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Introduction

This paper is an inquiry into the present law on voluntary intoxication and criminal liability in Hong Kong. Through this inquiry, I argue that the present law should be reformed. In this paper, I will first lay out the outline of the present law of voluntary intoxication in Hong Kong. Then, I will put forward several criticisms of the present law and argue that the law is not doctrinal, and it violates several basic principles in criminal law. Hence and finally, I will suggest two legal reforms which may resolve the problems of the present law.

1. An outline of the present law

1.1 Definition of Voluntary intoxication

“Voluntary intoxication” usually describes a state where defendants have knowingly consumed alcohol or drugs and have been induced by them, providing that the kind of drugs is well known for making a person aggressive, unpredictable or uncontrollable, as known as the dangerous drugs.

1.2 Voluntary intoxication is a common law defence to negate mens rea of an offence

It is worth first looking at the criminal law on voluntary intoxication in Hong Kong. This legal doctrine has long been following that in the UK. Generally, voluntary intoxication (or involuntary intoxication) may be raised as a common law defence to argue that the defendant may be sufficiently intoxicated and hence, he did not have the requisite mens rea of a crime charged. For example, in *D.P.P. v. Beard* [1920] 14 Cr. App. R. 159 (HL), the House of Lords held that the “evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proven in order to determine whether or not he had this intent”.¹ This implies

¹ [1920] 14 Cr. App. R. 159 (HL) pp. 501–502

that the function of calling the evidence of intoxication is to support the claim that the defendant lacked the requisite mens rea to be guilty of the offence charged, given that the offence should be one of specific intent, which will be discussed later.

1.3 The defence of voluntary intoxication is hardly admissible by courts

R v Sheehan and Moore 60 Cr App R 308 laid down the general principle:

"In cases where drunkenness and its possible effect upon the defendant's mens rea is an issue, ... the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent."²

This position is also followed by Hong Kong courts. Stock V-P in *HKSAR v Chiu Wai Kan Vicken* [2011] 2 HKLRD 643, quoting Sir Igor Judge P said, "public policy proceeds on the basis that a defendant who voluntarily takes alcohol and behaves in a way which he might not have behaved when sober is not normally entitled to be excused from the consequences of his actions."³

Besides, judges have confined the admissibility of voluntary intoxication as a defence by developing a distinction between basic and specific intent offences. Hence, the defence of voluntary intoxication can only be applied in cases of specific intent crimes. This case law stems from *DPP v Majewski* [1977] AC 443, HL, which is followed by Hong Kong courts. Nguyen J in *HKSAR v Ku Kit Ling* [2004] HKEC 1234 held that "the offence... was an offence of basic intent as opposed to one of specific intent and therefore the appellant [i.e. the intoxicated

² 60 Cr App R 308 744B-C

³ [2011] 2 HKLRD 643 para 45

offender] should not be allowed to say that she lacked the necessary mens rea due to voluntary intoxication.”⁴ The Lords made this distinction for the purpose of limiting the number of cases in which a defence of voluntary intoxication could be raised.⁵

Apart from making the defence of voluntary intoxication inadmissible in cases of basic intent offences, the case law also allowed voluntary intoxication to be substituted for the mens rea of any basic intent offence. Thus, voluntary intoxication may either be introduced to negate the requisite mens rea of specific intent crimes or taken to be sufficient evidence of mens rea for basic intent crimes.

This case law is rooted from *Majewski*. Lord Elwyn-Jones said:

“If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of mens rea, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary mens rea in assault cases.”⁶

What Lord Elwyn-Jones means is that if a person self-induces the state of intoxication and he is so intoxicated that he lacks the reason and conscience, it is right for the law to hold him criminal and his conduct of intoxication can be deemed as recklessness which suffices the requisite mens rea of an offence. In short, the defendant’s conduct of becoming voluntarily intoxicated could be substituted for the mens rea of a general intent offence.

⁴ [2004] HKEC 1234 para 5

⁵ Dimock, Susan. "What are intoxicated offenders responsible for? The “intoxication defence” re-examined." *Criminal law and Philosophy* 5.1 (2011): 1-20.

⁶ [1977] AC 443, HL

2. Criticisms of the present law

2.1 The distinction of basic and specific intent offences is not doctrinal

In *Majewski*, the House of Lords suggested that the specific intent crime requires an ulterior or purposive intent (i.e. the mens rea extends beyond the actus reus) rather than recklessness. Examples include robbery, trespass, murder, theft and aiding and abetting a crime. Contrastingly, examples of basic intent crimes include all forms of assault and manslaughter. It is criticized that the ulterior or purposive intent is an ambiguous concept. Some scholars have challenged this dichotomy as artificial, unprincipled, and indeterminate.⁷ These critiques indeed make sense because there is no agreed criterion for classifying an offence as of basic or specific intent, and at the same time there is a range of judicial opinions on this matter.⁸ That is why the High Court of Australia in *R v O'Connor* (1981) 146 C.L.R. 64 by a majority rejected *Majewski*. In the reasoning of the majority judges, they observed that *Majewski* operates by uncertain criteria. Also, they held that the distinction between basic intent and specific intent offences lacks logic. For example, Stephen J observed that the distinction in *Majewski* was aimed to provide a suitable gradation of offence and punishment: while the intoxicated defendant may escape conviction on the more serious charge (such as murder which is a specific intent crime), a lesser crime (such as manslaughter which is a basic intent crime) to which the intoxication will not help defence. In other words, the House of Lords thought that the intoxicated offenders are culpable but due to the lack of intention to offend they are less culpable than offenders who commit the same crime with an intent. Therefore, the intoxicated offenders should be liable to basic intent crimes only because basic intent crimes should be less culpable. However, Stephen J observed that “in many other cases *Majewski* will result in no gradation at all; for example, rape and indecent assault are crimes of the same ‘grade’, neither requiring a specific intent.”⁹ This suggests that the House of Lords in

⁷ Dimock, Susan. "What are intoxicated offenders responsible for? The “intoxication defence” re-examined." *Criminal law and Philosophy* 5.1 (2011): 1-20.

⁸ Intoxication and Criminal Liability, Consultation Paper No 127 (1993).

⁹ (1981) 146 C.L.R. 64

Majewski made a right policy, but it cannot be well adopted through the distinction of basic and specific intent crime.

As the distinction is not doctrinal, it is also criticized for the difficulty of the lower courts to follow. Even though some advocates of the intoxication rules may argue that the lack of a clear doctrinal basis for the distinction between basic and specific intent crime does not matter once most offences have been categorised by judicial decisions, there will be problems. For example, trial courts do not have clear guidance as to how the new offences should be categorised. What if an offence can only be committed intentionally, but not recklessly, while it does not contain the element of purposiveness, so what is the correct categorization? There is no obvious way that a trial judge can resolve this dilemma and cases will go up to the Supreme Courts to obtain a final judicial decision on the matter of categorization. This is a waste of judicial resources.

2.2 The substitution for mens rea creates a deeming effect of a basic intent offence as almost an absolute liability offence

The intoxication rules are also criticised for the substitution for mens rea which the basic intent offences are almost deemed as the absolute liability offences for intoxicated defendants.¹⁰ Imagine an intoxicated defendant who committed the actus reus of a basic intent offence by accident or mistake. By the substitution for mens rea, the defendant is denied all the mens rea defences that are available to sober offenders in the same circumstances because the conduct of voluntary intoxication is deemed as recklessness pursuant to *Majewski*.

Many judges and academic commentators suggest that becoming voluntarily intoxicated is necessarily reckless.¹¹ However, becoming intoxicated may not be necessarily reckless while intoxication is reckless only in some circumstances. For

¹⁰ Quigley, Tim. "Specific and General Nonsense." *Dalhousie LJ* 11 (1987): 75.

¹¹ Dimock, Susan. "What are intoxicated offenders responsible for? The "intoxication defence" re-examined." *Criminal law and Philosophy* 5.1 (2011): 1-20.

example, a person who regularly becomes violent when he ingests intoxicants could be expected to reasonably foresee the risk of him assaulting others under the state of intoxication so his act of voluntary intoxication can be considered as reckless with respect to that danger. Contrastingly, voluntary intoxication may not be reckless if a person never becomes violent after ingesting intoxicants.

However, the claim that becoming voluntarily intoxicated is necessarily reckless persists because it is claimed that it is commonly known that intoxication is per se dangerous. This claim is problematic because at the same time alcohol is available to customers in Hong Kong. Statistics show that between 2004 and 2018, the alcohol consumption per capita of Hong Kong stood between 2.53 and 2.87 litres and from 2009 onwards, the alcohol consumption per capita had an increasing trend.¹² Yet the crime rate in Hong Kong, particularly violent crimes has been falling down. For example, the number of violent crimes decreased from 909 in 2015 to 728 in 2018.¹³¹⁴ The above societal data seems to rebut the claim that the usage of alcohol and violent crime are positively correlated. Also, the Hong Kong government did not tell people not to consume alcohol because of the risk of criminality, except in the course of drink driving. This suggests that the government at least thinks that it is possible to drink alcohol as long as one does not drive. Therefore, voluntary intoxication of alcohol is not necessarily reckless.

While there is no absolute causation between the conduct of voluntary intoxication and recklessness, i.e. the mental culpability of a basic intent offence, it is wrong for criminal law to deem the voluntarily intoxicated defendants as having the requisite mens rea of a basic intent offence.

2.3 It is absurd to say voluntary intoxication is a defence

¹² Department of Health. "Alcohol Consumption Per Capita in Hong Kong." *Change4Health*, www.change4health.gov.hk/en/alcohol_aware/figures/alcohol_consumption/index.html.

¹³ Hong Kong Police Force. "Crime Statistics Comparison." *Crime Statistics Comparison | Hong Kong Police Force*, www.police.gov.hk/ppp_en/09_statistics/csc_2015_2016.html.

¹⁴ Hong Kong Police Force. "Crime Statistics Comparison." *Crime Statistics Comparison | Hong Kong Police Force*, https://www.police.gov.hk/ppp_en/09_statistics/csc_2017_2018.html

As the evidence of voluntary intoxication is precluded by the court for the defendant to rely on in order to raise doubt as to the mens rea of an offence, legally speaking, intoxication is never a defence.¹⁵ First of all, the law is not morally legitimate to the defendants because the intoxication doctrine is basically not a defence as what we have long said it is, but it is indeed a tool for the prosecution. Simester argues that intoxication is a doctrine of inculcation, not exculpation.¹⁶ Thus, in cases concerning intoxication, when a court starts by asking whether the defendant in fact possessed a particular intent of an offence, if the prosecution can prove beyond reasonable doubt that the defendant had the requisite mens rea, the defendant will be held as liable, notwithstanding whether the defendant's actions were caused by his drunkenness because "a drunken intent is nevertheless an intent." In other words, the purpose of raising this so-called defence (i.e. intoxication) is not to help the defendants, but indeed to pave the road for the prosecution to submit that "a drunken intent is nevertheless an intent" and the defendants will be liable. Therefore, it is absurd to say intoxication is a defence.

2.4 The present law violates the voluntariness principle

Another criticism is that the voluntary intoxication rules violate a fundamental principle of criminal law, i.e. the voluntariness principle. Under this principle, one is only liable for committing the actus reus of an offence if his conduct is under his voluntary and conscious control. Vertes J. in *R. v. Brenton* [1999] N.W.T.J. No. 113. said:

"The concept of voluntariness... represents the fundamental principle of our criminal law that no act can be regarded as criminal unless it is a voluntary act.... Thus, it is an aspect of the actus reus. It is the minimal requirement that acts must be conscious acts. There must be a mind capable of exercising the will-power to do the physical act that represents the crime. There must be a state of awareness on the part of

¹⁵ Simester, A. P. "Intoxication is never a defence." *Criminal Law Review* (2009): 3-14.

¹⁶ *ibid*

the actor that he or she is doing the act. One can phrase this principle in numerous ways, but the point is that voluntariness is an aspect of all crimes....”¹⁷

The doctrine of voluntary intoxication violates the principle of voluntariness because the intoxication defence is not admitted by courts in the cases of basic intent crimes and the intoxicated defendants are convicted, but it can be reasonably doubted that under the state of intoxication the defendants were not under his voluntary and conscious control at the time when he committed the actus reus of an offence and thus there is a reasonable doubt as to the actus reus of the offence. In other words, the intoxicated offenders are regarded as culpable even when their acts have not been proved to be voluntary beyond reasonable doubt. Besides, the doctrine of voluntary intoxication also violates the principle of presumption of innocence because the defendants can be convicted even when the prosecution has not proven the actus reus of the offence beyond reasonable doubt.

The voluntary intoxication rules also require conviction despite a reasonable doubt of the mens rea of an offence. It should be noted that voluntariness is also a component of mens rea. Again, Vertes J. in *Brenton* said:

“Voluntariness is also linked to the mens rea component. It is a principle of fundamental justice that every criminal offence punishable by imprisonment must have a mens rea component. There must be at least some minimal mental state as an essential element of the crime... Voluntariness is the basic constituent element of the mens rea requirement. The conscious doing of an act (being the actus reus) encompasses the intention to do it and therefore constitutes the minimal mens rea for general intent.”¹⁸

¹⁷ [1999] N.W.T.J. No. 113. para. 42

¹⁸ *ibid*

However, the doctrine of voluntary intoxication allows conviction even though it is reasonably doubted that because of intoxication the defendants were not voluntary at the time of committing the actus reus of an offence. In other words, it allows conviction even though there is reasonable doubt as to the basic constituent element of the mens rea requirement of an offence. All in all, the doctrine of voluntary intoxication violates the voluntariness principle.

2.5 The present law violates the principle of contemporaneity

The voluntary intoxication rules violate another fundamental principle of criminal law: the principle of contemporaneity. This principle in *Fowler v Padget* (1798) 7 Term Rep 509 was that "the intent and the act must both concur to constitute a crime." It means that the mens rea must *coincide* in point of time with the actus reus in order for a defendant to be convicted of an offence. This principle is violated by the voluntary intoxication rules because the requisite mens rea, which is substituted by the fault of becoming intoxicated may occur *before* the actus reus of an offence and the defendants may not contemplate the harm/damage at the time of ingesting the intoxicants.

2.6 Justifications of the intoxication rules and their criticism

Despite the criticism and the violations of the general legal principles mentioned above, advocates of these rules have suggested some reasons for why those violations are justified. One reason is that the voluntarily intoxicated offenders are morally culpable for allowing themselves to be so intoxicated.¹⁹ Therefore, even if the intoxication rules violate the general principle, they violate for a good reason. Hence, the restrictions of voluntarily intoxicated defendants to rely on intoxication defence in cases of basic intent offences do not violate the fundamental justice, which essentially protects the morally innocent from punishment because

¹⁹ Dimock, Susan. "What are intoxicated offenders responsible for? The "intoxication defence" re-examined." *Criminal law and Philosophy* 5.1 (2011): 1-20.

intoxicated defendants are in the first place not morally innocent in virtue of their voluntary intoxication.²⁰

One supporting point of this argument bases on the doctrine of prior fault. As what Andrew Ashworth puts forward, “an accused should not be permitted to rely on an incapacitating condition which arose through his own fault.”²¹ However, this supporting claim attracts some critiques. First of all, the mere act of ingesting intoxicants may not be illegal or immoral to be a fault. Besides, this doctrine requires a connection between the prior fault and the subsequent offence²²: it may ground culpability for the subsequent offence if the risk of the offence was or should have been contemplated by the defendants at the time of ingesting the intoxicants. However, such a connection or the element of contemplation is not made clear under the present law. Thus, the doctrine of prior fault does not support the point that the intoxicated defendants are not morally innocent.

Besides, the advocates of the intoxication doctrine also emphasise the linkage between the risks created by the conduct of the intoxicated person and the risks of the violence that may follow. For example, the commentary to the Model Penal Code argues that “it is not unfair to postulate a general equivalence between risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk.”²³ However, such an equivalence is not absolute because there are various factors other than intoxication that affect how a person or an intoxicated person behaves.²⁴ Thus, the linkage does not support the claim that the intoxicated defendants are not morally innocent.

3. Possible legal reforms

²⁰ *ibid*

²¹ Ashworth, A. J. "Reason, logic and criminal liability." *Law Quarterly Review* 91.361 (1975): 107-130.

²² Dimock, Susan. "What are intoxicated offenders responsible for? The “intoxication defence” re-examined." *Criminal law and Philosophy* 5.1 (2011): 1-20.

²³ Reitz, Kevin R. "American Law Institute, Model Penal Code: Sentencing, Plan for Revision." *Buffalo Criminal Law Review* 6.1 (2002): 525-672.

²⁴ J. Hodge, "Alcohol and Violence" in P. Taylor (ed.), *Violence in Society* (1993), p.127.

3.1 Approach 1: Abolish the *Majewski* Rule

One possible legal reform is to abolish the common law rules on voluntary intoxication: the specific/basic intent distinction, the substitution rule, and the exclusion of intoxication evidence. Hence, defendants may be able to introduce evidence of intoxication to raise a reasonable doubt of the actus reus or mens rea element of *any* offence. For example, New Zealand's Court of Appeal held:

Drunkenness is not a defence of itself. Its true relevance by way of defence, so it seems to us, is that when a jury is deciding whether the accused has the intention or recklessness required by the charge, they must regard all the evidence, including evidence as to the accused's drunken state, drawing such inferences from the evidence as appears proper in the circumstances''²⁵

In short, the intoxication will merely be a piece of evidence used, together with the other circumstances, in determining whether the defendant had the requisite mens rea of the offence. It should be noted that a drunken intent can be an intent, but at the time a drunken awareness can be an awareness.

This approach is the simplest way to reform the law and it is right in principle. Dickson J in *Leury* (1977) 33 CCC (2d.) 473, 486-487 said, "the burden of proving all of the elements in the definition of the crime charged, including the mental element, is always upon the Crown. The presence or absence of intoxication in no way affects that burden."

It is worth to look at the law in Australia. The High Court of Australia in *R v O'Connor* (1981) 146 C.L.R. 64 by a majority of 4-3 rejected *Majewski* on the ground that voluntary intoxication might be relied on by the defendant to raise reasonable doubt as to the requisite mens rea. The Court also confirmed that the burden is always on the prosecution to prove all the elements of the offence,

²⁵ [1975] 2 NZLR 610 (CA)

including the mens rea, beyond reasonable doubt, whether the offence is of “basic or specific intent”.

The impact of *O'Connor* is criticised that the abolishment of the *Majewski* rule may threaten the public safety if defendants could be more easily acquitted because of their voluntary intoxication. However, jurisdictions where *O'Connor* has been followed do not support this critique.

The 1986 Report of the Law Reform Commission of Victoria stated that:

"evidence of intoxication is rarely such that the accused is acquitted because there is doubt whether the proscribed act was done voluntarily or intentionally... About thirty authenticated cases were discovered in which the accused was totally acquitted, apparently due to lack of voluntariness or intent by reason of gross intoxication. Most were in magistrates' courts. The cases were generally minor but that was not always so. For example, they included charges of assault with a weapon, infliction of grievous bodily harm, theft, assault, wilful damage and resisting arrest... With most serious offences, however, particularly in the higher courts, intoxicated defendants are generally convicted of the offence charged or at least of a lesser offence."

"The reason for the small number of acquittals, particularly in the higher courts, is apparent. In order to avoid criminal responsibility, the accused must be in a state of such extreme intoxication as to have acted involuntarily or unintentionally. If the offence charged is a serious offence, particularly an indictable offence, the jury, judge or magistrate hearing the case would be reluctant to accept that the intoxication precluded the accused acting voluntarily and intentionally."²⁶

²⁶ Law Reform Commission of Victoria, “Criminal Responsibility: Intention and Gross Intoxication”, *Report No 6* (1986)

The Commission makes clear that the abolishment of the *Majewski* rules did not open the floodgate of acquittals of cases involving voluntary intoxication. All in all, this abolishment of *Majewski* rules can take away the troubles made by the distinction of basic and specific intent crime and require the prosecution to prove beyond reasonable doubt the requisite actus reus and mens rea of a particular offence with the presence of intoxication evidence, so the new intoxication doctrine will follow the basic principle of voluntariness and contemporaneity and bring the intoxication doctrine back to the principle that the prosecution should bear the burden to prove the actus reus and mens rea beyond reasonable doubt.

3.2 Approach 2: Introduction an offence of criminal intoxication

Another possible legal reform is to introduce the new offence of criminal intoxication. This separate offence would abolish the abstract distinction of specific and basic intent crimes and put the focus on what the defendant has actually done, including the voluntary intoxication. As the unsatisfactory distinctions between offences would be eliminated, hence all offenders would be treated on a consistent basis.²⁷ Before a further discussion, it should be made clear why this new offence should be introduced. The main reason is that the policy concern in *Majewski* based on the culpability of voluntary intoxication and I have argued that actually only in some circumstances voluntary intoxication is culpable, but after the abolishment of the *Majewski* rule, the defendants could be acquitted because the voluntary intoxication raises doubt as to the requisite mens rea of an offence, even if the voluntary intoxication is indeed culpable, so there may be a loophole in law that certain culpable conducts of voluntary intoxication cannot be punished, so this new offence can fill up this loophole and serve as a separate criminal offence to punish the criminality of the defendant's conduct of voluntary intoxication in certain circumstances.

²⁷ Schabas, Paul B. "Intoxication and Culpability: Towards an Offence of Criminal Intoxication" *University of Toronto Faculty of Law Review*, vol. 42, no. 2, 1984, p. 147-164. HeinOnline

However, this reform is not without difficulties. This way of convicting all intoxicated offenders of the same offence may lump all criminal conducts together. This new offence will criminalise intoxicated people who have killed and raped and those who have involuntarily punched someone or stolen a small thing under a mistaken belief that it was their own. To overcome this difficulty, it may introduce a new criminal offence of dangerous intoxication, which is proposed by the Butler Committee of 1975. An offence of dangerous intoxication only applies to offences "involving injury to the person (actual bodily harm) or death or consisting of a sexual attack on another or involving the destruction of or causing damage to property so as to endanger life".²⁸ Dangerousness could be proved by actual violence and conduct that is dangerous per se even if it has not yet caused harm. The Butler proposal confined criminal liability to only dangerous offences. For non-dangerous offences, defendants would be acquitted because of the lack of mens rea due to serious intoxication. This is a good way to avoid convicting serious and minor offenders of the same offence. Also, dangerousness is an unambiguous concept compared to basic and specific intent. The emphasis on danger and harm would also meet the policy concern in *Majewski* that the criminal law should protect the public from violent behaviour and the concerns about the correlation of intoxication, culpability and violence. This new offence also serves as a fair labelling and an increase of deterring effect.

Besides, this new offence should include the element of deliberateness. The defendant should not be convicted unless he was aware that he was at least running the risk of putting himself into that state of substantial intoxication.²⁹

However, on the issue of the severity of punishment of this new offence, the Butler Committee found it a matter of difficulty: if too severe, the punishment would be unfair, but if too light,

²⁸ Report of the Committee on Mentally Abnormal Offenders, 1975, Cmnd. 6244, p. 236

²⁹ Intoxication and Criminal Liability, Consultation Paper No 127 (1993).

"then in cases such as wounding with intent to cause grievous bodily harm (where in everyday experience in the courts the vast majority of defendants blame drink for their actions) the existence of a 'fall-back' verdict will encourage time-consuming unsuccessful defences to be run in inappropriate cases."³⁰

Few suggestions could be made. First, the maximum punishment for the intoxication offence should be less than that for the offence on which the conviction of the intoxication offence is based. Despite the defendant's fault in becoming intoxicated in the first place, such a fault should be less culpable than the fault of intentionally or recklessly committing the same criminal act. It would be wrong to treat the two situations equally in terms of punishment.

Second, the defendant's culpability and the justification for the penalty of intoxication offence will be best reflected by linking the punishment for the new offence more specifically to the harm suffered.³¹ This suggestion is right because the essential reason for why intoxication is culpable is the dangerousness that it leads to, therefore the punishment should be related to the nature and extent of the harm that intoxication causes.

On the issue of whether the new offence should require a causal link between the defendant's state of intoxication and his conduct, it is impractical to do so. It is because a causation test (i.e. 'but for' test) would require the judges and jury to consider how the defendant would behave if he had been sober. This is undesirable to consider this kind of hypothetical issue as I have mentioned before.

Conclusion

The criticisms presented above provide a strong ground for the law on voluntary intoxication to be reformed in Hong Kong. The legal reform of abolishing the

³⁰ Report of the Committee on Mentally Abnormal Offenders (Chairman: Lord Butler of Saffron Walden) (1975), Cmnd. 6244 para. 18.58

³¹ Intoxication and Criminal Liability, Consultation Paper No 127 (1993).

Majewski rule, as mentioned above, has good grounds and the legal history of Australia already serves as a good reference for Hong Kong to consider abolishing the present law. For the second legal reform, it is a more radical approach compared with the first one, but it is necessary to fill up the loophole where in some circumstances the voluntary intoxication is culpable but lacks punishment. Thus, the suggestion above serves as a first step for the legislature to introduce the new offence of criminal intoxication if the *Majewski* rule will be abolished in Hong Kong.