

Speech by Mr Keith Yeung, SC
Director of Public Prosecutions of the Hong Kong Special Administrative Region
at the Peking University on 25 October 2013

1. I would like to discuss with you some aspects of the prosecution system in Hong Kong.

Independent Prosecutorial Powers Vested in the Department of Justice

2. The rule of law is a core value of the community of the HKSAR. In our legal system, the Department of Justice plays a very significant role. The Department gives legal advice to other bureaux and departments of the Government, represents the Government in legal proceedings, drafts government bills, control criminal prosecutions, and promotes the rule of law.
3. Article 63 of the Basic Law of the Hong Kong Special Administrative Region provides that the Department of Justice “*shall control criminal prosecutions, free from any interference*”.
4. This is a very important constitutional guarantee. It ensures that prosecutors within the Department may act independently without political or other improper or undue influence.
5. In particular, a prosecutor must not be influenced by:
 - a. any investigatory, political, media, community or individual interest or representation;
 - b. the personal feelings or beliefs of the prosecutor concerning the offence, the suspect, the accused or a victim of crime;
 - c. the possible effect of the decision on the personal or professional circumstances of those who have the conduct of the case;

- d. the possible political effect on the government, any political party, any group or individual;
 - e. possible media or public reaction to the decision;
 - f. the race, religion, sex, ethnic or national origin, colour, language, political or other opinion, social origin, social or political affiliation, official or other position in the community, lawful activities, beliefs, property, health, disability or any other personal characteristics of the suspect or accused or any other person involved or concerned.
6. The Secretary for Justice is head of the Department of Justice. The Secretary is responsible for applying the criminal law, formulating prosecution policy, and superintending the Director of Public Prosecutions and prosecutors in the Prosecutions Division of the Department. The Court of Appeal of Hong Kong stated in *In Re C (A Bankrupt)* [2006] 4 HKC 582 at 590:

“The prosecutorial independence of the Secretary for Justice is a linchpin of the rule of law... ‘the decision whether any citizen should be prosecuted or whether any prosecution should be discontinued, should be a matter for the prosecuting authorities to decide on the merits of the case without political or other pressure.’ [Sir Robert Finlay, 1903] ...these statements...reflect accepted and applied fundamental principle in this jurisdiction the continuation of which is preserved by the entire theme of the Basic Law as well, specifically, as by article 63.”

7. The Director of Public Prosecutions is head of the Prosecutions Division of the Department of Justice and responsible for the conduct of the Prosecutions Division.
8. The Director initiates and conducts the prosecution of cases on behalf of the Hong Kong Special Administrative Region. There is one important point here which we have to note: at court, the prosecutor represents the Hong Kong Special Administrative Region, not the government or the law enforcement agencies. Investigators are not “clients” of prosecutors, nor do they give “instructions” to

prosecutors. I go back to Article 63 of the Basic Law, that the prosecutorial power vested in the Department of Justice is an independent one.

9. The Director is responsible to the Secretary for Justice for:
 - a. directing public prosecutions;
 - b. advising the Secretary on criminal law related matters, except in specific matters in which the Secretary has authorised the Director to determine the matter on his or her own;
 - c. advising law enforcement agencies in respect of prosecutions generally or in respect of a particular investigation that may lead to a prosecution;
 - d. developing and promoting prosecution policy;
 - e. advising the government on the development, enforcement and implementation of the criminal law.

Role and Duties of the Prosecutors

10. A prosecutor is required to comply with and promote the rule of law. A prosecutor acts on behalf of the community in an impartial manner and as a “minister of justice”. To this end, a prosecutor must fairly and objectively assist the court to arrive at the truth and to do justice between the community and the accused according to law.
11. I cite what Rand J. of the Supreme Court of Canada stated in *Boucher v The Queen* [1955] SCR 16 at 23-24:

“It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion

of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”

12. In litigation, a prosecutor must act fairly to the accused. In particular, a prosecutor must fairly seek to have relevant and credible evidence placed fully and intelligibly before the court; assist the court with accurate and complete submissions of law, to enable the law properly to be applied to the facts; refrain from expressing any personal opinion, especially as to the credibility of evidence or the guilt of the accused; and invite the court to stop the proceedings if it becomes reasonably apparent to the prosecutor that there is no longer a reasonable prospect of conviction.
13. A prosecutor also owes a duty of fairness to the community, through carrying out the responsibilities of prosecuting in as effective and efficient a fashion as is reasonably possible.
14. A prosecutor, in carrying out his or her role, is in a position to affect substantially the human rights of suspects, accused, victims, witnesses and other members of the public. A prosecutor has an obligation to be aware of those rights, as well as their sources, and to respect or give effect to them as appropriate in the course of criminal proceedings. Such rights include equality before the law, the rights to have confidential legal advice, to be presumed innocent, and to have a fair trial without undue delay under Basic Law (“BL”) Articles 25, 35 and 87 (Bill of Rights (“BOR”) Articles 10 and 11). The prosecutor should also be aware that the Basic Law recognizes freedom of speech (Article 27; BOR Article 16(2)); inviolability of the freedom of the person (Article 28; BOR Article 5); inviolability of the home (Article 29; BOR Article 14); freedom and privacy of communication (Article 30; BOR Article 14); freedom of movement (Article 31; BOR Article 8); freedom of conscience and religion (Article 32; BOR Article 15).

Decision to Prosecute

15. In the context of criminal prosecution, the decision to prosecute is one of the most important duties and functions of the Secretary for Justice and Director of Public Prosecutions.

16. Section 15(1) of the Criminal Procedure Ordinance, Cap. 221 states:

“The Secretary for Justice shall not be bound to prosecute an accused person in any case in which he may be of opinion that the interests of public justice do not require his interference.”

17. The decision to prosecute includes two required components. The first is that the admissible evidence available is sufficient to justify instituting or continuing proceedings. The second is that the general public interest must require that the prosecution be conducted.

18. Sufficiency of Evidence is by itself a very big topic. I am sure that we will have the chance to discuss this in some other future occasions.

19. I do however want to highlight the issue of public interest.

20. The first point to note is that even where there is sufficient evidence to prosecute, a prosecutor must consider the second component, the requirements of the public interest.

21. There can be no exhaustive list of the considerations to be addressed when making this assessment, but they include:

- a. the nature and circumstances of the offence, including any aggravating or extenuating circumstances;

- b. the seriousness of the offence: more serious offences, including those where a victim has suffered significant harm or loss, or where there have been multiple victims, are more likely to be prosecuted in the public interest;
- c. the effect of a prosecution on Hong Kong law enforcement priorities;
- d. any delay in proceeding with a prosecution and its causes;
- e. whether or not the offence is trivial, technical in nature, obsolete or obscure;
- f. the level of the suspect's culpability;
- g. the involvement of other suspects in the commission of the offence;
- h. any cooperation from the suspect with law enforcement or demonstrated remorse: the public interest may be served by not prosecuting a suspect who has made admissions, demonstrated remorse, compensated a victim and/or cooperated with authorities in the prosecution of others;
- i. any criminal history of the suspect;
- j. the attitude, age, nature or physical or psychological condition of the suspect, a witness and/or a victim;
- k. the likely final disposition of the case;
- l. the prevalence of the offence and any deterrent effect of a prosecution;
- m. special circumstances that would affect the fairness of any proceedings;
- n. the availability and efficacy of alternatives to prosecution, such as a caution, warning or other acceptable form of diversion.

Concluding words

- 22. The above gives you an overall view of some of the most important concepts behind the prosecution system in Hong Kong. Unfortunately this is all we have time for today. I would like to have the chance to share with you in the future other aspects of our criminal system, perhaps in greater detail.
- 23. Thank you