

# 特稿

## Feature Article

律政司：倫敦來客有感

The Department of Justice:  
Some views from London

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2010年10月，我首次踏足香港，時任刑事檢控專員是麥偉德資深大律師<sup>1</sup>。2010年12月至2011年3月期間，我重臨此地，離開時想不到日後會頻頻回來，接連處理與律政司有關的工作<sup>2</sup>。首度訪港，距今九載，其間薛偉成資深大律師、楊家雄資深大律師和現任的梁卓然資深大律師相繼接任專員一職。他們都是出類拔萃的律師，一直致力為香港的公眾利益服務，表現卓越，誰都想與他們在同一陣線。他們不但兼備律師和行政人員才能，更彰顯檢控官作為獨立“秉行公義者”行事的典範。正如加拿大最高法院法官Rand在 *Boucher 訴 女皇* [1955] SCR 16 一案（第23至24頁）指出：“檢控官不可存有任何勝敗之心；其職能純粹是為公眾服務，在所有公職人員當中，他承擔的個人責任，無人能及。檢控官應本着司法程序固有的威信、尊嚴和公義感，有效地履行其職責。”簡潔的文字表達了崇高的目標。然而，不管專員（無論男女<sup>3</sup>）如何精明幹練，也無法獨力達到這個目標。律政司刑事檢控科是一支高度專業、極具效率的團隊，科內優秀人員克盡厥職，其日常工作（往往不為人知或鮮獲公眾表揚）對香港司法工作的運作至為重要。《基本法》第63條確認律政司主管刑事檢察工作的關鍵角色，並保障律政司享有作出專業決定而不受任何外界干涉的自由。鑑

I first came to Hong Kong in October 2010. At that time, the Director of Public Prosecutions was Mr Ian McWalters SC<sup>1</sup>. At the end of my next visit, between December 2010 and March 2011, I had no idea that I would return on a frequent basis and become so involved with the work of the Department of Justice<sup>2</sup>. In the nine years since my first trip, the post of Director has been filled by Mr Kevin Zervos SC, Mr Keith Yeung SC and now Mr David Leung SC. These are formidable and distinguished lawyers who have served and continue to serve the public interest of Hong Kong with great distinction. Who would not want them on their side? Quite apart from their skills as lawyers and administrators, they exemplify the ideal of the prosecutor acting as an independent ‘minister of justice’. As Rand J expressed it, speaking for the Supreme Court of Canada, in *Boucher v The Queen* [1955] SCR 16 (at 23-24): “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.” These are elegant words expressing noble values. But no Director, no matter how skillful or dynamic can do it on his or her own<sup>3</sup>. The Prosecutions Division of the Department is a highly professional and efficient organization with a dedicated and talented group of individuals whose daily work (often unnoticed or unsung by the wide public) is vital to the functioning of the administration of justice in Hong Kong. The pivotal role

- 1 我獲委聘在香港特別行政區 訴 *Nancy Ann Kissel* [2011] 3 HKLRD 1, 高院刑事案件 2010 年第 55 號, [2014] 1 HKLRD 460, [2014] HKEC 155, [2014] HKEC 779 一案重審時負責檢控工作。濫用程序的論點在 2010 年 11 月聆訊, 重審在 2011 年年初進行。  
I had been instructed to prosecute the retrial in *HKSAR v Nancy Ann Kissel* [2011] 3 HKLRD 1, HCCC 55/2010, [2014] 1 HKLRD 460, [2014] HKEC 155, [2014] HKEC 779. The abuse of process argument was heard in November 2010 and the trial took place at the beginning of 2011.
- 2 香港特別行政區 訴 陳振聰 [2013] 6 HKC 437, 高院刑事案件 2012 年第 182 號, [2015] HKEC 2256, [2016] HKEC 304; 香港特別行政區 訴 *Krieger* [2014] 3 HKLRD 404, [2014] HKEC 1323; 香港特別行政區 訴 許仕仁, 高院刑事案件 2013 年第 98 號, [2016] HKEC 350, (2017) 20 HKCFAR 264; 律政司司長 訴 陳志雲及另一人 (2017) 20 HKCFAR 98; 香港特別行政區 訴 李國祥及其他人 (2014) 17 HKCFAR 319; 香港特別行政區 訴 曾蔭權 [2018] 2 HKLRD 186, 高院刑事案件 2015 年第 484 號, [2018] 3 HKLRD 564, [2018] 4 HKLRD 430, [2018] HKCFA 63; 香港特別行政區 訴 余力維 [2019] 1 HKLRD 1149。  
*HKSAR v Chan Chun Chuen* [2013] 6 HKC 437, HCCC 182/2012, [2015] HKEC 2256, [2016] HKEC 304; *HKSAR v Krieger* [2014] 3 HKLRD 404, [2014] HKEC 1323; *HKSAR v Hui Rafael Junior* HCCC 98/2013, [2016] HKEC 350, (2017) 20 HKCFAR 264; *Secretary for Justice v Chan Chi Wan Stephen & Another* (2017) 20 HKCFAR 98; *HKSAR v Li Kwok Cheung George & Others* (2014) 17 HKCFAR 319; *HKSAR v Tsang Yam Kuen Donald* [2018] 2 HKLRD 186, HCCC 484/2015, [2018] 3 HKLRD 564, [2018] 4 HKLRD 430, [2018] HKCFA 63; *HKSAR v Yu Lik Wai William* [2019] 1 HKLRD 1149.
- 3 我深信專員一職不久將由女性擔任。  
I fully expect the post of Director to be filled by a woman in the not too distant future.



於法律對各個公共行政範疇影響益增，亦伸展至日常生活每個角落<sup>4</sup>，加上對立團體之間的社會矛盾日多（而這些矛盾終究會在法庭審理），刑事檢控工作的獨立性因而更見重要。

我對律政司的工作和理念的欽佩，並沒有因為習以為常而減退。我處理每宗案件時都得到不少能幹的律師協助。這些專業人員竭力維護公義，對履行職責時得到全港市民信任，亦由衷感謝。法庭工作僅是部分職責，看數字可了解更多。律政司約有 1,500 名員工，而刑事檢控科由專員領導，轄下有四名副專員及 145 名檢控官提供支援。2018 年，該科就 13,105 宗案件向執法機構提供法律指引，籌備由原訟法庭審理的案件數目有 413 宗，區域法院則有 1,183 宗。這些數字若非以驚人來形容，也可說是極可觀，某程度反映了該科的工作量。此外，還有 407 宗在上訴法庭審理的案件和六宗在終審法院審理的刑事案件。

據我經驗所知，檢控官籌備案件時一絲不苟、考慮周詳，不會斤斤計較合約訂立的工時，經常工作至晚上，周末加班亦司空見慣。然而，我從未聽過任何人員為此抱怨，他們只視之為理所當然，是其專業職責的一部分。

自 1997 年以來，法院在專業律師的協助下，累積了大量案例。香港在處理刑事案件方面的一大特色是不僅受其他普通法司法管轄區（尤其是澳洲、加拿大、新西蘭和英國）影響，也受斯特拉斯堡歐洲人權法院的判決影響。這種國際化做法產生大量案例，例如香港特別行政區訴幸凌宇 (2010) 13 HKCFAR 142 (犯罪意圖) 案的裁決；該案例曾於香港特別行政區訴蔡偉麟 (2018) 21 HKCFAR 167 案應用，而毛里求斯最高法院和倫敦樞密院最近也予引用。

2018 年有不少重要裁決。在香港特別行政區訴李小向 (2018) 21 HKCFAR 272 一案中，終審法院對愈來愈多人基於錯誤理解而不當地指控律師明顯失職，堅決表示不認同。上述裁決顯示，法院理解律師在激烈的審訊中須肩負重大責任。法院裁定，除非有明顯而充分的理據，否則上訴律師絕不應透過指控質疑另一名律師的能力和誠信。這項裁決值得我們支持。在香港

played by the Department in the control of criminal prosecutions is recognized in Article 63 of the Basic Law which guarantees the freedom to make professional decisions free from any external interference; this independence has assumed an even greater significance given the growing influence of the law over all aspects of public administration, its expansion into every corner of daily life<sup>4</sup> and the increasing social tension between opposing groups which, one way or another, will be played out in the Courts.

My admiration for the work and ethos of the Department has not diminished with familiarity. I have been supported in each of my cases by many gifted lawyers. These professionals have demonstrated a conscientious commitment to the interests of justice and displayed a keen appreciation of the trust placed in the performance of their role by all the people of Hong Kong. And court work is only part of the picture. The statistics tell their own story. The Department employs about 1,500 staff. The Division is led by the Director, supported by four deputies and 145 prosecutors. In 2018, the Division provided advice to law enforcement agencies in 13,105 cases. In the same year, the number of cases prepared for the Court of First Instance was 413 and for the District Court 1,183. These are impressive, if not staggering figures and provide some indication of the Division's work load. To these should be added the 407 cases before the Court of Appeal and the 6 criminal cases heard by the Court of Final Appeal.

My own experience is one of prosecutors engaged in meticulous and thoughtful preparation, very often conducted in the evenings and at weekends without reference to contractual working hours. I have never heard anyone complain; it is simply accepted as a routine aspect of the professional duties of a prosecutor.

Since 1997, with the assistance of professional lawyers, the Courts have developed a vast body of case law. A distinctive feature of criminal practice in Hong Kong is the influence not only of other common law jurisdictions, particularly Australia, Canada, New Zealand and the United Kingdom, but also of the judgments of the European Court of Human Rights in Strasbourg. This cosmopolitan approach has created a rich seam of case law, such as the decision in *HKSAR v Hin Lin Yee* (2010) 13 HKCFAR 142 (*mens rea*), applied in *HKSAR v Choi Wai Lun* (2018) 21 HKCFAR 167; recently cited before the Supreme Court in Mauritius and the Privy Council in London.

The year of 2018 saw a number of notable decisions. In *HKSAR v Li Xiaoxiang* (2018) 21 HKCFAR 272, the Court of Final Appeal firmly deprecated the trend of misconceived and inappropriate charges of flagrant incompetence. The Court's decision shows a sensitive appreciation of the burdens imposed on counsel during the heat of a trial. It was held that appellate counsel should never advance

4 舉例說，到了本世紀的第三個十年期，以司法覆核作補救似乎會愈見吃重。

For example, it seems likely that the remedy of judicial review will take on a more dynamic role in the third decade of this century.

港特別行政區 訴 陳子豪 (2018) 21 HKCFAR 588 一案中，終審法院就法院允許認罪的被告人更改答辯的酌情權提供指引，當中首要考慮因素是司法公正原則，這一點並不令人意外。司法公正原則和有關公平的考慮因素也啟導法院就香港特別行政區 訴 梁竣傑 (2018) 21 HKCFAR 298 案作出裁決 (如被告人無律師代表，而除自己以外並無傳召任何證人，則控方無權作結案陳詞)。在律政司司長 訴 黃之鋒 (2018) 21 HKCFAR 35 一案中，終審法院罕見地受理就判刑提出的終審上訴。在該案中，終審法院雖不同意上訴法庭判處就各被告人因擾亂公共秩序而判處監禁的刑期，但亦注意到社會漸趨動盪，公眾抗議活動也日漸增多；法院繼而強調，如大規模的擾亂公共秩序事件涉及暴力，便有需要加以阻嚇和懲處。令人遺憾的是，香港法院在未來數年很可能須再次考慮這個與判刑有關的範疇。此外，上訴法庭曾就販毒案的判刑準則 (香港特別行政區 訴 Kilima Abubakar Abbas [2018] 5 HKLRD 88 ~ 法院在該案中提及香港尤其容易被利用作危險毒品交易平台) 及如何處理有關給予陪審團指示的批評 (香港特別行政區 訴 Wiwik Lestari [2018] HKCA 166；香港特別行政區 訴 謝顯揚 [2018] HKCA 196；香港特別行政區 訴 陳克恩及其他人 [2018] HKCA 121) 作出裁決。我們當然不應忘記，香港得以有如此大量的優質案例，獨立司法機構的努力固然重要，訟辯律師及所有行政支援人員<sup>5</sup>也功不可沒。

未來會怎樣？儘管最近公民社會氣氛緊張，大眾對政府的日後管治也有激烈辯論，我仍樂觀地認為香港會以其獨特的方式繼續繁榮發展，而法院也會不斷提供優秀案例。雖然未來考驗重重，但我深信，刑事檢控科定能一如既往，在執行公義上擔當核心角色，造福香港市民，繼續獲公認為卓越團隊。最後，我當然希望與律政司，以及在公非常敬佩、在私也有交情的每一位保持聯繫。

allegations questioning counsel's competence and integrity unless there was a palpably sound basis to do so. This is to be welcomed. In *HKSAR v Chan Chi Ho Lincoln* (2018) 21 HKCFAR 588, the Court of Final Appeal gave guidance on the Court's discretion to allow a change of plea. Unsurprisingly, the interests of justice are the overriding consideration. The interests of justice and consideration of fairness also motivated the decision in *HKSAR v Leung Chun Kit Brandon* (2018) 21 HKCFAR 298 (no prosecution right to make a closing speech where an unrepresented defendant called no witnesses other than himself). Unusually for a final appeal court, the Court of Final Appeal entered the arena of sentencing in *Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 35, and while disagreeing with the custodial terms imposed by the Court of Appeal, the Court could hardly overlook the increasing incidence of unrest and rising number of public protests, and went on to emphasize the need for deterrence and punishment in large scale incidents of public disorder involving violence. Regrettably, this is an aspect of sentencing which is likely to be considered again by the Courts of Hong Kong in the coming years. At Court of Appeal level there have been decisions on the approach to sentencing in cases of drug trafficking (*HKSAR v Kilima Abubakar Abbas* [2018] 5 HKLRD 88, in which the Court made reference to Hong Kong's particular vulnerability to the trade in dangerous narcotics) and the approach to criticisms of directions to jury (*HKSAR v Wiwik Lestari* [2018] HKCA 166; *HKSAR v Tse Hin Yeung* [2018] HKCA 196; *HKSAR v Chen Keen alias Jack Chen and Others* [2018] HKCA 121). Of course, it should not be forgotten that the quality of this body of case law is a tribute not only to the industry of the independent judiciary; it is also to the credit of advocates and all those who support them in an administrative capacity<sup>5</sup>.

So what of the future? Despite recent tensions in civil society, and the vigorous community debate over its future governance, I remain optimistic that Hong Kong will continue to flourish in its own distinctive manner and that the Courts will continue to produce case law of outstanding quality. Despite the many challenges that lie ahead, I am confident that the Division will continue to be recognized as a centre of excellence as it continues to perform its central role in the administration of justice to the benefit of all the people of Hong Kong. Certainly it is the case that I hope to continue my association with the Department, and all those individuals for whom I have a profound professional admiration and much personal affection.

5 應理解為包括在律政司內處理行政工作的全體人員，包括送遞員、文書人員、圖書館管理員、行政主任及所有支援人員。他們每一位都對部門運作貢獻良多。

This is to be read as including all those in the Department from messengers, clerks, librarians, executive officers and all the supporting staff. The work of every single individual contributes in no small measure to the functioning of the Department.