

Hong Kong's Money Laundering Offence: Two Problems

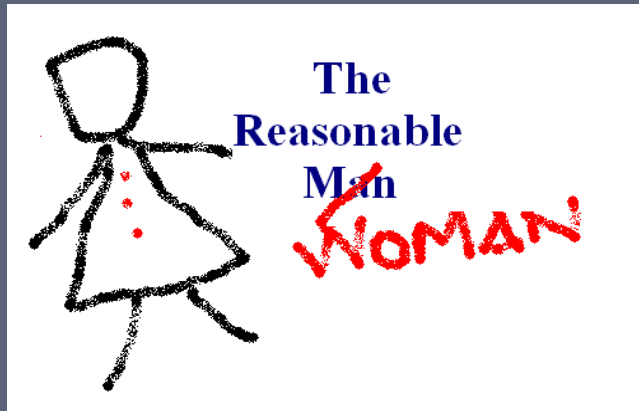
Professor Simon N.M. Young
Faculty of Law, University of Hong Kong

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Problems the Courts Cannot Solve

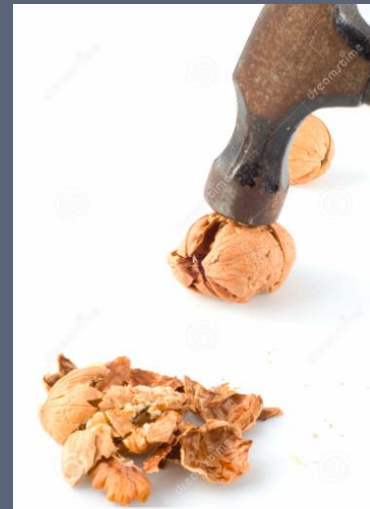
Problem 1

The Objective Fault Standard



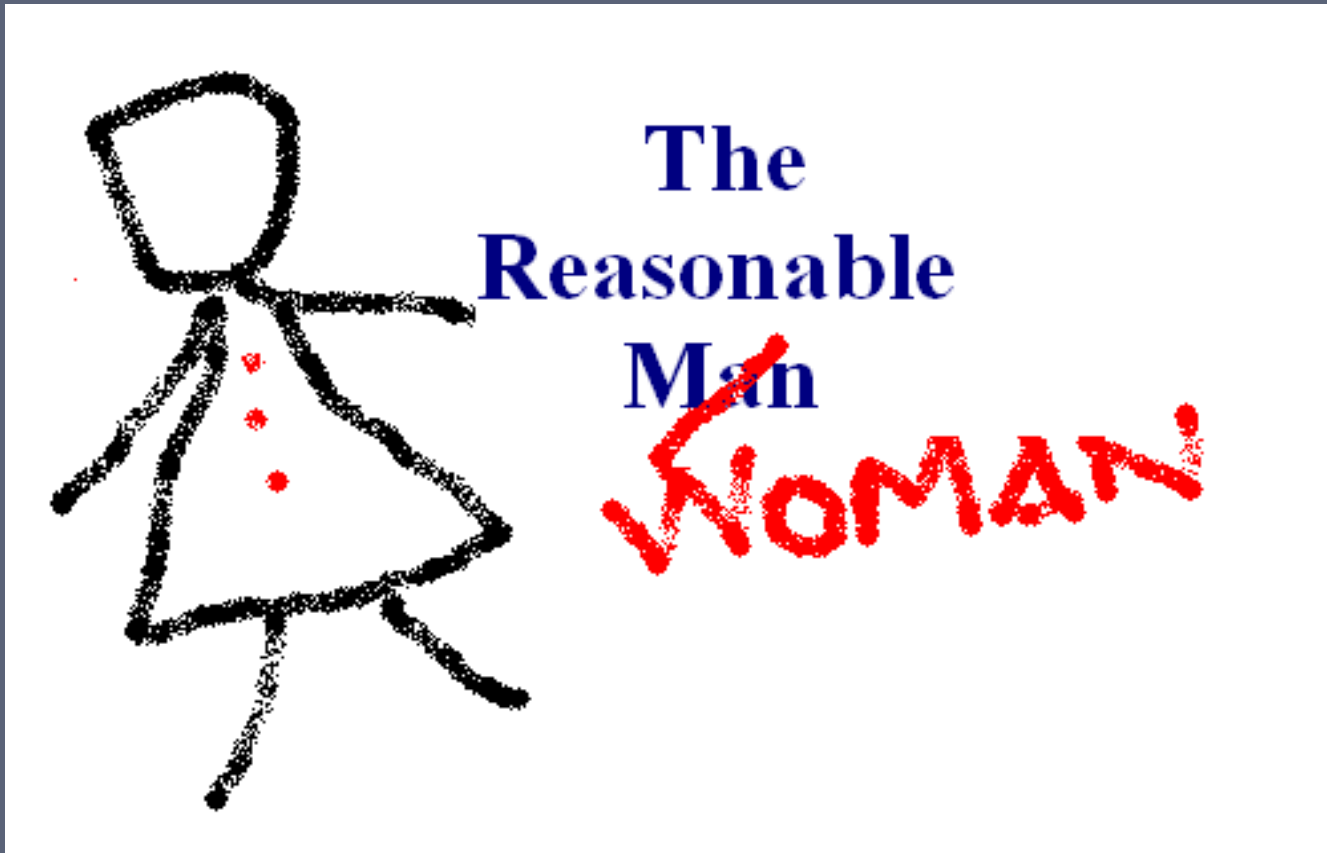
Problem 2

The Sanction-Blame Mismatch



Problem 1

The Objective Fault Standard



1. The Objective Fault Standard

- Runs up against subjectivist trend
 - Subjective recklessness
 - Misconduct in public office (*Sin Kam Wah* (2005 CFA))
 - Gross negligence manslaughter (*Lai Shui Yin* (2012 CFI))
 - Presumption of *mens rea*
 - Half-way house defences of honest and reasonable belief (*Hin Lin Yee* (2010 CFA); *Kulemesin* (2013 CFA))

1. The Objective Fault Standard

- Tension seen in *Pang Hung Fai* (2014 CFA)

“There is no need for an abstract personification for purposes of their application. Similarly, these words can be applied directly and do not need further characterisation as ‘objective’.” [49]

“[T]here is a significant mens rea element in the second limb of the offence...On the above analysis, there is a strong element of moral blame.” [57]

1. The Objective Fault Standard

- Tension seen in *Pang Hung Fai* (2014 CFA)
 - “...the accused had grounds for believing; and...anyone looking at those grounds **objectively** would so believe” [52] citing *Seng Yuet Fong* (1999 CFAAC)
 - “The two mental elements in the subsection should be understood as if they read: ‘knew or **ought to have known**’” [56]

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**But what was the legislative thinking behind
“having reasonable grounds to believe”?**

1. The Objective Fault Standard

- Legislative History (Ad Hoc Group 1989)
 1. DTROP Bill 1989: “*knowing or suspecting*” (based on English DTOA 1986)
 2. Group Proposal: “*believing*” (originating from HKAB)

1. The Objective Fault Standard

- Legislative History (Ad Hoc Group 1989)
“the Group asked Government to consider a further alternative submitted by HKAB, that is to replace the word ‘suspecting’ with ‘believing’.

Government has resisted this...

(a) To prove belief requires a much higher standard...

(c) ... The proposed amendment would fundamentally affect the effectiveness of the scheme.

(d) To amend the clause as proposed...would be interpreted by the international community as weakness...and may give rise to criticism that Hong Kong is enacting ineffectual legislation...” (Narcotics Division, 21 June 1989)

1. The Objective Fault Standard

- Legislative History (Ad Hoc Group 1989)

DTROP Bill 1989: “knowing or suspecting”

Compromise: “having reasonable grounds to believe”

Group Proposal: “believing”

1. The Objective Fault Standard

- Legislative History (Ad Hoc Group 1989)

“...the wording brings in an **objective rather than subjective test** as to the person’s state of mind. Thus, while under **the ‘belief’ formula people are likely to turn a blind eye to suspicious circumstances**, the effect of the ‘reasonable grounds to believe formula will be for people to report suspicions to play safe. To the extent that the latter will still encourage or oblige people to report, it will achieve, **albeit to a lesser extent**, the objective of clause 25 and is considered an **acceptable compromise.**” (Narcotics Division, 21 June 1989)

1. The Objective Fault Standard

- Problem is that s. 25(1) has an objective fault standard, and only law reform can change this
- Some defendants will fail to live up this standard (eg they “*ought*” to have known; “*anyone looking at those grounds objectively would so believe*”, even though Ds did not)
- Too much subjectivity in determining “*those grounds*” would appear to be inconsistent with the legislative intent behind not adopting a ‘believing’ standard

Problem 2

The Sanction-Blame Mismatch



Two Kinds of ML Offences

1. Predicate-Based

- Culpability lies in aiding predicated offenders to retain the proceeds of crime
- Proof of predicate offence and actual proceeds matter
- Reporting suspicion, a separate matter unrelated to liability
- Punished severely given close connection to predicate

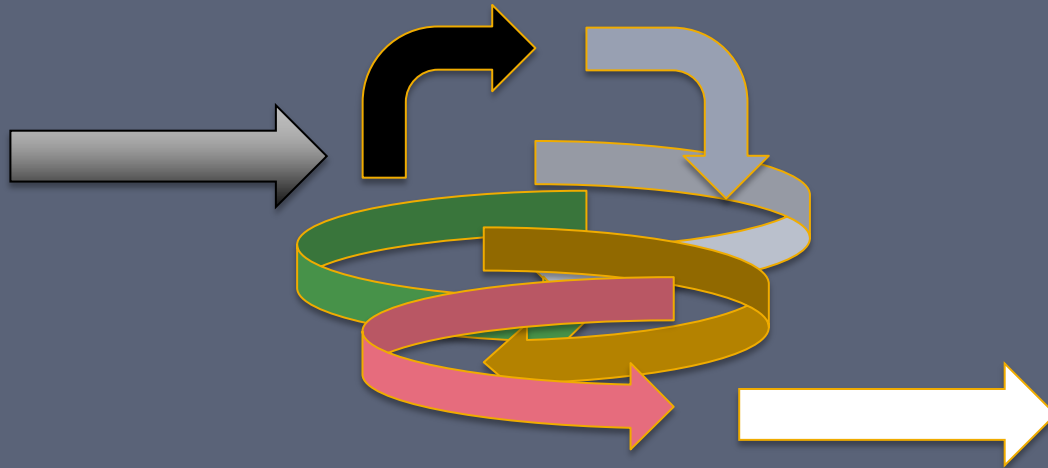
2. Risk-Based

- Culpability lies in failing to act prudently when exposed to the risks of money laundering
- Proof of risk indicators more important than predicate offence/actual proceeds
- Reporting encouraged and provides an excuse
- Punished less severely as less blameworthy

2. The Sanction-Blame Mismatch

- Problem is that s. 25(1) tries to address both predicate-based and risk-based ML under a single severe criminal sanction
- Only law reform can disentangle these two forms into separate offences.
- Law reform can also consider the feasibility of having only **civil sanctions** for risk-based ML.

THE END. THANK YOU.



Simon N.M. Young

Professor and Associate Dean (Research)
Faculty of Law, The University of Hong Kong
Barrister-at-Law, Parkside Chambers