

## The Author



Mr Victor Ho Wai-kin was called to the Hong Kong Bar in 1996 upon completion of his academic and professional legal studies at the University of Hong Kong. He served as Counsel in the Public Prosecutions Division of the Department of Justice for five years before resuming practice at the Criminal Bar in 2004.

Mr Ho also holds a Master Degree in Corporate and Financial Law from the University of Hong Kong and a Postgraduate Diploma in Law from King's College, University of London. He is a frequent speaker at professional seminars on various aspects of criminal law and practice.

<http://www.pbookshop.com>

trends, and some of the more recent changes since 1997 have included an increase in cybercrime, white-collar crime, money laundering cases, and the prosecution of stock market-related offences. With regard to judicial administration, the appointment of Chinese judges in the judiciary is on the rise.

Given the paucity of Chinese practicing barrister involved in writing academic books, I can venture to say that I completed this book with extraordinary courage and exhilaration notwithstanding my active practice in recent years. The primary aim of writing this book is to present in a simple and straightforward manner an updated record of the material that makes up the fabric of the Hong Kong criminal justice system. Based on my experience of defending my clients (few of whom are incorrigible criminals) in various levels in court and my past experience in prosecutorial work, my secondary aim is to present criminal law in a comprehensive yet convenient and practical format. I hope the book will also interest legal scholars or practitioners who are required to have a deeper understanding of criminal justice or compare the Hong Kong criminal justice system with that of their own countries.

In the course of writing this book, I, upon reflection, ask myself this: 'How could the criminal justice have been maintained in Hong Kong after 1997?' Answering this question is far from easy. Apart from the need for an impartial judiciary, fair prosecutorial decisions, and law enforcement agencies for conducting unbiased investigation, I share Lord Denning's judicial philosophy, which he states in his book *The Family Story* (Butterworths, 1981): '(i) Let justice be done; (ii) Freedom under the law; (iii) Put your trust in God'. Finally, I would like to acknowledge the undaunted support and patience of my wife, Pam, without whom this difficult task could not have possibly been accomplished.

The law stated is as of June 2015

Victor Ho Wai-kin  
Barrister-at-Law  
Hong Kong

<http://www.pbookshop.com>

## General Introduction

### Chapter 1. The General Background of the Country

#### §1. GEOGRAPHY AND CLIMATE

1. Hong Kong was a British colony for about 150 years, until 1997. Situated at the south-eastern tip of mainland China, Hong Kong was originally a small village, where most of the people fished and farmed for a living. It has a deep-water harbour but no natural resources, and is surrounded by steep mountains. Covering an area of more than 1,100 km<sup>2</sup>, Hong Kong comprises Hong Kong Island, Kowloon, the New Territories, and 237 outlying islands; more than 400 km<sup>2</sup> are designated as country parks or conservation areas for the sake of environmental protection. In recent years, pollution in Hong Kong has been a controversial issue. Since 1999, the chief executive has introduced a number of programmes to improve the air quality in Hong Kong. In 2007, a new branch of the government, the Environment Bureau, was established, and one of its tasks was to tackle air pollution.

2. The climate in Hong Kong is subtropical. In winter, between November and February, the temperature usually drops below 10°C in the New Territories. In March and April, the spring season, the humidity is a bit higher, and fog sometimes affects visibility in Hong Kong harbour. In summer, from May to August, the weather is hot, humidity is high, and showers and thunderstorms occur occasionally; the temperature can reach 33°C. The mean annual rainfall ranges from 1,300 mm to 3,000 mm in different areas in Hong Kong. The mean relative humidity was 77% in 2009, and the average annual rainfall in 2012 was 2,398.5 mm. The wettest month in Hong Kong is August and the driest, January. Tropical cyclones and strong summer monsoon winds and thunderstorms are common between April and September. Storms regularly occur in summer as well. In fact, an average of thirty-one tropical typhoons from the South China Sea and North Pacific Ocean visit Hong Kong yearly. The typhoons' centre winds can reach 180 km per hour or more, causing death, personal injuries, and substantial damage to property. The task of weather forecasting and issuing general climate information for the area belongs to the Hong Kong Observatory.

## §2. POPULATION

3. Hong Kong is one of the most densely populated territories on the globe. Statistics from the Census and Statistics Department show that the population of Hong Kong at the end of 2012 was 7,154,600, or about 6,620 people per km<sup>2</sup>. There were 91,343 births and 43,672 deaths in Hong Kong in 2012. Family reunions were one of the reasons for Hong Kong's population increase in 2012: about 54,600 mainland residents were able to join their families in Hong Kong under the one-way permit scheme.<sup>1</sup>

The ageing of the population, which poses financial pressure due to medical expenses, has raised much concern in the government. As at mid-2012, people aged 65 and older made up 13.7% of the population. The median age of the population was 42 as at mid-2012.

The birth rate in 2012 was estimated at 13 per 1,000 and the death rate, about 6 per 1,000.<sup>2</sup> Some 268 million visited Hong Kong in 2012, 5.65% more than in 2011.<sup>3</sup> To entice talented people from the mainland and overseas to live in Hong Kong, the Quality Migrant Admission Scheme was established on 28 June 2006.<sup>4</sup> Applicants were assessed under the General Points Test or the Achievement-Based Points Test, and by the end of 2012, there were 2,392 successful applications.<sup>5</sup>

Another scheme, established in October 2003, aimed to persuade foreign nationals, and Macau, Taiwan, and Chinese residents who had been granted permanent status in a foreign country to make capital investments in Hong Kong. With effect from 14 October 2010, successful applicants would have to invest at least HKD 10 million in permissible financial assets and by the end of 2012, there were 16,915 applicants approved under the scheme, investing a total of HKD 129.8 billion.<sup>6</sup>

Yet another programme, the Admission Scheme for mainland talents and professionals, which was established in July 2003, tries to attract talented mainlanders to work in Hong Kong.

## §3. ECONOMY

4. The socialist or communist system was not adopted in the Hong Kong Special Administrative Region (HKSAR) after the handover. Under the 'one country, two systems' principle, the HKSAR would maintain the same economic, social, and political systems after July 1997 for fifty years. Thus the existing capitalist system and way of life were retained and protected.

1. To boost the economy of Hong Kong (especially after the economic downturn resulting from the Severe Acute Respiratory Syndrome (SARS) scare from March to June 2003), the Chinese government adopted a policy allowing citizens from a number of provinces to move or travel to Hong Kong from August 2003 onwards.

2. See *Hong Kong Yearbook 2012*.

3. See *Hong Kong Yearbook 2012*.

4. *Ibid.*

5. *Ibid.*

6. See *Capital Investment Entrant Scheme, Hong Kong Yearbook 2012*.

Primary production (e.g., agriculture, fisheries, mining, and quarrying) is not common in Hong Kong, and secondary production (e.g., manufacturing and construction) has declined significantly, as most of the factories have been relocated to mainland China.<sup>7</sup> In contrast, Hong Kong's services sector has been expanding since the 1980s. The growth of logistics and transport, transshipment, tourism, telecommunications, financial, and other services<sup>8</sup> is reflected in their value-added contribution to the Gross Domestic Product (GDP) and employment.<sup>9</sup> Hong Kong also has a well-established legal and fiscal system, put in place while it was still a British colony. It is an internationalized city, with an excellent network of transport and communications infrastructure that fosters free trade and enterprise. In 2012, the US Heritage Foundation<sup>10</sup> and the Fraser Institute of Canada<sup>11</sup> ranked Hong Kong as the world's freest economy. The HKSAR maintains substantial fiscal and foreign exchange reserves,<sup>12</sup> as well as a simple tax system with a low tax rate.<sup>13</sup> It has been serving as an international trade and financial centre for quite some time, with a robust stock market. As of 2012, Hong Kong ranks among the world's top financial centres and it was ranked first among sixty-two of the world's leading financial systems and capital markets for the second consecutive year in the World Economic Forum's Financial Development Report 2012.<sup>14</sup> It also operates one of the busiest container ports and airports in the world.<sup>15</sup> In 2012, the GDP expanded by 1.4% in real terms.<sup>16</sup> In 2012, the total value of *visible* trade, including re-exports, domestic exports, and imports of goods amounted to HKD 7,347 billion.<sup>17</sup> Hong Kong has kept very close ties with Asian and Western countries. In fact, in mid-September 2008, when Lehman Brothers of the United States (US) collapsed, the Hang Seng Index of HKSAR's stock market plunged.<sup>18</sup> At the end of 2012, the stock market in Hong Kong ranked sixth in the world and second in Asia, amounting to HKD 22 trillion in terms of market capitalization.<sup>19</sup> A number of public companies and mainland enterprises were listed on the stock exchange. In 2012, the stock market of Hong Kong ranked the top five worldwide in terms of IPO funds raised.<sup>20</sup>

7. *Ibid.* Hong Kong continues to be the largest external investor in the mainland. According to the *Hong Kong Year Book 2012*, the cumulative value of Hong Kong's realized direct investment in Guangdong reached USD 185 billion at the end of 2012.

8. According to the *Hong Kong Year Book 2012*, the services sector directly contributed 93% to GDP in 2011.

9. The services sector's employment share rose from 69% in 1992 to 88% in 2012.

10. See *Hong Kong Yearbook 2012*.

11. *Ibid.*

12. *Ibid.* Fiscal reserves had reached HKD 669.1 billion by the end of March 2012.

13. A profit tax is imposed only on net profits earned from a trade, profession, or business carried out or derived from Hong Kong. In 2011–2012, the profit rate of unincorporated businesses was 15% and of corporations, 16.5%.

14. See *Hong Kong Yearbook 2012*.

15. Based on the number of passengers and volume of international cargo.

16. See *Hong Kong Yearbook 2012*.

17. See *Hong Kong Yearbook 2012*.

18. The Hang Seng Index dropped to the 11,016 mark on 27 Oct. 2008.

19. See *Hong Kong Yearbook 2012*.

20. *Ibid.*

5. In recent years, a stronger economic link has been forged between Hong Kong and the mainland.<sup>21</sup> Nearly 268 million visitors entered and left Hong Kong in 2012 whereas over 100 million people were mainland residents. Trade between HKSAR and the mainland has expanded rapidly since the open door policy took effect in 1978. The mainland has long been Hong Kong's largest trading partner in 2012. On the other hand, Hong Kong was the mainland's third largest trading partner (after the European Union and the United States), accounting for around 9% of the mainland's total trade value in 2012.<sup>22</sup> At the end of 2012, it had 200 authorized institutions (155 licensed banks, 21 restricted-licence banks, and 24 deposit-taking companies), with total assets of HKD 14,858.1 billion.<sup>23</sup> Hong Kong has one of the highest concentrations of banking institutions on the globe and the first phase of the Basel III standards was implemented in accordance with the Basel Committee's international timeline.<sup>24</sup> To comply with international standards, HKSAR's financial services maintain an efficient and effective regulatory system. The main regulators – the Hong Kong Monetary Authority, the Securities and Futures Commission (SFC), the Office of the Commissioner of Insurance, and the Mandatory Provident Fund Schemes Authority – supervise the banking, securities and futures, insurance, and retirement scheme industries, including the mandatory provident fund. Regarding the function of the SFC, the Securities and Futures (Amendment) Ordinance 2006 stipulated that the role of the chairman should be separate from that of the executive branch. A new post, Chief Executive Officer, was created for the daily operation of the SFC.

Since 2008, several steps have been taken to improve the economic cooperation and integration of the mainland and Hong Kong to boost the latter's economy: (1) introduction of the fifth phase of the Closer Economic Partnership Arrangement (CPEA); (2) building of a new boundary control point at Liantang; (3) building of the Hong Kong-Zhuhai-Macao Bridge; (4) development of Renminbi business in Hong Kong; and (5) listing of mainland enterprises in the Hong Kong stock exchange.<sup>25</sup> In 2012, the number of people employed was 3.79 million, 52.1% of whom were males and 47.9%, females. The overall unemployment rate fell from 3.4% in 2011 to 3.3% in 2012 and the underemployment rate also declined from 1.7% in 2011 to 1.5% in 2012. The majority of the labour force (88.4%) was engaged in the services sector;<sup>26</sup> only 3% worked in the manufacturing sector.

21. See the Closer Economic Partnership Arrangement (CPEA) between Hong Kong and the mainland. It could also be demonstrated by the fact that more mainland companies are continuing to invest in Hong Kong. For instance, the Bank of China (Hong Kong) Limited is the second largest banking group in Hong Kong. Like the Hong Kong and Shanghai Banking Corporation and Standard Chartered Bank, Bank of China is authorized to issue Hong Kong dollar banknotes.

22. *Hong Kong Yearbook 2012*.

23. *Ibid.*

24. *Ibid.*

25. *Ibid.*

26. *Hong Kong Yearbook 2012*. Of the 88.4%, 32% worked in the wholesale, retail, and import/export trades; restaurants; and hotels.

## §4. POLITICAL SYSTEM AND ADMINISTRATIVE STRUCTURE

6. Hong Kong has a two-tiered system of government: the Legislative Council which enacts laws, controls public expenditure, and monitors the government's administrative performance; and eighteen District Councils, which advise the government on the implementation of various policies. To increase government efficiency, a system of accountability for principal officials was implemented on 1 July 2002. The Chief Secretary for Administration, Financial Secretary, Secretary for Justice, and twelve Directors of Bureaux are the central organs and officials of the government. The Chief Secretary for Administration is the most senior official, who assists the Chief Executive in monitoring the performance and policy formulation of the policy bureaux. He/she becomes the deputy of the Chief Executive if the latter is on leave or overseas visits. The twelve policy bureaux in the Government Secretariat carry out the administrative and executive functions of the government. The sixty-one government departments and agencies, mainly manned by civil servants, are responsible for implementing laws and policies, and providing various services to society. The Office of Ombudsman was set up in 1989 to keep an eye on the performance of government departments and public bodies, and investigate complaints against them.

7. Under the Basic Law, the Chief Executive shall be elected by a broadly representative Election Committee appointed by the Central People's Government. He/she is chosen by universal suffrage after nomination by the Election Committee. The term of office of the Chief Executive is five years, and he/she may not serve for more than two consecutive terms (ten years). The first Chief Executive was elected by a committee of 400 Hong Kong residents coming from all walks of life. The present and the third Chief Executive of the HKSAR, Mr LEUNG Chun-ying, has been in office since 1 July 2012.

Various powers are vested in the Chief Executive, including the implementation of the Basic Law and other laws, signing of bills approved by the Legislative Council, promulgation of laws, signing of the budget approved by the Legislative Council, submission of reports to the Central People's Government as regards the budget, and appointment or removal of HKSAR judges and Executive Council Members. As of September 2007, fifteen principal officials under the accountability system and sixteen non-official members had been appointed to the Executive Council.

The Chief Executive informs the Central People's Government about the nomination, appointment, or dismissal of principal HKSAR officials. He should ensure good communication between the HKSAR government and the Central People's Government in respect of matters concerning the Basic Law.

The Chief Executive approves the motions on revenue or expenditure to the Legislative Council and decides whether officials or other personnel in charge of government affairs should testify in the Legislative Council or its committees. The law also stipulates that he can pardon convicted criminals or commute their penalties.

The Chief Executive has the discretion to select the matters or policies to be discussed in the Executive Council. After obtaining the advice of the council members, he decides on all crucial policies. However, the council must reach a collective

decision, which is presented to the public. The Chief Executive may refuse a majority opinion given by the Executive Council, but he must give specific reasons for doing so, which shall be put on record. The Executive and Legislative Councils are closely interlinked. The Executive Council makes decisions on the expenditure of public funds for policies, whereas the funds need to be approved by the Finance Committee of the Legislative Council. The advice rendered by the Executive Council on legislation is introduced to and subsequently passed by the Legislative Council. The Executive Council is also authorized to enact subsidiary legislation under a number of ordinances passed by the Legislative Council.

8. The Basic Law stipulates that the HKSAR Legislative Council is to be constituted by election, and clearly describes its composition. The Legislative Council is divided into three categories. For the first term, from 1998 to 2000, twenty members were directly elected by geographical constituencies; thirty, by functional constituencies; and ten, by the Election Committee. For the second term, from 2000 to 2004, twenty-four members were directly elected by geographical constituencies; thirty, by functional constituencies; and six, by the Election Committee. For the third term, from 2004 to 2008, thirty members were directly elected by geographical constituencies; thirty, by functional constituencies; and none by the Election Committee. At present, the president of the Legislative Council is elected by the members themselves. The term of office of a Legislative Council member is four years.

After 2007, the composition of the Legislative Council could be changed according to the Basic Law. However, such a change can be made only with a two-thirds majority vote of the members of the Legislative Council and the consent of the Chief Executive. Any changes in the composition should be reported to the Standing Committee of Mainland China's National People's Congress. The Basic Law also stipulates that eventually, all the members of the Legislative Council are to be elected through universal suffrage.

Article 73 of the Basic Law laid down the functions and powers of the Legislative Council:

- (1) to enact, amend, or repeal laws in accordance with the provisions of the Basic Law and legal procedures;
- (2) to examine and approve budgets introduced by the government;
- (3) to approve taxation and public expenditure;
- (4) to receive and debate the policy addresses of the Chief Executive;
- (5) to raise questions on the work of the government;
- (6) to debate any issue concerning public interest;
- (7) to endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court;
- (8) to receive and handle complaints from Hong Kong residents;
- (9) if a motion initiated jointly by one-fourth of all the members of the Legislative Council charges the Chief Executive with serious breach of law or dereliction of duty, and if he/she refuses to resign, the council may, after passing a motion for investigation, give a mandate to the Chief Justice of the Court of Final

Appeal to form and chair an independent investigation committee. The committee shall be responsible for carrying out the investigation and reporting its findings to the council. If the committee considers the evidence sufficient to substantiate such charges, the council may pass a motion of impeachment by a two-thirds majority of all its members and report it to the Central People's Government for decision; and

- (10) to summon, as required when exercising the previously mentioned powers and functions, persons concerned to testify or give evidence.

9. One of the principal functions of the Legislative Council is to enact laws. Proposed legislation will be scrutinized in the government, the Legislative Council panels, the advisory committees, or if necessary, the chambers of commerce and trade associations, and the district councils. The process of enacting legislation is described below:

The government submits its proposal to the Executive Council. If the Chief Executive approves it, the Executive Council may introduce the bill to the Legislative Council. If the Executive Council endorses the bill, it will be published in the *Gazette*. Thereafter, it will be introduced into the Legislative Council for its first reading. The official in charge of the bill will then move for the bill's second reading, and submit a speech explaining the pros and cons, and nature of the bill. Before the commencement of the second reading debate, the bill will be referred to the House Committee for examination; if necessary, the House Committee may form a Bills Committee to examine the bill's provisions more thoroughly. The Bills Committee will consider the nature, and pros and cons of the bill, amend it if necessary, and report back to the House Committee. The House Committee may then discuss the said report so that its members can prepare for the discussion of the bill.

The bill will then be returned to the Legislative Council for its second reading. If the bill passes the second reading, it will proceed to the committee stage, where amendments can be moved. Afterwards, the bill goes through a third reading. If the bill passes the third reading, it will go to the Chief Executive for signature. Once signed by the Chief Executive and published in the *Gazette*, the bill formally becomes a law.

10. Apart from the three-tier system in the HKSAR (see paragraph 8), the committee system ensures that members of the Legislative Council perform a variety of roles, such as scrutinizing bills, controlling public expenditure, and monitoring the performance of the government. The Legislative Council comprises three standing committees: the Finance Committee, Public Accounts Committee, and Committee on Members' Interests. For district administration, the eighteen District Councils advise on matters affecting the welfare of the citizens in their respective districts. The District Councils are also involved in improving the environment and their facilities, and promoting recreational, cultural, and community activities within their districts. The term of office of a District Board Member is four years.

## §5. SOCIAL AND CULTURAL ASPECTS

11. The Basic Law and relevant legislation in Hong Kong provide for the freedom of religion and freedom to preach – fundamental rights conferred to Hong Kong residents.<sup>27</sup> There are a number of religions in Hong Kong, including Christianity, Catholicism, Buddhism, Taoism, Confucianism, Islam, Hinduism, Sikhism, and Judaism. Apart from preaching, religious bodies such as Christian and Catholic churches play a crucial role in establishing primary and secondary schools, hospitals, and welfare facilities. Hong Kong residents also enjoy various rights, such as the freedom of speech, press, and publication; freedom of association, assembly, procession, and demonstration; and freedom to form and join trade unions, and go on strike.<sup>28</sup> They are also free to: (1) travel and enter or leave the HKSAR without restriction; (2) choose occupations; (3) engage in academic research, literary and artistic creation, and other cultural activities; and (4) marry and raise a family.<sup>29</sup> The political rights of Hong Kong residents comprise the right to vote and the right to stand for election.<sup>30</sup> Their legal rights and protection include confidential legal advice, access to the courts, choice of lawyer for representation in the courts, and judicial remedies.<sup>31</sup> They can also institute legal proceedings in the courts against the acts of the executive authorities and their personnel.<sup>32</sup> Hong Kong residents also have the right to social welfare;<sup>33</sup> they are entitled to Comprehensive Social Security Assistance in accordance with their needs, although they have to pass a test from the Social Welfare Department. Lastly, the provisions of the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and International Labour Conventions – those which are applicable to Hong Kong – shall remain in force.<sup>34</sup> They shall be enforced through the legislation of the HKSAR.<sup>35</sup>

12. The labour market in Hong Kong is quite competitive, as reflected by the unemployment rate (3.3% in 2012) and average wage rate. The employment of minors under the age of 15 is prohibited. Various laws, such as the Occupational Safety and Health Ordinance, the Factories and Industrial Undertakings Ordinance, and subsidiary legislation protect the safety and health of employees at the workplace. In cases of injury or death, employees are protected by legislation or schemes operated by the government, which provide compensation or the payment of damages to the employee or, in the case of his/her death, to his/her relatives.<sup>36</sup>

27. See Ch. III of the BL about the fundamental rights and duties of the residents.

28. See Art. 27 of the BL.

29. See Arts 31, 33, 34, and 37 of the BL.

30. See Art. 26 of the BL.

31. See Art. 35 of the BL.

32. *Ibid.*

33. See Art. 36 of the BL.

34. See Art. 39 of the BL.

35. *Ibid.*

36. Examples are the Employees Compensation Assistance Scheme, Occupational Deafness Compensation Scheme, Employees Compensation Assistance Scheme, Employees' Compensation Ordinance, and Pneumoconiosis (Compensation) Ordinance.

Meanwhile, the Employment Ordinance protects the general rights and benefits of employees, and a Labour Tribunal settles disputes between employers and employees.

13. Hong Kong's education system is composed of kindergartens, primary schools, secondary schools, and universities. In recent years, the government has begun to enhance the qualifications of kindergarten principals and teachers by increasing the number of professionally trained Qualified Kindergarten Teachers (QKT). The quality of kindergartens is also improved by decreasing the student-teacher ratio and imposing quality standards. Children enjoy twelve years of free education in all public schools. The government implemented a New Senior Secondary Academic structure in 2012, known as the new '334' system. All students have to attend three years of junior secondary school and another three years of senior secondary school. The students then take a public examination – the Hong Kong Diploma of Secondary Education Examination (HKDSE). The duration of the university undergraduate programme will be extended from three to four years.

Apart from the government-subsidized secondary schools, there were forty-nine international schools in Hong Kong as of September 2012,<sup>37</sup> including fifteen that were operated by the English Schools Foundation. The Hong Kong Institute of Vocational Education (IVE), Construction Industry Training Authority, and Clothing Industry Training Authority provide technical and vocational training. Various universities, such as the City University of Hong Kong, Hong Kong Polytechnic University, and Hong Kong Institute of Education also offer courses at the sub-degree level through self-financing programmes to those who leave secondary school. Hong Kong has twelve degree-awarding higher education institutions, eight of them publicly funded through the University Grants Committee. The remaining four are Hong Kong Academy for Performing Arts, the self-financing Open University of Hong Kong, Shue Yan University, and Chu Hai College of Higher Education. On 19 December 2006, the Shue Yan University was privatized – the first in Hong Kong.

## §6. THE JUDICIAL SYSTEM

14. The independence of the judiciary is a crucial feature of the HKSAR's legal system; it is separate from the executive and legislative branches of government. As such, the government will not interfere in the decisions of the courts, whatever their level. The courts have a wide jurisdiction to hear criminal prosecutions and civil disputes between individuals and private companies. The court system is composed of the Court of Final Appeal, High Court (which includes the Court of Appeal and Court of First Instance (CFI)), the District Court (which includes the Family Court), the Lands Tribunal, the Magistrate's Courts (which include the Juvenile Court), the Coroner's Court, the Labour Tribunal, the Small Claims Tribunal, and the Obscene Articles Tribunal. The Chief Justice of the Court of Final Appeal is the head of the

37. See *Hong Kong Yearbook 2012*.

re-visited whether the common law defence or a mistaken belief is a defence available to the offences of strict liability for safety regulations.<sup>243</sup> The appeal was dismissed. Statutory defences in relation to the taking of reasonable steps in avoiding the problem are available in some of the specific offences in Hong Kong.<sup>244</sup>

243. See *Hin Lin-ye v. HKSAR* [2010] 13 HKCFAR 142.

244. In the offence of construction sites (safety) regulations (Cap. 59I, Reg. 38B(1)), Reg. 38H creates a statutory defence; for instance, if all reasonable steps have been taken to ensure the proper use of safety belts provided to the workers. An offence such as exporting unmanifested cargo, contrary to s. 18(1)(b) of the Import and Export Ordinance, Cap. 60, s. 18(2), creates another statutory defence.

## Chapter 4. Justification, Excuse, and Other Grounds of Impunity

### §1. GENERAL PRINCIPLES

100. Ignorance of the law is not a defence in the Hong Kong legal system, but other types of defence are available to anyone who is accused of a criminal offence.<sup>245</sup> In some offences, such as absolute liability, general defences are not available. However, some offences are accompanied by statutory defences for the accused.<sup>246</sup> If the court accepts the defence, the accused shall be acquitted of the charge. If an accused raises the defence of alibi, he/she shall be acquitted if he/she can prove that he/she was not present at the crime scene at the material times. If a court accepts a defence such as provocation in the charge of murder, this will not lead to direct acquittal but to a reduction of the offence to manslaughter. Some defences relate to the mental condition of the accused. An accused cannot be responsible for a criminal act if he/she is not able to control the act (e.g., insanity, automatism, and so on).

The accused may also put the blame on other persons. For instance, if a person tells another to take a book that is not his, the taker may be treated as an innocent agent if he does not have *mens rea* in committing theft. On the other hand, if a person commits a crime under threat to personal safety or life from others, he/she may rely on the defence of duress. The acceptance of these defences by the court can result in direct acquittal or conviction of a lesser offence.

The defence of consent is not quite clear-cut in common law jurisdictions, as it may be necessary to strike a balance between the matter of public interest and the rights of individuals.

Regarding the burden of proof, it is a trite law that the prosecution has the burden to prove the guilt of an accused beyond reasonable doubt.<sup>247</sup> However, if an accused raises defences such as provocation, insanity, or diminished responsibility, the burden of proof rests on the accused and the test is on the balance of probabilities.

### §2. DEFENCES RELATED TO THE MENTAL CONDITION OF THE ACCUSED

#### I. Insanity

101. The defence of insanity follows English law in Hong Kong, relying heavily on the traditional English authority of *M'Naughten* (1843) 10 CI and Fin 200, commonly referred to as the *M'Naughten* Rules. The defence of insanity can be relied on at two stages: if the defendant is confirmed as an insane person before trial and if the defence raises the issue at trial. In the former case, on medical evidence, the accused is found unfit to enter a plea, being unable to understand the nature of the

245. Examples are wrong identification, lack of *mens rea*, jurisdictional problems, error in law, and so on.

246. An example is sexual intercourse with a mentally incapacitated person, contrary to s. 125 of the CO, Cap. 200.

247. See *Woolmington v. DPP* [1935] AC 462.

charge against him/her or differentiate between the pleas of guilty and not guilty.<sup>248</sup> In the latter case, the accused has already entered a plea. Similar to the issue of diminished responsibility, the issue of insanity will be left to the jury after proper direction is given by a judge.<sup>249</sup> The gist of the said rule implies two important principles. The first is that every person is presumed to be sane until proof of the contrary. The second is that an accused shall have such a defence if he/she can show that: (1) he/she was suffering from a defect of reason due to a disease of the mind, as either not to know the nature and quality of the act, or (2) he/she was not aware that what he/she was doing was wrong. If the judge, prosecution, or defence raises the issue of insanity, the issue is put to a jury.<sup>250</sup> If the defence raises the issue of insanity at trial, it will carry the burden of proof.

The defence is required to prove the case on a balance of probabilities. If the prosecution raises the issue at trial and it is disputed by the defence, the prosecution has to establish the issue beyond reasonable doubt. The accused can also rebut the presumption of sanity by producing evidence, such as medical reports, showing insanity at the time the offence was committed. The burden of proof will be discharged if the accused can satisfy the court or jury in the CFI, on a balance of probabilities, that he/she was insane. Sometimes, the accused does not explicitly plead the defence of insanity at trial. The defence may adduce medical evidence to the court in proving the accused's state of mind at the time of the alleged offence. If, after evaluating all the medical evidence, trial judge takes the view that there is a defect of reason from a disease of the mind of the accused within the *M'Naughten* Rules, the court could give a ruling that the accused pleaded the defence of insanity even if the defence objects to it. The matter of insanity would then be left to the jury to decide whether the elements as laid down in the *M'Naughten* Rules are satisfied.

102. However, when the defendant pleads the defence of insanity, the court shall allow 'the prosecution to adduce evidence tending to prove the other of those contentions and may give directions as to the stage of the proceedings at which the prosecution may adduce such evidence'.<sup>251</sup> If the jury believes that the accused was insane when he/she committed the offence, it shall return a special verdict of 'not guilty by reason of insanity'.<sup>252</sup> The accused, however, can appeal against such a decision to the Court of Appeal if it involves a question of law alone. If the accused appeals on a question of fact alone, a mixed question of law and fact, etc., which the Court of Appeal deems sufficient grounds for appeal, a leave to appeal has to be obtained from the Court of Appeal.<sup>253</sup>

103. Following a special verdict of not guilty by reason of insanity, the court shall make an order that the accused be admitted to the CSD Psychiatric Centre or

248. See *Podola* [1960] 1 QB 325: A man was found to be fit for plea even though he suffered from hysterical amnesia.

249. However, if an accused puts his/her state of mind in issue, the question as to whether she/he has raised the defence of insanity is determined by the judge. See *Sullivan* [1984] AC 156.

250. See *Jimmy Johnson* [1983] HKLR 344.

251. See s. 76A of the CPO, Cap. 221.

252. See s. 74 of the CPO, Cap. 221.

253. See s. 83J of the CPO, Cap. 221.

a mental hospital, acting on the written or oral evidence of two or more registered medical practitioners.<sup>254</sup> In addition, the court can also issue a guardianship order under the Mental Health Ordinance, a supervision and treatment order under Part IIIB of that ordinance, or an order for absolute discharge. However, the imposition of guardianship, and supervision and treatment orders shall not apply to an offence for which the sentence is fixed by law (e.g., murder).

In the *Queen v. Lam Ka Yiu* [1997] HKLRD 445, the appellant was charged with attempted robbery, which occurred inside a bank. The trial judge, after receiving medical evidence, accepted that the accused was insane at the time of the offence. The judge ordered that the appellant be admitted to a Psychiatric Centre in Hong Kong. The accused appealed and asked the court to replace it with an order of supervision and treatment under Part IIIB of the Mental Health Ordinance. The Court of Appeal allowed the appeal.

104. The accused must be able to prove three elements before he/she can succeed in raising the defence of insanity. The accused must prove that he/she was suffering from a disease of the mind. Whether a particular malfunctioning of the mind amounts to a disease of the mind is a legal rather than a medical issue. Epilepsy, diabetes, and brain tumours may be regarded as diseases of the mind in law if they produce a malfunctioning. However, a malfunctioning of the mind caused by external factors such as alcohol consumption will not be regarded as a disease of the mind.<sup>255</sup> The improper consumption of prescribed medicine, which caused a malfunctioning of the mind, will not be regarded as a disease of the mind.<sup>256</sup> The accused must also prove that he/she was suffering from a defect of reason due to the disease of the mind.<sup>257</sup> Lastly, the accused must prove that he/she did not know the nature and quality of the act or if he/she did, that he/she did not know that it was wrong.<sup>258</sup>

In *HKSAR v. Tang Kwok-wai* [2000] 2 HKLRD 744, the Court of Appeal considered the meaning of disease of the mind. D was convicted of attempted murder. He had tried to throw his girlfriend from an eighteen-floor building; but fortunately, the victim was rescued. The accused claimed that he had no intention of killing his girlfriend, but he had taken illegal drugs ('ice') which caused him to have delusions, hearing voices instructing him to kill the victim. One of the grounds for appeal was that the trial judge should have directed the jury as to a verdict of not

254. See s. 76 of the CPO, Cap. 221. See *HKSAR v. Wan Pak-sing* [2004] 3 HKC 283: An unspecified period of detention would normally be imposed.

255. See Smith & Hogan, *Criminal Law* (London, 2002), 219.

256. See *Quick* [1973] QB 910; for further discussion of diseases of the mind related to arteriosclerosis that caused a congestion of blood in the brain, see *Kemp* [1957] 1 QB, 399.

257. Absentmindedness resulting from depression will not suffice, even if it is a disease of the mind. The disease of the mind must lead to a defect in reasoning: The power of reasoning must be damaged; see *Clarke* [1972] 1 All ER 219.

258. See *Bratty v. AG for Northern Ireland* [1963] AC 386: The accused was suffering from psychomotor epilepsy and did not know the nature of his act. The court held that his mental condition amounted to insanity. Cf. *Bingham* [1991] Crim LR 433: Hypoglycaemia could not be regarded as a disease of the mind, as it was caused by external factors. See also *Pang Bing-ye v. Queen* [1984] HKLR 298: The defence of insanity would not be available to the accused if she knew what she was doing but could not stop or control herself from doing such act.



guilty by reason of insanity, in that the defendant had been suffering from 'ice'-induced psychosis which had caused the delusions. The accused contended that his mental condition caused a disease of the mind and he did not know the nature and quality of his acts at the material time. The appeal was dismissed.

The Court of Appeal held that the state of mind of the accused did not fall within the *M'Naughten* Rules. His defect of reason was caused by his 'ice'-induced psychosis, which would have become less severe if he had withdrawn the drugs. That defect of reason lasted for only a short time and had been caused by external factors. 'A mere temporary disposition or phenomenon displayed by D as a result of taking drugs without more, cannot be regarded as a disease of the mind within the *M'Naughten* rules.'

## II. Automatism (Non-insane Automatism)<sup>259</sup>

105. The automatism defence derives from common law. It refers to an accused who was unconscious or suffered from impaired consciousness at the time of the offence<sup>260</sup> and, therefore, did the act involuntarily. Insane automatism is governed by the *McNaughten* Rules (1843) 10 C1&F 200. Non-insane automatism is usually caused by external factors, such as a concussion from a blow to a head or the injection of insulin.<sup>261</sup> Therefore, malfunctioning of the mind caused by a disease is excluded. If a defence of this sort is successful, it results in direct acquittal, unless the automatism was self-induced.<sup>262</sup>

## III. Intoxication

106. The defence of intoxication is only available to the accused if his/her mental state was affected to the extent that he/she was not capable of forming *mens rea*. An accused who takes alcohol voluntarily cannot exempt himself/herself from criminal liability.<sup>263</sup> In other words, arguing that he/she would not have committed the offence had he/she been sober will not prosper. The distinction between the crime of basic intent and specific intent is crucial. In *Director of Public Prosecutions v. Majewski* [1977] AC 443, the House of Lords held that evidence of voluntary or involuntary intoxication negating *mens rea* is a defence to a charge of crime

259. To learn about the approach in Hong Kong, see *R v. Chan Tak-kwong* [1997] 1 HKC 478; cf. English case of *Burgess* [1991] 2 QB 92.

260. For the evidential burden of proof, see *Queen v. Mohammad Hussain* [1993] 1 HKCLR 1.

261. See Jackson, *Criminal Law in Hong Kong* (Hong Kong, 2003), 242.

262. See *Quick* [1973] QB 910.

263. In Hong Kong, self-induced alcohol intoxication will not warrant a lenient sentence in court. See *R v. Cockings* [1987] HKLY 348. See also *R v. Swann* [1987] HKLY 339: The accused was charged for indecent assault and assault occasioning actual bodily harm. He was sentenced to eighteen months of imprisonment. He appealed against the sentence, but it was dismissed. The court held that drunkenness was not a mitigating factor and could not be acted on as an excuse to justify the use of any violence.

requiring specific intent only, and does not apply to a charge of any other crime.<sup>264</sup> Where the crime committed by the accused does not require specific intent, the accused cannot rely on the defence of self-intoxication, even though he/she did not form the necessary *mens rea* in committing the offence.<sup>265</sup> As to the proper direction to the jury regarding drunkenness for offences requiring specific intent, the issue is not whether the accused is capable of forming the intention to commit the offence, but whether 'he did in fact form the necessary intent'.<sup>266</sup> If the jury think that the accused was so drunk that he did not intend or may not have intended to commit certain offence, the jury must acquit him.

In *Fung Chun-wai and The Queen*, CACC No. 1117 of 1981, the appellant, who had been drunk at the time of the offence, had had a heated argument with his victim, whom he assaulted and killed with a chopper. At trial, he raised the issues of provocation and drunkenness but was convicted of murder. The trial judge gave the following direction to the jury on the issue of drunkenness: 'Was the defendant so drunk that he was not capable of forming, and did not form, the intention to cause serious bodily harm?' The appellant argued that the direction was faulty in that it did not leave the jury the question of whether he had formed the intention to cause serious bodily harm, only the question of capacity to form that intention. The appeal was dismissed. The trial judge's direction on drunkenness and intention was deemed correct if the jury was told to consider not only the question of whether the accused was capable of forming the necessary intent but also the crucial question of whether in striking the fatal blow, the accused did have the necessary intent.

However, the *Majewski* rule does not apply when a statute (such as the offence of Criminal Damage under the Crimes Ordinance) expressly states that a particular belief, such as an honest belief, shall be a defence to the charge.<sup>267</sup> The accused cannot rely on the defence of drunkenness rendering him/her incapable of forming *mens rea* or on insanity within the *M'Naughten* Rules if the prosecution proves that he/she has deliberately taken alcohol or drugs to gain the 'courage' to commit the offence.<sup>268</sup>

107. Would an accused be able to rely on the defence of intoxication if he/she commits an offence of attempt? In the *Queen v. Mohammad Hussain*, CACC No. 197 of 1991, the accused, who was drunk when he committed the offence, was convicted after trial and sentenced to imprisonment for four years for attempting to rape a woman who was in her 1970s. The prosecution submitted that there was no distinction between rape or attempted rape, as they were offences of basic intent, and that the defence of self-induced intoxication was not available to the accused. The trial judge, after having referred to the leading authority of *Majewski*, gave a correct ruling that attempted rape was an offence of basic intent, for which specific intent did not have to be proved.

264. This concept was not stated clearly in the leading case of *DPP v. Beard* [1920] AC 479. Other commonwealth countries, such as Canada, Australia, New Zealand, and South Africa, do not follow the principle of *Majewski*; see Smith & Hogan, *Criminal Law* (London, 2002), 251.

265. See Smith & Hogan, *Criminal Law* (London, 2002), 245.

266. See *Pordage* [1975] Crim LR 575 CA, following the dicta in *Sheehan* [1975] 2 All ER 960.

267. See Smith & Hogan, *Criminal Law* (London, 2002), 246 and *Jaggard v. Dickinson* [1981] QB 527.

268. See *AG for Northern Ireland v. Gallagher* [1961] 3 All ER 299.

In *Attorney General v. Choi Wah-hang and another* [1987] 1 HKC 104, the defendants were charged with tampering with a vehicle without reasonable excuse and lawful authority, contrary to section 49 of the Road Traffic Ordinance (RTO), Cap. 374. The magistrate ruled that the defendants did tamper with the vehicle, but were so drunk they did not know what they were doing at the material time. He further said that, under section 49 of the RTO, Cap. 374, the offence required specific intent and, therefore, the defence of self-induced intoxication was available to the accused. The defendants were acquitted. The prosecution appealed by way of a case wherein the Court of Appeal held that the said offence did not require specific intent and the word *tamper*, as stated in the ordinance, can be differentiated from accidental interference with the vehicle.<sup>269</sup> The appeal was allowed and the acquittal was set aside.

If the accused argues that he did not form the *mens rea* of an offence of specific intent by reason of self-induced intoxication, the onus of rebutting the defence is on the prosecution. Subject to restrictions, the accused can also rely on the defence of intoxication, which negates the *mens rea*, if he/she voluntarily took drugs in accordance with a treatment or medicine prescribed by a doctor.<sup>270</sup>

108. If an accused took drugs or alcohol involuntarily because his/her drinks had been secretly laced with either substance or he/she was under duress, he/she cannot rely on a defence of involuntary intoxication. Such defence is invalid if the prosecution proves that the accused has the necessary intent.<sup>271</sup> An accused cannot claim involuntary intoxication due to his/her underestimation of his/her drinking capacity.<sup>272</sup>

109. The rules on voluntary or involuntary intoxication also apply to a person who takes drugs.<sup>273</sup> In *Bailey* [1983] 2 All ER 503 and *Hardie* [1984] 3 All ER 848, the court classified drugs into two categories. The first is soporific or sedative drugs (non-dangerous drugs), the taking of which would not cause violence. The second type causes a tendency towards violence (dangerous drugs). For dangerous drugs, the rules are the same as those for alcohol. In *Bailey* [1983] 2 All ER 503, the accused was charged with assault offences under sections 18 and 20 of the Offences against the Person Act in England. He was a diabetic and relied on the defence that he failed to take enough food after insulin, which put him in a state of automatism. The court held that this affords a defence in section 18, as it was an offence of specific intent. The Court of Appeal added that self-induced automatism, other than that due to intoxication from alcohol or drugs, provides no defence to crimes of basic intent.

269. Professors Smith & Hogan in *Criminal Law* took the view that it would be oversimplified to classify all offences into crimes of either specific or basic intent.

270. See *Quick (supra)*: The accused took insulin voluntarily at the time when he committed the offence.

271. See *Kingston* [1994] 3 All ER 353: Someone had secretly put drugs in the drinks of the accused. However, the accused knew what he was doing and intended to commit indecent assault on a teenager, which constitutes *mens rea*. Thus, the defence of involuntary intoxication was not available to him.

272. See *Allen* [1988] Crim LR 698.

273. See *Lipman* [1970] 1 QB 152.

For sedative drugs, reference could be made to *Hardie* [1984] 3 All ER 848, in which the accused was charged with damaging property with intent to endanger the life of another or being reckless regardless of whether another's life was endangered. He relied on the defence that he had taken a sedative drug (i.e., Valium) which negated the *mens rea* for the offence. Relying on the normal principle laid down in *Majewski*, the trial judge gave a direction that such could not be a defence, as the crime was one of basic intent. The Court of Appeal quashed the conviction, however, and held that the leading case of *Majewski* did not apply to this case because intoxication was due to non-dangerous drugs. Lastly, if a person is so drunk that the alcohol causes insanity, the *M'Naughten* Rules of insanity apply. If a person has been an alcoholic or drug addict for a very long time and the addiction has caused severe effects on the brain, it can give rise to an insanity defence under the *M'Naughten* Rules or diminished responsibility.<sup>274</sup>

#### IV. Diminished Responsibility

110. If an accused is charged with murder, he/she can be held guilty of a lesser offence – manslaughter – on the basis of diminished responsibility. The defence will, therefore, not result in a direct acquittal. The court can impose a hospital order for a specified or indefinite period.<sup>275</sup> This defence can only be applied to the offence of murder.

The general rule of law states that when a person kills or is party to the killing of another, he/she will not be convicted of murder 'if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing'.<sup>276</sup> The law places emphasis on the extent of the abnormality: it should reach the threshold of substantially impairing the mental responsibility of the accused. The issue should be left to the jury to decide. The requirement of 'substantially impaired' is crucial,<sup>277</sup> as trivial and minimal impairment are not sufficient.<sup>278</sup> If there are several accomplices to a murder, the defence of diminished responsibility put forward by one of the accused will not affect the criminal liability of the others.<sup>279</sup>

274. See Jackson, *Criminal Law in Hong Kong* (Hong Kong, 2003), 256.

275. See s. 45 of MHO, Cap. 136. The hospital order under s. 45 of the MHO, Cap. 136, will also be applicable to offences other than murder, such as obstructing a police officer in due execution of duty; see *HKSAR v. Wo-han* [2005] 3 HKLRD 438.

276. See s. 3 of the Homicide Ordinance, Cap. 339. See also *R v. Byrne* [1960] 44 Cr. App. R. 246, where s. 3 of the Homicide Ordinance is equivalent to s. 2(1) of the Homicide Act 1957 in England.

277. See *Campbell* [1986] 84 Cr. App. R. 225. See also *HKSAR v. Lau kin-hang* [2007] 1 HKC 42: A retrial was ordered, as the directions given to the jury in relation to the meaning of substantial impairment were wrong.

278. See *Lloyd* [1967] 1 QB 175.

279. See s. 3(4) of the Homicide Ordinance, Cap. 339.

The abnormality of mind must also arise from disease or injury,<sup>280</sup> but the defence is not required to prove that the cause of the disease should be other than one that had been self-inflicted.<sup>281</sup> This defence can be relied on if the abnormality of mind is brought by long-term drug abuse or alcoholism. If the accused pleads guilty to manslaughter on the basis of diminished responsibility and the prosecution does not accept the plea, the matter will be left for the jury's consideration. Strictly speaking, the jury may reject the medical evidence if it is justified to do so. If the defence intends to raise the issue of diminished responsibility, it carries the burden of proof. The standard of proof adopted, however, is one of a balance of probabilities, instead of having to prove the state beyond reasonable doubt.<sup>282</sup> In other words, it is sufficient for the defence to convince the jury that its case is more likely than not to be true.

III. The issue of diminished responsibility should be dealt with based on medical evidence.<sup>283</sup> If the defence raises the issue of diminished responsibility, doctors should be called in to give psychiatric evidence. A qualified psychologist will not be accepted by the court.<sup>284</sup> The prosecution is entitled to call its own doctor to rebut the defence.<sup>285</sup> If it is in the interests of justice to do so, the trial judge may also raise the issue of diminished responsibility on his/her own motion.<sup>286</sup>

Regarding the sentence in relation to the defence of diminished responsibility in a murder charge, the court may impose a hospital order for an unspecified period on

280. In England, disease covers battered woman syndrome, which is considered a type of mental disease. See *Hobson* [1998] 1 Cr. App. R. 31 and *Ahluwalia* [1992] 4 All ER 889: Disease and injury also covers alcoholism, if it causes injury to the brain resulting in the impairment of judgment. See *Tandy* [1989] 1 WLR 350. However, the temporary effect of alcohol and other drugs will not qualify as disease and injury. See *O'Connell* [1997] Crim LR 683. Cf. *R v. Wood* [2008] 3 All ER 898 and *R v. Stewart (James)* (2009) 2 Cr. App R 500.
281. See *HKSAR v. Liu Chun-yip* [2006] 4 HKLRD 595.
282. See *Dunbar* [1958] 1 QB 1 and a recent case of *Ali and Jordan* [2001] 1 All ER 1014.
283. In some cases, the court would take into account the act, demeanour, and statement of the accused apart from medical evidence; see *Byrne* [1960] 2 QB 396.
284. In *HKSAR v. Tsang Chiu-tik and Kum King-fung*, CACC No. 567 of 1998, a psychologist, instead of a qualified medical doctor, was of the opinion that the accused was suffering from an abnormality of mind (among other observations, in view of his mental conditions). The accused appealed on grounds that the court was wrong to deny the jury of the criminal evidence of the psychologist. If the psychologist's testimony had been accepted, the jury would have concluded that the accused was suffering from diminished responsibility at the time of killing. The Court of Appeal held that a psychologist was not qualified to give an opinion on diseases of the mind and the evidence should not be accepted.
285. According to s. 76A of the Criminal Procedure Ordinance, Cap. 221, the court shall allow the prosecution to adduce or elicit evidence to rebut the contentions in a murder trial where the accused contends that he was suffering from such abnormality of mind as stated in s. 3(4) of the Homicide Ordinance, Cap. 339. See also *HKSAR v. Tsui Chu-tin John* [2005] 1 HKC 518: A psychiatrist was called by the prosecution in a murder trial. He testified that the major depressive disorder made a 'significant contribution', so that it partly impaired the ability of the appellant to control himself. The psychiatrist further testified that the attack was not merely caused by anger and jealousy. The conviction of manslaughter was substituted, as the Court of Appeal held that the prosecution should have explored such medical opinion further in re-examination. Therefore, a verdict of murder was not safe.
286. See Jackson, *Criminal Law in Hong Kong* (Hong Kong, 2003), 249. See also *HKSAR v. Tang Kin-kwong* [2005] 1 HKC 65.

the accused under section 45 of the Mental Health Ordinance, Cap. 136.<sup>287</sup> Apart from the hospital order,<sup>288</sup> a wide range of sentencing options applies to cases of manslaughter on the basis of diminished responsibility.<sup>289</sup>

### §3. GENERAL DEFENCES

#### I. Infancy

112. 'Infants' normally refers to persons under the age of 18.<sup>290</sup> For the purpose of criminal liability, infants can be classified into three types: children below 10 years, children 10-14 years old, and young persons 14-16 years old. The judge is entitled to impose a length of sentence according to the circumstances of each case.

113. On 1 July 2003, the age of criminal responsibility was raised from 7 years to 10 years.<sup>291</sup> Because of an irrebuttable presumption in law,<sup>292</sup> children under 10 are exempted from criminal liability; they cannot be convicted of any offence, even if the prosecution could prove the *actus reus* and *mens rea*.<sup>293</sup>

For children aged 10-14, there is a rebuttable presumption in common law that they cannot be convicted of any offence because they are regarded as *doli incapax*.<sup>294</sup> The presumption can be rebutted only if the prosecution proves beyond reasonable doubt that the child knew that the act was 'seriously wrong'. Traditionally, this is known as 'mischievous discretion'. If the prosecution succeeds in proving

287. Cf. ss 37 and 41 of the Mental Health Act 1893 in England.
288. In *R v. Lung Fan-wa*, CACC No. 23 of 1994, the Court of Appeal refused to interfere with a hospital order for an unspecified period made against an accused, who had pleaded guilty to manslaughter on grounds of diminished responsibility. The doctors were uncertain about the appropriate length of the period of treatment. Regarding the appropriate length of time in serving the sentence in the hospital, the issue would be considered by the doctors and the Mental Health Tribunal, instead of the court itself (*HKSAR v. Tang Christophen*, CACC No. 43 of 1999).
289. In the case of *HKSAR and Lee Yin-wai*, CACC No. 632 of 1998, the accused pleaded guilty to manslaughter by way of diminished responsibility, and the prosecution accepted the plea in the light of the psychiatric evidence. The judge imposed a sentence of imprisonment but failed to consider s. 67B(1) of the Criminal Procedure Ordinance, Cap. 221, which states that the judge should specify as part of the sentence a minimum term that the person has to serve when a discretionary life sentence is imposed for an offence.
290. There is a distinction between the definition of child and young persons in Hong Kong. See s. 2 of the JOO, Cap. 226. A *child* is someone between 7 and 14 years of age, and a *young person*, between 14 and 16 years of age.
291. The amendment extends to s. 2 of the Reformatory Schools Ordinance, Cap. 225, where the definition of 'young offender' has been amended from a person aged 7 to a person aged 10. It was made in line with the existing legislation in relation to the criminal responsibility in England; cf. the Children and Young Person Act in England.
292. See *Walters v. Lunt* [1951] 2 All ER 645: A couple was charged with receiving a tricycle with knowledge that it was stolen property. The tricycle had been stolen by their 7-year-old son. The court acquitted the couple, as their son was too young to be considered guilty of stealing under the law.
293. See s. 3 of the JOO, Cap. 226, which stated that the age of criminal responsibility was only seven years before the law was amended.
294. The position in Hong Kong is the same as in England, but see *C (a minor) v. DPP* [1996] AC 1 [1995] 2 All ER 43 HL; see also *Chan Chi-wa v. Queen* [1967] HKLR 241.

'mischievous discretion', the child can be convicted of any offence, including murder.<sup>295</sup>

114. For the sake of completeness, a child under 14 cannot be convicted of rape or buggery, as there is a presumption that the act of committing sexual intercourse is restricted by the physical condition of his body. Infants (with some exceptions) shall be tried in the Juvenile Court, and the sentencing options will be different from those of adults.

## II. Mistake

115. The defence of mistake generally can be classified as mistake of law and mistake of fact. Regarding the mistake of law, it is trite law that ignorance of law is no defence. An accused cannot rely on a defence, no matter how sincere, that he/she did not know the act constituted a criminal offence. Arguably, the court may sometimes treat it as a mitigating factor in sentencing.

116. The mistake of fact is illustrated by the following example: a thief snatches a woman's necklace at night and runs off, an off-duty police officer chases the thief, and a civilian witness, thinking that the police officer is the thief, kicks against his leg and causes him injuries. The civilian witness would not be guilty of obstructing a police officer in the due execution of his/her duty or common assault if he/she genuinely thought that the off-duty policeman was a robber.

If an accused genuinely believed that the bottle he/she carried in a street only contained (harmless) chemicals, although it was later found to contain illegal drugs, he/she will be acquitted of the charge owing to the lack of *mens rea*.

However, if an accused thinks that he/she is carrying a bottle of heroin in a street but the bottle actually contains a different type of drug (say, ketamine), the mistake will not affect guilt of the accused, although it may affect the sentence. The prosecution has to prove that the accused knew that he/she was carrying illegal drugs. This principle would be found in two Hong Kong cases, *HKSAR v. Chiu Chi-wai* [1999] 3 HKC 225 and *R v. Tam Chun fai* [1994] 2 HKC 397.

In a leading case, *DPP v. Morgan* [1976] AC 182, A invited three persons to his residence to have sexual intercourse with his wife. A told them that his wife was willing to do so. In fact, she did not consent and the three were convicted of rape. The House of Lords held that if the accused genuinely believed that the woman had consented to the sexual intercourse, they were entitled to acquittal, regardless of whether that belief was based on reasonable grounds.<sup>296</sup> In this case, the mistake afforded the accused a defence because they did not have *mens rea*. It seems that

295. See Jackson, *Criminal Law in Hong Kong* (Hong Kong, 2003), 215.

296. It is quite debatable in England that some judges have taken the view that only reasonable mistakes would be an excuse if the criminal offence is a serious one. See *B v. DPP* [2000] 1 All ER 833 at 836–839. Lord Nicholls strongly disapproved these requirements in relation to the reasonableness of a mistake.

Hong Kong has followed this English authority in principle.<sup>297</sup> However, there are exceptions, so that not all mistakes afford a defence.<sup>298</sup>

If the legislation specifies or implies that the elements of intention and recklessness are required in the *actus reus*, a mistake may exempt the accused from criminal liability even though the mistake is unreasonable. However, if the legislation specifies or implies that the element of negligence is required in the *actus reus*, a reasonable mistake will be an excuse. If the offence is a type of strict liability, a reasonable mistake cannot afford any defence.

117. Lastly, mistake could also be regarded as a defence in some specific legislation. In the offence of theft, an accused will not be regarded as dishonest if that person appropriates the property in an honest belief that he/she has the right to deprive the victim of it, no matter whether he/she deprives it for self or as 'mischievous discretion' on behalf of a third person. Neither will he/she be regarded as dishonest if he/she appropriates the property believing that if the victim were aware of the appropriation and the circumstances surrounding it, he/she would consent to it. In relation to the offence of Criminal Damage under section 60 of the Crimes Ordinance, Cap. 200, an accused will not be convicted if, at the time of doing the act or acts, he/she believed that the property owner would have consented to the destruction of or damage to the property in question, had the owner been aware of it. The legislation also stipulates that it does not matter whether such belief is justified, if it is honestly held.

If a person commits any offences under the Trade Descriptions Ordinance under section 26, Cap. 362, it shall be a defence if he/she can prove that: (1) the offence was committed by mistake, accident beyond control, or relying on information supplied to him/her or the act or fraud of another person; and (2) all reasonable precautions had been taken and due diligence had been exercised in avoiding the commission of such offence.

297. See *HKSAR v. MA Kin-yiu*, CACC No. 161 of 2007; *HKSAR v. Wong Shing-chung*, CACC No. 66 of 1999; and *HKSAR v. Tsang Sai-Kit* [1997] 3 HKC 790.

298. In *R v. Hui Yin-fai* [1993] 1 HKC 223, the applicant was convicted of the forcible detention of a person with intent (1) to procure a ransom for the victim's liberation and (2) to murder the victim. The applicant appealed against his conviction on murder only. The deceased had been kidnapped and assaulted. He had been tied up and blindfolded and his body placed inside the boot of a vehicle for a long time. The appellant mistakenly believed that the victim had died and dumped the body into the sea. Forensic evidence established that the cause of death was, in fact, drowning. One of the grounds of the appeal was the appellant's claim that he did not have the necessary *mens rea* for the offence of murder, as he wrongly believed that he had disposed of a dead body by dumping it into the sea. The Court of Appeal dismissed the appeal. It held that:

a person who, with an intention to cause grievous bodily harm or to kill, inflicts serious injuries upon a person and then mistakenly believing him to be already dead, and in continuance of a course of conduct that may properly be regarded as indivisible, disposes of the body in such a way as to actually cause death, is guilty of murder.

It is for the jury to decide the question whether a course of conduct or sequence of events should be regarded as indivisible.

If A, an agent, agreed with B and C, that advantages be offered by B and C to A, such that if the agreement was carried out it amounted to or involved the commission of the offence under section 9(2)(b) of the Prevention of Bribery Ordinance, Cap. 201 by B and C, the offence of conspiracy would also be made out against A if A had intended that B and C should offer advantages to himself.

## Part II. Criminal Procedure

### Chapter 1. Principles, Institutions, Stages

#### §1. THE JUDICIAL ORGANIZATION

##### I. Trial Jurisdictions

244. The criminal courts in Hong Kong comprise the Court of Final Appeal, the Court of Appeal, the CFI, the District Court, and the Magistracy. Each court can try different offences and has different limits of sentencing power. After the handover or sovereignty in 1997, the highest court in the hierarchy is the Court of Final Appeal and the lowest, the Magistracy.

In general, offences in Hong Kong are classified into three types: summary, indictable, and indictable that can be tried on indictment or summarily. The classification of offences determines which court has the jurisdiction to try the cases.<sup>739</sup>

Indictable offences are more serious than summary offences; the latter could only be tried in the Magistracy Court. There were seven Magistracies in Hong Kong as of December 2007.<sup>740</sup>

245. Magistracies are presided over by permanent and special magistrates. The latter only have limited power to impose imprisonment and usually try minor offences involving traffic and hawking. Special magistracies are normally not legally qualified.<sup>741</sup> All criminal cases are commenced at the Magistracy, no matter how serious the offences are. The Magistracy then transfers the serious cases to the higher levels of the courts. The Magistracy Court has jurisdiction over summary offences and indictable offences that are triable summarily. It can transfer offences to the District Court and conduct committal proceedings.<sup>742</sup> There is a strict time limitation in laying the complaint or information against the accused: within six

739. For a distinction between summary offences, indictable offences, and offences triable either on indictment or summarily, see s. 14A of the CPO, Cap. 221. An offence shall be triable summarily if the words *upon indictment* or *on indictment* do not appear in the individual statute.

740. The Western and San Po Kong were closed at the end of 2003, and the cases were handled by other Magistracies.

741. In the past, some of the special magistracies formerly worked as lay court prosecutors.

742. The magistrate does not have jurisdiction to try indictable offences, as stated in Part I of the Second Schedule of s. 92 and s. 94A the MO, Cap. 227.

months from the time the matter of such information first arose. Beyond this time limit, the court no longer has jurisdiction to hear the case.<sup>743</sup>

Magistrates may impose a sentence of imprisonment of up to two years and a fine of HKD 100,000. Such limits can only be exceeded if additional powers are specified in any other ordinance in the case of indictable offences tried summarily.<sup>744</sup> If the accused is charged with two or more offences, the magistrate may order an aggregate sentence of the offences to be run consecutively, not exceeding a total of three years in prison.<sup>745</sup> The magistrates are appointed for an extendable three-year contract.

246. The District Court has criminal and civil jurisdiction.<sup>746</sup> A single District Court judge presides over the trial without the presence of a jury. District Court judges are appointed for life. The District Court has jurisdiction to try indictable offences, but can only try a summary offence if it is accompanied by an indictable offence when it is transferred to the District Court.<sup>747</sup> If a case involving only a summary offence is erroneously transferred from the Magistracy Court to the District Court, the case would be returned to the Magistracy. The proceedings in the District Court concerning said case are a nullity, the conviction will be quashed, and the sentence will be set aside.<sup>748</sup>

Procedures in relation to the transfer of cases from the District Court to either the CFI or back to the Magistracy are governed by section 77A of the District Court Ordinance, Cap. 336. The application must be made by a motion to the judge in the District Court, and should include an affidavit stating the basis for the motion. Relevant documents, including the charge sheet and summary of facts, shall be attached. Before approving or rejecting the application, the judge shall decide

743. See s. 26 of the MO, Cap. 227. In *Secretary for Justice v. Maxim's Caterers Ltd* [2009] 4 HKC 544 however, it was held that the computation of time did not include the date of offence.

744. For the unusual sentencing power enjoyed by the Magistracy, see the offence of possession of an imitation firearm, for which the Magistracy could impose a sentence of up to seven years' imprisonment.

745. See s. 57 of the MO, Cap. 227.

746. For the criminal jurisdiction in the District Court, see ss 74 and 75 of the DCO, Cap. 336.

747. See s. 88(1) of the MO, Cap. 227: It also involves some procedures on the day of the transfer, such as giving alibi warnings and granting bail to the accused. It is also to be noted that the transfer can be made orally. Usually, transfer papers, including the charge sheet and order of transfer, would be ready and a bundle of witness statements would be served on the accused on that day.

748. In the case of *HKSAR v. Oi San Kok Lo Oi ho* [2001] 4 HKC 208, the defendant was charged with one count of possession of an imitation firearm, contrary to s. 20(1) of the FAAO, Cap. 238, and one count of unlawfully remaining in Hong Kong. Both were summary offences that had been transferred to the District Court by mistake. The defendant was sentenced to a total of four years' imprisonment. Appeal was allowed, and the case was remitted back to the Magistracy for sentencing. The Court of Appeal also held that, following the case of *Attorney General v. Nunns (Permanent Magistrate) and another* [1987] 2 HKC 294, a magistrate who has acted in excess of his/her jurisdiction is able to exercise the jurisdiction properly, and that the quashing of the conviction will not cause prejudice to the jurisdiction of the magistrate. In a similar case, *HKSAR v. Tang Siu-kwong and another* [2000] 2 HKC 313, the prosecution had transferred a copyright offence, which was only a summary offence, to the District Court by mistake. The Court of Appeal held that the proceedings in the District Court were null and void, as the magistrate had no jurisdiction to make an order in transferring the case to the District Court pursuant to s. 88 of the MO, Cap. 227. See also *R v. Tong yuen*, CACC No. 19 of 1988.

whether the transfer is in the interests of justice.<sup>749</sup> The application of transfer will be a stay of proceedings in the District Court unless the judge makes a different order. There is no mechanism for the defence to lodge an appeal in relation to the transfer order.<sup>750</sup> If there is an application to transfer the case to the CFI, normal procedures such as the election of holding a preliminary enquiry should be maintained.

247. The District Court can impose a sentence of imprisonment of not more than seven years.<sup>751</sup> If the court imposes an order to activate a suspended sentence, however, the aggregate sentence may exceed seven years. The sentence may be run consecutively with a sentence that had previously been imposed on the accused. The district judge is allowed to impose a starting point for an offence or offences of more than seven years, as long as the final sentence will not exceed seven years.<sup>752</sup> However, if the court has adopted a starting point exceeding seven years in a case where the accused pleads guilty, the final sentence imposed shall not be seven years – the maximum jurisdictional limit – as the accused could be deprived of the benefit of the plea of guilty.<sup>753</sup> Apart from sentencing, the District Court also has the power to award compensation to victims for personal injury or damage to property.<sup>754</sup> The laying of charges involving indictable offences in the District Court have no time limit, but the defence may apply for a stay of the proceedings if there is a big gap between the arrest of the accused and the date of the trial.

248. The CFI has jurisdiction to try indictable offences only, as governed by section 12 of the High Court Ordinance, Cap. 4. If the accused is charged with an indictable offence accompanied by a summary offence, and the venue of the case is the CFI, the summary offence should be dealt with separately in the Magistracy instead of in the CFI. Criminal cases tried in the CFI will be heard before a single judge sitting with a jury. Normally, the jury consists of seven persons, but the number may be increased to nine under special circumstances if the court thinks it fit.<sup>755</sup> Before a case is transferred to the CFI for trial or plea, it shall be brought up to committal proceedings in the Magistracy at the initial stage.

Apart from trying indictable offences, the judge in the CFI has power to hear appeal from the Magistracy and bail application, if bail has been refused by the Magistracy and the District Court. In the transfer of cases from the CFI to either the District Court or Magistracy, the procedures are governed by section 65F of the Criminal Procedure Ordinance, Cap. 221. Before allowing the application, the court will consider whether it is in the interests of justice to do so. The application is made by notice of motion. An affidavit must be prepared that states the basis of the application and relevant documents, including the indictment and summary of facts, shall

749. See s. 77A(4) of the DCO, Cap. 336.

750. See s. 77A(12) of the DCO, Cap. 336.

751. See s. 82(2) of the DCO, Cap. 336.

752. See *HKSAR v. Li Yan* [1998] 4 HKC 12: In this case, the starting point adopted was nine years' imprisonment.

753. See *Queen v. Kwok Chi-kwan and another* [1990] HKLR 293.

754. See s. 73 of the CPO, Cap. 221.

755. See s. 3 of the JO, Cap. 3.

be attached. The issue of bail and alibi warning shall be dealt with on the same day as the time of transfer.

The sentencing powers of the CFI are unlimited, unless the maximum sentence is limited by the individual ordinances themselves.

249. The jurisdiction of the Court of Appeal is governed by sections 3, 13(1), and (3) of the High Court Ordinance, Cap. 4. The court has an appellate jurisdiction without the power to conduct any trial. Cases are tried by three justices of appeal, consisting of the Chief Judge of the High Court and two justices of appeal. A CFI judge may sit as an additional judge; he/she shall have the same jurisdiction and power as a judge of the Court of Appeal.<sup>756</sup>

The Court of Appeal hears appeals from the CFI or District Court.<sup>757</sup> It will consider questions of law reserved under section 81(1) of the Criminal Procedure Ordinance, Cap. 221; references made by the Secretary for Justice on questions of law following acquittal under section 81D of the Criminal Procedure Ordinance, Cap. 221; applications for review of sentence made by the Secretary for Justice under section 81A(1) of the Criminal Procedure Ordinance, Cap. 221; and appeals by way of cases from the District Court under section 84 of the District Court Ordinance, Cap. 336.

250. Sections 30-32 of the Court of Final Appeal Ordinance, Cap. 484, govern the jurisdiction of the Court of Final Appeal, the highest appellate jurisdiction in Hong Kong (similar to the House of Lords in England). The Court of Final Appeal consists of the Chief Justice and permanent judges. If necessary, the court may invite non-permanent Hong Kong judges and judges from other common law jurisdictions to sit in the court. The court has jurisdiction to hear appeals from the final decision of the Court of Appeal and CFI. It has no jurisdiction over acts of state, such as defence and foreign affairs. Like the House of Lords and Privy Council in England, the Court of Final Appeal has the power to reverse, confirm, or vary the decision of the court arising from the appeal; order a retrial; restore a conviction, and so forth.<sup>758</sup>

251. A juvenile court (Juvenile Court Ordinance, Cap. 226) has jurisdiction to hear all charges against children or young persons, with the exception of homicide charges.<sup>759</sup> A child is younger than age 14, whereas a young person is from 14 to 16 years old. Permanent magistrates preside over the juvenile court. However, if a juvenile is charged jointly with an accused who is more than 16 years old, the case shall be heard in the Magistracy, not in a Juvenile Court.<sup>760</sup> If the child or young person is convicted on his/her own plea or after trial of an offence in an adult court, the

756. See s. 5 of the HCO, Cap. 4.

757. See ss 80-83Y of the CPO, Cap. 221.

758. See s. 17 of the CFAO, Cap. 484.

759. See s. 3A(3) of the JOO, Cap. 226. However, the Juvenile Court has jurisdiction to hold committal proceedings; see *X v. Secretary for Justice*, CACV No. 318 of 2008 and s. 7(1) of the JOO, Cap. 226.

760. See s. 3C(2)(a) of the JOO, Cap. 226.

adult court shall remit the case to the Juvenile Court for sentencing.<sup>761</sup> The Juvenile Court has limited sentencing power compared with adult courts. For instance, the court could order the parent of a young offender to simply pay a fine in view of a child's young age.<sup>762</sup>

## §2. THE STAGES OF THE PENAL PROCESS

### I. Summons and Warrants

252. After a complaint or other information has been laid before a magistrate, he/she can issue a warrant for the arrest of the accused, who will be brought before a magistrate to answer to the complaint or information if he/she is not remanded into custody.<sup>763</sup> However, instead of issuing a warrant to apprehend the accused, the magistrate can also issue a summons that compels the accused to appear before a magistrate at a specified time and place. If the summons has been served on the accused and he/she fails to appear at the time and place stated, the magistrate may issue a warrant to arrest the accused and cause him/her to be brought before a magistrate to answer to the complaint or information.<sup>764</sup>

253. What if an accused commits an offence on high seas (outside Hong Kong) or in a harbour or other place within the jurisdiction of the courts of Hong Kong? If the accused resides or is believed to reside within HKSAR or its waters, the magistrate is empowered to issue a warrant to arrest the accused and to cause him/her to be brought before a magistrate to answer to the charge.<sup>765</sup>

254. At times, the Secretary for Justice may file an indictment against a person in accordance with the direction or consent of a judge under section 24A of the Criminal Procedure Ordinance, Cap. 221. Upon application made by or on behalf of the Secretary for Justice, the registrar can certify that the indictment has been filed against that person.<sup>766</sup> Assuming that the person stated in the indictment is still at large and the certificate has been submitted to a magistrate, the magistrate shall issue a warrant to arrest the person. If the accused is remanded into custody, the magistrate shall issue a warrant requiring the Commissioner of Correctional Services to bring him/her to appear before the magistrate.<sup>767</sup> In any event, if the

761. See s. 3F of the JOO, Cap. 226.

762. See ss 10, 11, and 12 of the JOO, Cap. 226.

763. See s. 72(1) of MO, Cap. 227: The magistrate must issue the warrant of arrest fairly or it will be quashed. See *Osman Lorrain Esme v. Attorney General and another* [1989] 2 HKLR 437: A magistrate received information on oath in relation to a case of the ICAC and issued a warrant inside the Attorney General's chambers for reasons of secrecy. As there was obvious bias in the place where the warrant was issued, the accused succeeded in applying for certiorari to quash the warrant of arrest.

764. See s. 72(1) of the MO, Cap. 227.

765. See s. 73 of the MO, Cap. 227.

766. See s. 74(1) of the MO, Cap. 227.

767. See s. 74(2) of the MO, Cap. 227.

accused is either arrested or brought before a magistrate by the Correctional Services, the magistrate shall automatically direct him/her to be committed for trial before the CFI. There is no need for the magistrate to hold any further inquiry or examination order. The magistrate could exercise the said power if he/she is satisfied that the accused is the same person who was named in the indictment and the certificate is issued by the registrar. The magistrate shall exercise discretionary power to either remand such person into custody or grant bail.<sup>768</sup>

Every complaint or information stating the commission of an indictable offence shall be in written form. It must contain a statement of the offence and the specific legislation with which the accused is being charged. It also contains the particulars, which show reasonable information about the date and the nature of the offence.<sup>769</sup> The accused is not allowed to raise any objection to any complaint or information for any defect in substance or form, or in relation to any defect in substance or form between the complaint and evidence put forward by the prosecution at the committal proceedings.<sup>770</sup> If the information is only defective and an amendment could fix it, the information will not be considered a nullity. Information shall be laid against an accused within six months from the time when the matter of such information arose, unless legislation states otherwise. After six months it would be time-barred.<sup>771</sup> However, if a magistrate is satisfied that a witness is likely to give important evidence for the prosecution, he/she may enforce the attendance of such person in accordance with the summary jurisdiction.<sup>772</sup> It is, of course, possible that after having been summoned, the witness appears before a magistrate yet adopts an uncooperative attitude, such as refusing to be examined upon oath in relation to the charge, declining to take such oath, or refusing to answer questions after having taken the oath. If such situation arises, the magistrate is empowered to commit the witness to imprisonment for two months, unless the witness consents to be examined and answer the questions in relation to the charge.<sup>773</sup>

255. Perhaps the most common power exercised by the Hong Kong magistrate is to remand the accused. The magistrate exercises such power in the course of committal proceedings, if those proceedings need to be adjourned. He/she exercises the same power in the event of a preliminary inquiry if (further) examination of the witnesses needs to be conducted later. The magistrate shall remand the accused into a prison or any other safe place of custody for a reasonable period. The law stipulates that during the period of remand, the accused shall be brought up to the court for mention every eight clear days, unless the accused and the prosecutor reach an agreement as to a longer period of remand. If the period of remand does not exceed

768. See s. 74(3) of the MO, Cap. 227.

769. See s. 75(1) of the MO, Cap. 227.

770. See s. 75(2) of the MO, Cap. 227.

771. See *Queen v. Yeung Lee Transportation and Engineering Company* [1995] 1 HKCLR 144 and *Attorney General v. Wong-Lau* [1993] 1 HKCLR 257: However, information could be laid within three years from the time when the information or matter arose in the offence of breach of condition of stay; see *HKSAR v. Li Li Mua*, HCMA No. 290 of 2000.

772. See s. 78(1) of the MO, Cap. 227.

773. See s. 78(2) of the MO, Cap. 227.

three clear days, the magistrate shall verbally order the police officer or any designated person to keep the accused in custody and to bring the accused before the same magistrate at a specific time and place set down for the committal proceedings.<sup>774</sup>

If the magistrate is satisfied that the accused, who is charged with an indictable offence, is unable to appear physically before him/her due to illness or accident, the magistrate shall visit the accused, and in the presence of the accused, exercise any of the powers granted by the specific legislation.<sup>775</sup> However, if the magistrate takes the view that it is not practicable for him/her to visit the accused, the magistrate shall exercise relevant powers in the absence of the accused as granted by specific legislation.<sup>776</sup>

## II. The Preliminary Inquiry

256. If an offender is charged with a serious and indictable offence, he/she should be tried in the CFI. Before the case is transferred to the CFI, it shall first be brought to the Magistracy so that the accused appears in a hearing of preliminary inquiry. The preliminary inquiry must not take place in open court.<sup>777</sup> In Hong Kong, it takes place solely in the Eastern Magistracy. When the accused has been brought before a magistrate for an indictable offence, the magistrate may, upon the application made by the prosecution, set a day for the process of committal proceedings. This is often referred to as 'the return day',<sup>778</sup> which 'shall not be less than ten days and not more than forty-two days from the day on which the return day is appointed'.<sup>779</sup> On the first return day, the magistrate shall inform the accused about his/her: (1) right to apply for legal aid; (2) entitlement to receive the witness statements, the indictment, and documentary evidence from the prosecution; (3) right to have a preliminary inquiry and to call witnesses to testify. If the accused chooses to forgo a preliminary inquiry, he/she will be committed for trial in the CFI directly without any inquiry. If the accused pleads guilty to the charge, he/she will be committed to the CFI for sentencing.<sup>780</sup>

A preliminary inquiry shall be conducted in accordance with sections 81, 81A, 82, 83, 84, and 85 of the Magistrates Ordinance, Cap. 227. The offender or a legal representative is entitled to question any witnesses. Although the witnesses who

774. See s. 79(1) of the MO, Cap. 227.

775. See s. 79(2)(a) of the MO, Cap. 227.

776. See s. 79(2)(b) of the MO, Cap. 227.

777. See s. 80 of the MO, Cap. 227.

778. Normally, the magistrate may appoint another return day to replace the previous appointed return day; s. 80A(1) of the MO, Cap. 227. See *AG v. Wong Ho-ying and another* [1987] HKLY 238: The prosecution asked for a second adjournment in a drug case, as the government chemist's certificate was not yet available. The prosecution had not yet decided if it required a return date to be set down for committal proceedings. The magistrate struck out the case for want of prosecution. The appeal was allowed, as the magistrate had wrongfully exercised his discretion. A reasonable magistrate should have known, *inter alia*, that a government chemist's certificate was a crucial document for a case involving drugs.

779. See s. 80A(3) of the MO, Cap. 227.

780. See s. 80A(4) of the MO, Cap. 227.



have made the statements may not be required to testify at the hearing, any witness statement produced in the court and the exhibits shall be deemed to have been admitted on behalf of the prosecution, unless the accused raises objection.<sup>781</sup> In that case, the magistrate may hear a reply from the prosecution before making a ruling. As indicated before, if the accused pleads guilty, the magistrate will commit him/her to the CFI for sentence. Before the magistrate accepts a plea, he/she has to ascertain the accuracy of the summary of facts from the prosecution. The magistrate has to explain the nature of the charge and its essential elements, make a record of what the accused said after the accused pleaded guilty, and explain the essential elements of the law to the accused.<sup>782</sup> If the magistrate is satisfied that the accused fully understands the nature of the charge and that the plea is made voluntarily, the magistrate will commit the accused to the CFI for sentencing.<sup>783</sup> The accused is not allowed to withdraw the plea unless leave is granted by a CFI judge.<sup>784</sup> After the accused has been committed to the CFI for sentencing, the magistrate shall have the right to remand him/her into custody or grant bail until the next hearing.<sup>785</sup> The accused has the right to give evidence and may call defence witnesses.<sup>786</sup> Defence counsel has the right to make submissions on behalf of the accused. If the accused makes any admission or confession in the hearing, the prosecution shall put that piece of evidence at any trial later as long as the evidence is admissible.<sup>787</sup>

All the statements and evidence given by the accused or any prosecution witness will be put into writing. If the magistrate has examined a witness in a preliminary inquiry, he/she may make an order in a form requiring the witness to attend and testify at trial in the CFI.<sup>788</sup> The witnesses must sign their depositions in the preliminary inquiry.<sup>789</sup> This is mandatory; otherwise, the committal of the accused for trial is a nullity.<sup>790</sup> However, a magistrate may issue a conditional order, that is, an order in the prescribed form requiring the witness to attend the trial if notice is given to

781. See s. 81A(1) of the MO, Cap. 227.

782. See ss 81B(1) and (2) of the MO, Cap. 227.

783. See s. 81B(2) of the MO, Cap. 227. See also *Queen v. Wong Lee* [1966] HKLR 178. The accused pleaded guilty on the committal proceedings. The magistrate made a record of a plea in mitigation of the sentence made by the solicitor on behalf of the accused. After the case was committed to the High Court, however, the accused was unrepresented at the time of sentencing. The issue was whether the High Court could consider the recorded plea in mitigation in the Magistracy earlier. It was held that the duty of the magistrate was restricted to accepting or rejecting a plea of guilty if the plea was made in committal proceedings.

784. See s. 81B(4) of the MO, Cap. 227.

785. See s. 81B(6) of the MO, Cap. 227.

786. See s. 82(1) of the MO, Cap. 227.

787. See *Queen v. Ho Siu-fei and others* [1976] HKLR 190: The opinion of the Court of Appeal was sought as to whether the magistrate in committal proceedings had failed to comply with the provisions of s. 81A of the MO, Cap. 227. The appellant contended that the magistrate had failed to consider the voluntariness of the alleged confessions and admit them in the hearing. It was held that there was no failure to comply with any of the provisions of s. 81A and there was no impropriety in the committal proceedings.

788. See s. 84(1) of the MO, Cap. 227.

789. See s. 81(2) of the MO, Cap. 227.

790. See *Queen v. Lee Chi-wai* [1973] HKLR 505.

him and not otherwise, if he/she is of the view that the attendance of any witness at the trial is unnecessary or could be agreed.<sup>791</sup>

The magistrate will make an order to discharge the accused if he/she finds that the evidence is insufficient to bring the accused to trial. Such an order will be made after the magistrate has considered the evidence from the prosecution and the accused, and any statement made by the accused.<sup>792</sup> The accused will be committed for trial in the CFI if the magistrate is satisfied that the evidence is sufficient to raise 'a strong or probable presumption of the guilt of the accused' after hearing the evidence in the preliminary inquiry.<sup>793</sup> If the accused is remanded into custody pending trial in the CFI, he/she shall have the right to apply for bail or legal aid. If an accused raises the issue of alibi or calls witnesses in support of the alibi,<sup>794</sup> the court should warn him/her to give a written notice to the court at least ten days before the commencement of the trial.

If a company, alone or together with some persons, is charged with an indictable offence, the provisions stated in the preliminary inquiry apply. The relevant documents, including the witness statements, could be served on a director or other officer who manages the company or corporation.<sup>795</sup>

257. Publishing committal proceedings in any newspaper and broadcasting them is prohibited, unless application has been made to and granted by a magistrate to remove such restriction.<sup>796</sup> Moreover, the publication is limited to certain aspects as laid down in the legislation. It is a criminal offence to publish or broadcast in relation to committal proceedings without a leave from the court.<sup>797</sup> Consent from the Secretary for Justice to prosecute is required if criminal charges of the offence are to be laid.<sup>798</sup>

### III. The Prosecution

258. According to Article 63 of the Basic Law of the HKSAR, the prime responsibility of the conduct of criminal proceedings is vested in the Department of Justice. The Secretary for Justice bears the sole responsibility for deciding whether to prosecute. The Secretary for Justice has delegated the power of prosecution to the DPP. The power of the Department of Justice is the same as that of the former Attorney General (AG) of Hong Kong before the resumption of sovereignty in 1997.<sup>799</sup>

791. See s. 84(2) of the MO, Cap. 227.

792. See s. 85(1) of the MO, Cap. 227. However, a magistrate has no jurisdiction to consider a plea of *autrefois acquit* in committal proceedings; see *Yeung Chun-pong v. Secretary for Justice* [2005] 3 HKC 447.

793. See s. 85(2) of the MO, Cap. 227.

794. See s. 85A(1)(d) of the MO, Cap. 227.

795. See ss 87(1) and (1A) of the MO, Cap. 227.

796. See s. 87A(1) of the MO, Cap. 227.

797. See ss 87A(8)(a)(b) and (c) of the MO, Cap. 227.

798. See s. 87A(9) of MO, Cap. 227.

799. See *Cheung Sou-yat v. R* [1979] HKLR 630. For comments on the power of the Attorney General, see also *R v. Tsui Lai-ying and others* [1987] HKLR 857.

According to the prosecution policy laid down by the DPP, a bare prima facie case is not sufficient to warrant a decision to prosecute. The proper test is for government counsel to consider whether there is a reasonable prospect of a conviction apart from the issue of the sufficiency of the evidence.<sup>800</sup> When government counsel is satisfied that such is the case, consideration should be given as to whether public interest warrants a prosecution.<sup>801</sup> Another crucial task for government counsel before proceeding with the case is to decide the proper venue of trial. For some specific offences, the charges can only be proceeded with after consent from the Secretary for Justice is obtained. More often, the DPP or subordinates, usually at the level of Senior Assistant Director of Public Prosecutions (SADPP), are authorized to give such consent.

259. The Department of Justice is vested with the power to control criminal prosecutions,<sup>802</sup> but every citizen in Hong Kong can exercise the right to initiate criminal proceedings in courts by way of a private prosecution.<sup>803</sup> The Secretary for Justice, however, is empowered to terminate the proceedings by the entry of a *nolle prosequi*. Apart from in-house government counsel, four deputy directors of public prosecutions assist the DPP.<sup>804</sup> The duties of government counsel in the Prosecutions Division include appearing at hearings of appeals, prosecuting trials in various levels of courts, giving legal advice to law enforcement agencies, and so on.<sup>805</sup>

800. See the Guidance for Government Counsel, published by the Prosecutions Division, Department of Justice, in Hong Kong, which enumerates, *inter alia*, some of the factors to be considered in giving legal advice.

801. See *The Statement of Prosecution Policy 2002* published by the Prosecutions Division, Department of Justice, in Hong Kong, 17.

802. See Art. 63 of the BL.

803. See s. 14 of the MO, Cap. 227. See *Jiang Enzhu v. Lau Wai-hing* [2000] 1 HKLRD 121 Administrative Law List No. 27 of 1998: Lau Wai-hing, a legislative councillor, instituted private prosecution against the director of the Xinhua News Agency for the latter's failure to comply with a date access request within forty days, contrary to ss 19 and 64(10) of the Personal Data (Privacy) Ordinance, Cap. 486.

804. For the limitation of the duties of DPP in England (as applied in Hong Kong), reference could be made to a recent case of the House of Lords in England, *Pretty v. Director of Public Prosecutions* [2002] 1 AC 800, which touches on, *inter alia*, the constitutional and statutory duty of the Director of Public Prosecutions of England and Wales. In this case, a 43-year-old woman suffered from a motor neurone disease that could not be cured and had rendered her totally immobile from the neck downwards. She sought assistance from her husband in committing suicide. That conduct constituted a crime, although it could be labelled as mercy killing. The solicitor representing the woman requested the Director of Public Prosecutions of England and Wales to give an undertaking in advance not to prosecute her husband if the latter assisted her successfully in committing suicide. The appeal was dismissed both in the High Court and the House of Lords, which held, *inter alia*, that the Director of Public Prosecutions had no power, statutory or otherwise, to undertake that a crime yet to be committed should be immune from prosecution. The woman appealed to the European Court of Human Rights but the appeal was also dismissed.

805. In Hong Kong, all government counsel are appointed as legal officers pursuant to the Legal Officers Ordinance, Cap. 87, and they enjoy the right of audience at all levels of courts in Hong Kong. In other words, a government counsel, whose original status was a solicitor, enjoys the right of audience in the CFI; solicitors do not enjoy that right in private practice. Also, the Prosecutions Division employs many lay prosecutors who are not legally qualified to prosecute exclusively in the Magistracy in Hong Kong.

Cases may be briefed to barristers and solicitors in private practice to conduct prosecutions at various levels of the courts.

The DPP seldom appears for the prosecution unless the case is of great public interest. In the case of *Secretary for Justice v. Ma Ping-wah* [2000] 2 HKLRD 312, the prosecution applied for a review of the sentence of a robbery case involving head bashing, where the sentence was considered wrong in principle and/or manifestly inadequate. The prosecution succeeded in the review hearing, and in that case, the DPP appeared for the prosecution.

### §3. THE LEGAL POSITION OF THE ACCUSED

#### I. Constitutional Rights

260. The Basic Law in Hong Kong is a written constitution after 1997. Article 38 of the Basic Law states that the residents of Hong Kong shall enjoy the rights and freedoms protected by the HKSAR. Article 35 of the Basic Law also states that every resident shall have 'the right to confidential legal advice, access to courts, choice of lawyers for protection of their legal rights and legal representation in courts, and to judicial remedies'. However, the accused is not entitled to choose the venue of trial, as it is the Secretary for Justice who has the power to decide whether the indictable offence is to be tried in the District Court or in the CFI.<sup>806</sup> Statutory legal aid schemes have been operating for a long time. An accused may seek legal representation provided by the Legal Aid Department in criminal proceedings, including committal proceedings in the Magistracy Court, trials, pleas, and sentencing in the District Court and CFI. There is a non-statutory Duty Lawyers Scheme that provides free legal services to the accused in the Magistracy. For the accused to be eligible for legal aid assistance, he/she should satisfy both the means and merits tests and, if necessary, pay part of the legal cost. Legal aid will not be granted unless 'it is satisfied that legal aid is desirable in the interests of justice'.<sup>807</sup> If the Director of Legal Aid has refused to grant legal aid to the accused, the court may still order the Legal Aid Department to do so if 'it appears to the Judge that legal aid should be granted'.<sup>808</sup>

The accused is entitled to choose his/her lawyer<sup>809</sup> but cannot abuse such right as part of a delaying tactic. When the accused dismisses his/her lawyer in the middle of the trial and applies for an adjournment in order to retain a new lawyer, the court shall have the discretion to grant an adjournment or request that the accused represent himself/herself at trial. In that case, the court should strike a balance between the interests of justice and the rights of the accused. However, an accused has a right to represent himself/herself at trial without the assistance of counsel if he/she wishes to do so. Prior to the trial proceedings, the accused must be informed by the judge

806. See *Chiang Lily v. Secretary for Justice* [2009] 6 HKC 234.

807. See Rule 6 of the Legal Aid in Criminal Cases Rules, Cap. 221D.

808. See Rule 8, *supra*. See also *R v. Wong Cheung-bun* [1992] 1 HKCLR 240: The court held that a few factors related to the refusal of granting legal aid by the Director of Legal Aid should be overturned.

809. See also Art. 11(2)(d) of the Bill of Rights Ordinance, Cap. 383.