* was referring to this rule, which is no longer applicable and should not be seen as supporting the existence of a separate doctrine of 'acting in concert'.

It should also be noted that *McAuliffe* was decided in 1995. Had the basic joint enterprise principle been widely recognised by then, it is curious that the only reference made by the Australian High Court in support of the principle was *Lowery and King (No 2)*, a case then more than two decades old[39] and decided by a lower court (the Supreme Court of Victoria). The reliability of *McAuliffe* is hence dubious.

The fourth and final relevant case cited by the HKCFA in *Chan Kam Shing* is *Miller v The Queen*.[40] *Miller* is a case that concerns the extended joint enterprise principle, and the basic joint enterprise principle was only briefly discussed:

> The law, *as stated in McAuliffe, is that a joint criminal enterprise comes into being when two or more persons agree to commit a crime*. The existence of the agreement need not be express and may be an inference from the parties' conduct. If the crime that is the object of the enterprise is committed while the agreement remains on foot, all the parties to the agreement are equally guilty, regardless of the part that each has played in the conduct that constitutes the *actus reus*. Each party is also guilty of any other crime ('the incidental crime') committed by a co-venturer that is within the scope of the agreement ('joint criminal enterprise' liability) (emphasis added).[41]

Miller merely repeated the basic joint enterprise principle 'as stated in *McAuliffe*' without independent or critical analysis. It also cannot be seen as providing strong support to the basic joint enterprise principle.

Indeed, it may be a legitimate concern that if the basic joint enterprise principle never existed, it is unlikely for it to have been recognised by the three highest courts (the Privy Council, the High Court of Australia, and the HKCFA). This concern is understandable. What is more worrying, however, is that none of these courts' decisions were able to point out convincingly where the basic joint enterprise principle originates from. Furthermore, early 2010s decisions in England and Wales tended to treat (basic) joint enterprise as an alternative term denoting mutual encouragement and assistance under traditional accessorial liability, but not as 'an independent source of liability'[42] where only a single crime is involved.[43] In *R v Mendez*,[44] joint enterprise is seen as 'an aspect of'

[36]See *Lo Kin Man* [63], where the HKCFA specifically excluded the application of the basic joint enterprise principle to the offence of riot or unlawful assembly only because of the statutory language of the Public Order Ordinance (Cap 245, Laws of Hong Kong).

[37]*R v Stanley* (1662) Kelyng J 86, cited in Findlay Stark, 'The Demise of "Parasitic Accessorial Liability": Substantive Judicial Law Reform, Not Common Law Housekeeping' (2016) 75 Cambridge Law Journal 550.

[38]See Beatrice Krebs, 'Joint Criminal Enterprise' (2010) 73 The Modern Law Review 578; Stark (n 37).

[39]The last hearing date of *Lowery and King (No 2)* was 23 June 1971.

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

[41]*Miller* [4].

[42]*R v Stringer* [2011] EWCA Crim 1396 (England and Wales Court of Appeal) [57].

[43]*R v Mendez* [2010] EWCA Crim 516 (England and Wales Court of Appeal) [17]; *Stringer* [57].

[44]*Mendez* [17].

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traditional accessorial liability. In *R v Gnango*,[45] immediately under the sub-heading of 'joint enterprise', the UK Supreme Court discussed the traditional accessorial liability principle and that an accessory would be equally guilty as the principal if the accessory 'aided, abetted, counselled or procured [the principal] to commit the crime'.[46] Although these decisions have not fully elaborated on the reasons to depart from previous authorities (such as *Brown*),[47] it appears that before *Jogee* the judicial consensus in England and Wales had gradually shifted to rejecting the existence of a distinct principle of basic or 'plain vanilla' joint enterprise.[48] This may explain why *Jogee* was completely silent in this regard, perhaps seeing no necessity to deal with the settled law. Had the principle been long rooted in common law, it would be difficult to quietly eradicate it from England and Wales's jurisprudence without facing serious repercussions, especially considering that almost a decade has passed since *Jogee*.[49]

It is also noteworthy that many of the judgments explained the basic joint enterprise principle in the context of deciding a case that requires the application of the extended joint enterprise principle. There is a possibility that in their eagerness to explain the concept of 'criminal enterprise', which is essential to the application of the extended joint enterprise principle, the courts mistakenly introduced a non-existent rule that being in a (basic) criminal enterprise itself could be a basis for attributing criminal liability.

Thus far, all the relevant cases cited by the HKCFA are unable to provide strong support to the historical foundation of the basic joint enterprise principle.[50] Below, academic literature that purports to support the historical roots of the principle will be explored.

Simester stated that '[i]n terms of "plain vanilla" joint enterprises, it has never seriously been doubted that … [s]hared pursuit of the common purpose was in itself a form of criminal participation'.[51] Simester cited Hale (1678), who observed: 'if divers come to commit an unlawful act, and *be present at the time of Felony committed*, though one of them only doth it, they are *all Principals*' (emphases added).[52] An initial reading of Hale's discussion appears to support the position that a person present at the scene who did not perform the *actus reus* can still be liable as a principal. However, the terminology of accessorial liability in the seventeenth century was not the same as that in the current law. At the time, the term 'principals in the second degree' was used to describe

[45]*R v Gnango* [2011] UKSC 59 (UK Supreme Court).

[46]*Gnango* [13].

[47][2003] UKPC 10.

[48]See also John Child & David Ormerod, *Smith & Hogan's Essentials of Criminal Law* (1st edn, Oxford University Press 2015) 505: 'Joint enterprise is not a separate form of complicity liability, so the term should simply be viewed as short-hand for complicity by assisting, encouraging or procuring'.

[49]For England and Wales's recent application of the doctrine of common intention in the limited context of transferred malice, see *R v Seed* [2024] EWCA Crim 650; *R v ARU* [2024] EWCA Crim 1101. This line of cases applied *Gnango* and held that when A and B participate in an 'agreed' gang shooting with C and D, A could be guilty of murder for the death of B, even when B was shot to death by C or D. The doctrine of common intention is now only applied in such a limited context in England and Wales. Also, academic commentary has doubted whether *Gnango* should be followed, as its reasoning was unclear and may be incompatible with the subsequent decision of *Jogee*, see Graham Virgo, 'The Return of Joint Enterprise' (2025) 83 Cambridge Law Journal 405. *Gnango* similarly made confusing reference to traditional accessory liability and failed to explain the origins of the doctrine of common intention, see *Gnango* [12]–[15].

[50]For completeness, there are other cases that suggest a distinct basic joint enterprise principle existed, but their reliability is dubious. In *Osland v The Queen* [1998] HCA 75 (High Court of Australia) [72], three years after *McAuliffe* was decided, the High Court of Australia again cited *R v Lowery and King (No 2)* in reaffirming the principle of 'acting in concert'. It has been discussed above that *R v Lowery and King (No 2)* should not be seen as a reliable authority. In *R v Steward and Schofield* [1994] EWCA Crim 3 (England and Wales Court of Appeal), under the heading of 'joint enterprise', the English Court of Appeal stated that 'where the allegation is joint enterprise, the allegation is that one defendant participated in the criminal act of another' and that such principle is distinct from traditional accessorial liability. However, there is no accompanying citation at all. The decision has also been criticised, see John Smith, 'Joint Enterprise and Secondary Liability' (1999) 50 Northern Ireland Legal Quarterly 153, 156.

[51]Andrew P Simester, 'Accessory Liability and Common Unlawful Purposes' (2017) 133 Law Quarterly Review 73.

[52]Matthew Hale, *Pleas of the Crown* (Professional Books 1678) 215, cited in Simester (n 51).

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secondary parties who were present when a felony was committed.[53] In *Foster's Crown Law* (1762),[54] it was explained that when a felony was committed, 'the person soliciting to the offence, will, if absent, be an accessory before the fact, if present a principal'. In the 1930 case of *R v Betts and Ridley*,[55] the English Court of Appeal explained that to be found guilty of 'present aiding and abetting' a felony as a 'principal in the second degree', the defendant must be near enough to the actual crime scene to assist when necessary.[56] When the *Criminal Law Act 1967* abolished the distinction between felony and misdemeanour,[57] the legal distinction between 'accessory before the fact' (who assists a crime before its commission) and 'principal in the second degree' no longer existed.[58] As a result, both groups are now simply known as 'accessories' and, more specifically, 'principals in the second degree' are now called aiders and abettors under traditional accessorial liability.[59] The mentioning of presence and felony in Hale's passage strongly suggests that the discussion relates to 'principals in the second degree'. Accordingly, Hale's passage does not support the suggestion that a separate basic joint enterprise principle has long been used to attribute criminal liability. On the contrary, it lends further support to the long-standing use of traditional accessorial liability (ie, aiding and abetting).

Simester's quotes of other authorities, such as Turner's *Russell on Crime*[60] and Glanville Williams's *Criminal Law*[61], exhibit similar limitations. *Russell on Crime* states:

> if a special verdict against a man as a principal does not show that he did the act, or was present when it was done, or did some act at the time in aid which shows that he was present, aiding and abetting, or that he was of the same party, in the same pursuit, and under the same expectation of mutual defence and support with those who did the fact, the prisoner cannot be convicted.[62]

The first part of the passage refers to the situation in which the defendant was present and aiding or abetting the crime. It appears to be describing 'principals in the second degree', who are aiders or abettors under modern traditional accessorial liability. The latter part, which refers to being 'in the same pursuit' and acting under the 'expectation of mutual defence and support', appears to reflect the historical extended joint enterprise principle, that everyone participating in a joint enterprise will be found liable for any further crimes committed in the pursuit of that joint enterprise.[63] This will be returned to shortly, but it is sufficient to note that the latter part does not provide sufficient support for the basic joint enterprise principle to be used as a basis for conviction when only one single crime is at issue.

Similarly, Glanville Williams' work cited by Simester states that '[a] person is *guilty of aiding and abetting* [ie, as principal in the second degree] if he is either (a) a conspirator who is present at the time of the crime, whether or not he assists, or (b) anyone who knowingly assists or encourages at

[53]Jackson (n 23) [17-1]; Matthew Dyson, 'Ever working in practice, but never in theory? The new English law of criminal complicity' (2017) 129 Zeitschrift für die gesamte Strafrechtswissenschaft 1.

[54]*Foster's Crown Law* (1762, republished in 1809) 369, cited in *Mendez* [19].

[55](1931) 22 Cr App R 148 (England and Wales Court of Appeal).

[56]See also John Ll J Edwards, 'Vicarious Liability in Criminal Law' (1951) 14 The Modern Law Review 334.

[57]Criminal Law Act 1967 (England and Wales), s 1. See also Criminal Law Act 1967, Schedule 3, Part III, which repealed ss 1–7 of Accessories and Abettors Act 1861 (England and Wales).

[58]Law Commission, 'Codification of the Criminal Law – General Principles – Parties Complicity and Liability for the Acts of Another' (30 Jun 1972) 5–7; Smith, 'Joint Enterprise and Secondary Liability' (n 50) 158.

[59]Jackson (n 23) [17-7]; see also John Smith, 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 Law Quarterly Review 453.

[60]James WC Turner, *Russell on Crime* (12th edn, Sweet & Maxwell 1964) 139.

[61]Glavnville L Williams, *Criminal Law: The General Part* (2nd edn, Stevens & Sons 1961) 353.

[62]Turner (n 60) 139.

[63]See below for a detailed analysis.

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the time of the crime, whether a conspirator or not and whether present or not' (emphasis added).[64] The passage explicitly refers to 'aiding and abetting' under traditional accessorial liability and cannot provide support for the existence of the basic joint enterprise principle. However, an interesting observation may be made here. Part (b) suggested that a defendant who assisted or encouraged a crime could be found guilty of aiding and abetting as a principal in the second degree without being present at the scene of the crime. Why is this so?

Dyson's work may provide an explanation. Dyson first pointed out that, as this article would most certainly agree, 'the history of common purpose is elusive, contested and constrained by limited contemporary discussion'.[65] Dyson then appears to suggest that the law whereby 'being present and aiding or abetting made D a principal, otherwise D was an accessory' was part of the law on common purpose.[66] Dyson, however, fairly recognised that 'common purpose' was not referenced consistently and that a leading textbook in 1907 made no reference to common purpose at all.[67] It seems doubtful whether the above rule should be referred to as traditional accessorial liability or 'common purpose'.

Putting aside whether this part of the law should be classified as 'common purpose', Dyson suggested that there has been a relaxation of the law, that

> in due course, the common purpose came to do more work, so that a contribution made prior to the crime, and presence, was sufficient to make D into a principal. In effect, 'aiding and abetting' was no longer required; counselling and procuring within the common purpose was enough.[68]

Similarly, Stark suggested that although the concept of common purpose lacks practical significance when no collateral offence has been committed,[69] it has been 'useful historically to found "constructive" presence when physical presence was required for aiding and abetting'.[70] According to Ballentine's law dictionary, constructive presence means that a person who is not physically present at the scene of the crime is regarded as present at the scene through 'agencies set in motion by that person'.[71] Therefore, it appears that 'common purpose' may have been historically used to circumvent the physical presence requirement and establish constructive presence to secure a conviction for secondary parties as 'principals in the second degree'. Regardless of whether the above law could really be referred to as the doctrine of common purpose (or whether it should be seen as a mere relaxation of the law of accessorial liability), as 'principals in the second degree' are now regarded as accessories under traditional accessorial liability, this part of the law has been absorbed into traditional accessorial liability and does not remain as a separate head of criminal liability under common law.

In another work cited by Simester, Krebs[72] quoted Stephen's *Digest of the Criminal Law* (1887), which states:

> When several persons take part in the execution of a common criminal purpose, each is a principal in the second degree, in respect of every crime committed by any one of them in the

[64]Williams (n 61) 353.
[65]Dyson, 'Principals without Distinction' (n 7) 302.
[66]ibid.
[67]In ibid 303, fn 36, it was stated that Courtney Stanhope Kenny, *Outlines of Criminal Law* (Cambridge University Press 1907) 'makes no mention of "common purpose" as a separate set of substantive rules'.
[68]Dyson, 'Principals without Distinction' (n 7) 303.
[69]Stark (n 37) 551 fn 3.
[70]ibid.
[71]James A Ballentine & William S Anderson, *Ballentine's Law Dictionary* (The Lawyers Co-Operative Publishing Company 1969).
[72]Krebs (n 38).

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> execution of that purpose. If any of the offenders commits a crime foreign to the common criminal purpose, the others are neither principals in the second degree, nor accessories unless they actually instigate or assist in its commission (emphasis added).[73]

This passage references the notion of being a 'principal in the second degree' in respect of 'every crime committed by any one of [the several persons taking part in the execution of a common criminal purpose]'. It clearly addresses a typical scenario pertaining to the extended joint enterprise principle where, in the course of executing an agreed crime, one of the co-perpetrators commits a further crime. In fact, in the seventeenth century, there was a different rule which later evolved to the modern extended joint enterprise principle, that 'when several men [join] an unlawful act they are all guilty of whatever happens upon it … [they are] guilty of all that follows'.[74]

As Krebs recognised,

> [s]ince Stephen's [*Digest of the Criminal Law*] restatement of the law of joint enterprise (or common purpose, as the doctrine was known back in the 19th century), there has been a shift in language and focus from conduct (objectively) going beyond the scope of the enterprise (=exculpating) to a test of subjective 'foresight' or 'contemplation' of the principal's actions (=inculpating).[75]

The 'extended joint enterprise' rule back then was therefore one of 'guilty by association' – one would be guilty for whatever act performed by any member in the unlawful joint enterprise (as long as that act falls within the scope of the joint enterprise), regardless of one's mental state.[76] The passage that Krebs cited only supports the historical roots of extended joint enterprise,[77] but not of basic joint enterprise.

Understanding how the extended joint enterprise principle evolved may shed light on whether an independent basic joint enterprise principle existed. At the risk of repetition, the law and criteria for criminalisation under the extended joint enterprise principle (before *Jogee* abolished the principle in England and Wales) have evolved from 'guilty by association' to requiring 'foresight of the further crime'.[78] Alarmingly, the doctrine of 'acting in concert' in *Lowery and King (No 2)*, where the court emphasised the requirements that the defendant must be '[present] at the scene of the crime' and 'not go beyond the scope of the understanding', is entirely consistent with and might be referring to the (already evolved) historical rule of 'guilty by association'. The 'guilty by association' rule, however, only concerns the criminalisation of further (incidental) crimes, historically enabling the courts to find all participants guilty of aiding and abetting as 'principals in the second degree' for the further crimes.[79] It has not been used as a principle to establish criminal liability for a single (original) crime.[80] Indeed, Krebs agreed that 'the joint enterprise doctrine assumes a distinctive role only in incidental crime scenarios' and suggested that joint enterprise is 'a rather clumsy misnomer suggesting that it represents a separate head of liability alongside aiding and abetting and co-perpetration'.[81] As the 'doctrine of common purpose' as stated in *McAuliffe* heavily relies on *Lowery and King (No 2)*, and the basic joint enterprise principle as stated by the HKCFA relies

[73]James Fitzjames Stephen, *A Digest of the Criminal Law (Indictable Offences)* (9th edn, Lewis Frederick Sturge ed, Sweet & Maxwell 1950).
[74]*R v Stanley* (1662) Kelyng J 86, cited in Stark (n 37).
[75]Krebs (n 38) 581.
[76]Krebs (n 38); Stark (n 37).
[77]See also Stark (n 37).
[78]See, eg, *Chan Kam Shing*.
[79]Stark (n 37).
[80]See ibid.
[81]Krebs (n 38) 584–585.

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on *McAuliffe*, there is a real possibility that the so-called common law principle of basic joint enterprise is actually a mis-transplant of the no longer applicable 'guilty by association' rule.

Accordingly, the authorities and literature discussed cannot provide strong support for the historical roots of the basic joint enterprise principle. Particularly, when 'principals in the second degree' are now regarded as aiders and abetters under traditional accessorial liability, there is no evidence that the basic joint enterprise principle remains in operation under common law as a separate and standalone basis for attributing criminal liability. Based on the above analysis, it is argued that the principle is possibly a recent judicial invention/mis-transplant by the courts, developing on the historical extended joint enterprise principle but stretching beyond its scope by treating it as an independent basis for conviction when only one single crime is concerned.

If the basic joint enterprise principle is indeed not rooted in common law, strong reasons must be proposed to support its retention. This article will argue that there is no justification to retain the principle. On the contrary, there is a strong case for its abolition.

No Practical Utility

In *Chan Kam Shing*, the main justification given for retaining the basic joint enterprise principle was that, in the HKCFA's opinion, the principle is highly valuable in tackling evidential uncertainty as to 'who struck the fatal blow' among multiple defendants.[82] The HKCFA stated that abolishing the basic joint enterprise principle would 'create a serious gap in the law of complicity'.[83]

The HKCFA relied on *Brown*[84] in support of its position. In *Brown*, the two defendants were witnessed to have abducted the victims from their house. Subsequently, gunshots were heard, and the next morning the victims' bodies were found in nearby bushes.[85] The two defendants were convicted of murder on the basis of basic joint enterprise.[86] In analysing the case, the HKCFA believed that there was no way to tell who had fired the shots and that there was no evidential basis to suggest that the defendants must have aided and abetted the murder. Hence the HKCFA said that traditional accessorial liability could not be applied and the defendants' guilt could only be established under the basic joint enterprise principle.[87]

The HKCFA's assertion, with respect, must be incorrect. Under traditional accessorial liability, when it is certain that both defendants were involved in a crime, but it is not possible to identify which of the two persons was the principal and which was the accessory, it is sufficient to prove that the defendants must have 'participated in the crime in one way or another' (this is also recognised by the HKCFA in *Chan Kam Shing*).[88] The defendants can be charged as being 'either the principal offender or an accessory'.[89] Thus, in *R v Giannetto*,[90] it was sufficient to prove that the defendant was either a principal who killed his wife, or an accessory who hired a contract killer to kill his wife.

Therefore, under traditional accessorial liability, it is immaterial that the prosecution cannot prove 'who struck the fatal blow' if both defendants must have played a role in the murder.[91]

[82] *Chan Kam Shing* [42]; see also *Lo Kin Man* [52].
[83] *Chan Kam Shing* [58].
[84] [2003] UKPC 10.
[85] *Brown* [1]–[4].
[86] ibid [1], [10], [14].
[87] *Chan Kam Shing* [43].
[88] ibid [24]; *Jogee* [88]; *R v Lewis and Marshall-Gunn* [2017] EWCA Crim 1734 (England and Wales Court of Appeal) [46]. However, it is of course not sufficient to prove that either one of the defendants committed the offence, see *R v Banfield* [2013] EWCA Crim 1394 (England and Wales Court of Appeal).
[89] *Chan Kam Shing* [23]; David Ormerod & Karl Laird, *Smith and Hogan's Criminal Law* (14th edn, Oxford University Press 2015) 206.
[90] [1997] 1 Cr App R 1 (England and Wales Court of Appeal).
[91] *Jogee* [88]; *R v Lewis and Marshall-Gunn* [2017] EWCA Crim 1734 [46].

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Returning to the facts in *Brown*, the guilty verdicts of the jury based on the basic joint enterprise principle reflected that the jury was sure that both defendants had, with the requisite intent, participated in an agreement to commit murder.[92] As such, their acts of abducting the victims clearly suffice to constitute assisting and/or encouraging the commission of murder. Hence, both of them can be charged as 'either the principal offender or an accessory' for the murder, regardless of who actually fired the shots. The conviction for both defendants could still be secured without relying on the basic joint enterprise principle.

As recognised by the Hong Kong Court of Appeal in *HKSAR v Yip Wing Fat*,[93] 'there is often a significant measure of overlap in the two concepts of joint enterprise and accessorial liability'.[94] In general, by participating in an agreement to carry out a crime with corresponding *mens rea*, each party had already at least intentionally encouraged another party to carry out that crime. At the very least, it appears difficult to think of a scenario where a person could (with the requisite *mens rea*) participate in an agreement to commit a crime without being seen as (legally) encouraging that crime. This is particularly so because whether the assistance or encouragement given has a positive effect towards the offence is immaterial in law.[95] Examples of such overlap have been provided by the HKCFA. In *Lo Kin Man*, the HKCFA noted that in the context of an unlawful assembly or riot,

> [t]he 'mastermind' who remotely oversees the situation and gives commands or directions to the participants on the ground would be guilty of incitement or as counsellor and procurer of the criminal assembly. So would the persons who fund or provide materials for the unlawful assembly or riot; or who encourage or promote it on social media. Those who provide back-up support to the participants in the vicinity of the scene, collecting bricks, petrol bombs and other weapons; or who act as lookouts in the vicinity of the riot may either be 'taking part' as principals … or liable as aiders and abettors if present at the scene; or, if not present, liable as counsellors or procurers …[96]

Moreover, as with accessorial liability, liability under the basic joint enterprise principle only arises when the crime is eventually executed.[97] This article argues, therefore, that those who could be found guilty under the basic joint enterprise principle could always equally be found liable under traditional principal-accessorial liability. Hence the basic joint enterprise principle has no practical utility.

The argument that the basic joint enterprise principle has better utility in securing convictions against secondary parties when the principal has not been convicted is also misconceived.[98] When the *actus reus* of an offence has been performed, it is not essential for the principal to be convicted before one can be found guilty under accessorial liability.[99] In *R v Gnango*, the UK Supreme Court

[92] *Brown* [14].

[93] *HKSAR v Yip Wing Fat* [2020] HKCA 58 (Hong Kong Court of Appeal).

[94] ibid [32].

[95] *Jogee* [12]; *R v Calhaem* [1985] QB 808 (England and Wales Court of Appeal).

[96] *Lo Kin Man* [69].

[97] ibid [52]; *Chan Kam Shing* [41].

[98] In *Sze Kwan Lung* [19], the HKCFA has mistakenly (as will be argued below) endorsed the Hong Kong Court of Appeal's ruling that, under traditional accessorial liability, an accessory can only be convicted if the principal is found guilty.

[99] If the *actus reus* of the offence has not been performed, the accessory must be acquitted, see *Thornton v Mitchell* [1940] 1 All ER 339. In Andrew Dyer, 'The Osland "Wrong Turn" and The Problems That Fictions Produce' (2019) 42 University of New South Wales Law Journal 500, Dyer explains that there are two ways to find the defendant guilty when the principal could not be convicted. The first is through the doctrine of innocent agency, that the defendant used another person as an innocent instrument to commit the crime. The second is that the defendant procured the *actus reus* of the offence. Eg, In *R v Millward* [1994] Crim LR 527 (England and Wales Court of Appeal), the accessory remained liable for aiding, abetting, counselling, or procuring reckless driving causing death, even though the principal lacked *mens rea* for reckless

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confirmed that an accessory can be found guilty of aiding/abetting a murder even when the principal who fired the fatal shots could not be identified and was not prosecuted.[100] An accessory could also be liable even when the principal lacks the requisite *mens rea* for the offence. In *R v Cogan and Leak*,[101] the defendant's conviction for procuring another (the principal) to rape the defendant's wife was upheld even though the principal was acquitted (the principal's *mens rea* could not be proven as the principal may have believed that the defendant's wife consented). A further example could be seen in *R v Bourne*,[102] where the defendant compelled his wife to have sex with a dog. Even though the wife, if charged, would have been acquitted as she was acting under duress, the defendant's charge of abetting buggery was upheld.

In addition, an accessory can be convicted of a more serious charge than that of the principal. As explained by the House of Lords in *R v Howe*,[103]

> where a person has been killed and that result is the result intended by another participant, the mere fact that the actual killer may be convicted only of the reduced charge of manslaughter for some reason special to himself does not … result in a compulsory reduction for the other participant.[104]

Likewise, the High Court of Australia acknowledged the possibility that 'the secondary offender might be convicted of murder whilst the principal offender is acquitted, or convicted of a lesser offence'.[105]

Finally, an accessory can also be convicted of a less serious offence than that of which the principal has been convicted. Consider that an accessory was a party to an attack, and the accessory merely intended to assist in causing some harm falling short of grievous bodily harm. However, unexpected to the accessory, the principal intentionally killed the victim. While the principal is liable for murder, the accessory would only be guilty of the lesser charge of (unlawful act) manslaughter.[106]

The above discussion demonstrates that traditional accessorial liability is well-equipped to deal with a wide range of scenarios. The HKCFA's claim that abolishing the basic joint enterprise principle would leave a serious gap in the law cannot be supported.

Furthermore, the basic joint enterprise principle substantially overlaps with the inchoate offence of conspiracy.[107] While the labelling of the criminal conduct differs (committing the crime vs conspiring to commit the crime), the two concepts are strikingly similar in application – both

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driving. It was held that as long as the *actus reus* has been performed, an accessory can be convicted even when the principal is acquitted because of some defence personal to the principal. Whether these decisions only apply to procuring or are of general applicability to accessorial liability is unclear, see David Ormerod & Karl Laird, *Smith, Hogan, & Ormerod's Criminal Law* (15th edn, Oxford University Press 2018) 223.

[100] *Gnango* [62]–[64], [104]. In *Gnango*, the principal's face was covered with a red bandana and he was referred to as the 'Bandana Man', see para [7] of the judgment. Moreover, as early as when the Criminal Law Act 1826 (England and Wales) was enacted, an accessory could be convicted without the principal being found or convicted, see Dyson, 'Principals without Distinction' (n 7).

[101] [1976] QB 217 (England and Wales Court of Appeal).

[102] (1952) 36 Cr App R 125 (England and Wales Court of Appeal).

[103] [1987] AC 417 (House of Lords).

[104] *R v Howe* [1987] AC 417, 458.

[105] *Clayton v The Queen* [2006] HCA 58 (High Court of Australia) [101].

[106] *Jogee* [96]; *R v Smith (Wesley)* [1963] 1 WLR 1200 (England and Wales Court of Appeal); *R v Gilmour* [2000] 2 Cr App R 407 (Northern Ireland Court of Appeal); *R v Carpenter* [2011] EWCA Crim 2568 (England and Wales Court of Appeal); *R v BHV* [2022] EWCA Crim 1690 (England and Wales Court of Appeal) [17], [29].

[107] Crimes Ordinance (Cap 200, Laws of Hong Kong), s 159A:

> If a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—

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criminalise an agreement between two or more persons to commit an offence. Similar to basic joint enterprise, under conspiracy, an agreement between the parties must involve a shared criminal purpose or design, rather than their purposes being 'merely similar or parallel'.[108] The key difference between the two modes of liability is that in the case of conspiracy, the offence is complete once an agreement is formed,[109] while in the case of basic joint enterprise, liability only arises when the crime has been carried out.[110] However, the charge of conspiracy could also be brought after the criminal offence has been carried out and completed (and this is often the practice).[111] For example, in *HKSAR v Tai Yiu Ting*,[112] the defendants were charged with 'conspiracy to commit public nuisance' only after the relevant incident – the mass protest known as 'Occupy Central Movement' – had taken place. The applicability of conspiracy is hence wider than the basic joint enterprise principle, as it also criminalises agreements to commit crimes even if the offences are never carried out. At the same time, conspiracy fully encompasses the scope where the basic joint enterprise principle applies. Such overlapping basis of attributing criminal liability renders the basic joint enterprise principle redundant.

Circularity in Proving Basic Joint Enterprise

Furthermore, a circular reasoning fallacy can be observed when the basic joint enterprise principle is used to establish a defendant's criminal liability. The Hong Kong Judiciary's jury specimen directions on basic joint enterprise summarise the route to verdict under the basic joint enterprise principle:

> First, you must decide whether it has been proved so that you are sure that the crime which was the subject of the joint agreement was in fact committed. In this case that crime is […]. I have already directed you as to the essential elements of that offence.
>
> If you are sure that the crime was in fact committed, the next question is whether the defendant [whose case you are examining] shared the intention to commit the offence and took some part in committing it. If you are sure of that, he is guilty of that offence. If you are not sure, then your verdict must be Not Guilty.[113]

The first step requires a fact-finder to decide whether the charged crime has been committed. It is trite law that many crimes could only be committed when there is *actus reus* and *mens rea*. Consider a case of murder. The crime of murder could only be committed when there is (i) the *actus reus* of causing someone's death and (ii) the *mens rea* of intention to kill or cause grievous bodily harm.[114] So if two persons (D1 and D2) come up with a plan to push their friend (the deceased) into the sea, intending only to make fun of him/her but accidentally causing his/her death, no crime of murder has been committed because the requisite *mens rea* is absent. In

(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement; or (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible, he is guilty of conspiracy to commit the offence or offences in question.

There is no requirement that a conspirator must intend the offence to be committed. It is sufficient that the conspirator had knowledge that the agreed conduct would necessarily involve the commission of the offence, see N Mohamed, 'Conspiracy, Incitement and Attempt to Commit Crime', in Kemal Bokhary & Simon NM Young (eds), *Archbold Hong Kong 2022: Criminal Law, Pleading, Evidence and Practice* (Sweet & Maxwell 2021) [36-14].

[108] *R v Shillam* [2013] EWCA Crim 160 (England and Wales Court of Appeal) [20].

[109] Mohamed (n 107) [36-4].

[110] *Chan Kam Shing* [41].

[111] Jeremy Horder, *Ashworth's Principles of Criminal Law* (8th edn, Oxford University Press 2016) 491.

[112] [2021] 2 HKLRD 899 (Hong Kong Court of Appeal).

[113] Hong Kong Judicial Institute, 'Specimen Directions in Jury Trials' (vol 2, '2020 Revision of Selected Topics') [101-7].

[114] See *HKSAR v Lau Cheong* (2002) 5 HKCFAR 415 (HKCFA).

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order to decide that the crime of murder has been committed, the fact-finder must be sure that at least one of the defendants had the requisite *mens rea*.

Thus, if the fact-finder finds that a crime of murder has been committed, this means that at least one of the defendants had either performed the *actus reus* (of causing the friend's death) or 'participated in the crime in one way or another'[115] with the *mens rea* of intending to kill or cause grievous bodily harm. If such a finding is made, the relevant defendant(s) could already be found guilty under orthodox principal-accessorial liability. It is simply redundant to ask the (already proven) second step of 'whether the defendant shared the intention to commit the offence and took some part in committing it'. Furthermore, any person who 'took some part in committing an offence' with the intent to commit the offence is clearly an accessory liable under traditional accessorial liability. As argued elsewhere, the circularity of the basic joint enterprise principle is therefore that the defendant must have already been proven to have committed the offence (either as a principal or an accessory) under orthodox principal-accessorial liability 'in order to establish his/her participation in the basic joint enterprise, and yet participation in the basic joint enterprise is in turn used' as a basis to establish that (i) the offence has been committed and (ii) the defendant is guilty of that offence.[116] The application of the basic joint enterprise principle therefore forces the court to engage in circular and unsound reasoning.

Inability to Deal with Evidential Uncertainty

Contrary to the HKCFA's suggestion, the basic joint enterprise principle might be unable to deal with situations of evidential uncertainty. As the principle criminalises parties' participation in an agreement to commit a crime, proving the existence of such an agreement poses difficulties when parties' intentions differ. Two examples will be used to illustrate this point.[117]

Consider the first example:[118] A chemical substance had been applied to the victim, which caused the victim's death. It was unsure who applied that substance. All defendants (D1, D2, and D3) were charged with murder, together with the alternative charge of manslaughter. They all ran a cut-throat defence and denied intention to kill or cause grievous bodily harm. The jury convicted D1 of murder and D2 and D3 of manslaughter. The verdict suggested that all defendants intentionally participated in applying the chemical substance, but that their individual intentions differed. When administering the substance, D1 intended to kill the victim, whereas D2 and D3 intended only to rob the victim.[119]

Traditional accessorial liability is well equipped to deal with this scenario. Where D1, D2, and D3 were involved in applying the chemical substance, but it was uncertain as to who performed the *actus reus*, they could be charged as either a principal or an accessory. D1 would be convicted of murder given the intention to kill or cause grievous bodily harm. D2 and D3, who lacked such intention and yet took part in applying the chemical substance (either being a principal or an accessory), were parties to an unlawful and dangerous act which led to the victim's death. They are thus liable for manslaughter.[120]

[115]That is, either performed the *actus reus* or assisted/encouraged the principal to perform the *actus reus*, see discussion in the above section.

[116]Aaron HL Wong & Noreen NC Lui, 'Dangerous Expansion of Basic Joint Enterprise in Hong Kong: *HKSAR v Tsang Cheung Yan* [2022] 1 HKLRD 16' (2023) 87 The Journal of Criminal Law 156, 157.

[117]The two examples below are basic joint enterprise scenarios with only a single *actus reus* (see, eg, *Chan Kam Shing* for how the HKCFA applies the principle). The potential applicability of the foresight test under the extended joint enterprise principle will not be discussed (as it is beyond the scope of this article).

[118]The facts are adapted from *HKSAR v Tsang Cheung Yan* [2022] 1 HKLRD 16 (Hong Kong Court of Appeal) and simplified for ease of understanding.

[119]See *Tsang Cheung Yan* [47].

[120]*Jogee* [96]; *R v BHV* [2022] EWCA Crim 1690 [17], [29]; Wong & Lui (n 116). *Jogee* [96] clearly indicates that an accessory can be convicted of the lesser crime of manslaughter when the principal is guilty of murder.

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In contrast, the basic joint enterprise principle is unable to deal with differing intentions. Liability under the principle requires entering into an agreement to carry out a crime. The jury specimen directions on basic joint enterprise clearly require a charged crime to be identified, stating, 'First, you must decide whether it has been proved so that you are sure that *the crime which was the subject of the joint agreement* was in fact committed' (emphasis added).[121] Thus, when D1, D2, and D3 were all charged with murder under the basic joint enterprise principle, the allegation was that they participated in an agreement to carry out a murder. The fundamental challenge here is that, logically, there could only be an agreement to commit murder when more than one party agrees on committing murder. If D2 and D3 never intended (agreed to commit) murder, D1 (as the only person who intended murder) could not be in any agreement to commit murder.[122] Logically, it follows that the charge of murder against D1 would fail.

Moreover, the common law rule of 'fundamental departure', which only applies under joint enterprise principles but not under traditional accessorial liability,[123] arguably precludes any liability for D2 and D3 in the above scenario. In England and Wales, the fundamental departure rule is replaced by a different test after *Jogee*,[124] but the rule likely remains in Hong Kong since *Jogee* was rejected by the HKCFA and the rule has been included in the latest version of the specimen directions for jury.[125] In essence, the rule is that if another party's act (eg, killing) was of a fundamentally different nature from what the defendant intended or foresaw, then that act falls outside the scope of the joint enterprise, and the defendant would not be guilty of any offence (including manslaughter).[126] Although there is little discussion of whether this rule (which usually applies to extended joint enterprise situations) could apply to basic joint enterprise scenarios,[127] assuming that it does, then D2 and D3 cannot be convicted of manslaughter, for the unforeseen killing was of a fundamentally different nature from robbery.

Consider the second example: A and B set fire to the victim's house, causing the victim's death. They were both charged with murder, with the alternative charge of manslaughter. The jury convicted A of murder and B of manslaughter. The jury's finding effectively means that A knew the deceased was in the house and intended to kill the deceased by setting fire, whereas B did not know the deceased was in the house and had no intent to kill or cause grievous bodily harm.

In this example, again only traditional accessorial liability would properly allow the different verdicts to be reached. It is difficult to reach the same decisions under the basic joint enterprise principle, as A and B's differing intentions mean that there is no agreement (or 'joint' enterprise) between both parties to commit murder.[128] Hence A could not participate in an agreement to murder and could not be so convicted under the basic joint enterprise principle. Also, if the fundamental departure rule applies, B may be acquitted even of manslaughter for that A's act was of a fundamentally different nature from what B intended or foresaw.

[121]Hong Kong Judicial Institute (n 113) [101-7].

[122]In *Tsang Cheung Yan* [46], the Hong Kong Court of Appeal held that 'the jury was entitled… to find that there was a joint enterprise to administer the substances but that the defendants' individual intentions in taking part in the enterprise differed'. The decision was criticised for identifying a non-charged crime (applying the substance) as a basis of basic joint enterprise, see Wong & Lui (n 116).

[123]Graham Virgo, 'Joint enterprise liability is dead: long live accessorial liability' [2012] Criminal Law Review 850.

[124]The 'fundamental departure' rule is replaced by the new test of 'overwhelming supervening act' in England and Wales, see *Jogee* [97]–[98].

[125]Hong Kong Judicial Institute (n 113) [101-11].

[126]*R v Powell and English* [1999] 1 AC 1 (House of Lords); *AG Reference No.3 of 2004* [2005] EWCA Crim 1882 (England and Wales Court of Appeal); *R v Rafferty* [2007] EWCA Crim 1846 (England and Wales Court of Appeal); Virgo, 'Joint enterprise liability is dead' (n 123); Hong Kong Judicial Institute (n 113) [101-12].

[127]It appears to cover a basic joint enterprise scenario in *AG Reference No.3 of 2004* [2005] EWCA Crim 1882.

[128]The fact that there was an agreement to commit arson does not matter because the defendants were not facing the allegation of participating in a basic joint enterprise to commit arson. In order to secure a conviction for murder under the basic joint enterprise principle, the parties must have participated in an agreement to commit murder.

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It is not uncommon for the courts to face evidential uncertainty scenarios, where the prosecution seeks to lay alternative charges against individual defendants because of their potentially differing intentions. As demonstrated, the basic joint enterprise principle is conceptually unable to deal with these scenarios.[129]

Disrupting the Principal-Accessory Distinction

The basic joint enterprise principle also unjustifiably disrupts the legal distinction between a principal and an accessory. It has long been the law that a principal is the person who performs the *actus reus* of the crime, and that an accessory is the person who aided, abetted, counselled, or procured the principal to commit the crime.[130] Under the basic joint enterprise principle, such principal-accessory distinction is irrelevant as all parties to a crime are treated as principals. This is reflected in *HKSAR v Lo Kin Man*, in which the HKCFA held that criminal liability under the basic joint enterprise principle 'is independently based on each defendant's participation in a joint criminal enterprise' and 'makes all participants guilty as principals'.[131] In contrast, Lord Kerr recognised the anomaly in *R v Gnango*,[132] opining that '[t]he essential ingredient for joint principal offending is a contribution to the cause of the *actus reus*. If this is absent, the fact that there is a common purpose or a joint enterprise cannot transform the offending into joint principal liability'.[133]

Case law does not appear to support the proposition that all participants in a joint enterprise should be seen as principals. When stating such a proposition in *Lo Kin Man*,[134] the only case that the HKCFA referenced is *Chan Kam Shing*, paragraphs 33 and 63. In *Chan Kam Shing*, paragraph 33, the HKCFA stated that 'under the doctrine of joint criminal enterprise, liability is not derivative … Liability is independently based on each defendant's participation in a joint criminal enterprise with the requisite mental state'. Yet the two relevant paragraphs in *Chan Kam Shing* contain no further citations. Hence, the legal basis or authority that the HKCFA had in mind when classifying all joint enterprise participants as principals is unclear.

In *Osland v The Queen*,[135] which recognised the doctrine of 'acting in concert',[136] the Australian High Court referred to *R v Lowery and King (No 2)* when proposing that 'the liability of each person present as the result of the concert is not derivative but primary. He or she is a principal in the first degree'.[137] Osland's reference to *R v Lowery and King (No 2)* is troubling and the latter may have misled the Court into thinking that all present parties could be seen as principals. To recap, the mode of liability discussed in *R v Lowery and King (No 2)* requires all defendants to be present and 'not [to] go beyond the scope of the understanding'. This article has earlier suggested that the basic joint enterprise principle and the doctrine of 'acting in concert' stated in *R v Lowery and King (No 2)* may have been a mis-transplant of the no longer applicable rule of 'guilty by

[129]In *Sze Kwan Lung* [19], the HKCFA stated that 'a participant in a joint enterprise can be convicted of murder even though the actual killer is acquitted outright or convicted of the lesser offence of manslaughter only'. Yet the authorities cited by the HKCFA, including *R v Howe* [1987] 1 AC 417 (House of Lords), relate to accessorial liability, not joint enterprise. In any event, it is unclear whether or why a joint enterprise (or agreement) to commit a charged crime could be formed when there is only one participant.

[130]*Chan Kam Shing* [9]; *Jogee* [1]; Ormerod & Laird, *Smith and Hogan's Criminal Law* (14th edn, n 89) 209.

[131]*Lo Kin Man* [52].

[132]*Gnango* [129].

[133]The majority in *Gnango* took a different view and was inclined to classify participants in a joint enterprise as principals, see *Gnango* [71], [81]. See also Virgo, 'Joint enterprise liability is dead' (n 123) 855, which supports Lord Kerr's views and criticised the majority decision as 'misplaced' and 'liable to confuse'.

[134]*Lo Kin Man* [52].

[135]*Osland v The Queen* [1998] HCA 75 (*Osland*) (High Court of Australia).

[136]The doctrine of acting in concert is considered to be the same as joint enterprise, see Judicial College of Victoria (n 35) 510.

[137]*Osland* [72].

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association', which relates to extended joint enterprise. Such a historical rule made all present parties guilty of any further crimes committed by their co-perpetrators as 'principals in the second degree'. Since the law reform in the 1960s, which abolished the previously used terms of 'felony', 'misdemeanour', 'accessory before the fact', and 'principal in the second degree', the concept of 'principals in the second degree' has been absorbed into traditional accessorial liability, where 'principals in the second degree' are now known as aiders and abetters. The idea that all secondary parties could still be regarded as principals under the basic joint enterprise principle may hence be based on a misunderstanding of authorities.

The differentiation between accessories and principals reflects a principled approach in law. The English Law Commission explained that because statutory provisions that create offences do not directly criminalise the acts performed by accessories, a special provision[138] criminalising the accessories (and hence classifying them as such) for assisting or encouraging an offence is needed.[139] A simple example is that the statutory provision on burglary criminalises the principal who trespasses into a building with the intention to steal, but does not explicitly criminalise the accessory who assists the principal by providing burglary tools.[140] Treating all participants as principals weakens the principled distinction made under traditional accessorial liability.

Moreover, the normative explanation purporting to explain how liability under the basic joint enterprise principle is conceptually different from that under traditional accessorial liability is not persuasive. The Australian authority of *Clayton v The Queen*,[141] which the HKCFA cited,[142] states:

> [L]iability as an aider and abettor is grounded in the *secondary party's contribution to another's crime*. By contrast, in joint enterprise cases, the wrong lies in the *mutual embarkation on a crime*, and the participants are liable for what they foresee as the possible results of that venture. In some cases, the accused may be guilty both as an aider and abettor, and as participant in a joint criminal enterprise. That factual intersection of the two different sets of principles does not deny their separate utility (emphases added).

It may be questioned whether 'contribution to another's crime' and 'mutual embarkation on a crime' can be readily distinguished in the majority of cases. As rightly suggested in *Smith & Hogan*,

> [i]f D and P set out together to rape (or to murder), how does D 'participate' in P's act of penile penetration of V (or P's shooting of V) except by assisting him or encouraging him – that is, aiding, abetting, counselling or procuring him – to do the act? It is submitted that there is no other way.[143]

To suggest that D, who was assisting P and contributing to P's crime, had instead 'mutually embarked on a crime with P' is not necessarily wrong – but it certainly involves some linguistic camouflage.

When D's role is limited to encouraging P, the HKCFA's suggestion that D has attracted 'independent liability' as a principal by virtue of D's participation in the joint enterprise is puzzling.[144] Under the basic joint enterprise principle, entering into an agreement to commit a crime is loosely

[138]Accessories and Abettors Act 1861 (England and Wales), s 8; Criminal Procedure Ordinance (Cap 221, Laws of Hong Kong), s 89.
[139]Law Commission (n 58) 7.
[140]See Theft Ordinance (Cap 210, Laws of Hong Kong), s 11.
[141][2006] HCA 58 (High Court of Australia) [20].
[142]*Chan Kam Shing* [36].
[143]See Ormerod & Laird, *Smith and Hogan's Criminal Law* (14th edn, n 89) 260, also cited in *Chan Kam Shing* [39].
[144]*Lo Kin Man* [52].

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defined, eg, D's encouragement with a knowing nod would suffice.[145] Consider that D encourages (ie, enters into an agreement with) P to rape V, but the crime was eventually not executed only because of P's erectile dysfunction. When the *actus reus* of the crime has not been performed, D cannot be found guilty under the basic joint enterprise principle.[146] As D's liability under the principle is contingent upon P's successful execution of the crime, D's liability is clearly not an 'independent' one. Whether criminal liability can be attributed to D depends entirely on P's decision (and ability) to carry out the crime.

As a counter-argument, one may be tempted to think that some 'accessories' under the traditional classification could be gravely culpable, and hence the basic joint enterprise principle allows for a better reflection of culpability by reclassifying such offenders as 'principals'. Previously, when the law had a separate classification of crimes between 'misdemeanour' and 'felony', an accessory may have been seen as less culpable than the principal. This is because, historically, an accessory may not have been subjected to the same maximum penalty as the principal for some felony offences,[147] and an accessory could not be convicted of a more serious crime than that for which the principal was convicted.[148] By the mid-19th century, the law already treated accessories in the same way as principals in sentencing.[149] With the abolition of the misdemeanour and felony classifications in the 1960s, the principal-accessory distinction is now merely technical in nature[150] and no longer indicates the respective culpability of the defendants. As *Jogee* explained,

> [i]n the language of the criminal law a person who assists or encourages another to commit a crime is known as an accessory or secondary party. The actual perpetrator is known as a principal, *even if his role may be subordinate to that of others* (emphasis added).[151]

Nowadays, the respective culpability of the defendants is properly assessed at the sentencing stage, irrespective of the principal-accessory label. In *HKSAR v Herry Jane Yusuph*,[152] for example, the Hong Kong Court of Appeal reaffirmed the drug trafficking sentencing guidelines that the manager of a drug trafficker or the financial controller of organised trafficking (ie, an accessory) is more culpable than the actual (or direct) trafficker (ie, the principal).[153] This shows that the courts will consider the overall circumstances in determining the respective culpability of the defendants, without giving much weight to the principal-accessory classification.[154] In any event, applying the basic joint enterprise principle certainly would not help to better indicate the respective culpability of the defendants, as all defendants are treated equally and invariably as principals (under the basic joint enterprise principle), regardless of their role or contribution towards the offence.

[145]ibid [56].

[146]D would not be guilty under the basic joint enterprise principle but may be guilty of conspiracy to rape.

[147]Dyson, 'Principals without Distinction' (n 7).

[148]ibid. Moreover, historically, an accessory cannot be convicted before the principal has been convicted. To ensure that secondary parties would not be treated with undue leniency when classified as accessories, it later became the law that persons 'who are present aiding and abetting' a felony are 'principals in the second degree', see William Oldnall Russell, *A Treatise on Crimes and Indictable Misdemeanours* (Joseph Butterworth and Son 1826) 21, cited by Dyson, 'Principals without Distinction' (n 7).

[149]Criminal Procedure Act 1848 (England and Wales), s 1, cited by Dyson, 'Principals without Distinction' (n 7).

[150]It only serves to distinguish which offender(s) performed the *actus reus* of the offence.

[151]*Jogee* [1].

[152][2021] 1 HKLRD 290 (Hong Kong Court of Appeal).

[153]ibid [58]–[69].

[154]See also *R v Hussain* [2023] EWCA Crim 697 (England and Wales Court of Appeal) [97]:

> By section 8 of the Accessories and Abettors Act 1861, an accessory shall be liable to be punished as a principal offender. The judge was entitled to sentence on the basis that each of the applicants was as culpable as Hammad, even though it was Hammad who took the knife into Bryan's flat and who inflicted the fatal wound.

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Treating all secondary parties as principals could also lead to absurd reasoning and arbitrary principal/accessory classifications. For example, by definition, the offence of rape can only be committed by men.[155] If A (a woman) and B (a man) reach an agreement for B to rape V, A (a woman who lacks the physical capacity to commit rape) would still be regarded as a principal offender under the basic joint enterprise principle. Convicting A, who is incapable of performing the *actus reus* of the crime as a principal, by suggesting that either (i) A has raped V through B, or (ii) A and B have mutually raped V, is logically unsound.

More importantly, the above example also demonstrates the undesirable anomaly that whether a person is guilty as a principal or as an accessory could depend solely on the approach chosen by the prosecution. If A is charged under traditional accessorial liability, she could only be liable as an accessory. However, if A is prosecuted under the basic joint enterprise principle, she would be regarded as a principal. Under the same set of facts, a defendant should be either a principal or an accessory, but not both. The clarity and certainty of the law are therefore at risk of being 'undermined by an overzealous application of joint enterprise terminology and a strategic (ab)use of the joint enterprise doctrine as a distinct head of liability in cases which are really only instances of aiding and abetting'.[156] Ultimately, no convincing reason has been advanced to disrupt the long-standing law and to reclassify all defendants, especially those who merely performed an accessory role, as principal offenders.

Conclusion

This article has examined the authorities and arguments that purport to support the continued application of the basic joint enterprise principle. A review of these authorities finds that none of them provide clear support for the historical roots of the principle. On the contrary, most authorities reflect the long-standing use of traditional accessorial liability to attribute secondary liability when no further (collateral) offence was in issue.

Four further arguments were proposed as to why the basic joint enterprise principle should be abolished. First, the basic joint enterprise principle completely overlaps with traditional accessorial liability and the inchoate offence of conspiracy, and is therefore of no practical utility. Its abolition would not leave any gap in the law. Second, proving criminal liability under the basic joint enterprise principle necessarily requires the court to engage in circular reasoning. A defendant must already have been proven guilty under the traditional principal-accessorial liability before his/her participation in a basic joint enterprise can be proven. Third, the basic joint enterprise principle is unable to deal with situations of evidential uncertainty where the intentions of the parties possibly differ. Fourth, treating all defendants as principals under the basic joint enterprise principle unjustifiably disrupts the long-standing distinction between a principal offender and an accessory.

Thus far, academic literature on secondary liability has focused almost exclusively on analysing the merits of the extended joint enterprise principle, and little attention has been paid to the basic joint enterprise principle. It is hoped that this article will spark further discussion in this under-researched area of law, and that there will soon be an opportunity for the courts to review the necessity to retain the basic joint enterprise principle.

[155]See Crimes Ordinance (Cap 200, Laws of Hong Kong), s 118.
[156]Krebs (n 38) 590.

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