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Sentencing neurodivergent offenders in Hong Kong: the persistence of sanist attitudes and stereotypes in criminal justice

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This chapter examines sentencing practice in relation to neurodivergent offenders in the Hong Kong Special Administrative Region. Notwithstanding the emergence of the neurodiversity paradigm, neurodivergence is considered under the broad heading of "mental disorder" in Hong Kong criminal jurisprudence. As such, the chapter opens by providing an overdue summary of the law on mental disorder as a sentencing consideration in general. It then proceeds to examine recent case law concerning neurodivergent offenders in this context. It is shown that, while the wide discretion afforded judges in sentencing allows, in theory, neurodivergence to be considered in assessing matters such as culpability and rehabilitative needs, the lack of clear guidelines means that judges all too often resort to ableist attitudes and stereotypes when dealing with neurodivergent offenders. Moreover, it is suggested that criminal law's predominant concern with cognitive and rational impairment – as seen in the well-established defences of insanity and diminished responsibility and which continues into the sentencing stage – presents an inappropriate framework for sympathetic treatment when applied to neurodivergent offenders. Finally, the chapter concludes with recommendations for research and reform in this persistently sanist area of criminal justice.

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1. Introduction

Sentencing represents the culmination of the criminal adjudication process in the courtroom: it is "the moment at which justice is seen to be done" (Sullivan, 2017, p. 413). In handing down the sentence, the judge publicly communicates and acts upon the various goals of criminal law on behalf of society – to protect, punish, condemn, deter, compensate, and rehabilitate. For neurodivergent individuals convicted of criminal offences, the question of what justice entails is complicated by their supposed deviance from the paradigm of the "normal criminal legal subject" (Steele and Thomas, 2014, p. 362). In other words, the perceived or actual cognitive differences of neurodivergent individuals may justify differential treatment in sentencing, or a different balance between the criminal justice goals applied. This chapter examines these potential issues arising in the sentencing of neurodivergent individuals in the Hong Kong Special Administrative Region (hereafter Hong Kong). It does so through a socio-legal analysis of the sentencing framework for offenders deemed "mentally disordered", under which neurodivergent individuals are currently considered.

A British colony until 1997, Hong Kong has remained a singular common law jurisdiction within the socialist People's Republic of China (PRC), inheriting much of its legal and judicial infrastructure from colonial days under the "One Country, Two Systems" principle (Basic Law, 1997). While the legislature and courts of Hong Kong continue to draw on Anglo-American common law jurisprudence, they have, over time, developed their own statutory and case law across fields, including that in relation to people found "mentally disordered" or "incapacitated" (Mental Health Ordinance (MHO), cap. 136; Chiu and Chow, 2023). Following the PRC's ratification of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in 2008, the civil mental health regime in Hong Kong has attracted renewed academic interest in recent years (see, *e.g.*, Cheung *et al.*, 2020; Chiu, 2021). In contrast, little has been written about the treatment of mentally disordered individuals in the criminal justice system,[1] an arena which certainly warrants critical examination given its potential to become "an escape valve through which society's prejudices and stereotypes [about mental disabilities] overwhelm our commitment to fairness and justice" (Perlin, 2013, p. 1).

The aim of this chapter is to provide, within this broader context, a comprehensive overview and critique of current Hong Kong criminal jurisprudence on sentencing neurodivergent individuals. The analysis is grounded in critical disability studies, which sees dis/ability as a discursive construction and questions entrenched norms about the dis/abled subject in law and beyond (Shildrick, 2020; Campbell, 2009), as well as the neurodiversity paradigm which seeks to challenge negative narratives about neurodivergence embedded in medical discourse (Smith and Renehan, 2025). In line with the rest of this volume, and reflecting the neurodiversity paradigm, identity-first language will be adopted save where specific legislation, case law, or other text is being referenced. The terms "mental disorder", "disability", and "illness" are used to refer to psychiatric – or, rather, psychiatrised – conditions often considered to affect one's mental and legal capacities in criminal law. Notwithstanding the emergence of the neurodiversity paradigm, such pathologising terms often include, or are

[1] A lone recent example is Richards (2021).

conflated with, neurodivergence for the purposes of criminal law in Hong Kong (and many other jurisdictions). As such, the use of these terms in discussions around neurodivergence is not to denote individuals' mental state or identity. Rather, it refers to their designation as medicalised or pathologised subjects in the criminal legal process as currently constructed: for example, as a disordered offender in the eyes of the law. Diagnostic labels for specific types of neurodivergence are only used insofar as they are mentioned in any material cited. Ultimately, following a postmodern and critical approach to dis/ability, this chapter does not accept positivist understandings of mental disorder but seeks to understand how pathologised understandings of neurodivergence and mental distress are produced through criminal legal discourse.

The chapter's focus is on the sentencing stage. Compared to well-established critiques of doctrines related to culpability, such as insanity and diminished responsibility, research on the consideration of mental disorder in sentencing individuals has been scarce in criminal legal scholarship across the common law world.[2] Section 2 first addresses this in the Hong Kong context by providing an overview of the legal rules and principles underlying mental disorder as a sentencing consideration in the jurisdiction. Section 3 then interrogates how, within this framework, judges understand neurodivergence specifically in response to frequently asked questions about culpability and the suitability of different sentencing options. A discursive analysis of recent case law concerning neurodivergent offenders reveals that judges often resort to ableist and "sanist" assumptions – entrenched prejudices against those deemed *not* sane (Perlin, 2006, p. 74) – in their reasoning. It is also found that criminal law's traditional concern with cognitive and rational impairment presents neurodivergent offenders with an inappropriate framework for sympathetic treatment in practice. Section 4 concludes with some suggestions for research and reform in this persistently sanist area of criminal justice.

2. Mental disorder in criminal sentencing: principles and application

2.1.Mental disorder as a mitigating factor

Sentencing law in Hong Kong is perhaps best defined by its very lack of definition. In contrast to many common law jurisdictions,[3] and beyond statutory limits set down for specific offences,[4] there are no definitive rules or guidelines governing sentencing in Hong Kong. While common law offers some guidance as to what mitigating or aggravating factors could or should be taken into account by judges, whether they apply in each case and what impact they may have on the final sentence are "very much … within the discretion of the court" (Cross and Cheung, 2024, para. 1-15). Sentencing is often said to be "an art", a holistic "assessment [which] has to be made not only of the offence, but also of the offender" (Cross and Cheung, 2024, para. 30-6).

[2] See, for recent critiques of the insanity and diminished responsibility defences in English and comparative contexts, Mackay and Brookbanks (2022); Reed, Wake, and Simpson (2021). In contrast, cross-jurisdictional discussions about legal mechanisms addressing mental disorder at the sentencing stage have been limited, with much of the theoretical scholarship having been done in relation to England and Wales: see, e.g., Peay (2016a); Peay (2016b).

[3] *E.g.*, England and Wales (Sentencing Council for England and Wales, 2019); New Zealand (Sentencing Act 2002, s. 9); Canada (Criminal Code (RSC 1985, c. C-46), pt. XXIII); Victoria, Australia (Sentencing Act 1991, s. 5); and New South Wales, Australia (Crimes (Sentencing Procedure) Act 1999, s. 21A).

[4] *E.g.*, Dangerous Drugs Ordinance, cap. 134, s. 56A(a); Offences against the Person Ordinance, cap. 212, s. 2.

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The offender's "mental disorder", "disability", "illness", "impairment", or "condition" (Cross and Cheung, 2024, paras. 30-225–30-231) appears regularly in sentencing judgments as one of the factors considered by judges in exercising their discretion. Importantly, though a myriad of (overlapping and severely outdated) definitions for "mental disorder", "handicap", and "incapacity" are provided for decision-making in relation to psychiatric "patients" in the civil setting under the MHO (cap. 136, s. 2), the main legislation governing mental capacity and disability in Hong Kong,[5] no unifying terminology exists for their counterparts in criminal law. Nor do judges refer to the MHO definitions when speaking of "mental disorder", *etc.*, in sentencing. Case law indicates that these terms are used interchangeably by judges. As such, they encompass and conflate a diverse range of differences and conditions known in clinical *psy*[6] classifications as "mood disorders", "anxiety disorders",[7] "psychotic disorders",[8] "personality disorders",[9] "intellectual disabilities", and "neurodevelopmental disorders"[10] (see the *International Classification of Diseases*, 11th revision, World Health Organization, 2025). In this way, sentencing jurisprudence in Hong Kong also equates neurodivergence with mental disorder.

Two main rationales seem to unite judges' consideration of these diverse conditions in sentencing. First, as at the fact-finding stage where the insanity or diminished responsibility defence may operate to reduce or negate the defendant's criminal responsibility, mental disorder is thought to potentially impact culpability for the purpose of sentencing: "[a] mental disability, if causative of or materially contributing to the offending, is 'capable of reducing moral culpability as distinguished from legal responsibility'" (Cross and Cheung 2024, para. 30-225, quoting *Henry v. R*, 2019, para. 43). As such, mitigation may be granted to reflect "diminished criminality or culpability on the part of the accused who has committed a crime under an abnormal state of mind" (*HKSAR v. Chiu Peng*, 2002, para. 16). While "abnormal state of mind" – reminiscent, of course, of "abnormality of mind" or "mental functioning" in common law provisions for diminished responsibility (Homicide Ordinance, cap. 339, s. 3; Homicide Act 1957, s. 2) – is nowhere defined in statute or case law, judges seem to be concerned with familiar questions about the offender's ability to understand "the nature and quality of [their] act" (*M'Naghten's Case*, 1843), "to form a rational judgment", and "to exercise self-control" (Homicide Act 1957, s. 2(1A)(a)(b)). This preoccupation with impairments in the offender's cognitive, rational, and volitional capacities is shown in the

[5] Under MHO, s. 2, "mental disorder" means "(a) mental illness; (b) a state of arrested or incomplete development of mind … ; (c) psychopathic disorder; or (d) any other disorder or disability of mind which does not amount to mental handicap". "Mental handicap", in turn, means "sub-average general intellectual functioning with deficiencies in adaptive behaviour". Confusingly, "mental incapacity", the main triggering condition for different MHO provisions, is defined as "(a) mental disorder; or (b) mental handicap". A "patient" is someone "suffering or appearing to be suffering from a mental disorder".
[6] Nikolas Rose uses "psy" to represent psychiatry, psychology, and related disciplines, which together constitute an "intellectual technology" (Rose, 1996, pp. 10–11).
[7] *E.g.*, "mixed anxiety and depressive disorder" in *HKSAR v. Lam Kwok-Wing* (2020).
[8] *E.g.*, "paranoid schizophrenia" in *HKSAR v. Yeung Kwok-Wai* (2018, para. 8).
[9] *E.g.*, "dissocial personality disorder" in *HKSAR v. Tai Wan-Hoi* (2021).
[10] *E.g.*, "mild grade intellectual disability" and "autism spectrum disorder" in *HKSAR v. Leung Yat-Chi* (2020, paras. 18, 20).

following excerpt, taken from a judgment on a defendant said to be of "extremely low intelligence" (*HKSAR v. Lee Pui-Ho*, 2022, para. 12, my translation).[11]

> The defendant's mental disability limited his judgment and self-control, which in turn affected him so that he did not sufficiently appreciate the moral quality of his act and its potential serious consequences. Therefore, the defendant's intellectual disability is capable of mitigating his moral … liability. (*HKSAR v. Lee Pui-Ho*, 2022, para. 23, my translation.)

Second, even if the offender's mental disorder did not "materially contribut[e] to the offending" (Cross and Cheung 2024, para. 30-225) and thereby affect culpability, it may nevertheless inform judges' deliberation of the suitability of different sentencing options. In these cases, the offender's personal, medical, and/or rehabilitative needs may take priority over other criminal justice goals:

> Essentially, mentally disordered offenders, whether or not the disorder has been the root cause of the offence, are approached on the basis that the law, where possible, should facilitate treatment in hospital. (*HKSAR v. Chiu Yu-To*, 2000, para. 24)

Under the MHO, a convicted "mentally disordered person" may be detained in a "mental hospital for treatment" if the judge is satisfied, upon certification by two registered medical professionals, that "the nature or degree of [their] mental disorder … warrants [such] detention" and that this is the "most suitable method of disposing the case" (MHO, cap. 136, s. 45). Where psychiatric institutionalisation is not appropriate, judges may still consider other options, such as granting a shorter period of imprisonment or a non-carceral sentence, to facilitate treatment and/or minimise the negative impact of punishment on the individual. As the appellate court states in the following case concerning a defendant with "a history of mental health problems" (*Secretary for Justice v. CMT*, 2020, para. 50):

> Although there is no evidence to link [the defendant's] mental health issues with the commission of the present offence, we cannot ignore the real possibility that her mental conditions might significantly deteriorate and she might commit self-harm if a harsh sentence were to be imposed on her … After balancing all relevant sentencing factors, … the appropriate sentence … must have a sufficient punitive element and deterrence while at the same time take care of the [defendant's] rehabilitation and well-being. (*Secretary for Justice v. CMT*, 2020, paras. 50–52)

Overall, the judicial approach to considering the broad factor of mental disorder in sentencing reflects the idea that disorder "may make [the offender] both less culpable and more amenable to therapeutic or rehabilitative endeavours, drawing on our humanitarian instincts" (Peay, 2016b, p. 138). As "responsibility for crime is founded in a certain set of capacities" (Lacey, 2001, p. 255), it seems instinctive that those who, according to the law, do not possess such capacities ought to be treated differently. Moreover, the development of international

[11] Sentencing judgments are delivered in either English or Chinese, the official languages of Hong Kong. Quotes from Chinese judgments included in this chapter have been translated into English by the author, who is bilingual and received her legal education in both England and Hong Kong. The tone and punctuation of the translation are kept as close to the original as possible.

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human rights law such as the UNCRPD has injected new force into states' obligation to provide reasonable accommodations to enable disabled people's effective participation in the criminal justice system (UNCRPD, art. 13; see Baldry, 2018). Broadly speaking, taking an offender's mental disorder into account in assessing culpability and needs in sentencing would seem, at first glance, to fulfil part of the state's paternalistic function vis-à-vis disabled people, including some (though not necessarily all) neurodivergent individuals.

In practice, however, ensuring fair process and outcomes through legal doctrines predicated upon a strong link between mental and legal capacity is less than straightforward, as their ostensibly protective rationale may conflict with other values – in particular, disabled people's right to equal recognition before the law (UNCRPD, art. 12). The defences of insanity and diminished responsibility, for example, have long been criticised for their stigmatising and pathologising effects (Law Commission of England and Wales, 2004; Law Commission of England and Wales, 2013). Successfully pleaded, they seem to imply that the offender is "someone who can't explain [themselves] rationally, someone whose responsibility, and hence whose participation in the human good, was diminished" (Gardner, 2007, p. 181). At the same time, to not provide these defences might mean judging mentally disordered defendants against an unsuitable and thus discriminatory standard (Dawson, 2015). This dilemma between (a) recognising the legal capacity of all and (b) acknowledging that criminal law is premised upon a standard of rationality which not everyone, disordered or not,[12] is equally capable of meeting continues to trouble legal scholarship (Minkowitz, 2014; Craigie, 2015). As section 3 demonstrates, this conflict also manifests in sentencing judgments on neurodivergent defendants in Hong Kong.

2.2.Mental disorder in criminal law: general critiques

Before moving on to discuss the treatment of neurodivergent offenders specifically, some critical comments may be offered on how claims about defendant mental disorder are presented and addressed in Hong Kong sentencing courts generally. First, as the enduring presence of outmoded and stigmatising terminology surrounding mental disorder in civil mental health law might lead one to expect (see Chiu and Chow, 2023), similarly problematic language which sees disability and difference primarily through the clinical gaze pervades criminal law. Terms describing individuals which are widely considered offensive and harmful today, such as "mentally retarded" and "handicapped", can easily be found in recent sentencing jurisprudence (see, *e.g.*, *HKSAR v. Shek Ka-Chun*, 2019, paras. 6, 20). Beyond specific conditions, mental disorder is consistently posited as a kind of "defect" (*HKSAR v. Lau Ching-Yin*, 2018, para. 7, my translation) or "deficiency" (*HKSAR v. Lau Chung-Kwan*, 2019, para. 30), and the disordered offender as "someone different from the normal person" (*HKSAR v. Ng Chi-Yeung*, 2019, para. 56), someone who is "not … an entirely normal adult" (*HKSAR v. Lee Kai-Fat*, 2020, para. 37). Not only is the labelling of a person as "defective", "abnormal", and generally lesser than others clearly stigmatising for the individual (see Robinson and Herring, 2024), it also reinforces the broader assumption in law and society that disability is "ontologically intolerable" and "inherently negative" (Campbell, 2001, p. 43). Of course, the problem of

[12] Feminist legal scholars have long problematised the concept of the reasonable man in law. See Moran (2003).

pathologising language is not limited to the courtroom, as the biomedical model of mental distress continues to dominate psy practice and everyday discourse (Lafrance and McKenzie-Mohr, 2013), which judges draw on in decision-making. At the same time, questions about the offender's "abnormal state of mind" (*HKSAR v. Chiu Peng*, 2002, para. 16) entrenched in statute and case law lead psy experts to frame their reports to the court in the same terms. The mentally disordered offender is thus constructed primarily through the language of pathological and socio-legal ab/normality in criminal jurisprudence, in line with prevailing normative and discursive paradigms.[13]

Second, beyond the use of harmful language, the absence of sentencing guidelines, generally or specifically targeting defendants who may be vulnerable due to their psychosocial differences, has led to poorly justified findings in sentencing judgments. This lack of guidance means there is no consistent, principled judicial approach to answering the following: (a) whether an offender has a qualifying mental disorder or is disordered in a way that warrants lenient treatment and (b) how to evaluate the relevant psy expert evidence, if any. Rather than offering a transparent and informed assessment of psy and non-psy evidence in addressing these questions, judges tend to rely on subjective judgment about what constitutes dis/ordered or ab/normal conduct, that the defendant's "behaviour … is clearly not that of a normal person" (*HKSAR v. Yau Chung-Yin*, 2020, para. 16, my translation) or, conversely, that their crime "is no different from [that] committed by a person without mental illness" (*HKSAR v. Yan Ting-Leong*, 2018, para. 19). These findings of ab/normality are, in turn, founded largely upon ableist and sanist assumptions. Judges have dismissed claims of possible mental disorder simply on the basis that the defendant's letter to the court "was well written fluently [sic] and coherent" (*HKSAR v. Tam Chun-Leung*, 2020, para. 28), that they are "a successful chef with two children" (*HKSAR v. Wong Siu-Ming*, 2021, para. 25, my translation), or that they are "adored by [their] employer and friends" (*HKSAR v. Leung Wai-Lun*, 2020, para. 35, my translation). In these judgments, mentally disordered individuals – a label applied to a diverse group associated with vastly different psychiatrised conditions and differences – are seen as necessarily less competent than others in all spheres of life and constructed in extremely narrow, caricatured ways.

Building upon these critiques of the legal framework governing the problematically broad and ill-defined factor of mental disorder in Hong Kong sentencing courts, the following section examines the problems of stigmatising language and stereotypes in relation to neurodivergent offenders specifically. Concerningly, the sentencing judgments analysed reflect limited judicial understanding about neurodivergence, its presentations, and potential impact on individual behaviour. Further, they demonstrate that the general principles on diminished culpability and rehabilitative needs, as they are currently applied by judges, may not be fit for purpose when it comes to neurodivergent individuals.

3. Sentencing neurodivergent offenders: a critical analysis of recent case law

[13] See Foucault (2016) on the construction of the offender as psychologically and socially "abnormal" in the criminal legal process.

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This section takes a discursive approach to examining recent case law concerning neurodivergent offenders, focusing on the language and discourses used by judges to justify their decisions rather than legal doctrine itself (see Goodrich, 1987; Black, 2002). It is divided into three subsections: first, on how neurodivergence is conceptualised and discussed in sentencing judgments in general; second, on constructions of neurodivergent offenders in relation to the question of diminished culpability; and third, on understandings of neurodivergent conditions in terms of offenders' rehabilitative needs.

3.1. Biomedical and pathological understandings of neurodivergence in Hong Kong criminal courts

Neurodivergence is commonly used to describe a "group of people whose 'brains diverge' from the dominant standards" and is often equated with and defined by specific differences or (from a clinical perspective) conditions – that is, neurodevelopmental diagnostic categories (Ostaszewska *et al.*, 2025, pp. 1–2). Therefore, definitions and descriptions of neurodivergence often overlap with a distinct and diverse range of neurodevelopmental diagnoses such as autism, attention deficit hyperactivity disorder (ADHD), developmental language disorder, dyslexia, and learning disabilities (Ostaszewska *et al.*, 2025, p. 2). Though these differences (or diagnostic categories) may or may not co-occur, they are generally lumped together with other "psychiatric problems" (*HKSAR v. Yan Ting-Leong*, 2018, para. 8) within the aforementioned sentencing framework and dealt with by judges using their broad discretion in relation to "mental disorder". As such, neurodivergence may be (and usually is) considered in terms of its impact on the defendant's culpability and needs in sentencing, though, again, no clear definitions or guidelines on how judges should do this are available.

As the vocabulary of neurodivergence gradually – though slowly – develops in Hong Kong (see Lai, Aoki, and Seera, 2025; Lam and Wong, 2024; Neurodiversity Association Hong Kong, 2024), shifting the focus of academic and public discourses from clinical and social norms to acknowledgement and reflection of lived experience, judicial language around neurodivergent conditions in criminal jurisprudence remains highly medicalised. At the same time, it does not seem that sentencing judges are particularly informed about the state of medical knowledge or vocabulary in this area. Judges' heavy reliance upon clinical diagnostic labels, as defined by psy authorities and offered to the court by psy expert witnesses, to understand neurodivergence is exemplified in the following excerpt from a sentencing judgment:

> Commenting on "Asperger's Disorder" which [the psychiatrist] had assessed [the defendant] to be suffering from, [the clinical psychologist] described it as being classified as Autism Spectrum Disorder in the latest version of the Diagnostic and Statistical Manual of Mental Disorders. (*HKSAR v. Ng Chi-Yeung*, 2019, para. 26.)

Conscious perhaps of evolving language, or simply unsure which technical term to apply, the judge summarises the expert reports as confirming that the defendant "was suffering from some form of mental problem, be it psychiatric or psychological" (*HKSAR v. Ng Chi-Yeung*, 2019, para. 31). There is an uncomfortable sense of wilful ignorance and dismissiveness on the judge's part here: he seems to see no need to carefully examine the defendant's "mental

problem", whether through further verification or information from witnesses or the defendant himself, so long as there is confirmation of some such (albeit ill-defined) problem by psy experts. The defendant is reduced to a medicalised, "suffering" object. Other neurodivergent conditions from which defendants have specifically been said to "suffer" include "ADHD, Tic Disorder and Conduct Disorder" (*HKSAR v. Yip Cheuk-Yan*, 2021, para. 10), "ADHD and dyslexia" (*HKSAR v. Tsang King-Lun*, 2021, para. 12, my translation), "autistic spectrum disorder with deficits in social interaction and restricted interests" (*HKSAR v. Lai Wan-Lung*, 2020, para. 9), "pervasive developmental disorder, attention deficit, and borderline intelligence" (*HKSAR v. Chung Chi-Kin*, 2020, para. 9, my translation).

Judicial uncertainty as to their precise scientific classification notwithstanding, neurodivergence appears firmly established in sentencing jurisprudence as a homogenised medical problem posing "challenges" and requiring certain "diagnosis and treatment" (*HKSAR v. Limbu Jun-Kang*, 2019). Judicial discussions about the relevant diagnosis tend to revolve around "difficulties in [the defendant's] daily living *due to*" the condition (*HKSAR v. Ng Chi-Yeung*, para. 28, my emphasis), even if these do not bear an obvious or direct connection to the offence, with differences being characterised as inherent deficits. In *Limbu Jun-Kang* (2019), for example, the judge goes into much detail about the defendant's troubled domestic life and education history and, in doing so, places blame for criminal behaviour on the defendant and his neurodivergence:

> [The defendant] misbehaved at school and at home. *Perhaps not surprisingly*, his relationship with most of his family members is one involving conflict and *his behaviour is clearly at the heart of that*. … On any view, the combination of the borderline intelligence of the accused, the autistic spectral disorder [sic] and … the pervasive under-achievement of the accused in educational endeavours, suggests that the accused has a long way to go in order to put his life in order and, within the limits of his abilities, to be a proper functioning member of the community. (*HKSAR v. Limbu Jun-Kang*, 2019, my emphasis.)

The defendant's neurodivergence, a "mental illness" according to psy reports cited in the judgment (*HKSAR v. Limbu Jun-Kang*, 2019), is constructed here as inevitably limiting his opportunities, *dis*ordering his life, and rendering him a less "proper" member of society than others. Despite the sympathy displayed throughout the judgment towards the defendant and his family, neurodivergence is ultimately positioned as a "tragedy", a misfortune which is inherently undesirable and ought to be "deal[t] with" (*HKSAR v. Limbu Jun-Kang*, 2019).

In other judgments, similar euphemistic language implying inborn defect or abnormality is used to refer to different manifestations of neurodivergence alongside other psychiatrised differences: "the defendant is challenged in many ways … he is challenged in his mental capacity and psychiatrically and psychologically" (*HKSAR v. Cheung Kwok-Wah*, 2019, para. 11); "because of congenital deficiencies in [the defendant's] health and limitations on his intelligence, he is naïve and simple in his thinking" (*HKSAR v. Yung Wai-Yip*, 2019, my translation). These judicial comments echo broader societal discourse, which, despite efforts towards destigmatisation, remains saturated with narratives about the "burdens and challenges"

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presented by mental disorder and neurodivergence to the individual and those around them (Chiu, Wei, and Lee, 2006, p. 413; see also Li, Fan, and Yu, 2012; Wong and Wong, 2020). In addition to mislabelling and stigmatisation, such judgments entrench the biomedical model of disability and its "negative ontology" in law (Campbell, 2001, p. 43).

3.2.Neurodivergence and "abnormal state of mind"

That neurodivergence is largely understood in pathological terms in sentencing discourse does not mean that neurodivergent offenders will automatically receive lenient treatment or special attention. Referring to recent jurisprudence and focusing on the first justification for considering mental disorder in mitigation discussed above – diminished culpability – this subsection makes the case that the current judicial approach to the question of offending "under an abnormal state of mind" (*HKSAR v. Chiu Peng*, 2002, para. 16) is unsuitable for neurodivergent offenders.

As discussed in section 2, in determining whether an offender's culpability may be mitigated by reason of mental disorder, judges are chiefly concerned with the impact of disorder on the offender's cognitive, rational, and volitional capabilities. It has also been suggested that, given the lack of guidance on how judges should understand claims of disorder, they rely largely upon subjective findings about external signs of ab/normality, as well as clinical diagnoses provided by forensic psy experts, to reach their conclusions. Beyond the principle articulated in *Chiu Peng* (2002), no clear test for diminished culpability has been established for the purpose of mitigation, nor is there judicial clarification on how this issue may be differentiated from other queries about the defendant's mental and legal capacities in the criminal legal process. Indeed, one question often asked by judges in relation to mitigated culpability is, arguably, only a slight reformulation of the famous *M'Naghten's* rules (1843):[14] whether the defendant "acted with knowledge of what was being done and … of the gravity of the criminal conduct" (*HKSAR v. Yan Ting-Leong*, 2018, para. 19). At the same time, there are certainly many instances of successful mitigation in case law where it is explicitly acknowledged by the court that "the defendant has been affected by mental disorder at the time of the offence", even if "not to the extent of being deemed 'insane'" (*HKSAR v. Choi Hing-Fai*, 2018, para. 19, my translation).[15]

In practice, this emphasis on the individual having a particular moral and rational understanding of their criminal act means that psy conditions known primarily by their effect on one's cognitive functioning – their ability to perceive and process information – appear to be more readily accepted in mitigation than others. Examples of such conditions include dementia, which supposedly affect one's "ability to differentiate right from wrong or real from unreal" (*HKSAR v. Neoh Weng-Wah*, 2018, para. 29), and psychotic disorders, which may manifest in "non-existent voice[s]" and "persecutory beliefs" directly leading the defendant to

[14] The *M'Naghten's* test (1843) asks whether, at the material time, the defendant "was labouring under such a defect of reason, from disease of the mind, as *not to know the nature and quality of the act* he was doing; or, if he did know it, that he *did not know he was doing what was wrong* [my emphasis]".
[15] Indeed, if the defendant had been found "not guilty by reason of insanity" at the verdict stage, their culpability, strictly speaking, would be completely abrogated.

offend (*HKSAR v. So Wai-Keung*, 2020, para. 13). Serious mood disorders such as "severe depressive episode" have also been said to "have [had] significant influence on [the defendant's] judgment and substantially impaired [their] condition" at the time of offending (*HKSAR v. Lam Kwok-Wing*, 2021). Additionally, "eligible" conditions generally have more visible, externalised symptoms and a well-defined onset timeline which allow judges to construct a straightforward pathology of the disorder. This is seen in *Choi Hing-Fai* (2018), a judgment concerning a man convicted of wounding his neighbour:

> [In the days leading up to the offence], the defendant was clearly affected by the onset of his mental disorder, as he repeatedly questioned [the victim] on the suspicion that he was having an affair with his wife. On the day of the offence, the defendant even went into a frenzy and wildly attacked [the victim] with a beer bottle, cleaver, and hammer, which shows that the defendant was fairly troubled by his illness at the time … . (*HKSAR v. Choi Hing-Fai*, 2018, para. 16, my translation.)

Under the current judicial approach to the question of "abnormal state of mind" (*HKSAR v. Chiu Peng*, 2002, para. 16), the defendant's evidently "frenzied" and "wild" acts immediately before and during the offence are taken as substantial proof that he offended whilst "under the influence" of his delusional disorder (*HKSAR v. Choi Hing-Fai*, 2018, para. 15, my translation). Judges in other cases have similarly cited defendant's "crazy" (*HKSAR v. Ho Po-Kwong*, 2021), "frightening" (*HKSAR v. Chow Kam-Cheung*, 2018, para. 4, my translation), "strange" (*HKSAR v. Wong Siu-Lok*, 2018, para. 2, my translation), "bizarre" (*HKSAR v. Lai Yuk-Man*, 2020, para. 18), and "incomprehensible" (*HKSAR v. Pang Wai-Ming*, 2021, para. 7, my translation) conduct as the basis of potential mental disorder. As mentioned in section 2.2, it is not uncommon for judges to resort to normative judgment – to ask whether the defendant's behaviour accords with what "a normal person *should* display" (*HKSAR v. Chow Kam-Cheung*, 2018, para. 4, my translation and emphasis) – in drawing such conclusions.

Within this context, for neurodivergent offenders who wish to plead diminished culpability in mitigation, the weight placed on cognitive and rational impairment and bias towards particular manifestations of mental distress in judicial conceptions of mental disorder present difficulties. Prejudicial notions of "craziness" aside,[16] these narrow understandings of what counts as eligible "disordered" behaviour are unlikely to accommodate or be appropriate for many individuals whose neurodivergence warrants consideration in judicial assessments of culpability. From academic literature and accounts of lived experience (see Lang, 2025; Lierman, 2024), it is clear that neurodivergence, which manifests in highly diverse ways, rarely presents in the same manner as the psy diagnostic categories mentioned in the paragraph above; that is, with an identifiable point of onset and external signs of unwellness. Rather than constituting distinct "symptoms" of a condition separable from the person, neurodivergent traits are often closely tied to the individual's "way of being" and pervade their "every aspect of existence" (Lang, 2025).

[16] See section 2.2 above for my critique of the ableist language and stereotypes used in describing mentally disordered offenders in criminal jurisprudence in general.

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On the other hand, individuals may also consciously or unconsciously "mask" their psychosocial differences, a phenomenon particularly common amongst gender, racial, and class minorities (Russell *et al.*, 2025; Nelson and Lichwa, 2025; Goscicki *et al.*, 2025; Suttie, 2025). If judges are expecting explicitly "abnormal" behaviour in order to make a finding of disordered offending – which, again, relies on deeply ableist and harmful assumptions to begin with – many neurodivergent offenders will not be able to satisfy such a test. Yet, despite this invisibility, neurodivergence is relevant to culpability as currently understood in criminal jurisprudence given its foundation in "divergent ways of learning, communicating, regulating attention, executive function, social and sensory processing, and mood regulation" (Smith and Renehan, 2025, p. 48). For example, difficulty with interpreting neurotypical social cues might mean that some autistic people are less able to appreciate the potentially negative effect of their actions on others and the scope for misunderstanding of their actions (and the consequent emotional and moral impact when this occurs), despite having the cognitive ability to perceive and process information about the world around them (see Freckelton and List, 2009).

The disjuncture between neurodivergent and neurotypical ways of understanding the world, or the "double empathy" problem (Milton, 2012), also means that judges have quickly and unduly dismissed claims of disordered offending by neurodivergent individuals on account of their "normal" demeanour – in short, their outward presentation of neurotypicality. For example, the following judgment considers a defendant reported to have "problems including ADHD, Asperger's Syndrome, and dyslexia" (*HKSAR v. Ma Ho-Cheung*, 2020, para. 18, my translation; diagnostic terms are written in English in the original):

> Although the defendant has some bodily problems, and the psychologist even says that his condition falls under that of "borderline intelligence" [English in original], I have observed the defendant in court carefully, spoken with him, and found that there is no problem with his IQ, he can actually clearly distinguish right from wrong … . (*HKSAR v. Ma Ho-Cheung*, 2020, para. 26, my translation.)

It is impossible to say, from the judgment alone, whether the defendant in this case should have benefited from mitigation based on diminished culpability. However, what is troubling here is the judge's ready inference from his observation of the defendant in court that there is simply "no problem" with his intellect and thus moral understanding of the offence. Apart from the obvious question of whether a sentencing judge is qualified to assess someone's intelligence in the courtroom, there is no consideration of the possibility that the defendant may, regardless of intellectual ability, require consideration for his neurodivergence, especially considering the expert psychologist's report that he "is impulsive, unable to deal with situations, [and] easily influenced by bad friends" (*HKSAR v. Ma Ho-Cheung*, 2020, para. 20, my translation). As such, the judgment both fails to distinguish neurodivergence from other psychiatrised differences as well as judges it inappropriately against neurotypical conceptions of normality, thus eliminating any possibility of mitigation.

In another judgment, the judge uses a defendant's ability to participate in normal everyday life as incontrovertible evidence that he could not have offended under an "abnormal state of mind":

> [Counsel's claim of intellectual disability on the defendant's part] contradicts the submission that the defendant is a successful high-level chef. Becoming a high-level chef requires considerable wisdom and the ability to get along with people …. Moreover, the defendant's police interview recording shows he was eloquent …. The defence seems to have underestimated the defendant's intellect in order to seek mitigation. I therefore refuse to order psychiatric and psychological reports. (*HKSAR v. Wong Siu-Ming*, 2021, para. 27, my translation.)

Again, there is no way for anyone reading to ascertain whether the defendant was indeed "intellectually defective" (*HKSAR v, Wong Siu-Ming*, 2021, para. 27, my translation) for the purpose of sentencing. What is objectionable about the judge's words is rather the unspoken assumption that neurodivergent people are necessarily unable to pursue a successful career, "get along with people", or even speak eloquently – an assumption which is both bigoted and inaccurate. Such an uninformed view of disability and neurodivergence has particularly problematic implications for neurodivergent people who are seen as "high-functioning",[17] who may excel in certain spheres of life but experience difficulties in others. Ironically, then, such individuals may be given less favourable treatment in sentencing for failing to "perform" vulnerability in a manner which conforms with mainstream expectations (Brown, 2015, p. 43), for masking and adapting to neurotypical society too well.

Given the arbitrary dichotomy judges seem to have drawn between ab/normal behaviour in assessing culpability, successful claims made by neurodivergent offenders have been largely limited to cases where the individual's neurodivergence directly manifests in their offending behaviour, or where such behaviour falls within narrow stereotypes of neurodivergent people as particularly childish and naïve. Cases where claims of diminished culpability have succeeded include, for example, a defendant who drove off with a bus without authority who has had an "excessive passion and obsession towards buses" since childhood (*HKSAR v. Marco Yiu*, 2018, para. 22, my translation), as well as a defendant who downloaded child abuse images because of his "persistent preoccupation that [doing so] might help to protect the victims" (*HKSAR v. Ng Chi-Yeung*, 2019, para. 47). In describing these offenders, judges would often adopt infantilising and patronising language, for instance:

> [The defendant] is a hygiene freak and a simple and kind-hearted man. Society is too complicated for him. He has spent 20 days in custody and heard the clangs of prison gates which was already a nightmare to him. (*HKSAR v. Ng Chi-Yeung*, 2019, para. 58.)

While the judge is clearly sympathetic towards the defendant and finally hands him a suspended sentence, labels such as "hygiene freak" and "simple" have the effect of othering the individual and reinforcing the idea that neurodivergent people are strange and ill-suited for life in society, rather than the other way round (see Bechsgaard, 2025). The judge could certainly have taken into account the defendant's psychosocial differences without resorting to such language, but this was unfortunately not the case here or in many judgments. Moreover, state-sanctioned deprivation of liberty is arguably a distressing prospect for anybody; though

[17] The very distinction between different levels of "functioning" amongst neurodivergent, especially autistic, individuals has itself been problematised. See Lang (2025).

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neurodivergent individuals may face specific difficulties with incarceration – which are touched upon in section 3.3 below – such judicial language caricaturises the individual without actually addressing their needs.

The problem of infantilising language and stereotypes in understanding the culpability of neurodivergent individuals – and the broader conflict between accommodating difference and disability and recognising capacity in criminal law discussed in section 2.2 – becomes even more glaring in cases involving participants in the recent democratic protests in Hong Kong.[18] In a judgment concerning a protestor described as having "[an] attention span, verbal skills, and social skills… lower than those of normal people" and "various congenital and acquired deficiencies" (*HKSAR v. Amy Pat*, 2019, paras. 17–18, my translation), her participation in a "riot" is seen as *either* an exercise of political freedom *or* the result of difficulties experienced in her social life:

> The defendant may be said to be a person abandoned by mainstream society, the main reason for which is of course her below-average intelligence … . Of course, the defendant may have joined the democratic movement because of her desire for freedom, democracy, and injustice … . Yet, according to the relevant [psychiatric and psychological] reports, I also believe that the potential reason … is to gain recognition, validation, and praise, which she has been unable to obtain in other communities. (*HKSAR v. Amy Pat*, 2019, para. 19, my translation.)

The defendant is finally given a discounted sentence on the basis that her decision to offend "was influenced by social and personal factors" (*HKSAR v. Amy Pat*, 2019, para. 21, my translation). Here, in order to reach this conclusion of mitigated culpability, the judge seems to have completely disregarded her political autonomy by constructing her criminalised conduct as a misguided act of attention-seeking, as opposed to a genuine, thoughtful exercise of political rights. Moreover, though the judge rightly acknowledges the discriminatory treatment likely faced by the defendant in "mainstream society", he ultimately attributes its cause to "deficiencies" inherent in her person, a narrative echoing the "social deficit" model of neurodivergence, which pathologises and marginalises individual differences in social interactions (see Kapp, 2019). Once again, the one-dimensional view of dis/order adopted by sentencing judges is shown to prevent considerations of individual nuance in each case as well as the possibility of balancing accommodation and recognition of capacity in assessing culpability. Certainly, the defendant, like most people, could have been driven by concurrent, complex, and sometimes contradictory reasons for her actions, all of which may factor into her criminal responsibility; instead, she is reduced to the gross stereotype of a desperate social outcast. These comments also feed into stigmatising narratives found in media and public discourses that protestors were "brainwashed" or that disabled people were "used" by others to further political ends (see, *e.g.*, He, 2019; Ta Kung Pao, 2020). Such narratives, in turn, reinforce the longstanding sanist assumption that neurodivergent individuals are not capable of, and should not be allowed, full participation in civil society due to their inability to meet certain social and legal standards of rationality. (see Anspach, 1979; De Bhaillís and Flynn, 2017).

[18] See, for the background to the 2019 "anti-Extradition Bill" protests, Chen (2019).

Despite these worrying displays of judicial sanism and lack of awareness about neurodiversity, a number of judgments show that judges can, under the current legal framework, take into consideration the potential relevance of neurodivergence on culpability without denying the individual's capacity. In another riot judgment, for example, the judge is able to acknowledge the two autistic defendants' political motivations, that they were "concerned about minorities and injustices in society", and at the same time take into account the possibility that their neurodivergence may have contributed to their not leaving the scene when dispersed by the police due to difficulties in understanding social cues and in dealing with rapidly escalating situations (*HKSAR v. Yung Wai-Yip*, 2019, my translation). Judges have also moved away from the purely cognition and rationality-based test for disordered offending in some cases to consider, for example, "the influence of Asperger's syndrome on [the defendant's] judgment *as well as empathy*" (*HKSAR v. CWC*, 2021, my translation and emphasis). Given that social processing and mood regulation are areas where neurodivergent individuals may diverge significantly from societal expectations, it is important that judges expand their current approach to assessing culpability to include these considerations.

3.3.Neurodivergence and rehabilitative needs

In relation to the second justification for considering mental disorder in mitigation – rehabilitative needs – the analysis suggests that judges have limited awareness of the needs of neurodivergent individuals in penitentiary environments, and that any such needs are often dismissed or overlooked as a result. A growing corpus of research (most of which has been conducted outside of Hong Kong) has found that neurodivergent detainees experience unique challenges in prison and other custodial environments which criminal justice systems have yet to adequately address (see, *e.g.*, Talbot, 2010; Day, 2022; Vinter, Dillon, and Winder, 2023; Gibbs, 2025). The sentencing process in Hong Kong appears to be no exception.

In general, unless an offender is thought to potentially require psychiatric institutionalisation, no clear test or guidance exists as to how their "rehabilitation and well-being" may be "take[n] care of" in sentencing and punishment (*Secretary for Justice v. CMT*, 2020, para. 52). As mentioned in section 2.1, before handing down a hospital order, judges must be satisfied that the offender meets a very high and specific threshold, including that the "nature or degree of [their] mental disorder warrants detention … in a mental hospital for treatment" (MHO, cap. 136, s. 45). Hospital orders are therefore made only in relation to a limited group of offenders, usually those with serious psychosis-related symptoms and/or risk of violence (Chiu, 2024).[19] Without suggesting in any way that more offenders should be considered eligible for hospital orders,[20] a secondary effect of this special measure is that those for whom hospitalisation is not only unnecessary but inappropriate may, perversely, be seen as not having sufficiently serious needs which require attention in sentencing. Many neurodivergent offenders would fall under this latter category.

[19] In my previous research which examined 300 recent sentencing judgments from Hong Kong concerning offenders suggested to be mentally disordered, hospital orders were only made in 16 of them: Chiu (2024).
[20] Forensic psychiatric institutionalisation has been much criticised for pathologising and unduly depriving mentally disordered offenders of their liberty, often without the usual scrutiny accompanying criminal procedure. See Steele (2020); Lyons (2023).

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In the judgments, there is limited judicial consideration of the potential challenges experienced by neurodivergent individuals in prison, whether difficulties with understanding behavioural norms and navigating the bureaucracies of the institution, the lack of suitable rehabilitative programmes, sensory challenges such as noise, or bullying (Day, 2022). Rather, it seems to be taken for granted by judges that difficulties arising from any mental disorder as categorised by the law, including neurodivergence in this context, will be easily identified and addressed in prison. Whilst not focused on neurodivergence, the quote below demonstrates this issue:

> The other factor [in sentencing] of course is the defendant's physical and mental challenges [cancer and "borderline intelligent or mild mental retardation" (para. 11)]. He will of course be looked after well where he is now, in prison, and so I have no need to really factor in his medical problems beyond the fact it may make his incarceration somewhat more difficult. (*HKSAR v. Cheung Kwok-Wah*, 2019, para. 16.)

There is no further interrogation into the nature of the "mental challenges" mentioned, nor how they will be addressed during the defendant's imprisonment in the rest of the judgment.

In other cases, judges have blatantly conflated the issues of diminished culpability, rehabilitative needs, and other issues relating to mental capacity in the criminal legal process, often with the result of letting the question of past culpability overshadow future needs. Despite the stipulation in case law that the defendant's needs relating to mental disorder should be taken into account in sentencing "whether or not the disorder has been the root cause of the offence" (*HKSAR v. Chiu Yu-To*, 2000, para. 24; see also *Secretary for Justice v. CMT*, 2020),[21] judges have refused or neglected to do so where they have found no disordered offending (see, *e.g.*, *HKSAR v. Wong Siu-Ming*, 2021; *HKSAR v. Amos Chung*, 2018). The following is an especially egregious example of this confusion between different tests of legal capacity in considering the possibility of mental disorder (not specifically neurodivergence), broadly speaking, on the defendant's part:

> Both psychiatric reports … state that the defendant does not require inpatient treatment in a mental hospital, the defence did not suggest during the hearing that the defendant was unfit to plead, and I also observed … that the defendant is able to understand the entire proceedings … , *therefore*, I think there is no need to call for [further] psychiatric reports, I think custodial punishment is the most suitable sentence for this case, but I will make the recommendation that the Commissioner of Correctional Services provides psychiatric and/or psychological treatment to the defendant when necessary. (*HKSAR v. Chu Wing-Kit*, 2020 para. 15, my translation and emphasis.)[22]

[21] Again, neurodivergence would be included under the court's reference to "disorder" here.
[22] The whole paragraph is, indeed, one run-on sentence in the original Chinese judgment. The rather convoluted sentence structure and syntax have been kept to reflect the judge's reasoning as closely as possible.

Needless to say, the questions of unfitness to plead,[23] suitability of a hospital order, and necessity of psy treatment and other accommodations in prison all involve quite different considerations and thresholds. They are, however, melded into one single query of dis/orderedness here, contrary to the neurodiversity paradigm and reflective of the binary view of mental disorder also found in other judgments, where one's competence in different aspects of everyday life is directly equated with full criminal capacity.[24] The lack of guidance on understanding mental disorder in sentencing and in criminal jurisprudence more generally has, arguably,[25] contributed to this confusion and allowed ableist assumptions to seep into judicial decision-making. By extension, the approach to neurodivergence – which has not been appropriately acknowledged as requiring distinct consideration from other psychiatrised conditions – inherits the same problems.

In any case, judges' confidence that neurodivergent detainees will be adequately "looked after" (*HKSAR v. Cheung Kwok-Wah*, 2019, para. 16.) or that any necessary accommodations, support, treatment, or rehabilitative measures will be provided to them in custodial settings seems largely unfounded and possibly misplaced. There is, unfortunately, no comprehensive research on the experience of neurodivergent (and other mentally disordered) offenders in the penal system in Hong Kong beyond anecdotal personal accounts reported in the media (see, *e.g.*, Wong, 2024). A judgment concerning a defendant described as having "a mild grade intellectual disability with significant psychological deviant sexual disorders" (*HKSAR v. Leung Yat-Chi*, 2018, para. 12), however, reveals the lack of training and information available to judges on the treatment of vulnerable individuals in custody, including those who are neurodivergent. In the judgment, the judge refers to the defendant's previous offending and encounter with the criminal justice system, noting that he received "proper psychological help" at the time, but also that it was "not maintained when his probation order was completed" (*HKSAR v. Leung Yat-Chi*, 2018, para. 11). Accepting the expert psychologist's suggestion that a "rehabilitation plan" is needed for the defendant involving "lifestyle restructuring that facilitates his attainment of stable employment and development of social support", the judge concludes:

> *I do not know how it can be ensured [such treatment] is provided*, but I will make an order that [the defendant] be provided with psychological services whilst serving this term of imprisonment. (*HKSAR v. Leung Yat-Chi*, 2018, para. 13., my emphasis.)

The judge's open acknowledgment here that she has no way of ensuring her order will be implemented during the defendant's sentence is concerning, though perhaps not as alarming as the lack of inquisitiveness regarding offenders' psychological vulnerability, general mental health and wellbeing, and specific rehabilitative needs shown in other judgments. To date, sentencing jurisprudence on the general and rehabilitative needs of individuals deemed mentally disordered (including, in this context, neurodivergent offenders) has remained in this

[23] Under Criminal Procedure Ordinance, cap. 221, s. 75, the issue of "fitness to be tried" concerns "whether the accused is under such a disability, that is to say, under any disability such that apart from this Ordinance it would constitute a bar to his being tried".
[24] See section 3.2. above.
[25] See section 2.1 above.

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unsatisfactory state of confusion and opacity, with little known about judicial training in the area or about the specific experiences of neurodivergent offenders subjected to different types of criminal punishment.

4. Conclusion

It has been suggested that the current sentencing regime in Hong Kong "encourages judicial discretion" and that, as a result, "culture plays a definitive role in shaping which factors are salient" in judicial reasoning in this area (Cheng, 2017, p. 514). Certainly, judicial treatment of mentally disordered offenders, under which neurodivergent offenders are currently inappropriately considered, is constituted by and constitutive of "cultures of disability, abnormality and normality circulating in society" (Goggin *et al.*, 2017, p. 338). Despite the social model of disability heralded by the UNCRPD and developments in disability scholarship and advocacy in recent decades,[26] criminal sentencing in Hong Kong continues to be dominated by the biomedical model of disability as well as sanist language and assumptions. This is, perhaps, a reflection of the fact that:

> Despite significant progress in the West, the neurodiversity movement remains in its infancy in East Asia. In Hong Kong, the concept of neurodiversity is relatively new and primarily recognised by the upper socioeconomic class. … Clinical practice often continues to focus on addressing deficits rather than leveraging strengths … . (Lai, Aoki, and Seera, 2025, p. 124)

Given judges' heavy reliance upon psy experts in understanding mental disorder in the civil context (Chiu and Cheung, 2020), it is no surprise that they also see neurodivergence exclusively through a clinical lens of disorder and deficit in the unstructured arena of sentencing, where there is little legislative and judicial guidance both domestically and internationally to steer or constrain their decision-making. Socio-political turmoil and increasing securitisation in the territory in recent years also means that there is little momentum in research and advocacy to push for law and policy reforms in relation to marginalised communities (see Fu, 2025; Cheng, *et al.*, 2023), which include neurodivergent offenders who are perceived by society at large as both *mad* and *bad*.

The thread which runs through the analysis in this chapter has been a clear lack of awareness and understanding about psychiatrised differences in general and neurodivergence specifically seen in sentencing jurisprudence in Hong Kong. Outdated and stigmatising terminology pervades comments made by judges, psy experts, and counsel, and where language used to describe offenders deemed legally disordered is not explicitly discriminatory, it nevertheless implies pathological abnormality inherent to the individual which needs to be fixed or cured. In considering whether an offender may benefit from mitigated culpability, judges are guided by traditional questions, found in established criminal legal doctrines such as insanity and diminished responsibility, which focus on cognitive and rational impairment and thus present an inappropriate test for neurodivergent individuals. In any case, these

[26] The social model, however, also has its critics in critical disability studies as it continues to assume the existence of a stable subject which differs from others for their pre-discursive, "natural" "impairment". See Tremain (2005).

assessments are often grounded in subjective, sanist ideas about what "disordered" offending should look like. The view that dis/order is a binary concept is carried through to the second question in mitigation concerning the offender's rehabilitative needs, where judges again show little knowledge or willingness to carefully engage with individual circumstances beyond outwardly discernible signs of abnormality. Judges' readiness to consider neurodivergent offenders' needs aside, there do not seem to be any established rules or mechanisms which ensure that judicial recommendations for treatment and accommodation are implemented in penal practice. Nor are there any official reports or research which can offer empirical insights into neurodivergent offenders' experiences behind bars.

Given that the neurodiversity paradigm is only beginning to gain traction in Hong Kong society, and that the legislative framework governing "mentally disordered" and "incapacitated" individuals (MHO, cap. 136, s. 2) in Hong Kong remains highly oppressive and fundamentally ableist, a systemic overhaul will be needed for sanist language and assumptions to be completely removed from the criminal justice system. In the meanwhile, however, a few legal and academic endeavours can realistically be put into motion with the long-term goal of improving the treatment of neurodivergent individuals in sentencing. First, a clear set of sentencing guidelines concerning neurodivergence and the impact different forms of neurodivergence have on culpability and rehabilitative needs, akin to the ones set down by the Sentencing Council for England and Wales (2020),[27] would help steer judges towards the right direction in taking into account relevant considerations and discarding irrelevant, discriminatory ones. Second, hand in hand with the guidelines should be judicial training which would equip judges with the necessary knowledge and sensitivity to appropriately consider neurodivergent and other psychiatrised individuals when sentencing. Finally, further theoretical and empirical criminal legal research – by public and private bodies across the common law world – on how issues of psychological vulnerability and capacity should be conceptualised at the sentencing stage is much needed. As seen in the present analysis, the current lack of clarity about the role of mental disorder in sentencing, as distinguished from other questions concerning mental capacity in the criminal legal process, has often led judges to resort to ableist and broadly applied generalisations in order to justify their decisions to grant or refuse mitigation. A better theorisation of *why* and *how* neurodivergence should be considered in sentencing, grounded in the neurodiversity paradigm and lived experience, could eventually lead to a new era of criminal justice which is truly inclusive.

[27] Note that the English sentencing guidelines also suffer from the uncritical use of "mental disorder" and pathologising language to describe diverse psychiatrised differences.

References

Anspach R.R. (1979) 'From stigma to identity politics: political activism among the physically disabled and former mental patients', *Social Science & Medicine*, 13, pp. 765–773.

Baldry, E. (2018) 'Rights of persons with disability not to be criminalised', in E. Stanley (ed.) *Human rights and incarceration: critical explorations*. New York City: Springer , pp. 53–77.

Brown, K. (2015) *Vulnerability and young people: care and control in policy and practice*. Bristol: Policy Press.

Bechsgaard, K.K. (2025) 'The significance of labels: from shy and lazy to autistic and ADHD', *Ought*, 6(2), 16. Available at: https://doi.org/10.9707/2833-1508.1221 (Accessed: 5 November 2025).

Black, J. (2002) 'Regulatory conversations', *Journal of Law and Society*, 29(1), pp. 163–196.

Campbell, F.A.K. (2001) 'Inciting legal fictions: disability's date with ontology and the ableist body of the law', *Griffith Law Review*, 10(1), pp. 42–62.

Campbell, F.K. (2009), *Contours of ableism: the production of disability and abledness*. London: Palgrave Macmillan.

Chen, A.H.Y. (2019) 'A perfect storm: Hong Kong-Mainland rendition of fugitive offenders', *Hong Kong Law Journal*, 49(2), pp. 419–430.

Cheng, K.K. (2017) 'Aggravating and mitigating factors in context: culture, sentencing, and plea mitigation in Hong Kong', *New Criminal Law Review*, 20, pp. 506–533.

Cheng, Y., Tekola, B., Balasubramanian, A., Crane, L., Leadbitter, K. (2023) 'Neurodiversity and community-led rights-based movements: barriers and opportunities for global research partnerships', *Autism*, 27(3), pp. 573–577.

Cheung, D., Dunn, M., Fistein, E., Bartlett, P., McMillan, J., Petersen, C.J. (2020) 'Articulating future directions of law reform for compulsory mental health admission and treatment in Hong Kong', *International Journal of Law and Psychiatry*, 68, 1015123. Available at: https://doi.org/10.1016/j.ijlp.2019.101513 (Accessed: 5 November 2025).

Chiu, M.Y., Wei, G.F., and Lee, S. (2006) 'Personal tragedy or system failure: a qualitative analysis of narratives of caregivers of people with severe mental illness in Hong Kong and Taiwan', *International Journal of Social Psychiatry*, 52(5), pp. 413–423.

Chiu, U. (2021) 'Overprotecting professionals from "vexatious" claims under the Hong Kong Mental Health Ordinance: the question of access to justice for persons with mental illness', *International Journal of Mental Health and Capacity Law*, 28, pp. 54–72.

Chiu, U. (2024) *At the frontiers between penal and psy discourses: judicial constructions of the mentally dis/ordered defendant in Hong Kong sentencing judgments.* Oxford University Research Archive (embargoed). Abstract available at: https://dx.doi.org/10.5287/ora-5j9k6jbbw (Accessed 5 November 2025).

Chiu, U. and Cheung, D. (2020) 'Claiming wrongful diagnosis under the Mental Health Ordinance: the impossibility of building a reasonably arguable case', *Hong Kong Law Journal*, 50(3), pp. 837–850.

Chiu, U. and Chow, P.Y.S. (2023) 'Mental capacity in Hong Kong: inconsistencies, uncertainties, and the need for reform', in M. Bach and N. Espejo Yaksic (eds.) *Legal capacity, disability and human rights*. Cambridge: Intersentia, pp. 277–298.

Craigie, J. (2015) 'Against a singular understanding of legal capacity: criminal responsibility and the Convention on the Rights of Persons with Disabilities', *International Journal of Law and Psychiatry*, 40, pp. 6–14.
Cross, I.G. and Cheung, P.W.S. (2024). *Sentencing in Hong Kong*. 11th edn. New York: LexisNexis.
Dawson, J. (2015) 'A realistic approach to assessing mental health laws' compliance with the UNCRPD', *International Journal of Law and Psychiatry*, 40, pp. 70–79.
Day, A. (2022) 'Disabling and criminalising systems? Understanding the experiences and challenges facing incarcerated, neurodivergent children in the education and youth justice systems in England', *Forensic Science International: Mind and Law*, 3, 100102. Available at: https://doi.org/10.1016/j.fsiml.2022.100102 (Accessed: 5 November 2025).
De Bhaillís, C. and Flynn, E. (2017) 'Recognising legal capacity: commentary and analysis of Article 12 CRPD', *International Journal of Law in Context*, 13(1), pp. 6–21.
Foucault, M. (2016) *Abnormal: lectures at the Collége de France 1974–1975*. Translated by G. Burchell. London: Verso.
Freckelton I. and List, D. (2009) 'Asperger's disorder, criminal responsibility and criminal culpability', *Psychiatry, Psychology and Law*, 16(1), pp. 16–40.
Fu, H. (2025) 'Managed freedom in precarious times: maintaining academic freedom in transitional Hong Kong', *Global Constitutionalism*, 14(1), pp. 182–205.
Gardner, J. (2007) *Offences and defences: selected essays in the philosophy of criminal law*. Oxford: Oxford University Press.
Gibbs, A. (2025) '"It's my brain why don't they get that my brain is different?": the needs of neurodivergent probation service users and what neuro-informed best practice for criminal justice social workers looks like', *Probation Journal*, 72(4), pp. 366–382.
Goggin, G., Steele, L., and Cadwallader, J. R. (2017) 'Normality and disability: intersections among norms, law, and culture', *Continuum: Journal of Media & Cultural Studies*, 31(3), pp. 337–340.
Goodrich, P. (1987) *Legal discourse: studies in linguistics, rhetoric and legal analysis*. London: Palgrave Macmillan.
Goscicki, B.L., Scoggins, M.E., Espinosa, G.H., and Hodapp, R.M. (2025) 'A "round, bruising sort of pain": autistic girls' social camouflaging in inclusive high school settings', *Journal of Autism and Development Disorders*. Available at: https://doi.org/10.1007/s10803-024-06716-5 (Accessed: 5 November 2025).
He, L. (2019) 'HK's future lies with China, not with the West', *Global Times*, 15 August. Available at: https://www.globaltimes.cn/content/1161602.shtml (Accessed: 5 November 2025).
Kapp, S. (2019) 'How social deficit models exacerbate the medical model: autism as case in point', *Autism Policy & Practice*, 2(1), pp. 3–28.
Lacey, N. (2001) 'Responsibility and Modernity in Criminal Law' , *Journal of Political Philosophy*, 9(3), pp. 249–276.
Lafrance, M.N. and McKenzie-Mohr, S. (2013) 'The DSM and its lure of legitimacy', *Feminism & Psychology*, 23(1), pp. 119–140.

Lai, C.L.E., Aoki. A., and Seera, G. (2025) 'Embracing neurodiversity: shifting from deficit-based model to strength-based model', *East Asian Archives of Psychiatry*, 35, pp. 123–127.
Lam, G.Y.H. and Wong, H.T. (2024) 'The representation of neurodivergent individuals in Radio Television Hong Kong's television series *A Wall-less World*', *International Journal of Qualitative Studies in Education*, 37(2), pp. 384–398.
Lang, H.M. (2025) 'History of the autism diagnosis – how the perspectives have changed', *Health Care Analysis*. Available at: https://doi.org/10.1007/s10728-025-00527-0 (Accessed: 5 November 2025).
Law Commission of England and Wales (2004) *Partial defences to murder*. Available at: https://webarchive.nationalarchives.gov.uk/ukgwa/20250109094524mp_/https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2015/03/lc290_Partial_Defences_to_Murder.pdf (Accessed: 5 November 2025).
Law Commission of England and Wales (2013) *Criminal liability: Insanity and automatism*. Available at: https://webarchive.nationalarchives.gov.uk/ukgwa/20190301132026mp_/https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/insanity_discussion.pdf (Accessed: 5 November 2025).
Li, W.O., Fan, T., and Yu, C.K. (2012) 'Difficulty and burden experienced by principal family caregivers of people with intellectual disabilities in Hong Kong', *Asia Pacific Journal of Counselling and Psychotherapy*, 3(1), pp. 95–105.
Lierman, A. (2024) *The struggle you can't see: experiences of neurodivergent and invisibly disabled students in higher education*. Cambridge: Open Book Publishers.
Lyons, K. (2023) 'The neurodiversity paradigm and abolition of psychiatric incarceration', *Columbia Law Review*, 123(7), pp. 1993–2034.
Mackay, R. and Brookbanks, W. (eds.) (2022) *The insanity defence: international and comparative perspectives*. Oxford: Oxford University Press.
Milton, D. (2012) 'On the ontological status of autism: the "double empathy problem"', *Disability & Society*, 27(6), pp. 883–887.
Minkowitz, T. (2014) 'Rethinking criminal responsibility from a critical disability perspective: the abolition of insanity/incapacity acquittals and unfitness to plead, and beyond', *Griffith Law Review*, 23(3), pp. 434–466.
Moran, M. (2003) *Rethinking the reasonable person: an egalitarian reconstruction of the objective standard*. Oxford: Oxford University Press.
Nelson, T. and Lichwa, H. (2025) 'The lived experiences of masking black Autistic girls in UK education: "before people see the autism, they see my race."', *Educational Psychology in Practice*, 41(4), pp. 417–438.
Neurodiversity Association Hong Kong (2024) *Our model*. Available at: https://www.ndahk.com/our-social-model (Accessed: 5 November 2025).
Ostaszewska, A., Harper, G., Davis, R., and Joseph, H. (2025) 'Beyond diagnosis: setting research priorities with the neurodivergent community', *Neurodiversity*, 3, pp. 1–18.
Peay, J. (2016a) 'Responsibility, culpability and the sentencing of mentally disordered offenders: objectives in conflict', *Criminal Law Review*, 3, pp. 152–164.

Peay, J. (2016b) 'An awkward fit: Offenders with mental disabilities in a system of criminal justice', in M. Bosworth, C. Hoyle, and L. Zedner (eds.) *Changing contours of criminal justice*. Oxford: Oxford University Press, pp. 137–151.
Perlin, M.L. (2006) 'International human rights and comparative mental disability law: The role of institutional psychiatry in the suppression of political dissent', *Israel Law Review*, 39(3), pp. 69–97.
Perlin, M.L. (2013) *A prescription for dignity: rethinking criminal justice and mental disability law*. Farnham: Ashgate Publishing.
Reed, A., Wake, N., and Simpson, B. (2021) 'Domestic and comparative perspectives on loss of self-control and diminished responsibility as partial defences to murder: a 10-year review of the Coroners and Justice Act 2009 reform framework', *Northern Ireland Legal Quarterly*, 72(2), pp. 161–170.
Richards, J. (2021) 'Discrimination against defendants with disabilities in the Hong Kong criminal justice system: unfitness to plead rules, the insanity defence and disposition orders', *Hong Kong Law Journal*, 51(3), pp. 875–916.
Robinson, H. and Herring, J. (2024) 'Naming and describing disability in law and medicine', *Cambridge Quarterly of Healthcare Ethics*, 33(3), pp. 401–412.
Rose, N. (1996) *Inventing our selves*. Cambridge: Cambridge University Press.
Russell, G., Moore, I., Norman, S., and Harrington, J. (2025) 'Diagnosis and diversity: feminism, autistic identity, and the possibilities for neurodiversity', *Neurodiversity*, 3, pp. 1–12.
Sentencing Council for England and Wales (2019). *General guideline: overarching principles*. Available at: https://sentencingcouncil.org.uk/guidelines/general-guideline-overarching-principles/ (Accessed: 5 November 2025).
Sentencing Council for England and Wales (2020). *Sentencing offenders with mental disorders, developmental disorders, or neurological impairments*. Available at: https://sentencingcouncil.org.uk/guidelines/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/ (Accessed: 5 November 2025).
Shildrick, M. (2020) 'Critical disability Studies: rethinking the conventions for the age of postmodernity', in N. Watson and S. Vehmas (eds.) *Routledge handbook of disability studies*. 2nd ed. Abingdon: Routledge, pp. 32–44.
Smith, T. and Renehan, N. (2025) 'The neurodivergence in criminal justice network: connecting research, professionals and lived experience to improve criminal justice practice', *Prison Service Journal*, 280, pp. 48–55.
Steele, L. (2020) *Disability, criminal justice and law*. Abingdon: Routledge.
Steele, L. and Thomas, S. (2014) 'Disability at the periphery: legal theory, disability and criminal law', *Griffith Law Review*, 23(3), pp. 357–369.
Sullivan F. (2017) 'Not just language: an analysis of discursive constructions of disability in sentencing remarks', *Continuum: Journal of Media & Cultural Studies*, 31(3), pp. 411–421.
Suttie, N. (2025) 'Lifting the "double mask": neurodivergent working-class students and the University experience', in J. Pilgrim-Brown, T. Crew, and E. Attridge (eds.) *Working-class people in UK higher education*. Leeds: Emerald Publishing, pp. 73–88.

Ta Kung Pao (2020) '調查報道：黑暴黃媒 推殘疾人做炮灰' ('Investigative report: Corrupt and violent yellow media pushed disabled people into becoming cannon fodder'), 26 August. Available at: http://www.takungpao.com.hk/231106/2020/0826/490685.html (Accessed: 5 November 2025).
Talbot, J. (2010) 'Prisoners' voices: experiences of the criminal justice system by prisoners with learning disabilities', *Tizard Learning Disability Review*, 15(3), pp. 33–41.
Tremain, S. (2005) 'Foucault, governmentality, and critical disability theory', in S. Tremain (ed.) *Foucault and the government of disability*. Michigan: University of Michigan Press, pp. 1–24.
Vinter, L.P., Dillon, G., and Winder, B. (2023) '"People don't like you when you're different": exploring the prison experiences of autistic individuals', *Psychology, Crime & Law*, 29(3), pp. 243–262.
Wong, J. (2024) 'Hong Kong prison memoir captures pain of neurodivergence in an era of ignorance', *The Hong Konger*, 2 October. Available at: https://hongkonger.world/2024/10/02/hong-kong-prison-memoir-captures-pain-of-neurodivergence-in-an-era-of-ignorance/ (Accessed: 5 November 2025).
Wong, W.C. and Wong, I.Y.F. (2020), 'Burden and coping strategies of parents of children with attention deficit/hyperactivity disorder in Hong Kong: a qualitative study', *Nursing Open*, 8, pp. 3452–3460.
World Health Organization (2025) *ICD-11 for Mortality and Morbidity Statistics*. Available at: https://icd.who.int/browse/2025-01/mms/en (Accessed: 5 November 2025).

Legislation

Basic Law 1997 (Hong Kong)
Crimes (Sentencing Procedure) Act 1999 (New South Wales)
Criminal Code (RSC 1985, c. C-46) (Canada)
Criminal Procedure Ordinance, cap. 221 (Hong Kong)
Dangerous Drugs Ordinance, cap. 134 (Hong Kong)
Homicide Act 1957, c. 11 (England and Wales)
Homicide Ordinance, cap. 339 (Hong Kong)
Mental Health Ordinance, cap. 136 (Hong Kong)
Offences against the Person Ordinance, cap. 212 (Hong Kong)
Sentencing Act 1991 (Victoria)
Sentencing Act 2002 (New Zealand)
United Nations Convention on the Rights of Persons with Disabilities

Cases

Henry v. R [2019] NZCA 407
HKSAR v. Cheung Kwok-Wah [2019] HKDC 92
HKSAR v. Chiu Peng [2002] 1 HKLRD 185
HKSAR v. Chiu Yu-To CACC 104/2000
HKSAR v. CWC [2021] HKMagC 14
HKSAR v. Ho Po-Kwong [2021] HKCFI 2835

HKSAR v. Lai Yuk-Man [2020] HKCFI 3138
HKSAR v. Lam Kwok-Wing [2021] HKCFI 3787
HKSAR v. Lau Chung-Kwan [2019] HKDC 1285
HKSAR v. Lee Kai-Fat [2020] HKCFI 2854 (official English translation)
HKSAR v. Leung Yat-Chi [2018] HKDC 1110
HKSAR v. Leung Yat-Chi [2020] HKDC 746
HKSAR v. Limbu Jun-Kang [2019] HKCFI 583
HKSAR v. Neoh Weng-Wah [2018] HKDC 1347
HKSAR v. Ng Chi-Yeung [2019] HKDC 548
HKSAR v. Shek Ka-Chun [2019] HKCFI 1993
HKSAR v. So Wai-Keung [2020] HKDC 658
HKSAR v. Tai Wan-Hoi [2021] HKCFI 3040
HKSAR v. Tam Chun-Leung [2020] HKDC 915
HKSAR v. Yan Ting-Leong [2018] HKDC 1460
HKSAR v. Yeung Kwok-Wai [2018] HKDC 1264
HKSAR v. Yip Cheuk-Yan [2021] HKDC 1258
HKSAR v. 劉正彥 ("Lau Ching-Yin") [2018] HKDC 1138
HKSAR v. 周錦昌 ("Chow Kam-Cheung") [2018] HKDC 1605
HKSAR v. 姚浩賢 Marco ("Marco Yiu") [2018] HKDC 1204
HKSAR v. 容偉業 ("Yung Wai-Yip") [2019] HKCFI 1985
HKSAR v. 彭偉明 ("Pang Wai-Ming") [2021] HKDC 1423
HKSAR v. 曾勁麟 ("Tsang King-Lun") [2021] HKDC 1104
HKSAR v. 朱永杰 ("Chu Wing-Kit") [2020] HKDC 97
HKSAR v. 李培浩 ("Lee Pui-Ho") [2022] HKDC 691
HKSAR v. 梁偉倫 ("Leung Wai-Lun") [2020] HKDC 996
HKSAR v. 王紹明 ("Wong Siu-Ming") [2021] HKDC 914
HKSAR v. 畢慧芬 Amy ("Amy Pat") [2019] HKDC 1636
HKSAR v. 蔡慶輝 ("Choi Hing-Fai") [2018] HKDC 208
HKSAR v. 賴雲龍 ("Lai Wan-Lung") [2020] HKMagC 1
HKSAR v. 邱頌賢 ("Yau Chung-Yin") [2020] HKDC 1171
HKSAR v. 鍾子健 ("Chung Chi-Kin") [2020] HKDC 881
HKSAR v. 鍾浩德 Amos ("Amos Chung") [2018] HKDC 1313
HKSAR v. 馬浩鏘 ("Ma Ho-Cheung") [2020] HKDC 1113
HKSAR v. 黃兆樂 ("Wong Siu-Lok") [2018] HKDC 1637
M'Naghten's Case (1843) 8 ER 718
Secretary for Justice v. CMT [2020] HKCA 939