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**Summary of Judicial Decision**

**Secretary for Justice v Leung Kwok Hung (“the Respondent”)**

**HCMA 520/2018; [2020] HKCA 424**

**Decision** : **Appeal by way of case stated allowed**  
**Date of Hearing** : **1 August 2019 and 12 May 2020**  
**Date of Judgment** : **2 June 2020**

**Background**

1. On 15 November 2016, the Panel on Housing and the Panel on Development of LegCo held a joint meeting. The Respondent, then a LegCo member and Mr Ma Siu-cheung, then Under Secretary for Development were in attendance. In the course of it, the Respondent left his seat, approached Mr Ma, snatched his meeting folder which contained confidential documents from the bench at which Mr Ma sat and passed it to another LegCo member for him to read, ignoring the repeated demands of the meeting’s chairperson to return to his seat and return the folder to Mr Ma. In the end, the chairperson ordered the Respondent to withdraw from the meeting pursuant to Rule 45(2) of the Rules of Procedure of LegCo. Mr Ma’s folder was retrieved by a security guard and returned to him.
2. On 12 May 2017, the Respondent was prosecuted for the offence of contempt, contrary to section 17(c) of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) (“LC(PP)O”).
3. After a preliminary hearing, Acting Principal Magistrate Ms Ada Yim (“the Magistrate”) on 5 March 2018 ruled that what was said and done by a LegCo member during proceedings was within the sphere of the privilege under section 3 of the LC(PP)O provided that it did not amount to an ordinary criminal offence; and that although section 17(c) was applicable to the proceedings of LegCo or a committee in general, it was not applicable to LegCo members. Those being her rulings, the Magistrate did not find it necessary to decide whether section 17(c), if found to be applicable to a LegCo member, was unconstitutional. The hearing before the Magistrate had since been adjourned *sine die*.
4. Pursuant to section 105 of the Magistrates Ordinance (Cap. 227), the Secretary for Justice appealed against the Magistrate’s rulings by way of case stated. Such hearing is usually heard in the Court of First Instance of the High Court. However, at the Direction Hearing on 29 November 2018, Anthea Pang J ordered that the appeal be reserved for the consideration of the Court of Appeal under section 118(1)(d) of the Magistrates Ordinance.



### Issues in dispute

5. Four questions of law based on the Magistrate's rulings are raised in this appeal:
  - (1) Was the Magistrate correct in finding that what is said and done by a member of LegCo during the proceedings is within the sphere of the privilege provided that it does not amount to an ordinary criminal offence? (Question 1)
  - (2)(a) Was the Magistrate correct in ruling that, upon true interpretation, section 17(c) of the LC(PP)O is not applicable to the members of LegCo? (Question 2(a))
  - (2)(b) Was the Magistrate correct in ruling that, upon true interpretation, section 17(c) of the LC(PP)O is applicable to the proceedings of LegCo or a committee in general (i.e. not limited to proceedings related to evidence taking under oath)? (Question 2(b))
  - (3) Should the Magistrate's ruling that section 17(c) is inapplicable to the Respondent be upheld on the further alternative basis that section 17(c) is unconstitutional if interpreted to apply to a member of LegCo? (Question 3)

### Department of Justice's Summary of the Court's rulings

(full text of the Court of Appeal's judgment at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=128319&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=128319&QS=%2B&TP=JU))

6. Since both sections 3 and 17(c) are statutory provisions, their scope and interface must be determined by the courts as a matter of statutory interpretation. Indeed, in *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689, the Court of Final Appeal at [39]-[43] held that under the constitutional framework of the Basic Law, the courts will determine whether LegCo has a particular power, privilege or immunity. (paragraph 14)
7. It is trite that the courts adopt a purposive and contextual approach to statutory interpretation. The context of a statutory provision is taken in its widest sense and includes other provisions of the statute and the existing state of the law. It also includes its legislative history and purpose. (paragraph 18)
8. The state of the relevant law existing at the time of the enactment of the LC(PP)O in 1985 is this. LegCo members had the absolute privilege of freedom of speech and debate in Council by virtue of the doctrine of inherent



necessity. LegCo also had inherent disciplinary power to maintain its order and discipline to deal with contempts including the power to order a member to withdraw on gross disorderly conduct or a non-member to withdraw. But LegCo did not have penal jurisdiction to impose criminal sanctions, such as fine or imprisonment, against any person, whether he was a member or not, for his disorderly conduct generally. There was no criminal offence for such disorderly conduct either. LegCo had jurisdiction to punish persons guilty of contempt in connection with proceedings for taking evidence under section 4(1) of the Oaths and Declarations Ordinance (Cap. 11) (“ODO”). However, there was no criminal offence as such in the criminal statute or at common law. (paragraphs 20-29)

9. The deliberations during the legislative process shed light on the purpose and context of the LC(PP)O. The first point to note from the legislative deliberations is that the privileges and immunities to be conferred on LegCo by legislation are derived from those already in existence under the common law doctrine of inherent necessity. The same doctrine of necessity should inform an exercise to define the scope of the privileges as a matter of statutory interpretation, as in the present. (paragraphs 30 & 34)
10. To a limited extent, the LC(PP)O is a codification. The common law doctrine of inherent necessity applied to the pre-1997 LegCo. Insofar as the privileges and immunities were conferred by that doctrine, they are codified in the corresponding provisions in Part II. They include the absolute privilege of section 3, which is modelled on article 9 of the English Bill of Rights 1689. Further, section 4 of the ODO was replaced by the corresponding provisions in Part III. However, the criminal offences in Part IV including those in connection with evidence, such as refusing to give evidence, giving false evidence, interference or obstruction of witnesses, etc and disorderly conduct are not codifying provisions as such. Those concern proceedings of witnesses might have been derived from the ODO. Prior to the enactment, there were no such criminal offences, whether in statute or at common law. Only LegCo had the jurisdiction to punish persons guilty of such conduct. It was open to LegCo to relinquish the jurisdiction to the courts by enacting the provisions. For other criminal offences, LegCo did not have the necessary penal jurisdiction. The corresponding provisions including section 17(c) vested the courts, and not LegCo, with the jurisdiction to punish persons guilty of the same. (paragraphs 36-37)
11. Like any other legislature, LegCo can only properly discharge its constitutional functions as legislature of Hong Kong, free from outside interference, in an



environment which is secure, dignified and conducive to the orderly and effective conduct of its business without disruption or disturbance while permitting members of the public to observe its proceedings as an open process. The LC(PP)O clearly aims at securing such a statutory framework for LegCo. Protection of the core legislative and deliberative business in terms of free speech and debate in the Council and proceedings in a committee is conferred by sections 3 and 4. Together with other privileges and immunities, they aim at enabling LegCo to carry out its functions independently and without outside interference. The provisions regulating admittance, etc and for offences, including section 17(c) aim at maintaining the secure and dignified environment that LegCo needs to carry out its functions. This main purpose of the LC(PP)O is also illustrated by the retention and continual application of the Standing Orders at the time of the enactment and after 1997, their replication in the Rules of Procedure. They set a standard of orderly behavior for both members and non-members that is congruent with LegCo's constitutional and social importance so that it may perform its functions orderly and effectively without interference and disruptions. (paragraphs 40, 42 & 43)

12. The following general propositions germane to the privileges and immunities of LegCo also inform the interpretative exercise at hand. First, the privileges and immunities are deeply rooted in the doctrine of separation of powers to enable LegCo to function properly, efficiently and without interference or disruptions. This is well borne out in the judgment of the Court of Final Appeal in *Leung Kwok Hung v President of the Legislative Council (No 1)*, supra. Second, the non-intervention principle identified by the Court of Final Appeal is necessarily subject to constitutional requirements. Third, the purpose of conferring the privileges and immunities on LegCo members is not to put them above the law. They just ensure that LegCo members can carry out their role and perform their functions as legislators without fear of any outside interference such as executive action or proceedings in the courts. Fourth, following on from the third proposition, since the whole purpose of conferring the privileges and immunities is to enable LegCo members to perform their functions as legislators without fear or interference, they are not immune from civil or criminal proceedings merely by reason of their status. Thus they would enjoy no immunity if charged with ordinary criminal offences which are not connected with their legislative functions. Fifth, the courts will determine whether the legislature has a particular power, privilege or immunity by the test of necessity, that is, whether it is necessary to the legislature's capacity to function as a legislative body. The test of necessity can also be formulated thus:



does the claimed privilege or immunity go to the “core or essential business” of the legislature. In drawing the contour of the privilege and immunity, the courts must firmly bear in mind the doctrine of separation of powers, the underlying rationale why privilege and immunity are conferred and the test of necessity. The boundary the courts draw should not be too narrow, lest it would unduly restrict legislators in performing their functions by placing them at the mercy of legal proceedings by others including the executive. Nor should it be too wide either, lest it would easily allow legislators’ wrongful or even criminal conduct to go unchecked and undeterred. (paragraphs 45-54)

13. The privilege under section 3 must not be exercised in a way which is contrary to or inconsistent with or even defeats the main purpose of LC(PP)O in creating and maintaining a secure and dignified environment that LegCo needs to conduct its business orderly and effectively. Equally important, the privilege must not be exercised in a way which infringes the same privilege other LegCo members need in order to perform their functions as legislators. It follows that the privilege must not be exercised in a so disruptive manner that it is caught by the impugned conduct of section 17(c). For it cannot possibly be the legislative intent to confer the privilege of section 3 to allow a LegCo member to cause or join a disturbance which interrupts or is likely to interrupt the proceedings of the Council or a committee, thereby disrupting the business of the Council or the committee and infringing the freedom of speech and debate of other LegCo members. (paragraph 59)
14. It is not inherently necessary for the proper functions of LegCo to give its member, as part of the privilege of section 3, the freedom to disorderly conduct themselves within the meaning of section 17(c), thereby disrupting LegCo’s business or infringing other members’ freedom of speech and debate. The protection for such disorderly conduct does not go to the core or essential business of LegCo. (paragraph 60)
15. The boundary of the privilege of section 3 drawn above only aims at prohibiting a member from frustrating the very purpose of the privilege being granted for the furtherance of the functions of LegCo and from infringing other members’ same privilege, and no more. It does not inhibit any member from exercising their freedom of speech and debate in any manner other than that caught by section 17(c). Subject to constitutional requirements, he is still entitled to exercise his freedom of speech and debate within the boundary of the absolute privilege freely in the proceedings of the Council or a committee. (paragraph 61)



16. Section 17(c) is derived from the English law on parliamentary privilege concerning contempt of Parliament. The English experience shows that Parliament, if so decided, could relinquish the penal jurisdiction to the courts without offending the non-intervention principle. Before 1997, LegCo did not have penal jurisdiction to deal with contempt of legislature generally, whether committed by members or not. It is clear from the legislative process of the LC(PP)O that it was considered necessary to give LegCo additional safeguards to maintain its order and discipline. The protective disciplinary powers to deal with contempt of legislature were not sufficient. New criminal sanctions in Part IV to punish for contempt of legislature were created. LegCo decided to vest the penal jurisdiction with the courts. LegCo had thereby made a deliberate and informed decision to relax the non-intervention principle by relinquishing to the courts the penal jurisdiction it could have claimed over matters concerning contempt of legislature which falls within the rubric of its exclusive cognisance. Insofar as it concerns a member whose conduct is caught by section 17(c), LegCo retains its full exclusive jurisdiction to discipline him. As an additional safeguard to maintain its order and discipline, LegCo gives the courts the criminal jurisdiction to penalize him should a prosecution be brought under section 17(c). (paragraphs 65 & 71)
17. By virtue of the criminal offences in Part IV, both LegCo and the courts have different, overlapping, jurisdiction over contempt of legislature. LegCo can take disciplinary proceedings against the person guilty of such contempt; the courts can try him for the crime. That being the case, careful consideration must be given to see if a prosecution is warranted for a particular case. Accordingly, section 26 of the LC(PP)O provides that no prosecution for an offence under the Ordinance shall be instituted except with the consent of the Secretary for Justice. The Secretary must consider if it is in the public interest to bring the prosecution. The non-intervention principle does not prevent LegCo from conferring the criminal jurisdiction to the courts over a member whose conduct is caught by section 17(c). (paragraphs 72-73)
18. Read in the context of the LC(PP)O as a statutory framework to provide a secure and dignified environment for LegCo to perform its functions and conduct its business orderly and effectively, section 17(c) clearly aims at protecting the order and discipline of all the proceedings in the Council or a committee from any person whose conduct is caught by the provision, whether he is a member or not. Insofar as criminal offences are concerned, the LC(PP)O is not a codifying statute. The new criminal offences, including section 17(c), were created to give LegCo further safeguards to maintain its order and discipline.



The wording used in section 17(c) is “any person”. It is the natural and ordinary meaning of the wording used. If the legislative intent were to exclude a member, it would have used the same formula in section 20: “any person, other than a member ... of the Council”. The legislative intent is clearly to include a member. Excluding a member from its application would have the consequences of defeating the main purpose of the LC(PP)O and infringing other members’ exercise of their privileges and immunities in performance of their functions. (paragraphs 75-77)

19. Section 17(c) must cover all proceedings in order to achieve the aim of the statutory framework of the LC(PP)O by protecting the order and discipline of the proceedings of the Council and its committee. It cannot be limited to proceedings for taking evidence under oath or indeed any type of proceedings. (paragraph 78)
20. On a proper interpretation, section 17(c) applies to a LegCo member. (paragraph 79)
21. Under the constitutional framework of the Basic Law, only the courts have judicial powers. LegCo is never vested with any judicial power. Since penal jurisdiction is judicial, it always belongs to the courts exclusively. It is exactly because of the doctrine of separation of powers that section 17(c) must vest the penal jurisdiction with the courts and not anybody else, including LegCo. LegCo’s decision to relax the non-intervention principle as explained above conforms entirely with that doctrine. Section 17(c) does not offend the doctrine of separation of powers. It is constitutional. (paragraphs 81-82)
22. The answers to the questions of law (see paragraph 5 above) are:
  - (1) Question 1: the Magistrate erred in finding that the privilege of section 3 covers the disorderly conduct of a LegCo member if caught by section 17(c);
  - (2) Question 2(a): No;
  - (3) Question 2(b): Yes; and
  - (4) Question 3: No.

**Prosecutions Division**  
**Department of Justice**

**June 2020**