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Simularizing Tradition and Foreign: Osmotic Production of Justice in the Milieu of Hong Kong Anti-Domestic Violence Law

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1. Introduction

Between 2007 and 2009, the Legislative Council in Hong Kong had passed a series of amendments in relation to law controlling domestic violence. The two most controversial provisions include (1) introduction of court mandated counseling; and (2) extension of protection to *Tongzhi*¹ couples. In 'Politicizing *Han* Chinese Masculinities: A Plea for Court Mandated Counseling for Wife Abusers in Hong Kong',² and 'Contextualizing the Same-sex Erotic Relationship: Post-colonial *Tongzhi* and Transgender Political Discourse on Hong Kong and PRC Law of Marriage',³ I had argued that both court mandated counseling and legal recognition of *Tongzhi* couples have no inherent conflict with *Han* Chinese traditional culture and thus can work effectively in Hong Kong, a predominately *Han* Chinese society. However, two questions remain unanswered: (1) Is *Han* Chinese traditional culture still influential and relevant in 21st century Hong Kong society? (2) Can the 2008 -- 2009 amendments produce justice? In this article, I adopt the Deleuzean perspective on time / history and Rawlsian theory of justice in responding to the questions. Also, I will refer to the theory of 'transcultural similarity' when examining how the foreign theories can engage smoothly with Hong Kong legal culture. I also hope the following discussion can shed light on the future development of legal device controlling domestic violence in Mainland China. Let us start with discussing the details of amendments.

2. Hong Kong anti domestic violence law reform in 2008 and 2009

Before 2008, a victim of domestic violence can apply for injunction orders under Domestic Violence Ordinance⁴, the court may, on the application of an abused party to the marriage, grant an injunction. The injunction can (1) restrain the other party from molesting the applicant and / or any child living with the applicant; and / or (2) exclude the other party

¹ In Chinese, 'TongZhi' includes two words - 'Tong' (同) means the 'same' and 'Zhi' (志) connotes 'beliefs (of anti-heterosexism)'; 'TongZhi' therefore signifies all people who share and stand up for the problematization of heterosexism. See Chiu, Man-chung (2001b).

² Chiu, Man-Chung (2001a).

³ Chiu, Man-Chung (2001b).

⁴ Cap 189, LHK.

from the matrimonial home, or from a specified part of the matrimonial home,⁵ or from a specified area whether or not the matrimonial home is included in that area (like the applicant's place of work and her / his parent's apartment). In 2008, a series of amendments were introduced and one of the most important amendments is the introduction of court mandated counseling – in other words, after the amendment, the court can order the abuser to attend counseling programme (for example, anger management). And, in 2009, another significant amendment was passed, under which the *Tongzhi* couples can also apply for injunctions.⁶ Since *Tongzhi* couples do not enjoy the right to marriage, and the Ordinance no

⁵ Matrimonial home means 'a home in which the parties to a marriage ordinarily reside together whether or not it is occupied at the same time by other persons.' (Section 2(1)) The order has no relation with the property rights. In other words, a cohabitant, who has no proprietary right, can also apply to exclude her/his partner, who is the owner of the place. Before the amendment introduced in 2008 and 2009, the orders which an abused party can apply included: '1(a) a provision restraining that other party from molesting the applicant; (b) a provision restraining that other party from molesting any child living with the applicant; (c) a provision excluding that other party from the matrimonial home, or from a specified part of the matrimonial home, or from a specified area whether or not the matrimonial home is included in that area; (d) a provision requiring that other party to permit the applicant to enter and remain in the matrimonial home or in a specified part of the matrimonial home, whether or not any other relief is being sought in the proceedings.' After the amendments, the order available include '(a) a provision restraining the respondent from molesting the applicant; (b) a provision restraining the respondent from molesting any specified minor; (c) a provision prohibiting the respondent (i) (where the applicant has been molested by the respondent) from entering or remaining in – (A) the residence of the applicant; (B) a specified part of the residence of the applicant; or (C) a specified area whether or not the residence of the applicant is in that area, whether or not the residence is the common residence or matrimonial home of the applicant and the respondent; (ii) (where the specified minor has been molested by the respondent) from entering or remaining in – (A) the residence of the specified minor; (B) a specified part of the residence of the minor; or (C) a specified area whether or not the residence of the minor is in that area, whether or not the residence is the common residence of the minor and the respondent; (d) a provision requiring the respondent to permit – (i) (where the applicant resides with the respondent) the applicant to enter and remain in the common residence or matrimonial home of the applicant and the respondent or in a specified part of such common residence or matrimonial home; or (ii) (where the specified minor resides with the respondent) the minor to enter and remain in the common residence of the minor and the respondent or in a specified part of such common residence, whether or not any other relief is being sought in the proceedings. (1A) A court may in an injunction containing a provision mentioned in subsection (1)(a) or (b) include a provision requiring the respondent to participate in any programme, approved by the Director of Social Welfare, that is aimed at changing the attitude and behaviour that lead to the granting of such injunction.'

⁶ Before the amendment introduced in 2008 and 2009, only parties to marriage and their children can apply for injunction order under the Ordinance. (Section 3) Under the amended Ordinance, the following person can apply for injunction: '(a) the applicant's father, mother, grandfather or grandmother (whether natural or adoptive); (b) the applicant's step-father, step-mother, step-grandfather or step-grandmother; (c) the applicant's father-in-law or mother-in-law who is the natural parent, adoptive parent or step-parent of the applicant's spouse; (d) the applicant's grandfather-in-law or grandmother-in-law who is the natural grandparent, adoptive grandparent or step-grandparent of the applicant's spouse; (e) the applicant's son, daughter, grandson or granddaughter (whether natural or adoptive); (f) the applicant's step-son, step-daughter, step-grandson or step-granddaughter; (g) the applicant's son-in-law or daughter-in-law who is the spouse of the applicant's natural child, adoptive child or step-child; (h) the applicant's grandson-in-law or granddaughter-in-law who is the spouse of the applicant's natural grandchild, adoptive grandchild or step-grandchild; (i) the applicant's brother or sister (whether of full or half blood or by virtue of adoption); (j) the brother or sister (whether of full or

longer only protects people within the familial relationship network, the Ordinance is retitled 'Domestic and Cohabitation Relationship Violence Ordinance.'

3. Time is always out of joint: Is the past always with us?

I support the amendments, not only because they can effectively control the wrongdoing, but also because they can effectively engage with *Han* Chinese traditional culture. However, in 2007, during a conference '21st Century Sex and Gender in Greater China: A Roundtable', Professor Angela Wong of Chinese University of Hong Kong posed me a question: Is *Han*-Chinese tradition still relevant in Hong Kong nowadays? Why? I at that time put forward numerous pieces of evidence (for example: Chinese traditional medical practice and *FengShui* (風水) – *Han* Chinese traditional environmental science – are still widely referred today in Hong Kong) showing how important and vital *Han* Chinese tradition is in contemporary Hong Kong society. In the following section, adopting the Deleuzean philosophical paradigm, I will construct a more sophisticated philosophical framework in creating the relevance of traditional culture.

When the academics question the significance of *Han* Chinese traditional culture in contemporary Hong Kong Society, they assume that heritage is a contextual product and since Hong Kong today is obviously very different from *Han* Chinese traditional society, *Han* Chinese traditional culture is no longer applicable in current society. Underlying their argument is a linear model of time: time is a join up of numerous 'instants' -- it links or glues distinct moments of experience in fixed uni-direction, i.e. the model of 'past → present → future'. Deleuzean philosophy challenges this way of thinking: as Todd May elaborates, if time is made up of 'instants', then it should be divisible into different units (years, months, days, hours...), otherwise present cannot be grasped; but instant at the end is always indivisible, because 'however thinly we slice the instant of the Now [instants], we can always slice it thinner.'⁷ In other words, present can never be caught as some academics want and assume.

The Deleuzean school argues that it is not the movement or moment which produces and derives time, but vice versa – time creates and invents movements, since time is a 'becoming' which is made up of 'durations'. 'Duration' is different from 'instant': the

half blood or by virtue of adoption) of the applicant's spouse; (k) the applicant's step-brother or step-sister; (l) the step-brother or step-sister of the applicant's spouse; (m) the applicant's uncle, aunt, nephew, niece or cousin (whether of full or half blood or by virtue of adoption); (n) the uncle, aunt, nephew, niece or cousin (whether of full or half blood or by virtue of adoption) of the applicant's spouse; or (o) the spouse of any person mentioned in paragraph (i), (j), (k), (l), (m) or (n). Whether a couple who have not married are qualified to apply injunction are determined with regard to the following criteria: (a) whether the parties are living together in the same household; (b) whether the parties share the tasks and duties of their daily lives; (c) whether there is stability and permanence in the relationship; (d) the arrangement of sharing of expenses or financial support, and the degree of financial dependence or interdependence, between the parties; (e) whether there is a sexual relationship between the parties; (f) whether the parties share the care and support of a specified minor; (g) the parties' reasons for living together, and the degree of mutual commitment to a shared life; (h) whether the parties conduct themselves towards friends, relatives or other persons as parties to a cohabitation relationship, and whether the parties are so treated by their friends and relatives or other persons.' (Section 3B)

⁷ May, Todd (2005: 41).

former, as it is constituted by mental activities (perception and memory), can be divided. Whenever 'duration' is divided, it changes, because how it is divided can be both a cause and effect of mental activities, which never stop and can never be forever consistent or totally predictable. Gilles Deleuze writes:

Duration divides up and does so constantly...but it does not divide up without changing in kind, it changes in kind in the process of dividing up: this is why it is a nonnumerical multiplicity.⁸

Duration, being a product of mental activities, contains both continuity and differences. Cliff Stagoll gives the best illustration: '[m]ental states flow together as if parts of a melody, with previous notes lingering and future ones anticipated in the unity of a piece...To try and grasp this flow as a complete set of notes is pointless, because the music is always on the verge of ending and always altered by the addition of a new note.'⁹ Deleuze also proposes that time / 'duration' progresses, not in a linear direction, but by continuously fissioning into past and present,¹⁰ because past needs to be there for present to pass into past. Put simply, past and present constitute themselves at the same duration.

...if the present can pass away, it is because, in some sense, it is already past or has a past element to it. In other words, every present must have a past aspect in order for it to pass away.¹¹

When a present, together with a past, passes away, it becomes a past event for forthcoming present (ie. the new present / future). The difference between past and present, however, must exist; otherwise, the passing cannot occur. So what is the difference? Deleuze argues that past is virtuality, and present actuality, as we are experiencing it. Please note: it is not a dichotomy of past / virtuality vs. present / actuality; in fact, when present passes into past, past also engages (not mixes) with present at the same duration -- past actualizes and becomes part of the present.

The present and former present are not, therefore, like two successive instants on the line of time; rather, the present one necessarily contains an extra dimension in which it represents the former and also represents itself.¹²

History, a concept produced by past, as argued by Elizabeth Grosz, is thus still influential contemporaneously through 'its capacity to link to and thus to inform the present.'¹³ When (part of) past actualizes, it is becoming the line of social force in a 'duration' and 'conditions all the experience that we have since actual experience is a composite of the virtual natural natures of perception and memory.'¹⁴ It does not mean present is only a reconstitution of history / past; in fact, the entirety of past and history always coexists with present. That is why Dean Tipps stresses that tradition is an integral part and product of modernity (present).¹⁵ Nonetheless, present, which is always together with past and history, can always be innovative and create new -- a (forthcoming) present must be absolutely new, since once

⁸ Deleuze, Gilles (1991: 42).

⁹ Stagoll, Cliff 'Duration (Duree)' in Parr, Adrian (ed) (2005: 79).

¹⁰ Bryant, Levi (2008: 114).

¹¹ Williams, James (2003: 94).

¹² Deleuze, Gilles (1994: 80).

¹³ Grosz, Elizabeth (2005: 102).

¹⁴ Due, Reidar (2007: 31).

¹⁵ Fu, Zi-tang (2008: 297)

whenever a present passes into past, a new present (the forthcoming present) is created.¹⁶ Xing-jian Hu also proposes: the traditional legal system structures our current concept of justice.¹⁷

Time is, put simply, according to Deleuze, not only an objective and transcendental scale that exists outside human life,¹⁸ but a circular and folding motion of duration (past \leftarrow (falling into) present 1 \Rightarrow (forthcoming) present 2 (falling into) \rightarrow past [+ present 1]). Deleuzian concept of duration sensitizes us to the multiple interpretations and constitutions of time, history, and memory.

Using this perspective, then *Han* Chinese traditional culture (past) in fact has never left us; it always exists with contemporary Hong Kong society (present), who is predominantly *Han* Chinese. The traditional culture could become the force of social control in our current society, but it does not forbid the current society from changing. In other words, whether the mechanism of court mandated counseling and acceptance of *Tongzhi* couple, originated from overseas jurisdiction, can engage with *Han* Chinese traditional culture and function in Hong Kong, a predominately Chinese society, must be considered in order to ensure or evaluate the effectiveness of the amendments.

Another problem is: although we have to take into account the *Han* Chinese traditional culture, another aim of reforming law is to maintain and produce justice. If harmony, as argued by some of academics and lawmakers, is the core value of *Han* Chinese traditional culture,¹⁹ then we have to understand, harmony may also be the contrary of justice -- dispute, especially familial conflict, may be covered and ignored so as to maintain superficial peace of interpersonal relationship. In other words, the fact that the new provisions of Hong Kong anti domestic violence law can engage smoothly with traditional *Han* Chinese culture and function does not mean they can essentially bring just and fair consequences. So, are they just? And more importantly, what is justice?

4. Imagine there will be no powerless: Can the reforms produce justice?

In this section, I will investigate *Han* Chinese traditional cultural perspective on justice and examine if the newly introduced sections of law controlling domestic violence (ie. court mandated counseling and inclusion of same sex couples) is just. First, we have to define 'justice'.

In his groundbreaking monograph, *A Theory of Justice*, John Rawls argues that 'justice' starts with 'fairness', which means equal distribution of primary goods (i.e. rights, freedom, resources and *self-respect*) among multitude.²⁰ And, even though inequality is always presumed, when it is accepted by the most marginalized / powerless in a society, it can become positive and productive under his theory.²¹

Drucilla Cornell, in *The Imaginary Domain: Abortion, Pornography and Sexual Harassment*, further substantiates Rawlsian theory of justice, and relates the theory with the Lacanian 'imaginary domain': According to Lacanian philosophy, imaginary relates to self projection

¹⁶ Bryant, Levi (2008: 118).

¹⁷ Quoted in Fu, Zi-tang (2008: 360). For more discussion in relation to *Yi* / justice, please see below.

¹⁸ May, Todd (2005: 41).

¹⁹ Chiu, Man-chung (2001a, 2001b).

²⁰ Rawls, John (1971: 62, 95); see also Jiang, Shan (2002: 31).

²¹ Zhao, Dun-hua (1988: 151).

/ introjection of (erotic) desire, which is vital in the re-construction of individual human subjectivity. In imaginary domain, one can fantasize oneself having indefinite and multiple identities.²² Prohibiting people from representing their desire in imaginary domain or imposing a particular socio-political-cultural model on others without mutual consent is a neglect and suppression of others' *self-respect* is simply a kind of subordination and dehumanization which is, according to Rawls and Cornell, unjust.²³ They also agree that among all primary goods, *self-respect* is especially vital.²⁴

Within the Rawlsian theory, there always exists a problem: if 'Veil of Ignorance'²⁵ can stop everyone from knowing and understanding exactly their respective and others' socio-political-cultural positions, how can people understand and feel the possible and unwilling discrimination, subordination and inequality faced and experienced by others and then willing to value and realize justice? The question can be answered by engaging the Lacanian concept of the imaginary domain with Rawlsian theory – as argued by Cornell, in the imaginary domain, a person is able to fantasize herself / himself becoming others, and feel how others feel in the contexts where they are situated.²⁶

Applying the above principles in analysing the introduction of court mandated counselling and the inclusion of same sex couples in the sphere of protection, the first step is: we put ourselves into the shoes of victims of domestic violence and / or *Tongzhi*. Then we have to ask: are we (becoming the victims of domestic abuse and *Tongzhi*) the marginalized powerless in contemporary Hong Kong? Where the victims' rights to body and freedom and *self-respect* are neglected by the abusers when domestic violence happens, are they not oppressed and dehumanized? In Hong Kong, where the anti sexual orientation discrimination law and *Tongzhi's* rights to marry are absent, the *Tongzhi's self-respect* is peripherized. The recent reforms, which can provide increasing and effective legal protection, are of course welcomed and accepted by them and are thus just and fair.

5. Engaging foreign concepts with Hong Kong culture: Where are the similarities?

In order to transplant the Deleuzean perspective on time / history and Rawlsian theory of justice, philosophical products reproduced in Euro-American socio-political-social matrix, into Hong Kong, we need to develop a machine / a mechanism by which the import can carry out smoothly.²⁷ The model of transcultural similarity, developed by Hsiao-hung Chang, can offer us with an efficient and functional paradigm to conduct effective transplantation.

Chang, in *Fake Globalization*, adopting Deleuzean theory of simulacrum, challenges the dichotomy of real / origin and fake / replica. Chang, in short, argues that an authentic original culture does not exist, and we can put the effort in locating the zones of possible

²² Grosz, Elizabeth (2005: 73).

²³ Cornell, Drucilla (1995: 7-8).

²⁴ Hu, Shui-jun (2005: 9).

²⁵ According to John Rawls, in 'Original Position', people are covered by the 'Veil of Ignorance'; hence they only have the ordinary economic and political knowledge, they know nothing about 'real' social positions, resources under control and life plans of themselves and the others (Rawls, John 1993: 23).

²⁶ Cornell, Drucilla (2008: 136).

²⁷ Any transplantation of law without being sensitive towards the possible conflict of cultures can lead to failure and / or postcolonial violence. That is why I argue that a very in-depth investigation of the cultural contexts need to be carried out before any transplantation of law. Chiu Man-chung (2010).

similarities between cultures, i.e. simulacra. Chang goes on and advocates that dialogue between cultures can be viewed as the similarity between cultures – there are similarities, and simulations can occur between cultures.

Chang, in this context, produces the machine of transcultural similarity.²⁸ According to Chang, the similarity is a virtual zone, where osmosis between cultures can be proactively conducted. In the milieu of the transcultural similarity, cultural concepts and related legal reform can be mutually infiltrated.²⁹ How can the infiltration be carried out? The key, as I argued, is ‘matching point’ – we need to locate and create the points where transcultural similarity machine can function as the starting points of osmosis.³⁰ We thus, in the context of anti domestic violence law, need to find out the matching points between the Deleuzian concept of time / Rawlsian theory of justice and *Han* Chinese traditional culture.

If we have to locate and construct the matching points, we have to understand how *Han* Chinese traditional culture engineers its perspectives on time / history and justice. *Han* Chinese traditional concept is a hybridity of different schools of thought, and we are going to put the focus on (Orthodox) Confucianism, (Orthodox) Daoism and Buddhism – which are considered as the mainstream of *Han* Chinese traditional culture.³¹

5.1 Daoist and Confucian perspective on history: Medium of promotion?

According to Lao Zi, the philosopher believed to be the founder of (Orthodox) Daoism, *Dao* is the source and reference of everything, including nature and human society.³² Thus, *Dao* consumes the status of transcendental metaphysics.³³ So, *Dao* is not only a philosophical perspective but also a cosmic force. Since *Dao* determines everything, action-less, i.e. ‘letting things work to their perfection naturally’, becomes one of the thematic principle of Lao Zi’s ideology.³⁴

(Orthodox) Confucianism, produced and advocated by Confucius and Mencius during Zhou (周) Dynasty (BC 1066 – BC 221), advocates the importance of *Ren* -- good being / benevolence, which is derived and considered as the most important guideline of Confucian interpersonal politics, since harmonious interpersonal relationship enjoys a very high status in Confucianism.³⁵ Familial relationship is always the centre of *Ren*: *Ren* starts with filial piety and extends to other interhuman relationships. It is in this context where (Orthodox) Confucians formulate the famous five Constant Virtues (benevolence between father and son, righteousness between emperor and ministers, differences between husband and wife, hierarchy between elder and the young, fidelity between friends), the core of *Li* (禮, social moral order), to engineer *Ren*’s smooth operation.³⁶ The principles formatted a highly hierarchical society, which stressed harmony, in imperial China.

²⁸ Chang, Hsiao-hung (2007: 20, 68, 73)

²⁹ Chiu, Man-chung (2008).

³⁰ Chiu, Man-chung (2010).

³¹ Chiu, Man-chung (2008).

³² Wang, Ze-ying (2003: 98); Wang, Qing-jie (2004: 149).

³³ Ng, Yu-kwan (1998: 2).

³⁴ Koller, John (2002: 288).

³⁵ Please note that *ren* was not invented by Confucians, it is said to have existed before Confucius’ time. However, it was Confucius who transformed it into a virtue achievable by man (i.e. human being), broadened it to become a comprehensive virtue covering all individual Confucian virtues, and finally elevated it to become the centre of his philosophy.’ (Ling, D W 1995: 73).

³⁶ Tang, Kai-lin & Zhang, Huai-cheng (2003: 76).

Analyzing tradition and history from the perspective (Orthodox) Daoism and (Orthodox) Confucianism, philosophical historians always use the historic facts and issues as the tools or media to promote and market their philosophical ideals – for instance, Daoist would also praise Emperor Wen (漢文帝) of the West Han Dynasty (206 BC- 9 AD) as he adopted Daoist principle of action-less as his state policy: *Book of Han* writes: ‘During his 23 year reign, there had been no further construction of palace, palace garden, vehicle and uniform...Emperor Wen also instructed that when he passed away...no royal burial chamber was allowed to be built.’³⁷ (trans., 即位二十三年，宮室、苑囿、車騎、服禦無所增益……治霸陵，皆瓦器，不得以金、銀、銅、錫為飾，因其山，不起墳) Confucian academics appreciate those emperors who realized or recognized *Ren* during their reigns, for instance, Confucius himself always praised Emperor Yao (堯) – a legendary king – as he considered what Emperor Yao did establishes the highest standard of *Ren*: ‘Great indeed was Yao as a sovereign! How majestic was he! It is only Heaven that is grand, and only Yao corresponded to it. How vast was his virtue! The people could find no name for it. How majestic was he in the works which he accomplished! How glorious in the elegant regulations which he instituted!’³⁸ (trans., 大哉，堯之為君也！巍巍乎！唯天為大，唯堯則之。蕩蕩乎！民無能名焉。巍巍乎！其有成功也；煥乎，其有文章！) When carefully examine the Daoist and Confucian perspectives on history, we will find that they are in fact taking historic fact (past) as the teaching examples for people in contemporary society (present). In other words, they are using the linear model of history, hence, it is impossible to have any similarity between Deleuzean perspective on time / history and Daoist / Confucian view on history – the latter cannot be the matching point for transplantation of philosophy.

5.2 Buddhist perspective on time / history: Beyond past / present dichotomy

One of the thematic principles of Buddhism is *Karma*, which indicates the mechanism by which what a human did and / or thought would determine her / his future action and / or status.³⁹ It is not a kind of absolute destiny pre-determination, but a mechanism of choice and responsibility: one can choose her / his act / thought and would be held responsible for that. *Karma*, put simply, is the ‘power by virtue of which cause is followed by effect.’⁴⁰ Dao-fa Song writes, for example, Emperor Wu Zhong (武宗) of Tang Dynasty (618 – 907 AD) decided to abolish Buddhism in AD 845, the incident is titled ‘Hui Chang Buddhism Abandonment’ (會昌滅佛). In AD 846, someone saw two deities, dressed in official uniform, came out from a tomb. The person asked why they came to human world, and the deities said: because Emperor Wu Zhong abandoned Buddhism, his life had been cut short and he would pass away very soon. Three days later, Emperor Wu Zhong died suddenly.⁴¹ The parable, which is extremely Buddhist-centric and aims at creating the sacredness of Buddhism, indicates that bad activities (leaving and abandoning Buddhism) will certainly bring bad consequences (early death) of a person; and even emperor cannot escape.

³⁷ ‘Annals of Emperor Wen’, *Book of Han* (<http://www.guoxue.com/shibu/24shi/hansu/hsuml.htm> 22 March 2011).

³⁸ Chapter 8, *The Analects of Confucius* (<http://www.yellowbridge.com/onlinelit/analects08.php> accessed 22 March 2011).

³⁹ Hu, Xiao-guang (1999: 9).

⁴⁰ Tom Sun (1998: 3).

⁴¹ Song, Dao-fa (2009: 203).

The interaction between human and the common sense world constitutes the *Karmic* seeds - *bija*, which are stored in *alaya-vijnana*, the storehouse-consciousness which is a timeless concept, determines the forthcoming interaction between human and the common sense world.⁴² *Alaya-vijnana* 'collects and stores the effects or *bija* of experience until they mature and give rise to new experiences.'⁴³ As *Karma* is a non-stop accumulation and depletion, the production and attrition of *bija* never ends. Every decision and action of human subject influences the nature of *bija* production: When a particular set of *bija* becomes mature and consumed under a particular material environment, other *bija* and another context is manufactured.⁴⁴

Buddhist theory of *Karma* offers a philosophical perspective which describes how past (action / thought) and present (forthcoming action / thought) intermingle in detail, although it mainly aims at elaborating and reconstructing the interaction between human action / thought and the constitution of her / his subjectivity. Put simply, the concept goes beyond the binarism of past vs. present. *Karma* also offers a perspective explaining how past can be actualized in present via *bija* activities - Buddhism thus is able to offer another model in understanding how past can become the social control force in *Han-Chinese* traditional culture. This Buddhist mechanism, in short, is very similar to and can simulate interactively with Deleuzian concepts of time, i.e. fission of time into past and present and past folding with present. Buddhist *Karma* hence can be used as a matching platform for the successful and smooth transplantation of Deleuzian concept.

5.3 Absence and presence of equality: Is there any justice in Han-Chinese culture?

In contemporary *Han* Chinese language, justice is translated as *Yi* (義). However, *Yi*, does not start with equality but harmony.⁴⁵ This is why Duan Lin says: in ancient China, there was no justice (which starts with equality), but *Yi* (that emphasizes harmony and appropriateness).⁴⁶ In this section, I will investigate if Lin's statement is valid.

We can again start with (Orthodox) Daoism. (Orthodox) Daoists are generally believed that they will view *Yi*, as a human product, violates the principle of action-less and thus *Dao*.⁴⁷ In (Orthodox) Confucianism, *Yi* always assumes a vital role: 'The superior man considers *Yi* as the most important.'⁴⁸ (trans., 君子義以為上) Both Confucius and Mencius advocate that *Yi*, a natural product of *Ren* and *Li*, i.e. harmonious hierarchical interpersonal network,⁴⁹ aims at

⁴² The mechanism will be further elaborated below.

⁴³ Koller, John (2002: 222).

⁴⁴ Yang, Wai-zhong (2007: 298-299).

⁴⁵ Hu, Shui-jun (2005: 12); Jiang, Shan (2002: 38).

⁴⁶ Lin, Duan (2007: 437).

⁴⁷ Wang, Ze-ying (2003: 23, 43). According to Lao Zi, the philosopher who is widely believed to be the founder of the school, *Dao* is the origin and reference of everything, including human, society and culture. Thus, *Dao* consumes the status of ultimate and transcendental metaphysics. For details, please see Wang, Ze-ying (2003: 98) and Wang, Qing-jie (2004: 149). However, Guu-ying Chen has another interpretation, he points out that, *Lao Zi* does not object *Yi*, provided that it is derived from *Dao*. Please see Chen, Guu-ying (2001).

⁴⁸ Chapter 17, *The Analects of Confucius* (<http://www.ccnt.com.cn/wisdom/rujia/lunyu/lunyu3.htm> accessed 22 March 2011).

⁴⁹ Book 2, *Tso Commentary to Spring and Autumn Annals*

(http://www.guoxue.com/jinbu/13jing/cqzz/cqzz_ml.htm accessed 22 March 2011); see also Zhu, Yi-ting (ed) (2005: 24). For the definition and discussion of *Ren* and *Li*, please see Chiu, Man-chung (2006).

maintaining the operation of the hierarchical social structure.⁵⁰ The two most important elements of *Yi*, in the discourse of *Ren* and *Li*, are *Zhong* (忠) and *Shu* (恕). *Zhong*, according to Confucius, is 'a matter of going on to establish other people because one seeks to establish oneself, and of bringing other people to perfection because one desires perfection for oneself'⁵¹ (trans., 己欲立而立人, 己欲達而達人), i.e. faithfulness; and *Shu* means '[w]hat you do not wish for yourself, do not do to others'⁵² (trans., 己所不欲, 勿施於人), i.e. forbearance. *Yi*, hence, in sum, signifies an extension of oneself to the others,⁵³ -- there is others in one self, and a self in the others:⁵⁴

People all have things that they will not bear. To extend this reaction to that which they will bear is benevolence. People all have things that they will not do. To extend this reaction to that which they will do is righteousness [i.e. *Yi*].⁵⁵ (trans., 人皆有所不忍, 達之於其所忍, 仁也; 人皆有所不為, 達之於其所為, 義也。)

Mencius further elaborates Confucius's perspective on *Yi*; he takes *Yi* as the ultimate standard of human performance: '*Yi* is people's correct road.'⁵⁶ (trans., 義, 人之正路也); and connects *Yi* with individual *self-respect*: 'There is nature's nobility and human nobility. Being benevolent, dutiful, loyal, and trustworthy; enjoying the good without tiring -- these are nature's nobility. Dukes, ministers, and great men -- these are human nobility.'⁵⁷ (trans., 有天爵者, 有人爵者。仁義忠信, 樂善不倦, 此天爵也; 公卿大夫, 此人爵也。古之人修其天爵, 而人爵從之。今之人修其天爵, 以要人爵; 即得人爵, 而棄其天爵, 則惑之甚者也, 終亦必亡而已矣。) What Mencius means is: *self-respect* is the result of self discipline and self practice; and it must be protected, preserved and emphasized by *Yi*: 'Life is also something I want, and righteousness [i.e. *Yi*] is also something I want. If I cannot get both of them, I am one who will do without life and choose righteousness [i.e. *Yi*].'⁵⁸ (trans., 生亦我所欲也, 義亦我所欲也; 二者不可得兼, 舍生而取義者也。)

Juxtaposing Rawlsian / Cornell's theory of justice and *Han* Chinese traditional cultural concept of *Yi*, we can locate the transcultural similarities, i.e. an effective transplantation platform, between two ideologies: both are using *Yi* / justice as the standard of human behaviour evaluation. The second matching point is *self-respect*: both Rawlsian / Cornell's theory and Mencius's perspective stress the nurture, protection and promotion of individual *self-respect*. Cornell's respect of individual desire also echoes with (Orthodox) Confucian concept of 'putting oneself into others' shoes': 'If you don't want others to impose their choice on you, should you not do the same to others?' Also, Cornell's interpretation of imaginary domain supplements Confucius's concept of *Shu*: only if one can imagine what

⁵⁰ Pan, Li-ping (2006: 45).

⁵¹ Chapter 6, *The Analects of Confucius* (http://www.wfu.edu/~moran/zhexuejialu/Analects_PEM.html accessed 22 March 2011).

⁵² Chapter 12, *The Analects of Confucius* (<http://plato.stanford.edu/entries/confucius/> accessed 22 March 2011).

⁵³ Zhu Zi *Zhu Zi's Explanation to Zhong Yong* (中庸章句集注) (<http://www.millionbook.net/gd/z/zhuxi/000/001.htm> accessed 22 March 2011).

⁵⁴ Wang, Qing-jie (2004: 246).

⁵⁵ Chapter 14, *Mencius* (<http://faculty.vassar.edu/brvannor/mengzi.html> accessed 22 March 2011).

⁵⁶ Chapter 4A, *Mencius* (<http://www.tianyabook.com/gudian/mengzi.htm> accessed 22 March 2011).

⁵⁷ Chapter 6A, *Mencius* (<http://www.tianyabook.com/gudian/mengzi.htm> accessed 22 March 2011).

⁵⁸ Chapter 6A, *Mencius* (http://fsrcenter.blogspot.com/2009/02/fish-and-bears-palm_14.html accessed 22 March 2011).

may happen to others (for example, the marginalized powerless), s/he can understand and feel the vitality of respect and accepting (not simply tolerating) differences; this attitude and technique can certainly assist a person to avoid (unconsciously and / or unintentionally) imposing her / his agenda and value judgement on others within the interpersonal politics network.

The problem, however, is: *Yi*, which is developed in imperial China, is used to restrengthen and reconstruct the social hierarchy and hence inequality. In other words, equality, an essential element in producing Rawlsian / Cornell's theory, is not a factor in the formation of *Yi* in Han-Chinese traditional culture. Again, it seems Buddhism can fill the gap.

According to Vasubandhu, a significant Buddhist philosopher, there are eight *vijnana* / consciousnesses: the five consciousnesses respond respectively to visual perception, auditory perception, olfactory perception, gustatory perception, tactile perception (the five senses), *mano-vijnana* (mind-consciousness), *mana-vijnana* (ego-consciousness) and *alaya-vijnana*. *Samdhinirmocana-sutra* states that the first five *vijnana* are indeed the consciousnesses of the senses which create the biological human body, and *mano-vijnana* is responsible for individual moral determination and connection between a person and the common sense world.⁵⁹ *Alaya-vijana*, as mentioned above, which is the storehouse of *bija*, reproduces and sustains the other seven consciousnesses.⁶⁰

The interaction among the performances of the eight *vijnana* is a loop of production and constitutes the (virtual) subjectivity of human. The interactive production of body and the world -- the *Karma* mechanism -- continuously produces / consumes *bija* and maintains *alaya-vijnana*, as discussed above. Please note: *Karma* cannot totally predetermine what is going to happen in the forthcoming duration, as *Karma* always creates new *bija*, thus new and unpredictable interaction between human; and unforeseeable interaction human and common sense world are allowed and encouraged. According to this analysis, enactment of new law (for example: the amendment of anti domestic violence law and introduction of court mandated counseling) would 'perfume' (薰習), or affect, the nature of existing and forthcoming set of *bija*. *Karma* hence leads to one of the most important Buddhist ideologies, 'Dependant-arising thus Emptiness of Self Nature' (緣起性空). It describes the mental constitutive reception of every activity and phenomenon that can never be a fixed and universal essentiality, but a virtuality re-created and re-newed by the non-stop *Karma* machine and *bija* exercise (for example, consequences of perfume) under a milieu -- a forever changing set of connections between desire (needs and request of justice) and social force (for example, enactment of new law), which itself can be a (new) product of *bija* activity.

This line of argument devises and formulates another two important Buddhist principles: (1) 'Non-Insistence' (諸法無我) or 'Self-less-ness (*Anātman*)', 'self' in this context does not only mean 'I', but over-insistence of any philosophical perspective;⁶¹ and (2) 'Non-Permanence' (諸行無常): since human body and subjectivity cannot be preset and can be changed, due to the *karma*, *bija* exercise and perfume, there is no forever eternality and essentiality in common sense world. In other words, since the composition of *bija* goes on changing, it is impossible to have any monolithic and universal subjectivity / self; and if the common sense world, the related activities and phenomena are only and partly a psychological product, initiated by a set of *bija* and end up with the production of another cluster of *bija*, any metanarrative is only a virtuality.

⁵⁹ Powers, John (1995).

⁶⁰ Yang, Wai-zhong (2007: 288).

⁶¹ Chan, Stephen (2005: 25).

The two principles, 'Non-Insistence' and 'Non-Permanence', are part of the Buddhist 'Correct Law' (*Prāvaccaṇa*), i.e. the most important beliefs in Buddhist philosophy.⁶² It is therefore not surprising when Śākyamuni developed and advocated the theory of *equality*, since everything is not fixed, every identity / subjectivity is not fixed and monolithic, thus any kind of hierarchy cannot exist forever thus becomes meaningless:

Within my *Dhamma*, the 4 clans -- (1) priestly, (2) military and ruling, (3) farmers and traders, and (4) serfs...would all drop their original titles and are called 'Shih' students of Buddha.⁶³

Buddhist emphasis on equality becomes a platform for the exercise of transcultural similarity, and can be utilized as a matching point for the import and transplantation of Rawlsian / Cornell's conception of justice.⁶⁴ Buddhist machines of *Karma* and perfume have also constructed a theoretical framework by which we can understand and investigate how new laws can change and re-new human and society.⁶⁵

6. Conclusion: Implication for mainland Chinese legal development

I always emphasize that it is not my intention to propose that 'Hong Kong Culture = traditional *Han* Chinese culture = Orthodox Confucianism + Orthodox Daoism + Buddhism': if a traditional cultural concept is a virtuality, and becoming, as argued by Deleuze, then an authentic original notion of culture simply does not exist. Please also note: even if transcultural similarity is proactively created and / or located, and transplantation can be carried out, whether the new concept / law can reach its scheduled and planned effect and outcome cannot be predicted or guaranteed – transcultural similarity only promises the possibility of successful transplantation; it cannot guarantee the effect and outcome.⁶⁶

However, one question remains: If Buddhism can be used as a philosophical paradigm for analyzing the effect and status of *Han* Chinese tradition in contemporary Hong Kong and producing justice, why do we still need to import the foreign support? Why don't we simply utilize the materials we already have? The answer is: In the case of interpreting and understanding tradition at present, Buddhist theories of *Karma* and *bija* are mainly used to understand how human subjectivity is reconstructed and problematized – in the example I quote above, the parable was used to demonstrate how *Karma* can work on a person: even when the Emperor, who was usually called 'Son of Heaven', had done something against Buddhism, he would be punished by his own decision and action – Buddhism has not frequently used the *Karma* machine to investigate how culture and tradition work contemporarily. We therefore need the Deleuzean perspective to sensitize Buddhist theory towards how it can be used in deterritorializing the connections between time and history. And, in relation to justice, as Guu-ying Chen sharply points out, there is a lack of critical perspective within *Han* Chinese traditional culture.⁶⁷ In other words, there is no

⁶² Quoted in Li Cun-shan (2009: 440).

⁶³ Taisho Tripitaka Editorial Committee (1985) Vol. 22.

⁶⁴ However, I have to emphasize that there are a number of very discriminatory practices within Buddhism, for example: transgender are not allowed to practise fully Buddhism, and Buddhist nuns (*bhilsuni*) cannot enjoy same status with male monks (*bhiksu*). The practices nonetheless are now under serious challenges in Taiwan. Please see Shih Chao Hui (2002) and Yang, Hui-nan (2002).

⁶⁵ For discussion on perfume and Buddhist jurisprudence, please see Chiu Man-chung (2007, 2009).

⁶⁶ Chiu, Man-chung (2010).

⁶⁷ Chen, Guu-ying (1988: 1).

philosophical perspective that develops a strategy to challenge injustice. Since (Orthodox) Confucianism is developed in the discourse of harmony, where conflicts are devalued, how can they develop an effective strategy to challenge injustice?⁶⁸ This viewpoint is especially loomed large due to the hegemony of harmony in the cultural construction of legal perspective – harmony is the prime principle and it never encourages people to use litigation to resolve conflicts. While Daoism stresses ‘action-less’ and Buddhism emphasizes equality, have they said anything on the motivation / intention of challenging inequality and producing justice? Transplanting Rawlsian / Cornell’s theory of justice can certainly help connect Buddhist equality with the possible development of justice in Hong Kong. In this article, I have developed a line of argument, according to which, when making new policy and enacting new law, the stakeholders have to take into account the *Han* Chinese traditional culture when considering if the law controlling domestic violence in Hong Kong should adopt court mandated counseling as a device to reform the behavior of the perpetrator and include *Tongzhi* couples as part of the protection targets: as I argued elsewhere, since (Orthodox) Confucianism puts so much effort on maintaining and reproducing interpersonal harmony in the context of social hierarchy – – as Confucius said: ‘For judging law suits I share the same position with others. What I insist upon is to make it impossible for all law suits to arise’⁶⁹ (tran., 聽訟，吾猶人也。必也使無訟乎！) -- court-mandated counseling can certainly help re-constructing the familial harmony as it avoids directly sentencing the abusers in jail, and thus can be well accepted and engaged with Hong Kong *Han*-Chinese traditional culture. Also, because (1) sexual orientation does not play any role in Confucian philosophy of harmony, (2) when Daoism advocates action-less and therefore would only object excessive and non-essential regulation of sexuality and sexual orientation, and (3) as one of the most important Buddhist principles is equality, Buddhism certainly rejects any proposition of not embracing *Tongzhi* in the orbit of protection; the revision of Hong Kong anti domestic violence law by which *Tongzhi* couples are now protected from domestic violence can, like the introduction of court-mandated counseling, will not be strongly resisted by *Han*-Chinese traditional cultural perspective.⁷⁰ Putting the focus on the possible legal device controlling domestic violence in Mainland China – like Hong Kong, Mainland China is dominated by race of *Han*⁷¹ -- we can find that besides two provisions in Mainland Chinese Criminal Law which prohibit people from abusing their marital partners, and one similar article under Marriage Law,⁷² there is an absence of law which particularly deals with domestic violence. Anti Domestic Violence Network, an organization under China Law Society, has together with a team of law and

⁶⁸ Chen, Ying-xun (2004: 215).

⁶⁹ Chapter 8, *Great Learning* (<http://www.en84.com/article-4277-1.html> accessed 22 March 2011).

⁷⁰ Chiu, Man-chung (2001a, 2001b).

⁷¹ According to the Consensus conducted in 2007, the population of *Han* in Mainland China is 1,182,950,000, 90.56% of the total population.

⁷² Art 260 of PRC Criminal Law (刑法); which writes that *vicious* abuse of family members amounts to a criminal offence, the offender may be subjected to 2 – 7-year imprisonment. It is the so called ‘offence of (domestic) maltreatment’ (虐待罪). Art 182 of the PRC Marriage Law (婚姻法) also includes the same stipulation. ‘Vicious’ in this context means that the maltreatment (1) has an immoral intention; or (2) is conducted in a grave manner; or (3) continues for a long period of time; or (4) is imposed on a minor, elderly, pregnant woman. ‘Maltreatment’ refers to physical abuse and psychological abuse. It, therefore, seems that spousal abuse would not be considered as a vicious maltreatment. For details, please see Chiu, Man-Chung (2006).

social science academics, drafted 'Law of the People's Republic of China on the Prevention and Punishment of Domestic Violence – A Draft Proposal' (hereafter 'Draft') in 2010. The Draft, like the Hong Kong law, suggests the issue of court orders in relation to non-molestation (Art 36), exclusion (Art 54), and court mandated counseling (Art 22). But the Draft is more ambitious and aggressive as it does not only concern the legal status of victim shelter (Art 20), it also sets up the compulsory reporting system and makes the education institutions and medical service providers responsible (Art 31 and 32). Besides, the Draft also suggests a further emphasis on domestic violence related criminal offences (Part 3). When discussing the possibilities of implementing the Draft effectively and efficiently, and if it is accepted by the Government and National People's Congress, the academics argues that the local and indigenous experience produces a very strong foundation for successful exercise of the Draft (and possible future law) (page 8, the Draft). Nonetheless, the Draft does not offer a very clear definition of the local and indigenous experience – does it also mean the culture and tradition? If yes, then, like the dialogue between Hong Kong law and Han-Chinese traditional culture, how the Draft (and possible future law) can engage with the traditional culture must be investigated and examined carefully. The following questions hence must be answered: In Mainland China, will criminalization and compulsory reporting of domestic violence welcomed by the society and work effectively? In other words, will reporting domestic violence to police, either by the victims or other professionals (like medical practitioners), be taken as a further violation of social harmony (on top and above the damaged familial relationship), including neighbourhood and interpersonal relationship at work? Provided that Rawlsian / Cornell's justice is still new and is not yet fully engaged with Mainland (Han-)Chinese society, can the implementation of law, without the evaluation of a sophisticated perspective of justice, help to solve the problem of domestic violence and reveal the suppression of powerless? It seems, whether law can be an effective means to control domestic violence in Mainland China, still needs to be further explored and discussed.

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