



Prosecutorial Independence – Continuity and Development¹

Prosecutorial Discretion

BL 63 entrenches the constitutional principle of prosecutorial independence by providing that “the Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference.” Criminal prosecutions include the decisions of whether or not to prosecute, whether to give consent to prosecute where there is an express statutory requirement of such consent,² whether to take over a private prosecution and whether to enter a *nolle prosequi*. The SJ when making such decisions acts in a quasi-judicial capacity and does not take orders from the government, politicians, the law enforcement agencies, or anyone else. The established constitutional principle is that he is entitled to exercise his quasi-judicial powers in a completely independent manner.³

This constitutional principle is consistent with the constitutional convention in leading common law

jurisdictions such as the United Kingdom and Canada: the Attorney General there in making prosecution decisions enjoys independence.⁴

Independence from Political Interference

The recent decision of the Court of Appeal (“CA”) in *Re C (A Bankrupt)*⁵ on the prosecutorial independence entrenched under BL 63 is of particular relevance. The Court held that:

“The prosecutorial independence of the SJ is a linchpin of the rule of law. He is in the discharge of that duty to be ‘actuated by no respect of persons whatsoever’ (Sir Robert Finlay, 1903, *Parl Debates Vol 118*, cols 349–390) and ‘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

¹ This article is based on Hon Wong Yan Lung, SC, SJ, “The Secretary for Justice as the Protector of the Public Interest – Continuity and Development” (2007) 37 HKLJ 319, with appropriate update of the relevant case law.

² Section 33(5) of the Public Order Ordinance (Cap 245) provides that proceedings under s 33(1) for an offence of possession in any public place of any offensive weapon, without lawful authority or reasonable excuse, should not be instituted without the consent of the SJ.

³ I Grenville Cross, “Focus on the Discretion Whether to Prosecute: The DPP and Exercise of Prosecutorial Discretion” (1998) 28 HKLJ 400; Albert HY Chen, “Focus on the Discretion Whether to Prosecute: Prosecutorial Discretion, Independence, and Accountability” (1998) 28 HKLJ 406.

⁴ John LI J Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964), pp 220–225; John LI J Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet and Maxwell, 1984), at pp 318–324; Bruce A MacFarlane, “Sunlight and Disinfectants: Prosecutorial Accountability and Independence Through Public Transparency” (2001) 45 Criminal Law Quarterly 272. The position of Australia is not so clear since it has been recently questioned as to whether the Attorney General should enjoy absolute independence in prosecutorial decisions especially when considerations of public interest are involved. See LJ King, “The Attorney General, Politics and the Judiciary” (2000) 74 Australian Law Journal 444; David Bennett, “The Roles and Functions of the Attorney-General of the Commonwealth” (2002) 23 Australian Bar Review 26.

⁵ *Re C (A Bankrupt)* [2006] 4 HKC 582 concerns whether s 138 of the Bankruptcy Ordinance (Cap 6) contravenes BL 63. The CA held that s 138, in so far as it provides for the court to order that the bankrupt be prosecuted for an offence under Cap 6, is not in breach of BL 63.

pressure. . . . any practice savouring of political pressure, either by the executive or Parliament, being brought to bear upon the Law Officers when engaged in reaching a decision in any particular case, is unconstitutional and is to be avoided at all costs.’: *‘The Law Officers of the Crown’* Edwards (1964), page 224. That these statements of fundamental principle were made in reference to the prosecutorial role of the Attorney General in England is of no present consequence for they 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 BL 63. I have

no doubt but that it is to these principles that the reference to ‘control’ in conjunction with the requirement that that control be free from interference, is there directed . . .”⁶

The CA emphasized that the prosecutorial independence of the SJ is central to the rule of law and that the function of BL 63 is to continue this fundamental principle in Hong Kong, consistent with the entire theme of continuity in the Basic Law. The same principle is also underpinned by a number of statutory provisions such as sections 14(1), 14B and 15(1) of the Criminal Procedure Ordinance (Cap 221).⁷ The reference by the CA to the prosecutorial role of the Attorney General

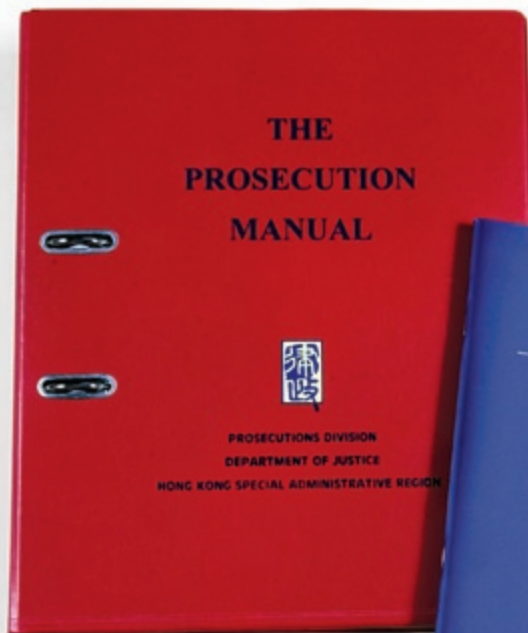


⁶ *Ibid*, para 18.

⁷ Section 14(1) of the Criminal Procedure Ordinance (Cap 221) provides: “The SJ, if he sees fit to institute criminal proceedings, shall institute such proceedings in the court against the accused person as to him may seem legal and proper. . . .” Section 14B of the Criminal Procedure Ordinance provides: “Where any Ordinance provides that no prosecution for an offence shall be commenced without the consent of some person other than the SJ, such a provision shall not derogate from the powers of the SJ in respect of the prosecution of that offence.” Section 15(1) of the Criminal Procedure Ordinance provides: “The SJ 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.”



in England echoes the recognition it gave prior to reunification to the powers and responsibilities of the Attorney General of Hong Kong being the same as those of the Attorney General in England.⁸



The independence of the SJ (or the Attorney General in some jurisdictions) arises from the fact that he must exercise the various powers and discretions in the public interest. Political acceptance of this independence appears to be only relatively recent in the United Kingdom following criticism of the Campbell affair in 1924 when the Attorney General was directed by the Cabinet to withdraw a criminal prosecution against Campbell as editor of the communist newspaper, *Workers Weekly*. Subsequently released Cabinet minutes of 6 August 1924 revealed that the Cabinet had also instructed the Attorney General that “no

public prosecution of a political character should be undertaken without the prior sanction of the Cabinet being obtained”.⁹ The Prime Minister in the Conservative Government which succeeded the defeated Labour Government, Mr Stanley Baldwin, proclaimed that a Cabinet instruction to the Attorney General to withdraw a prosecution was “unconstitutional, subversive of the administration of justice and derogatory to the Office of Attorney General”.¹⁰

In Australia, the resignation in 1977 of the Commonwealth Attorney General, Mr Robert Ellicott QC, over pressure from the Cabinet for him to intervene to terminate a private prosecution

against former Prime Minister Mr Gough Whitlam and others, highlighted the importance of the independence of the Attorney General at least in criminal matters. The Cabinet had decided to refuse the Attorney General access to Cabinet papers relating to the previous government’s involvement in a controversial attempt to raise overseas loans and had conveyed to him the considered opinion of the entire Cabinet that the Attorney General should take over the private prosecution and discontinue the proceedings.¹¹

⁸ See *Cheung Sou-yat v R* [1979] HKLR 630.

⁹ Edwards, *The Law Officers of the Crown* (n 4 above), pp 199-211; Edwards, *The Attorney General, Politics and the Public Interest* (n 4 above), pp 310-318.

¹⁰ Edwards, *The Law Officers of the Crown* (n 4 above), p 213; Edwards, *The Attorney General, Politics and the Public Interest* (n 4 above), pp 311-312.

¹¹ Edwards, *The Attorney General, Politics and the Public Interest* (n 4 above), pp 379-388.

Sir Hartley Shawcross, KC, Attorney General in the post-war Labour Government of the United Kingdom, explained to the House of Commons in 1951 the constitutional position of the Attorney General in making decisions on prosecution as follows:

“I think the true doctrine is that it is the duty of an Attorney General in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. In order to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the government and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist and must not consist, in telling him what the decision ought to be. The responsibility for the eventual decision rests upon the Attorney General, and he is not to be put, and is not put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney General shift his responsibility for making the decision to

the shoulders of his colleagues. If political considerations in the broad sense that I have indicated affect government in the abstract arise, it is the Attorney General, applying his judicial mind, who has to be the sole judge of those considerations.”¹²

The essence of Sir Hartley’s statement is that the Attorney General, in making decisions of prosecution, may consult his colleagues in the government (including those in the Cabinet) but he is not, and should not be, subject to any political pressure from them.¹³ In the context of Hong Kong, the SJ (being a member of the Executive Council (“ExCo”)¹⁴) is in a similar position in that he is not, and should not be, subject to any political pressure from other persons in making prosecution decisions. Such constitutional principle as endorsed by the CA in the case of *Re C (A Bankrupt)* is now entrenched under BL 63. The same constitutional principle is also reflected in *The Statement of Prosecution Policy and Practice* published by the Department of Justice as follows:

“1.1 The Department of Justice is responsible for the conduct of criminal proceedings in Hong Kong. In the discharge of that function the Department enjoys an independence which is constitutionally guaranteed. BL 63 of Hong Kong stipulates that the Department ‘*shall control criminal prosecutions, free from any*

¹² Edwards, *The Law Officers of the Crown* (n 4 above), p 223.

¹³ In an article in *The Telegraph* (11 March 2007), Lord Goldsmith, the then Attorney General of England, reiterated the fundamental responsibilities of the office, particularly including cases which “involve a difficult balancing exercise between the competing public interests” – “The principles which guide me in such decisions are clear. The law must come before party loyalties. Decisions need to be made on the basis of an objective view of the evidence and the law . . . The Attorney General will have to carry on applying the law objectively on the evidence, even when as Sir Francis Bacon said, ‘calumnies are hurled boldly’.”

¹⁴ The ExCo is an advisory body to the CE under BL 54 and 56.



interference'. That the notion of prosecutorial independence enjoys an entrenched status enables prosecutors to discharge their duties to the public within secure parameters. Prosecutors act independently without the fear of political interference or improper or undue influence. At the same time, the SJ is accountable for their decisions and actions."¹⁵ (emphasis original)

Judicial Respect for Prosecutorial Independence

The stated constitutional principle is reinforced by the judicial respect for prosecutorial independence, and more specifically, the settled common law principle that the court would only intervene in very narrow circumstances in respect of the decision to prosecute or not to prosecute. Over the years, courts in Hong Kong and other leading common law jurisdictions have shown great deference for the principle of prosecutorial independence.

Canada

In the judgment of the majority of the Supreme Court of Canada in *R v Power*, L'Heureux-Dube J remarked as follows:

"It is manifest that, as a matter of principle and policy, courts should not interfere with prosecutorial discretion. This appears clearly

to stem from the respect of separation of powers and the rule of law. Under the doctrine of separation of powers, criminal law is in the domain of the executive . . ."¹⁶

In a similar vein, Monnin CJ, of the Canadian Supreme Court, in *Re Balderstone v the Queen*, said:

"The judicial and the executive must not mix. These are two separate and distinct functions. The accusatorial officers lay informations or in some cases prefer indictments. Courts or the curia listen to cases brought to their attention and decide them on their merits or on meritorious preliminary matters. If a judge should attempt to review the actions or conduct of the Attorney-General - barring flagrant impropriety - he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney-General or his officers. That a judge must not do."¹⁷

More recently, the principles in *R v Power* were applied in the decision of the Supreme Court of Canada in *Krieger v Law Society of Alberta*.¹⁸ Iacobucci and Major JJ identified certain matters as the core elements of prosecutorial discretion as follows:

"[46] Without being exhaustive, we believe

¹⁵ Department of Justice, *The Statement of Prosecution Policy and Practice* (2002), para 1.1.

¹⁶ (1994) 89 CCC (3d) 1, at p 14.

¹⁷ (1983) 8 CCC (3d) 532 at 539.

¹⁸ (2002) 217 DLR (4th) 513.



Supreme Court of Canada, Ottawa

the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution . . . ; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether... ; and (e) the discretion to take control of a private prosecution... While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.

[47] Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it . . .

[49] Within the core of prosecutorial discretion, the courts cannot interfere except in such circumstances of flagrant impropriety or in actions for 'malicious prosecution' . . . In all such cases, the actions of the Attorney General will be beyond the scope of his office as protected by constitutional principle, and justification for such deference will have evaporated."¹⁹

United Kingdom

Similar respect for prosecutorial independence can be found in cases of the United Kingdom. In a series of cases the limited degree to which the court can intervene has been emphasized. In the context of judicial review, while the Divisional Court has power to review a decision of the Director of Public Prosecutions for England and Wales not to prosecute, the power is one to be sparingly exercised. This approach was clearly spelt out by the English Divisional Court in *R v DPP ex parte C*:

"From all of those decisions it seems to me that in the context of the present case this court can be persuaded to act if and only if it is demonstrated to us that the Director of Public Prosecutions acting through the Crown Prosecution Service arrived at the decision not to prosecute:

- (1) because of some unlawful policy (such as the hypothetical decision in *Blackburn* not to prosecute where the value of goods stolen was below £100); or

¹⁹ *Ibid*, at paras 46, 47 and 49.



- (2) because the Director of Public Prosecutions failed to act in accordance with her own settled policy as set out in the Code; or
- (3) because the decision was perverse. It was a decision at which no reasonable prosecutor could have arrived. . . .”²⁰

The Divisional Court added that it was one of those rare cases where the Director of Public Prosecution’s decision not to prosecute was shown to be flawed because the relevant legal adviser did not approach the question in accordance with the settled policy of the Director of Public Prosecutions.²¹

The guidelines contained in *ex parte C* have been

reiterated in *R (On the application of Stephens) v DPP*.²² In that case, the Divisional Court referred to *ex parte C* and the guidance given that “the intervention should be sparing and only on the grounds of unlawful policy, failure to act in accordance with policy, and perversity”.²³ The court rejected a renewed application for permission to move for judicial review in respect of the decision of the Director of Public Prosecutions not to prosecute the relevant accused for manslaughter in respect of a Mr Hunter’s death.

In the earlier case of *R v DPP ex parte Manning and Another*,²⁴ an English Divisional Court quashed a decision not to prosecute in very exceptional

²⁰ [1995] 1 Cr App R 136, at 141C-D.

²¹ *Ibid*, at 144B-C.

²² CO/2506/2000 (transcript, 19 Oct 2000).

²³ *Ibid*, at para 22.

²⁴ [2001] 1 QB 330.

circumstances. The applicants' brother, who had been remanded in prison custody awaiting trial for an offence of violence, died of asphyxia while under restraint following an altercation with two officers. His death was investigated by the police and the papers were referred to the Crown Prosecution Service. At a coroner's inquest the evidence indicated that death had resulted from the manner in which one of the officers had held the deceased's head during the incident and the jury returned a lawful verdict of unlawful killing. A specialist senior caseworker in the Crown Prosecution Service undertook a detailed examination of all the available evidence, including that adduced at the inquest. Having referred to the weaknesses and inconsistencies of the prison officers' evidence, he rejected alternative potential charges and considered, in respect of unlawful act of manslaughter, that it was only the fatal force to the deceased's neck which could be characterized as excessive so that the only potential defendant was the officer identified as holding the head. He concluded that there was a *prima facie* case against that officer but no realistic prospect of the prosecution being able to establish that excessive force had been used deliberately, rather than as the result of an attempt to effect proper restraint which had been frustrated by the struggle with the deceased.

In communicating his decision not to prosecute, the specialist senior caseworker stated that there was insufficient evidence to justify any criminal prosecution and that he was not satisfied that the available evidence would provide a realistic

prospect of convicting any of the officers of any offence arising out of the deceased's death. The applicants, having unsuccessfully requested full reasons for that decision, sought permission to apply for judicial review to challenge the lawfulness of the decision. Following the grant of permission to apply for judicial review, the caseworker's review note setting out his full reasoning was served on the applicants in the proceedings.

The Divisional Court, in respect of the substantive application, held that there was no absolute obligation imposed on the Director to give reasons for a decision not to prosecute. However, since the right to life was the most fundamental of all human rights and since the death of a person in the state's custody which resulted from violence inflicted by its agents necessarily aroused concern, the Director would be expected, in the absence of compelling grounds to the contrary, to give reasons for such a decision where it related to a death in custody in respect of which an inquest jury had returned a lawful verdict of unlawful killing implicating an identifiable person against whom there was *prima facie* evidence, in order to meet the expectation that, if a prosecution did not follow, a plausible explanation would be provided, and to vindicate the decision by showing the existence of solid grounds to support it. In granting relief and quashing the decision, the Divisional Court held that although the court would exercise its power of review sparingly, the standard should not be set so high as to deprive an aggrieved citizen of his only effective remedy. Since the caseworker had not addressed and resolved specific matters which the



officer would have to overcome to defeat the prima facie case judged to lie against him and since an objective appraisal of the prospects of a successful prosecution required those matters to be taken into account, the caseworker's failure to do so vitiated the Director's decision.

It is significant that in *R (On the application of Stephens) v DPP*, the Divisional Court dealt with the approach to judicial intervention in *ex parte Manning* and clarified that there was no departure in the *Manning* case from the guidelines laid down in earlier cases, including *ex parte C*, and that the test remained that which was adumbrated in *ex parte C*.²⁵

Hong Kong

Similar reluctance to intervene can be found in Hong Kong case law before reunification.²⁶ For example, in *Keung Siu Wah*, the CA held that "it is a constitutional imperative that the Courts do not attempt to interfere with the Attorney General's discretion to prosecute, but once the charge or indictment comes before a Court for hearing, it can consider whether the prosecution should be allowed to continue if grounds amounting to an

abuse of process are raised."²⁷

The learned editors of *Halsbury's Laws of Hong Kong*, citing *ex parte C* in support, have taken the view that after Reunification the position appears to be as follows:

"The decision not to prosecute is susceptible, in very narrow circumstances, to judicial review but such intervention would only be considered where it was demonstrated that (1) the decision was the result of an unlawful prosecution policy; (2) the decision ignored established policy; or (3) the decision was perverse."²⁸

In its recent judgment in *Kwan Sun Chu Pearl v Department of Justice*,²⁹ the CA observed that whether *Keung Siu Wah* precludes judicial review in relation to the decision of the Department of Justice is an open question as far as Court of Final Appeal ("CFA") is concerned and it may be that, despite *Young v Bristol Aeroplane Co Ltd*,³⁰ the matter is open to review by the CA as well.

The CA in *Re C (A Bankrupt)* held that what BL 63 does, apart from its prime purpose of prohibiting political interference, is to reflect the boundary that

²⁵ See n 22 above, at paras 24 and 25. Recent useful cases on judicial review of the prosecutorial discretion also include *R v DPP, ex p Kebilene* [2000] 2 AC 326; *R(D) v Central Criminal Court* [2004] 1 Cr App R 540; *Weininger v R* [2003] 212 CLR 629 (per Kirby J at 654). In the Northern Ireland context, see *Re Adams's Application for Judicial Review* [2001] NI 1 (per Carswell LCJ at 9).

²⁶ See *Cheung Sou Yat v R* [1979] HKLR 630; *Tang Yee Chun v Attorney General* [1988] 2 HKLR 408; *Keung Siu Wah v Attorney General* [1990] 2 HKLR 238; *R v Harris* [1991] 1 HKLR 389.

²⁷ *Keung Siu Wah v Attorney General*, *ibid*, at 255E-F.

²⁸ *Halsbury's Laws of Hong Kong*, Vol 9 (2002 Reissue), para 130.627.

²⁹ [2006] 3 HKC 207 in which the application by the applicant for leave to apply for judicial review of the decision of the Director of Public Prosecutions not to prosecute an alleged attacker of the applicant was refused by the Court of First Instance ("CFI"). The applicant appealed to the CA against the refusal by the CFI but the appeal was dismissed by the CA.

³⁰ [1944] 1 KB 718. The CFA has recently held in *A Solicitor v Law Society of Hong Kong* [2008] 2 HKLRD 576 that the rule in *Young v Bristol Aeroplane*, namely that in civil cases the CA was bound by its own previous decisions subject to three exceptions, would no longer apply in Hong Kong. The rule has been replaced by "the plainly wrong test": the CA is bound by its previous decisions but it may depart from a previous decision where it is satisfied that it is plainly wrong.

protects the SJ from judicial encroachment upon his right to decide whether to institute a prosecution, what charge to prefer, whether to take over a private prosecution, and whether to discontinue proceedings. However, the CA made clear that this does not mean that the courts are powerless to prevent an abuse of their process. It recognized that there is authority for the proposition that “dishonesty, bad faith or some other exceptional circumstances” might found a basis for challenge in the courts of the exercise in a particular case of a prosecutorial prerogative.³¹

This review of comparative authorities is not intended to provide an exhaustive statement of the law.³² The authorities reflect judicial respect

for prosecutorial independence whether under a written constitution or not. As observed by the CA in *Kwan Sun Chu Pearl v Department of Justice*, whether the CFA or the CA will review the decision in *Keung Siu Wah* remains an open question. In the light of the development of other common law jurisdictions, it would be difficult to persuade the courts that decisions of whether or not to prosecute are immune from any review at all. However, the settled common law principle is that the court would only intervene in very narrow circumstances in respect of such decisions.

In the recent case of *RV v Director of Immigration and Secretary for Justice*,³³ Hartmann J, following the CA decision in *Re C (A Bankrupt)*, held that



³¹ *Re C (A Bankrupt)* [2006] 4 HKC 582, paras 21 and 22 referring to *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326.

³² For example, subsequent to *ex parte C* (n 20 above), the following grounds of review have been added by the courts of the United Kingdom, ie improper motive and bad faith (see *In the matter of an application by “D” for judicial review*, transcript, CA, 10 April 2003, para 20).

³³ *RV v Director of Immigration and Secretary for Justice*, [2008] 2 HKC 209 concerns an application for judicial review by the applicant, a citizen apparently of the Republic of Congo, against the decisions of the Department of Justice to institute criminal proceedings against him and to proceed with the prosecution of the charges of using a false travel document and making a false representation to an immigration assistant. The applicant alleged that the decisions were inconsistent with, and contradicted, the SJ's own prosecution policy. He also alleged that the decisions undermined his basic right to seek asylum in Hong Kong. Finally, he claimed that the decisions constituted an abuse of process. Hartmann J held against the applicant on all the three grounds and refused the application for judicial review.



BL 63 enshrines the independence of the SJ to control criminal proceedings as he thought best and that, in the exercise of that power, the SJ is free of political interference and judicial encroachment. However, the SJ's power is a constitutional power bestowed by the Basic Law, and must be exercised within constitutional limits. It must be for the courts, in any given case, to determine whether the exercise of that power has exceeded the constitutional limits through the means of judicial review. His Lordship considered that the SJ would act outside his powers if it could be demonstrated that he has done so not on an independent assessment of the merits but in obedience to a political instruction. He further held that the SJ would act outside of his powers if he acted in bad faith. Moreover, a rigid fettering of his discretion would fall outside of the SJ's constitutional powers. His Lordship emphasized, though, that the remedy of judicial review of the SJ's control of criminal prosecution will only be granted in the rarest of cases.

Accountability for Prosecutorial Decisions

Given the constitutional principle of prosecutorial independence entrenched under BL 63, the question arises of the means of accountability of the SJ for his decisions of whether or not to prosecute. Some overseas jurisdictions have put



BL 63

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in place an independent office of Director of Public Prosecutions to address the issue of accountability (and impartiality).³⁴ In the United Kingdom, prosecutions are now conducted or supervised by the Director of Public Prosecutions who acts under the superintendence of the Attorney General as provided under the Prosecution of Offences Act 1985.³⁵ In Australia, the Commonwealth Director of Public Prosecutions was established under the Director of Public Prosecutions Act 1983.³⁶ The Australian Attorney General has the power to issue guidelines and directions to the Commonwealth Director of Public Prosecutions.³⁷ However, in the context of Hong Kong, it is doubtful if there is any scope for an independent office of the Director of Public Prosecutions in view of BL 63.

³⁴ Bruce A MacFarlane, "Sunlight and Disinfectants: Prosecutorial Accountability and Independence Through Public Transparency" (n 4 above) at pp 283-290.

³⁵ *Halsbury's Statutes of England and Wales*, Vol 12(1) (4th ed, 2005 Reissue) 993; I Grenville Cross, "Focus on the Discretion Whether to Prosecute: The DPP and Exercise of Prosecutorial Discretion" (n 3 above) at p 404.

³⁶ *Acts of the Parliament of the Commonwealth of Australia (Passed During the Year 1983)* (Canberra: Australian Government Publishing Service, 1984), p 1590.

³⁷ Director of Public Prosecutions Act 1983, s 8.

There are two means by which a private citizen may hold the SJ to account. First, the right of a private individual to institute a private prosecution for a breach of the law is undoubtedly a valuable safeguard for balancing the decision of the prosecuting authority not to prosecute.³⁸ Second, it is possible that decisions of whether or not to prosecute are subject to judicial review by the courts, although they may only intervene in very narrow circumstances.

The Legislative Council (“LegCo”) may ask for information and call for explanations in respect of decisions as to whether to prosecute in specific cases.³⁹ There is no doubt that, by answering questions and explaining decisions of prosecution in the LegCo, the SJ may enhance his accountability to the public. However, there is a limit to the extent of disclosure of reasons for prosecution decisions. The parameters are reflected in *The Statement of Prosecution Policy and Practice* as follows:

“25.4 Reasons for decisions may not be given in any case where to do so would adversely affect the interests of a victim, a witness, a suspect or an accused, or would prejudice the administration of justice. In particular, public discussion of a decision not to prosecute might amount to the trial of the suspect without the safeguards which criminal proceedings are designed to provide. As Sir Patrick Mayhew

QC, Attorney General of England and Wales, explained to Parliament in 1992:

It is extremely important that where somebody has not been prosecuted or where a prosecution has been discontinued against somebody, the evidence that would have been available had that prosecution continued should not be paraded in public.

25.5 The public are entitled to know the general principles which the prosecution apply to the cases it decides. It will not, however, usually be in the interests of justice for the prosecution to go further and to give details in individual cases. No distinction exists in this regard between decisions to prosecute and decisions not to prosecute. This policy is rooted in fairness to the suspect. As Michael Thomas QC, Attorney General, told the LegCo, in 1987:

There are good reasons why the Attorney General does not normally explain in public a decision not to prosecute in a particular case. It is rare for any public announcement to be made of that decision because it would reveal unfairly that someone had been under suspicion for having committed a criminal offence. And even where that fact is known, to give reasons in public for not prosecuting the suspect would lead to

³⁸ The ability for individuals to mount criminal proceedings is fundamental to Hong Kong’s criminal justice system. Private prosecutions are subject to the control by the SJ as discussed in para 26 of the CA’s decision in *Re C (A Bankrupt)* (cited in n 5 above): “A private prosecution, once commenced, may be taken over by the Secretary [for Justice] and continued and discontinued as he sees fit.”

³⁹ BL 73 provides the LegCo with the powers and functions to, *inter alia*, raise questions on the work of the government, to debate any issue concerning public interests, and to receive and handle complaints from Hong Kong residents.



public debate about the case and about his guilt or innocence. The nature of the evidence against the suspect would have to be revealed. Then some might say that that was proof enough of guilt, and the suspect would find himself condemned by public censure . . . [I]n our legal system, the only proper place for questions of guilt or innocence to be determined is in a court, where the accused has the right to a fair trial in accordance with the rules of criminal justice, and the opportunity to defend himself.”⁴⁰

Indeed, there has been firmly in place for many years in Hong Kong, in England, and elsewhere in the common law world, a prosecutorial policy of not disclosing in detail the reasons for prosecution decisions. Instead, the criteria applicable are disclosed, namely, whether there is sufficient evidence to prosecute and whether it is in the public interest to prosecute. This policy has been consistently applied in Hong Kong. It is a policy which is both sound and just. It ensures fairness to the suspect. It safeguards the integrity of the criminal justice system and protects the legitimate interests of those caught up in that system. It also ensures that the fundamental safeguards provided for a defendant in a criminal trial are not swept away in the course of a nonjudicial enquiry, where there are no rules of evidence, no presumption of innocence, no right of cross-examination and no

requirement of proof beyond reasonable doubt. It has always been a cherished feature of Hong Kong’s system that the only proper forum for the determination of questions of guilt or innocence of crime is the court, where the suspect has the right to a fair trial in accordance with the rules of criminal justice. This policy has served the interests of justice in Hong Kong well over the years.

More detail about the basis for prosecution decisions may, however, be given in exceptional circumstances. In two recent cases, the statements of the SJ and the Director of Public Prosecutions on the decision not to prosecute provided to the LegCo went into greater detail, in respect of facts and legal reasoning, than ever before because of the extent of public concern aroused and the special circumstances of the cases.

In December 2003, the Department of Justice decided not to prosecute the former Financial Secretary, Mr Anthony Leung, for his actions in respect of a car purchased shortly before an increase in the First Registration Tax in the 2003 Budget in March 2003. Independent opinions were obtained from two outside leading counsel who advised that there was insufficient evidence to charge Mr Leung with the common law offence of misconduct in public office.⁴¹ In January 2006, the Department of Justice decided not to prosecute Mr Michael Wong, a retired judge of the CA, for allegedly deceiving his principal, ie the judiciary, into granting

⁴⁰ Department of Justice, *The Statement of Prosecution Policy and Practice* (2002), paras 25.4 and 25.5.

⁴¹ Minutes of special meeting of the Panel on Administration of Justice and Legal Services of the LegCo on 26 December 2003 (LC Paper No CB(2)1391/03-04).

him leave passage allowance by the use of false documentation between August 1998 and February 2001. An independent opinion was obtained from an outside leading counsel who advised that there was insufficient evidence to charge Mr Wong.⁴² In both cases, the advices given by the outside leading counsel were summarized in the statements of the Director of Public Prosecutions provided to the LegCo.

Save in exceptional circumstances, it is not the practice of those who have responsibility for the conduct of public prosecutions in Hong Kong to indicate in any detail the basis of particular prosecutorial decisions. This practice reflects the traditions of the common law world, which recognize that once a decision has been taken not to prosecute a person the position of the suspect must be safeguarded. Issues of guilt or innocence should be determined in a court of law, rather than through public debate or media comment.

Summary

The prosecutorial independence of the SJ is a linchpin of the rule of law, and through BL 63 this

fundamental principle is enshrined in a manner consistent with the entire theme of the Basic Law. The SJ is not, and should not be, subject to pressure, political or otherwise, in making prosecutorial decisions. This constitutional guarantee is underpinned by judicial respect for the prosecutorial function, and, more specifically, by the settled common law principle that the courts will only intervene in very narrow circumstances in respect of the decision to prosecute or not.

This, however, does not mean that the SJ is unaccountable for prosecutorial decisions, or that he cannot be held to account. The right of a private individual to institute a private prosecution for a breach of the law provides a balance of the SJ's decision-making function. The decision of whether or not to prosecute may also be amenable to judicial review, although it seems clear that the courts will only intervene in very narrow circumstances. Furthermore, by answering questions and explaining prosecutorial decisions in the LegCo, within certain parameters, the SJ may enhance his accountability to the public.

⁴² Minutes of special meeting of the Panel on Administration of Justice and Legal Services of the LegCo on 3 February 2006 (LC Paper No CB(2)2526/05-06).