Traditional Legal Ethics for Prosecutors

A Speech by DPP to New Government Counsel and Legal Trainees on the Criminal Advocacy Course

31 October 1998

1. Standards

The highest ethical and professional standards are required of prosecutors. The approach of a prosecutor must always demonstrate fairness and integrity. A prosecutor is in an immensely powerful and privileged position. That carries with it important responsibilities. At the advice stage, it is vital that you consider the implications of a prosecution upon an accused. How will it affect his or her job, family etc. Consider the ramifications of the decision to be taken. Remember the ordeal involved in a trial, and the trauma that can result even if there is ultimately an acquittal. Always stand back and ask yourself if a prosecution is really necessary.

2. To prosecute or not: public pressure

You must make your decisions upon prosecutions by faithfully applying the prosecution policy, and by bringing to bear your own judgment and common sense. Sometimes you will be criticised for prosecuting, and at other times you will be criticised for not prosecuting; that is inevitable. But do not worry about that: so long as you have faithfully discharged your duties, and have conscientiously decided the matter, then there is no need for you to be upset by criticism from whatever quarter it may come. You must always do what you believe to be right: even if you think that inevitably your decision, be it to prosecute or not, will attract a hostile response. You must never allow public or media criticism to force you into a course which you do not believe to be right.

3. Reference to accused person

Another matter, small in itself, but symbolic. Often in criminal proceedings you will see the person on trial referred to as 'the defendant'. This, in my view, is to be avoided as it rather suggests that there may be a duty on a person to defend himself. There is not. The person on trial does not have to prove or establish anything - only the prosecution does. It is for that reason that I suggest you adopt the practice of referring to the person charged as 'the accused', rather than as 'the defendant'.

4. Position of prosecutor

Always remember who you, as the prosecutor, represent. The HKSAR. Not the government. We are not controlled by the government or any law enforcement agency. This is clearly spelt out in Article 63 of the Basic Law. We are as independent as is the judiciary. That has certain important consequences : you must see yourself as ministers of justice : your role is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and to the dictates of fairness.

A prosecutor should not act as if representing private interests in litigation. You have no 'client' in the conventional sense - you act independently, yet in the public interest. The defence lawyer is an advocate who has a private duty : he will do everything he honourably can do to protect the interests of his client : he is entitled to 'fight for a verdict'. You, on the other hand, have the function to assist the court in arriving at the truth : you must not advance arguments which you do not believe in, or try to conceal or suppress any legal evidence that could assist the accused. It is not your duty to obtain a 'conviction at all costs'; it is simply to lay before the court the facts which comprise your case,

and to explain these intelligently and convincingly to the court. You have no interest in securing a conviction as such : your sole interest is that the right person should be convicted and that the truth should be known. It is a fundamental duty of prosecutors to comply with the principle stated by Mr. Justice Sutherland for the United States Supreme Court in 1935 : the interest of their office '*is not that it shall win a case, but that justice shall be done'*.

Your advocacy must be conducted temperately and with restraint, bearing in mind that the primary function is to aid the court in the arrival at the truth and the attainment of justice by fair means: do not seek to rely on inadmissible evidence. Remember, prosecutors do not 'win' or 'lose' cases, although, of course, incompetent prosecutors may 'blow' a case. If the accused is acquitted, then, although you may be personally disappointed, provided you have done your best the proper view for you to take is that justice has been done.

Nothing I have said is to be taken as suggesting that you must not be vigorous and determined in the presentation of your case. You operate in an adversarial structure. Stand up for your position. Seek by all proper means to convince the court of the rightness of your case. Firmly and vigorously press your argument and, if necessary, to get to the heart of the matter, attack that of the accused. A weak advocate will rarely get at the truth, and, if he does not, it may well be that the truth will not come out at all. In that eventuality, the purpose of the trial will have been frustrated.

When you advise on a case, do not overload the indictment or charge sheet. Whilst the charges laid must be truly representative of the criminality of the accused, keep a sense of proportion for excessive charging sews confusion and promotes an inability to focus by all parties. So, where possible, keep things simple. Also, never go ahead with more charges than are necessary with a view to encouraging an accused to plead guilty to a few. In the same way,

do not lay a more serious charge just to encourage the accused to plead guilty to a less serious one.

5. Terminating a Case

What happens if the stage is reached in a prosecution when you lose faith in your case? That is, you feel that it would be improper to proceed? That may arise, for example, because evidence has been ruled inadmissible or because a witness has turned hostile. Your duty is clear : you must pull the plug on the case. You should tell the court that you will not be calling further evidence; that is because the defendant will be entitled to his acquittal without further ado - it is his right to have his ordeal brought to an end.

But do not allow yourselves to be intimidated by the defence, or pushed into a course of action you deem to be inappropriate by the judge. Do not be a soft touch. Always listen to what the defence request, and to what the court advises, give those matters full respect, but do not take a course of action unless you yourself are convinced that it is the proper one.

6. Conduct in Court

Always be courteous to all : to the judge, to the defence, to the accused, to the witnesses, and the officer in charge of the case. Remember that the prosecutor may strike hard blows but "is not at liberty to strike foul ones". Prosecutors, therefore, have responsibilities to present the case fairly, to address rather than conceal points for the defence, and, above all, to exercise their considerable powers with a sense of proportion. Prosecutors normally take these duties seriously. By and large, they do not adopt as their role model Attorney-General Coke who, in the 1603 trial of Sir Walter Raleigh for high treason, told the unfortunate defendant : *"I will prove you the notoriest traitor that ever came to the*

Bar. Thou art a monster." You must not in cross-examination make statements or ask questions which are merely scandalous or intended or calculated only to vilify or annoy a witness or some other person. It is unethical to ask a question, knowing that it will be objected to and ruled inadmissible, purely in order to implant an impression on the Court or on the witness.

Always be fair. Always have a mastery of your brief and of the issues. Anticipate what they might be. Do not be left with your mouth hanging open. If you achieve that, you will find that you are trusted and respected both by the bench and by the Bar, and that will assist you enormously in your career as an advocate. To be trusted in the profession is a great thing. Scrupulous fairness is essential : Has your witness got a criminal record? Check and, if so, tell the defence. Have you material which may assist the defence? Check and, if so, disclose it. Whilst it is no part of your role to do the job of the defence for them if you are aware of an authority which may damage your case you, as a minister of justice, should advise the court of it; do not suppress it. <u>As the representative of the public interest you are obliged to guard against the conviction of the innocent</u>. Properly understood, the primary goal of a prosecution is to convict the guilty but not the innocent. In the eyes of the public, a criminal trial is a contest in which both sides are seeking to 'win'. Seen from this perspective, a prosecution is successful only if the accused is convicted. The prosecutor's obligation to see that justice is done, regardless of the outcome of the case, is easily forgotten when emotions have been aroused by a heinous or scandalous crime. To weather these occasional storms, you as prosecutors must provide a consistent level of dedicated and competent service.

7. Familiarity with Brief

Always master the legal and factual issues in your brief. The public perception of the efficacy of a prosecution will be adversely affected if the

prosecutor displays poor case management or advocacy skills, irrespective of the outcome in the case. If the prosecution stumbles and fails to tender important available evidence, if the judge has to become involved in the questioning of witnesses because relevant testimony is not being adduced, or if the prosecutor is inaccurate in summarising the evidence, the public will question whether the prosecution is being properly conducted. Also, always know your law : if the defence rely on outdated authorities, or make submissions contrary to the authorities, you should be in a position to correct them. If the judge in directing on the law makes an error, you must be in a position to correct him at the end of the summing-up by drawing attention to any apparent mistakes or omissions of fact or law. This is in line with the notion of prosecutors as ministers of justice. All these things you can only do if you keep yourselves bang up to date with the latest developments in criminal law. If you do not do these things, then there may have to be appeals, or reviews of sentence, and you will thereby have contributed to the expense and time which any such appellate proceeding involves. What then if there is an appeal?

8. Appeal

If there is an appeal against conviction, you must objectively consider the grounds of appeal and decide whether or not they are meritorious. Normally you will seek to uphold the conviction, and you will marshal the submissions and the authorities accordingly. What if, having read the grounds of appeal, you agree with the defence that the appeal should be allowed? An appeal cannot be decided on the basis that both sides have agreed between themselves that the appeal should succeed. What you must not do is to advance arguments in which you have little confidence; you should advise the court of the view you have formed and explain the reasons for it. If the court disagrees with you, you are still entitled to adhere to your view and you are not obliged to conduct the appeal in a way which conflicts with your own judgment. At the same time it remains your

duty to give assistance to the court if requested to do so. In addition, if the defence and the court overlook a key ground of appeal, you should let them know: that is part of your role as a minister of justice.

9. Promotion

Before finishing, let me say a few words about promotion. After you have been here for a while you will hope to be promoted. That is entirely natural. Sometimes you may see people promoted whom you feel are less deserving than yourselves. What I say is this: work hard, be professional, and do your best and things will turn out right in due course. It is so important that you remain true to yourselves : always treat your superiors with respect, but do not fawn on them : the way to advancement is not through ingratiating yourselves with your superiors but by doing the best possible job of which you are capable - and it will be noticed. Do not let hope for promotion develop into an obsession : if that happens, it can corrupt your personality, corrode your judgment and leave you a profoundly unhappy person. So I repeat : be true to yourselves, perform to the highest standards, and you will find that things have a way of working themselves out for the best.

10. Conclusion

It is a tremendous honour to be a prosecutor. But it carries with it awesome responsibilities. Dedication, professionalism and assiduity are what are required of you. To play a role in the criminal justice system, at whatever level, is a privilege, and it is your responsibility to ensure that you are never found to be wanting. The community, which you serve, is entitled to expect that of you. All that having been said, the work of a prosecutor is challenging, fulfilling and edifying - so as you discharge your duties to the community, keep a sense of

balance, keep a twinkle in your eye, keep a bounce in your step, maintain a sense of humour and try also to enjoy yourselves at the same time.

I. Grenville Cross QC, SC

DPP's Speech at the Seminar on Constitutional Law Developments organised by the Hong Kong Bar Association and the Centre for Comparative and Public Law of the University of Hong Kong
[9 May 1998]

To prosecute or not to prosecute?
Duty and accountability

In so far as it is possible in a short speech of this nature, I will seek to touch on the issues of how the decision to prosecute is exercised, how the public prosecuting authority inter-reacts with the public, and how the Department of Justice can legitimately be held to account for its actions.

Let me say at the outset that an important aspect of accountability must be transparency. It was for that reason that last month the Department of Justice re-issued its prosecution policy document. That initiative was designed to explain to the public at large, in short form, the policy, principles and practices of the prosecuting authority. Such openness, I believe, contributes to a degree of accountability to the public though not, I accept, to the degree which is sometimes sought. It can certainly assist the public in a tangible way in its dealings with the Department and to that I will revert.

Any talk of this nature must necessarily take as its point of reference Article 63 of the Basic Law, which makes clear that the Department of Justice alone controls criminal prosecutions, free from any interference. I consider it re-assuring that this principle, long recognised in colonial times, now for the first time enjoys an entrenched status by virtue of its placement in the mini-constitution.

The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must

be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute, or, conversely, a wrong decision not to prosecute both tend to undermine the confidence of the community in the criminal justice system.

Decisions whether to prosecute must be taken in accordance with recognised legal criteria. And when deciding whether or not to institute prosecutions the Secretary for Justice acts in a quasi-judicial capacity and does not take orders from the government, politicians, the law enforcement agencies or anyone else. Responsibility for this matter rests solely with the Secretary for Justice, and her counsel, and for this purpose the Secretary for Justice must be regarded as an independent official. In this there is undoubtedly a strong element of trust, such as has to exist also in relation to judicial officers. Although that may not necessarily satisfy all, mechanisms exist to ensure that the prosecuting authority can be held to account.

What then are the means of redress open to the citizen who feels aggrieved by inertia or partiality, on the part of the prosecuting authority?

First, the right of a private individual to institute a private prosecution for a breach of the law is undoubtedly a valuable constitutional safeguard. Indeed, the right of a private citizen to lay an information and the right and duty of the Secretary for Justice to supervise a criminal prosecution, may each be viewed as fundamental parts of our criminal justice system.

Second, the prosecuting authority can be held accountable if its decisions are reviewable. The prosecutor’s discretion to make a decision in the public interest carries with it the need to make that decision reviewable.

So it is that the decision not to prosecute has been held to be susceptible to judicial review. However, such a course of action will only realistically get off the ground if it can be shown that :

(1) the decision was the result of an unlawful prosecution policy;

(2) the decision ignored established policy; or

(3) the decision was perverse.

[In relation to (2) above the prosecution policy document I mentioned earlier is clearly relevant as it informs citizens of what established policy is.]

[*Vide* : R v DPP, ex p C (1994) 159 JP 227; R v CPS, ex p waterworth [1996] COD 273]

It is now at least arguable that prosecutors can be held to account also for improper decisions to prosecute. True, in Keung Siu-wah v AG [1990] 2 HKLR 238, dated March 1990, it was held to be a constitutional imperative that the Court of Appeal would not interfere with the AG's decision to prosecute on a judicial review application. However, the Court indicated that the trial court retained an inherent discretion to prevent an abuse of its process by staying a prosecution. Fuad VP nonetheless added that "*In the criminal field this is still a developing and unsettled area of the law*." It is now perhaps rather less unsettled in light of R v IRC, ex parte Allen [1997] STC 1141, dated February 1997, wherein it was held that a decision to prosecute is indeed amenable to judicial review if it represents an unjustified departure from established prosecution practice, or even if, without reference to wider policies or practice, it is unfair in so far as to amount to a breach of contract or representation.

Those are two obvious means by which the private citizen can hold the prosecuting authority to account.

As regards accountability at the public level, Article 73 of the Basic Law recognises the power of LegCo to 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. That is a broad mandate. That apart, the practice of the Attorneys General has, certainly in more recent times, been to provide the legislature with explanations to demonstrate that all relevant legal and policy considerations have been given due weight in a particular case and to

describe the way in which any such case has been handled. So it was that in relation to the Alan Bond case in 1987, the Attorney General told LegCo he had considered a prosecution under the Securities Ordinance, but decided against it. He said there were good reasons why an AG did not normally explain in public a decision not to prosecute in a particular case. By that I take it he meant that the policy of not disclosing particular reasons was designed in large part out of the need to be fair to the suspect who ought not to have his identity and guilt made the subject of public debate. In like vein, on 14 July 1986 the British Attorney General told Parliament that "*I propose to continue my existing practice, as a general rule, of confining answers to the basis of the decision in a particular case, without giving details of the evidence or other considerations which have led me to a particular decision.*" And in New South Wales the DPP's prosecution policy document similarly declares "*Where there had been no prior public proceedings and a decision is made not to commence a prosecution, reasons will not normally be given. Generally, to discuss reasons in such circumstances is undesirable as it would mean publishing materials assessed as not having sufficient evidential value to justify prosecution.*" So, AG/SJ's practice accords with Commonwealth practice in this regard.

In the Bond case the AG added that he would say a little more in view of public concern and he mentioned that he had received representations from Mr. Bond's lawyer and he was of the view that the outcome of any prosecution was far from certain and he said that the publication of an apology by Mr. Bond was a factor he had taken into account when subsequently he decided not to prosecute.

In 1989, the AG told LegCo that in the performance of his functions he was accountable to the public through that Council sitting in open session. That he said in relation to his conduct of the case of Mr. E.C. Harris. He also went so far as to reveal to LegCo the mistakes which had been made in that case. Again, in 1994, the AG attended LegCo on no less than three occasions in relation to the Wilkinson case to explain why he had decided not to pursue a prosecution, and to accept a bind over instead. That level of accountability continues and in March this year SJ faced extensive questioning on the Hong Kong Standard case. Of course, LegCo may not compel AG/SJ to resign by

expressing its lack of confidence. That said, it is certainly not a toothless tiger. As the Hong Kong Law Journal has observed in relation to such questioning by LegCo : "*This is not a very strong form of accountability but ..... given the freedom of the press and a community which cherishes the rule of law, such accountability can still be viable, important and valuable.*"

The recurrent question is how to strike a balance between the independence of the prosecuting authority and its accountability to LegCo. That is one of the most sensitive questions for any prosecuting authority funded by the state. On the one hand there is a need to protect the decision making process from improper influence or instruction; on the other, there are reasons why the prosecuting authority should be held to some form of account. A balance obviously has to be achieved and, whatever its imperfections, it is not immediately apparent how the present system of accountability can be improved upon.

That takes me directly into the issue of whether there ought to be an independent office of DPP. That question contains an element of artificiality. The reality is that Article 63 of the Basic Law leaves little scope for such an office. According to Prof. Wesley-Smith's book "The Basic Law and Hong Kong's Future" (1988) at page 190, this proposal was floated before the BLCCs special group on law and political structure of the SAR, which issued a report in 1987. The proposal as floated stated "*An independent prosecuting authority should be set up and the head of such authority would be statutory, totally independent of the AG and free from any interference.*" The report itself, however, recommended a provision which is now Article 63 of the Basic Law. For my part I cannot see how Article 63 could permit of an independent office of the DPP. If I be right, then further discussion is perhaps essentially academic. That said, I might add a few words about the relationship between the DPP and the AG in England. That may be salutary to this extent : the DPP's office there, despite being placed upon a statutory basis, enjoys not quite as much independence as is often supposed.

But a word first about the role of the AG in England, and of the SJ in Hong Kong. The DPP in each jurisdiction is solely responsible to the AG/SJ who in turn is in the unique position of being

a member of the government yet not subject to the collective decision of the government, nor required to obey the orders of the head of government in relation to those matters which involve the exercise of the prosecution role. It is by defining the relationship in that way that a proper distance has been achieved in order to protect the integrity of the decision making process. The case which enshrined that approach was that of John Ross Campbell in 1924. The important aspect of the case was that in November 1924 when Stanley Baldwin had become Prime Minister, he disclosed that in August of that year, the then Labour Government had decided that '*no public prosecutions of a political character should be undertaken without the prior sanction of the cabinet being obtained*'. The Prime Minister told Parliament that '*such an instruction, in the opinion of the government, was unconstitutional, subversive of the administration of justice, and derogatory to the office of the Attorney General. Her Majesty's Government have therefore given instructions that the instruction be excised*'. Like considerations apply in Hong Kong today.

The office of DPP was created by the Prosecution of Offences Act 1879, and that Act uses the word "superintendence" which has, since, become the parliamentary word of choice to define the relationship between the statutorily created office of the DPP, and the AG. [That was followed in 1985 by a second Prosecution of Offences Act which created the Crown Prosecution Service under the DPP - the principal rationale for that being the need to separate those who investigate from those who prosecute : the investigator had previously controlled the prosecutor. Fortunately, we have no such problem in Hong Kong.]

What then does 'superintendence' encompass? It must surely include the effectiveness of the decision making process and the quality of judgment used in reviewing, discontinuing and prosecuting cases. It must also apply to the overall thrust of policy which the DPP decides to adopt. To that extent, the AG is consulted about various public interest factors which are found in the CPS Code, and which, incidentally, is drawn in terms similar to those to be found in the Hong Kong prosecution policy document I mentioned earlier. Issues of general importance are matters upon which the AG as guardian of the public interest has a legitimate right to comment. The views of the AG

are therefore sought before a decision is taken on whether the general thrust of CPS policy is correct. That system seems to work well : while the DPP and, through her, the CPS, has the right to exercise discretion without fear or favour, malice or ill-will, the relationship between the AG and the DPP provides the constitutional safeguard that legal officials who are taking decisions that may ultimately affect an individual's liberty do not adopt policies which Parliament considers to be improper. However, it would be wrong to conclude that the AG has cut himself loose somehow from accountability for prosecution decisions. On 14 July 1986 the AG told Parliament "*I shall remain answerable in Parliament for decisions or actions that I or the DPP and his headquarters staff take on prosecution matters and also for the policy that is applied by the CPS in the handling of particular cases*." On 22 February 1992, the AG told Parliament he had the power to discontinue any prosecution brought by any prosecuting authority. He had the overriding responsibility for the conduct of prosecutions.

It is interesting also to see how the balance is struck between the role of the AG and that of the DPP in England. In his evidence to the Royal Commission on Criminal Procedure [1978-81], Sir Thomas Hetherington, DPP, stated "*It is my practice to consult the Attorney General in cases of special importance or difficulty even where there is no legal requirement for the Attorney to be involved. It is, for example, customary for me to consult the Attorney General in cases involving possible contraventions of Rhodesia sanctions. Cases in which the Attorney's fiat is required are considered by me, and the Attorney General takes his decision only after my advice has been received. If the Attorney General gives his consent to criminal proceedings, I have conduct of the case. This position has two practical results. On the one hand, the Attorney's "superintendence" does not require him to exercise control in detail over my work. On the other hand, I and my department have to be perceptive enough to identify the type of case about which the Attorney General is likely to be concerned in the public interest.*"

So there, may be, we see the essence of the matter: "**it all depends**". And, perhaps, despite the structure of the English system, with its statutory DPP, it is not so different from the Hong Kong system. Perhaps, after all, the differences are more apparent than real :

the DPP in England cannot be allowed to work in a vacuum : the DPP remains answerable through the AG to Parliament, just as the DPP in Hong Kong is answerable to the SJ who is in turn accountable to LegCo. Even in those Australian States which have statutory DPPs, it seems that the AG retains some residual control.

The systems in England and Hong Kong each provide the advantage of two independent and impartial legal minds and it can be of benefit to each to be able to turn to the other and seek to confer objectively, particularly so when the pressures, public or otherwise, are at their height. Mutual trust is essential. Moreover it is possible and has happened, that the British Attorney General has agreed that the Director should take sole responsibility for a case. One such case involved Jeremy Thorpe, the former leader of the Liberal Party. In Hong Kong, the SJ has likewise left to me the decision as to whether to initiate a prosecution against a person suspected of an offence in relation to her own medical records, and I, in turn, sought the advice of private counsel.

Is there then a distinction between informing and consulting? In practice there is. Sir Thomas Hetherington, when asked for examples of cases where he initiated consultation with the Attorney General, gave this reply : "*Some of the City Fraud cases - involving Lloyds and Johnson Mathey Bankers - because there is so much legitimate public interest in what is going to happen. Cases involving public figures such as Derek Hatton, the Deputy Leader of Liverpool Council, where we decided not to prosecute: that was one where we kept the Attorney informed rather than asking him to take a decision.*"

To sum up : In Hong Kong, as in England and Wales, there is a DPP who takes most decisions by himself or through his staff, but who consults the SJ in a small number of difficult, sensitive and complex cases. There is an SJ in Hong Kong, just as there is an AG in England, who makes up her own mind on those selected cases following advice from the DPP. The SJ, like the AG, asserts her independence from government because other people must not tell her what to do. A compromise? Perhaps. But the relationship works. The development of the respective roles of the AG/SJ and the DPP means

they have to work closely together. That willingness is necessary to make the system work.

May I conclude my remarks with this quote from the communique issued after the Commonwealth Law Ministers Conference in Canada in August 1977 : "*In recent years, both outside and within the Commonwealth, public attention has frequently focused on the function of law enforcement. Ministers endorsed the principles already observed in their jurisdictions that the discretion in these matters should always be exercised in accordance with wide considerations of the public interest, and without regard to considerations of a party political nature, and that it should be free from any direction or control whatsoever. They considered, however, that the maintenance of these principles depended ultimately upon the unimpeachable integrity of the holder of the office whatever the precise constitutional arrangements in the State concerned*."

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