**Citizens and Criminal Justice**

**Lecture No. 7: The court system in Hong Kong**[[1]](#footnote-1) **and personnel in the legal justice system**

1. **An overview of the main criminal courts**[[2]](#footnote-2)

At the start of the system we have the Magistrates’ Courts (“MCs”). There is also a court that deals with young offenders called the Juvenile Court (“JC”) which operates like the MCs.

These courts have an exclusively criminal jurisdiction. The next criminal trial court is the District Court (“DC”) and above that is the Court of First Instance of the High Court (“CFI”). Above these trial courts there are avenues of appeal to the Court of Appeal[[3]](#footnote-3) (“CA”) and the Court of Final Appeal (“CFA”).

The appeal system enables a higher court to review the judgment of a lower court. It seeks to ensure that any failures or mistakes claimed to have been made in or in relation to a court hearing can be corrected by way of appeal to a higher court. Broadly speaking, appeals on facts are limited to the defence although the prosecution can appeal on a mistake of law.

**Chart 1 – Layout of courts exercising criminal jurisdiction in Hong Kong**

|  |
| --- |
| Court of Final Appeal – appeal court |
| Court of Appeal – appeal court |
| Court of First Instance – trial court and appeal court for cases from Magistrates’ Courts |
| District Court – trial court |
| Magistrates’ Courts/Juvenile Courts – trial court |

1. **Magistrates’ Courts**[[4]](#footnote-4)

All criminal cases start in the MCs and most of them end there.

The normal maximum sentence in the MCs is 2 years imprisonment and a fine of $100,000. However, a sentence of up to 3 years imprisonment may be imposed where there are two or more offences being dealt with at the same time. Under some ordinances, a single offence may carry 3 years imprisonment and a fine of $5 million.

The Magistrate sits alone and is therefore a judge of fact and a judge of the law.

As to the different types of Magistrates, see further below at 9.

**2.1 The Juvenile Court**

The JC hears charges against children and young persons under the age of 16, except where the charge is one of homicide or where they are jointly charged with a person 16 or over.

It may also make care and protection orders in respect of children or young people.

As the age of criminal responsibility is now 10 in Hong Kong, the JC deals with persons aged between 10 and under 16.

Persons aged between 10 and under 14 are referred to as children.

Persons who have attained 14 years of age but have not yet had their 16th birthday are referred to as young persons.

Although juvenile offenders can lose their liberty, the emphasis in the JC is upon long-term reform rather than upon punishment.

The JC sits in private, contrary to the general principle of the common law that criminal proceedings should be in courts open to the public.

There are also extensive restrictions upon the reporting of cases in the JC because of the emphasis upon long-term reform.

**3. The District Court**

**3.1 General jurisdiction**

The District Court (“DC”) Judge (His or Her Honour) sits alone. They are professionally qualified and can exercise both a civil and a criminal jurisdiction.

The DC is a first instance trial court.

In its criminal jurisdiction, the DC deals with indictable offences transferred to it from the MCs.

A DC Judge sits alone without a jury.

The DC tries all serious criminal cases except the most serious cases such as murder, manslaughter and rape. The maximum term of imprisonment it can impose is 7 years.

The DC therefore deals with the middle category of crime.

**4. The High Court**

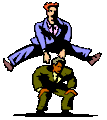
The High Court is made up of the Court of Appeal (“CA”) and the Court of First Instance (“CFI”). The CFI has both appellate and original jurisdiction i.e. it can both hear appeals sent to it and try cases first taken to it from the MCs. Set out below is a chart showing the role of the CFI in hearing appeals from MCs (encompassing JCs here) and further avenues for appeal.

**Chart 2 – Appeal on conviction from Magistrates’ Courts**

CFA

CA

CFI

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|  |
| --- |
| Magistrates’ Courts    ***Appeals by the prosecution can only be in relation to the law but the defence can appeal re the facts and the law*** |

**5. The Court of First Instance as a trial court**

The CFI tries the most serious criminal offences, such as murder, manslaughter, rape, armed robbery, or trafficking in large quantities of dangerous drugs and complex commercial frauds.

Cases are tried, normally in open court, by a Judge of the CFI, sitting with a jury of 7, or, when a Judge so orders, 9.

**6. The Court of Appeal**

The CA (comprising 3 judges) hears appeals in criminal matters from the CFI and the DC.

Section 83(1) Criminal Procedure Ordinance (Cap.221) (“CPO”) provides:

*Except as provided by this Ordinance,* [*the Court*](http://www.hklii.org/hk/legis/en/ord/221/s25.html#the_court) *of Appeal shall allow an appeal against conviction if it thinks-*

*(a) that the conviction should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or*

*(b) that the judgment of* [*the court*](http://www.hklii.org/hk/legis/en/ord/221/s25.html#the_court) *of trial should be set aside on the ground of a wrong decision on any question of law; or*

*(c) that there was a material irregularity in the course of the trial.*

*and in any other case shall dismiss the appeal:*

*Provided that the*[*Court*](https://www.hklii.org/eng/hk/legis/ord/221/s2.html#court)*of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the*[*appellant*](https://www.hklii.org/eng/hk/legis/ord/221/s2.html#appellant)*, dismiss the appeal if it considers that no miscarriage of justice has actually occurred.*

The last paragraph is commonly referred to as the proviso. It has the effect, that even if the appellant is successful on one of these 3 points, his/her appeal may be dismissed if there has been no miscarriage of justice.

**6.1 Unsafe and unsatisfactory** – e.g. does the CA have a “lurking doubt” about the correctness of a decision?

This term was considered in the case of *HKSAR* v *Chang Che Wei*.[[5]](#footnote-5) The defendant was found guilty by a jury in the CFI of conspiracy to unlawfully traffic Ketamine from the Mainland to Hong Kong (contained in speaker boxes) and he was sentenced to 22 years imprisonment. He then, as the applicant, applied to appeal to the Court of Appeal. The CA dealt with the application and the appeal together. One of the grounds of appeal was that there was a “lurking doubt”. The main evidence against the applicant was that he was on hand to receive and count the goods. However, there was no fingerprint evidence that he touched any of the drugs. Furthermore, he had exercised his right of silence and had made no admissions in relation to the charge.

The CA referred to earlier authorities and noted that the concept of “lurking doubt” embraced a number of principles as follows:

*(1) an appellate court should apply the principle with great caution as it does not enjoy the benefit which the jury had of seeing the witnesses and assessing their credibility;*

*(2) a “lurking doubt”* [means] *a substantial remaining doubt;*

*(3) determining whether it “feels” there is a lurking doubt the appellate court has regard not just to the evidence but also its instincts and experience; and*

*(4) where a defendant fails to give evidence it is much less likely that a court will feel there is a lurking doubt.*

However, in relation to the 4th point above, the CA stated that if the prosecution’s case is particularly weak, then a conviction may still be overturned in the absence of evidence from the defence.

Essentially, then, in this case, the prosecution had no cogent evidence and the Court stated it was a matter that would have satisfied the “lurking doubt” ground had it needed to rule here. In this regard, the case was already overturned in relation to a wrong decision on a question of law.

**6.2 Wrong decision on a question of law**

Was the jury misdirected or was evidence wrongly admitted?[[6]](#footnote-6) This helps ensure that any significant mistakes that occurred in determining the fact-finding process during the trial are rectified.

**6.3 Material irregularity in the trial**

One example would be where there was an instance of a critical mistranslation by an interpreter.[[7]](#footnote-7) This helps ensure that any procedural irregularities are remedied.

**6.4 The justice/due process model and decisions by the CA on appeals to it based on convictions**

Arguably, then, consistent with the operation of the justice**/**due process model, decisions by the CA on these 3 grounds of appeal, i.e. on conviction (at first instance), in conjunction with the proviso, operate to provide offenders with more legal protections and safeguards and to promote a balanced system to deal with conflicts between offenders and the State.

**7. The right of the Prosecution to appeal**

In relation to appeals on conviction from the District Court, the prosecution can only appeal on a matter of law: s.84 District Court Ordinance (Cap.336) i.e. they cannot appeal simply on the facts of the case. The situation is broadly the same in relation to appeals from MCs to the Court of First Instance, but the law is too complex to go into further detail here.

The prosecution has no right of appeal from a jury verdict.[[8]](#footnote-8)

We can see then, that consistent with the justice**/**due process model, these restrictions on the right of the prosecution to appeal provide added safeguards to those found not guilty of crimes.

**8. The Court of Final Appeal**

**8.1 Appeals on conviction to the Court of Final Appeal**

An appeal is heard and determined by the Court of Final Appeal (“CFA”), which is usually made up of the Chief Justice, 3 permanent judges and either 1 non-permanent Hong Kong judge or 1 non-permanent judge from another common law jurisdiction.

5 judges will sit to hear the appeal.

The CFA hears appeals in criminal matters from the Court of First Instance (in Magistracy matters) and also the Court of Appeal.

For criminal matters, appeals lie at the discretion of the CFA from:

* Any final decision of the CA
* Any final decision of the CFI (involving a decision of a Judge on appeal from a Magistrate).

In an attempt to ensure that only cases which should be heard by the CFA get to it, leave to appeal is required.

The possible grounds for leave are that:

|  |
| --- |
| *A point of law of great and general importance is involved in the decision; or*  *There has been a substantial and grave injustice.*[[9]](#footnote-9) |

The issue as to what amounts to a “substantial and grave injustice” is not always a straightforward one, but the following quote from *Ong Chun Ying* v *HKSAR*[[10]](#footnote-10) centres on the nature of the question to be answered:

|  |
| --- |
| *…whether the appellant has shown that there has been to his disadvantage a departure from accepted norms so serious as to constitute a substantial and grave injustice to him. What this appellant complains of, if his complaint is made out, would stand exposed as such a departure – occasioned at trial, not remedied on intermediate appeal and now to be remedied on final appeal.* |

In this case, the appellant had been charged with an assault at the home of the victim. The appellant had an alibi between about 10am and 11am on the day of the alleged assault. The appellant said he was at a restaurant at this time and the Magistrate stated in his decision that he could not reject the appellant’s alibi. The restaurant at Kowloon was about half an hour’s distance from the home of the victim in Yuen Long. In this case, the victim gave evidence that she arrived home at about 10am on that day and was later assaulted by the appellant who had been waiting for her inside her home. In spite of being unable to reject the defendant’s alibi, the Magistrate found the appellant guilty on the basis that his alibi did not cover the whole period of the alleged assault. However, the victim admitted under cross-examination that the assault had occurred within about 10 minutes of her arriving home.

In this case, the conviction by a Magistrate was quashed (set aside) on the substantial and grave injustice ground. Note here, upon the quashing of a verdict, that both the CA and the CFA have discretion to order a retrial, if the interests of justice permit, and balancing relevant factors. For instance, such matters might include, whether a successful appellant, following a trial of murder, would face a 3rd trial of murder and it was 8 years since the relevant killing.[[11]](#footnote-11) So critically, from the viewpoint of the justice**/**due process model’s need to balance conflicts between the offender and the State, a successful appeal by an offender/appellant on a technicality does not mean the offender automatically goes free.

**8.2 The justice/due process model and decisions by the CFA on appeals to it based on convictions**

Again, consistent with the operation of the justice/due process model:

- by providing a potential additional layer of appeal after conviction, beyond the CA or the CFI (in relation to magistracy appeals dealt with by the CFI)

- but one with a very high threshold to satisfy (so as to allow only the most meritorious appeals at a later stage - so as not to clog up the judicial system)

the law governing the right of appeals by the CFA operates to provide offenders with more legal protections and safeguards and to promote a balanced system to deal with conflicts between offenders and the State.

**9. Personnel in the legal justice system**

**9.1 Introduction**

There are a wide variety of people who participate in the court process in the criminal justice system.

Some of those personnel are professionals: police officers, Judges, lawyers, court staff, probation workers and social workers.

In relation to Judges and Magistrates, generally, the higher the court, the higher the requirement for entry onto the bench e.g. 5 years relevant experience for MCs and DC and 10 years for the High Court, ensuring those on the bench with the greatest experience deal with the most serious and complex matters. They bring legal knowledge and experience to the bench. The objective is to get people on the bench who are of proven quality; who are reliable and sensible.

Both Judges and Magistrates are traditionally appointed from barristers after many years of courtroom experience.

**10. Position and status of Magistrates**

Magistrates will usually be addressed as “Your Worship” or “Sir” or “Madame”.

Both English and Cantonese can be used in the MC’s. More and more cases are in Cantonese.

There is no automatic promotion from the MC’s to the higher courts, though Magistrates are appointed upwards from time to time.

There are two types of Magistrates. These are Permanent Magistrates and Special Magistrates. Permanent Magistrates hear the more serious matters while the Special Magistrates hear the less serious matters such as summons.

**11. District Court Judges**

District Court Judges (“DCJs”) must be professionally qualified as lawyers and have worked in such or similar roles (such as a Registrar of the High Court) for at least 5 years. There is some similarity with the requirements for appointment to the MCs.

**12. Judges of the High Court**

High Court Judges must be professionally qualified as lawyers and have worked in such or similar roles (such as a Registrar of the Court of Final Appeal) for at least 10 years.

**13.** **Judges of the Court of Final Appeal**

The Judges of the CFA are comprised of the CJ and generally at least 3 permanent Judges and may comprise non-permanent Judges.

The constitution of the CFA when hearing appeals comprises the CJ or a permanent

Judge in his role, 3 permanent Judges and 1 non-permanent Hong Kong Judge or 1 non-permanent Judge from a common law jurisdiction.

A very innovative feature of the CFA is the creation of the role of non-permanent Judges from another common law jurisdiction. This ensures that there is a cross-pollination of eminent jurists from similar jurisdictions outside Hong Kong. It is an especially valuable aspect of the judicial system in guiding HK through the challenges presented by globalization in the new millennium. Such judicial luminaries have included The Rt Hon the Lord Clarke of Stone-cum-Ebony (a Justice of the Supreme Court of the United Kingdom) and Sir Anthony Mason (the former Chief Justice of the High Court of Australia).

**14. The responsibilities of Judges**

**14.1 General**

The most visible responsibility of all Trial Judges in Hong Kong is presiding over trials or hearings and listening as the advocates representing the parties present their case.

The Judge rules on the admissibility of evidence and the methods of conducting testimony and they may be called on to settle disputes between opposing attorneys.

They ensure that rules and procedures are followed, and, if unusual circumstances arise for which standard procedures have not been established, Judges interpret the law to determine how the trial will proceed.

The Judge does not take sides, though there is a responsibility to look after the rights of a defendant who is not represented by a lawyer.

The Judge must not take over the conduct of the case from either side. This does not mean that the Judge has to be entirely passive, but any interventions must only be such as are necessary to ensure that a trial is fair and efficient.

DC Judges and Magistrates are also required to determine if the defendant is guilty or not guilty, which is called rendering a verdict.

**14.2 Manner of decision making by Judges**

In the CFI, Judges do not decide what the verdict is i.e. whether the defendant is guilty or not guilty, although they give the jurors directions to assist them in this decision and make decisions (based on the law) as to what evidence reaches the jury.[[12]](#footnote-12)

In DC and MC trials, where there is no jury, the Judge or Magistrate has to decide on both the facts and the law. It is often the case, that a judicial officer in these jurisdictions may rule that certain extremely prejudicial (and perhaps persuasive) evidence is inadmissible. The Judge or Magistrate would then be required to ignore such evidence when making their determination. Examples of such inadmissible evidence in this regard might include evidence that the defendant had an extensive prior criminal record of a type relating to the crime with which the defendant has been charged.

All Judges and Magistrates have the responsibility to move trials along, to ensure that time is not wasted and that the advocates act properly and professionally.

In criminal trials in the DC, Judges are required to state the reasons for their verdicts either orally or in writing within 21 days of the verdict.[[13]](#footnote-13) This requirement helps promote justice by:

* Helping guarantee that the parties are dealt with fairly
* Assisting due process
* Ensuring that the bench is diligent in the exercise of their decision-making duty.[[14]](#footnote-14)

Quoting also the Chief Justice, Geoffrey Ma:[[15]](#footnote-15)

*The second aspect of transparency is that the judgments of the courts containing the reasons in arriving at the legal result are published or made publicly available. This means that any member of the public can scrutinise every judgment of the courts. Where judgments are not in writing, they will be announced in open court. Where such judgments are written, whether in Chinese or English, save in exceptional circumstances, they will be published and made readily accessible on the Judiciary's website.*

**14.3 Judges - comparative issues**

Should Judges act in a remote, mystified way or should there be scope for a more pro-active/interventionist role for them? A growing phenomenon in common law countries (as noted in your lecture notes for Week 6) has been greater use of drug courts. Here the Judge assumes a role beyond mere sentencing to one of monitoring treatment. According to Simon, a number of these courts have demonstrated impressive results in rehabilitating persons with illegal drug dependencies.[[16]](#footnote-16)

Chief Justice Geoffrey Ma has said the following:[[17]](#footnote-17)

*Last year, I focused on the essence - or heart - of Hong Kong's system of law. I called it the integrity of the law. It is worth repeating the salient features of this integrity: a truly independent judiciary, judges who look no further than the proper application of the law both in letter and in spirit, and the importance of ensuring transparency in all that the courts do in order to demonstrate the integrity of the law.*

The Chief Justice further stated the importance of ensuring that only the best judicial appointments are made and considered 4 factors to be vital here:

1. Knowledge of the law;
2. Judicial temperament;
3. Propriety of conduct; and
4. Case management.

He noted as well that Judges should not be overworked as this may affect their performances.[[18]](#footnote-18)

**14.4 Judicial officers - issues of etiquette and protocol**

Judges wear wigs and gowns in court. Magistrates wear only gowns.

**15. The jury**

**15.1 Introduction**

Trial by jury is said to be a fundamental quality of our system of criminal justice. However, we only have a jury in a criminal trial in the CFI (although this does not extend in the CFI to cases under the National Security Law).[[19]](#footnote-19) Therefore, jury trials are reserved for the most serious cases which can only be tried upon indictment e.g. murder, rape.

In cases which can be tried either in the CFI or in the DC or the MCs, the Secretary for Justice decides where the case is to be heard. There is no right for an accused to choose a trial before a jury in these ‘either way’ cases.

**15.2 Responsibilities of juries**

Jurors are private citizens who have been sworn to hear the evidence and pass a verdict on an accused person in a criminal case. They decide on the facts in a case based on the evidence at the trial.

Serving as a juror is an obligation of every citizen of Hong Kong who is qualified to serve. The personal responsibility of each juror is to ensure that justice is done. This responsibility extends not merely to the person on trial but also to the whole community of which they and the person on trial form part.

Serving as a juror can sometimes cause inconvenience. However, the role and importance of the jury in our criminal justice system makes jury service an obligation.

**15.3 Manner of decision making** **by jurors**

In a criminal trial, jurors decide, based on the facts, whether the defendant is guilty or not guilty.

Jurors do not take part in the trial in the sense of becoming involved and asking questions of witnesses, although they can ask questions of the judge. They sit there and listen to the evidence. After all the evidence has been heard, they retire to a private and secure room to consider their decision. Their role is to decide upon the facts; who they believe and what this amounts to. Once they have reached a decision they come back into court and in a criminal case, the foreperson of the jury informs the Trial Judge in open court, before all the jury and in the presence of the accused, whether the jury has found the accused guilty or not guilty.

Jurors are ordinary people and they receive (or should receive) clear directions on points of law by the Trial Judge.

Although the Trial Judge decides which evidence the jury may hear, and sums up the case for the jury, it is for the jury to decide the weight to attach to such evidence when considering their verdict.

The jury's deliberations are confidential. Members of the jury should take great care never to discuss the case with anyone other than their fellow members.

Normally, a jury will comprise 7 members. However, if a trial is expected to be very lengthy and this heightens the risk that some jurors might need to be excused, the jury may be increased to 9 members.

It is desirable that the jury in a criminal trial should return a unanimous verdict if it can. If it cannot, a majority verdict of 5 to 2, either for a conviction or for an acquittal, is acceptable.

The following is a table setting out the numbers needed to deliver a verdict with a jury originally comprising 7 members when there has been some attrition of members, reflecting, respectively, sections 24(3)(a)(ii) and (i) Jury Ordinance (Cap.3) (“JO”).

|  |  |
| --- | --- |
| 6 jurors | Majority of no less than 5 |
| 5 jurors | Unanimous verdict |

If the jury has 9 members, then there must be a majority of at least 7:2 or 6:2 if 8 members.[[20]](#footnote-20)

The jury does not give reasons for its decision.

**15.4 Qualification for jury service**[[21]](#footnote-21)

A resident of Hong Kong is eligible to serve as a juror if he/she -

* Has reached the age of 21 but is not yet 65;
* Is a resident of Hong Kong;
* Is of a sound mind and has no disabilities such as hearing or visual impairments or other disabilities that might prevent him/her from serving as a juror;
* Is of good character; and
* Has sufficient knowledge of the language of the court proceedings (Chinese or English as the case may be) to understand the proceedings.

Apparently eligible persons are included in the list of jurors. The Registrar of the High Court will serve a notice on persons notifying them their name is about to be added to the list of jurors.

The requirements of proficiency of knowledge of language are not described in the legislation, nor is the residency requirement. Surprisingly though, according to the Department of Justice (DoJ) only 21.6% of criminal cases in the Court of First Instance (involving jury trials) in 2020 were held in Chinese.[[22]](#footnote-22) This presupposes that the remainder were held in English. According to Ng, although many prospective jurors express misgivings about their English proficiency (and seek to be exempted from jury service on this basis) they are still selected for service.[[23]](#footnote-23) Ng has expressed concerns that the relatively low numbers of Hong Kong residents who have a high level of English proficiency, combined with absence of specific interpretation services for the jury, a general reluctance by jurors to ask questions of the bench, combined with the rapid delivery of some judges in communications with the jury can lead to injustices in the verdict.[[24]](#footnote-24) This is problematic as jurors in general have difficulty in understanding some legalese;[[25]](#footnote-25) a point that received confirmation in a wide-ranging study of jurors in England that found about 20% of respondents would have preferred a fuller explanation here.[[26]](#footnote-26)

In order to alleviate this perceived language problem, Ng has suggested the employment of competent interpreters for the jury.[[27]](#footnote-27) Potentially, additional awareness and training for judges can alleviate the other communication problems relating to rapidity of delivery and over-reliance on legal jargon referred to in the paragraph above. See as well, in this regard, further below in relation to the article by Le Cheng, Winnie Cheng and Jian Li at footnote 36.

It seems that the sufficiency of knowledge requirements is attempted to be met by an administrative rule that jurors must have matriculated.[[28]](#footnote-28)

Currently, there is no procedure for determining the good character requirement.[[29]](#footnote-29)

In practice, the residency requirement is based simply on the eligible juror being resident at the time of service i.e. they do not need to have been in Hong Kong for a specific period of time.[[30]](#footnote-30)

The Law Reform Commission has considered a number of changes to eligibility requirements of jurors, in particular:

* Replacing the good character provision in the JO with a requirement that a person can only serve as a juror if he or she does not have a criminal conviction other than a spent conviction, pursuant to the Rehabilitation of Offenders Ordinance (Cap.297) (which involves, in most cases, essentially removing the criminal records of persons 3 years after conviction who have not been sentenced to more than 3 months jail or fined more than $10,000 and have committed no further offences) or is not facing trial for an indictable offence or is in custody awaiting a trial for any offence. Arguably, this would provide greater clarity and a fairer balance as to who might be eligible to serve on juries.
* The residency requirement should be that a person needs to have been resident (living in the HK jurisdiction) for 3 years, or have been issued with a Hong Kong ID card within 3 years, before being served with a jury notice. The purpose of this new rule would be to ensure that jurors are sufficiently recently connected to be familiar with Hong Kong norms.
* The upper limit of jurors be increased to 70 in line with demographic changes in Hong Kong.
* The lower limit of jurors be decreased from 21 to 18, which would be consistent with other responsibilities of those aged 18, like voting.[[31]](#footnote-31) See further at paragraph 15.7 of these notes.

Toward the end of 2018, the DoJ foreshadowed that it would conduct a public consultation to consider implementation of these proposals.[[32]](#footnote-32) As yet, this consultation does not appear to have been occurred, but such reform still appears to on the DOJ’s policy agenda.[[33]](#footnote-33)

**15.5 Exemption from jury service**

This issue concerns the obligation to serve as a jury member, rather than qualifications or disabilities that have been discussed above.

A person summoned for jury service should check whether they meet the eligibility requirements and whether they are within the categories of persons who are exempted from jury service under section 5 JO. These include practising barristers and solicitors, police officers and Judges. Other professionals such as chemists, clergymen, full-time students and pilots are also exempted, presumably on the basis that they carry out too important a function in society to tie their time up in this way, or they would be very inconvenienced or the nature of their occupation renders them unsuitable. What effect might this restriction of the pool potentially have on:

* The nature and quality of juries in cases involving complex questions of fact and law (as explained by the Judge to the jury)?
* The likelihood that all defendants will be tried by a jury of their ‘peers’?
* And so, on the correctness of the jury verdict?

**15.6 Criticisms of the jury**

Common criticisms (which implicitly would not extend to highly qualified and experienced DC Judges) include that:

* The presence of a jury means that trials go on too long
* Juries are not able to deal with long complicated cases as well as judges. This could occur in complex commercial fraud cases which are heard in the Court of First Instance.[[34]](#footnote-34) This supposition is backed up to some extent by a survey conducted in Hong Kong the late 1980s which found that 38% of jurors in general found it difficult to follow the evidence.[[35]](#footnote-35) Ensuring that judges give juries clear, comprehensive and succinct instructions to jurors is likely to facilitate obtaining a just verdict.[[36]](#footnote-36) Appropriate judicial training in the field of basic linguistics, consequent upon research as to how juries best understand jury directions in matters which require going outside specimen directions,[[37]](#footnote-37) might also be of assistance here.
* Juries acquit too many guilty defendants. Recent Hong Kong statistics provide a bit of a mixed picture here. According to the DoJ, the following conviction rates (which operate admittedly as a fairly crude, but probably not an entirely negligible, barometer) were recorded after trial in 2020:[[38]](#footnote-38)
* Magistrates Courts - 52.4%
* District Court - 70.5%
* Court of First Instance – 56.3%
* Juries are too easily swayed by defence advocacy
* Juries are too expensive.

Jurors may not confine themselves to the fact-finding exercise which occurs in the court room before rendering their verdict, such as looking up the Internet. However, if this is found to be the case then the verdict would probably be set aside, although whether that would always be discovered is another matter.[[39]](#footnote-39)

We never know how juries (as opposed to Hong Kong DC judges) reached their verdict[[40]](#footnote-40) and cannot assess whether it is right or wrong, so they are not accountable.[[41]](#footnote-41)

Questions have also arisen as the ability of juries to understand complex expert evidence such a DNA.[[42]](#footnote-42) A study was conducted in NSW, Australia, to test this specific assumption. Amongst the basic findings of were that the jurors considered that their general comprehension levels in understanding DNA were sufficient for the purposes of the cases they were considering, especially if the evidence was not contested.[[43]](#footnote-43) These are rather subjective viewpoints. While they may reduce alarmist concerns about the performance levels of juries in making determinations in relation to expert evidence, at this stage, the amount of empirical evidence relating to jurors’ understanding of expert evidence is not comprehensive. It does seem that expert evidence that contains a sufficient degree of tuition (that is capably taught e.g. using well-prepared visual aids) on the expertise being considered is thought to be of assistance by jurors.[[44]](#footnote-44) This is a rather common-sense proposition.

* 1. **Common defences of the jury system**

Jurors are more representative of the community than Judges. In Hong Kong, it has been suggested by Hui and Lo that there is scope for greater diversity by reducing the age of jurors to 18.[[45]](#footnote-45) Previous recommendations for this change have been rejected on the basis that those aged 18 lack sufficient maturity and experience.[[46]](#footnote-46) In one Hong Kong study, involving two groups (the ineligible group to be jurors aged between 18-20 and a group aged 21 and above) some important differences between the groups as far as their judgment of culpability in a simulated exercise were discovered. Namely, that the younger group seemed less skeptical about the probative value of expert evidence, but were slightly more skeptical about other forms of evidence like eyewitness testimony, victim and police testimony. In general, the older group required a higher standard of evidence in relation to what constitutes beyond reasonable doubt.[[47]](#footnote-47) According to Matthews and others, representativeness of jurors was regarded as an important mechanism for achieving justice by those surveyed in that study.[[48]](#footnote-48)

* Judges may be more biased against defendants than jurors because of the greater frequency with which judges deal with criminals.
* The decision of whether or not a person is guilty is not restricted into the hands of one individual, so there should be less chance of an error.
* Because an individual’s liberty is at stake the extra cost and time relating to a jury trial is worth it.
* The decision of a jury is less likely to cause controversy in politically sensitive cases.
* The assertion that jurors cannot understand complex facts is overstated.[[49]](#footnote-49)
* The educational qualifications of Hong Kong jurors are quite high. In this regard, the study by Matthews and others showed that jurors from professional and managerial classes claimed a higher understanding of the proceedings than those who were not in these groupings.[[50]](#footnote-50) As noted earlier, in Hong Kong, many highly educated people are exempted from jury duty. This is no longer the case in England and Wales, as all registered voters became eligible for jury service.[[51]](#footnote-51) So, for instance, the previous exemption for lawyers[[52]](#footnote-52) and doctors[[53]](#footnote-53) was abolished in England and Wales by the Criminal Justice Act 2003. Could this smaller pool of eligible jurors sometimes affect the verdicts rendered in Hong Kong?
* There is provision to remove unsuitable jurors:
* for reason (misconduct or obvious bias) through challenges by both the prosecution and the defence; or
* without having to give an explicit reason, such as if their appearance would lead to the perception that they may be prejudiced (which relies on a ‘gut feeling’). The defence has up to 5 challenges in Hong Kong. The number of challenges available to the prosecution is unspecified but they are expected to only employ such a challenge sparingly.[[54]](#footnote-54)

**15.8 Absence of a jury system in the District Court in Hong Kong**

In *Chiang Lily v Secretary of Justice*,[[55]](#footnote-55) the Court of Final Appeal confirmed that there is no right to a jury trial in HK, despite the presence of Article 86 of the Bill of Rights which states that, “The principle of trial by jury practised in Hong Kong shall be maintained.” The applicant’s “subjective desire” to have the matter dealt with by jury, while understandable, was not a matter that the DOJ was required to consider. Accordingly, for these and other reasons, the applicant’s appeal was dismissed. Therefore, a factor to be taken into account into whether the jury system should be introduced into Hong Kong is that, arguably, defendants suffer a double disadvantage in access to justice; not only is the jury system of more limited application than in other jurisdictions,[[56]](#footnote-56) but in many cases, the Secretary of Justice can further limit access to jury trials.

In considering whether the jury system should be introduced into the District Court, it should be noted that in 1995, only about 20,000 persons qualified for jury service. Following the extension of proficiency of Chinese language as a requirement, the number of eligible persons in December 2008 to serve as jurors amounted to 616,617.[[57]](#footnote-57) Allied with this development is that by 2012, slightly over half of prosecutions were conducted in Chinese in the District Court.[[58]](#footnote-58)

The HKSAR government is reported to have rejected calls to introduce a jury system in the DC because of the extra costs in:

* Providing appropriate accommodation for jurors
* Recruiting additional administrative staff
* Providing allowances for jurors.[[59]](#footnote-59)

As well, re-introduction of a jury would likely lead to more delays unless more Judges were appointed and courts built.

**16. Prosecutors**

**16.1 Introduction**

Prosecutions are handled by the Prosecutions Division of the Department of Justice (“DOJ”).[[60]](#footnote-60)

**16.2 The responsibilities of prosecutors**

The responsibility of the prosecution is to achieve justice rather than to obtain a particular result.[[61]](#footnote-61)

The responsibility of the prosecutor is to put the case for the prosecution before the court fully and fairly so that the decision maker, whether Judge or jury, can reach a reasoned and informed decision either as to guilt or innocence and/or as to sentence. The issues concerning the prosecution’s burden of proof have been discussed earlier in the Course.

The prosecutor is an officer of the court and is subject to all the requirements and obligations of their professional body, either the Bar Council or the Law Society.

Consistent with role of the prosecution as a minister of justice, in general the prosecution is required to disclose their evidence to the defence in advance of the trial.

**17. Defence lawyers**

Persons accused of crimes can represent themselves. Whether that is the wisest course of action is another matter.

Persons accused of a crime either in the MCs, the DC or the CFI or persons appealing against conviction and/or sentence can be represented by a solicitor in the MCs, in the DC or on appeal to the CFI or by a barrister or a specially qualified solicitor in whichever court their case is being dealt with (see Article 35 of the Basic Law).

Barristers and solicitors who are retained privately will be paid by the person they are defending. If that person does not have sufficient means to pay their own lawyer they may be able to obtain one at the public expense through Legal Aid or the Duty Lawyer Service.

* 1. **The responsibilities of defence lawyers**

Defence lawyers, whether barristers or solicitors, are governed by the professional conduct rules of the profession. In particular, and like those acting for the prosecution, they are not allowed to mislead the court. However, major differences exist though, between the ethical obligations of those acting for the defence, and those acting for prosecution. In particular, the role of the defence lawyer is essentially to get their clients off or if this is not possible, to obtain the lightest possible sentence for them, provided this is done within the ethical rules.

Both the prosecution and defence lawyers are able to employ their forensic skills in advocacy in the trial, such as cross-examination and in closing addresses, which can have a major impact on the outcome of the case. These matters will be discussed in the next topic.

1. Material has been drawn, but substantially expanded upon, from previous notes in this and related SLW courses. The legislation covering these matters can be found in the Magistrates Ordinance (Cap.227), District Court Ordinance (Cap.336), the High Court Ordinance (Cap.4) and the Hong Kong Court of Final Appeal Ordinance (Cap.484). [↑](#footnote-ref-1)
2. Because of the large number of matters in this Course, the subject of appeals concerning sentencing will not be considered in it. [↑](#footnote-ref-2)
3. For MC’s cases, their appeal court is the Court of First Instance exercising appellant jurisdiction. [↑](#footnote-ref-3)
4. In order to make this course manageable for non-law students, not all legislation relating to this topic will be cited. Students only need to be aware of legislation in this course if it is cited. [↑](#footnote-ref-4)
5. [2012] HKCA 18. [↑](#footnote-ref-5)
6. Tony Upham, “Criminal Appeal Courts”, Chapter 9 in Wing Hong Chui and T Wing Lo (eds.) *Understanding Criminal Justice in Hong Kong* (Willan Publishing, Devon 2008) 188. [↑](#footnote-ref-6)
7. Archbold Hong Kong 2018. *Criminal Law, Pleadings, Evidence and Practice* (Hong Kong: Sweet and Maxwell 2018) 7-101. [↑](#footnote-ref-7)
8. Stephan H C Lo, “The Criminal Court System” Chapter 14 in Wing Hong Chui and T Wing Lo (eds.) *Understanding Criminal Justice* (Hong Kong: Second Edition. Routledge 2017) 256. [↑](#footnote-ref-8)
9. Section 32(2) Hong Kong Court of Final Appeal Ordinance (Cap.484). [↑](#footnote-ref-9)
10. [2007] HKCFA 46. [↑](#footnote-ref-10)
11. *HKSAR* v *Tam Ho Nam* [2017] HKCFA 58; (2017) HKCFAR 414 FACC 3/2017(22 September 2017). [↑](#footnote-ref-11)
12. *Specimen Directions in Jury Trials: Functions of Judge and Jury*, available at legalref.judiciary.gov.hk/lrs/common/pd/Practice\_Directions.jsp. [↑](#footnote-ref-12)
13. Section 80(2)(b) District Court Ordinance (Cap.336). [↑](#footnote-ref-13)
14. Amanda Whitfort, *Criminal Procedure in Hong Kong. A Guide for Students* (Third Edition. Hong Kong LexisNexis Butterworths 2020) 101. [↑](#footnote-ref-14)
15. The Hon Chief Justice Geoffrey Ma, *CJ's Speech at Ceremonial Opening of the Legal Year* *2018*,available at www.judiciary.hk/en/index/index.htm. [↑](#footnote-ref-15)
16. Leonore M J Simon, “Proactive Judges: Solving Problems and Transforming Communities” in David Carson and Ray Bull (eds.), *Handbook of Psychology in Legal* *Contexts* (Second Edition, John Wiley and Sons, Chichester New York 2003) 449 at 454-455. [↑](#footnote-ref-16)
17. The Hon Chief Justice Geoffrey Ma, *Speech of the Chief Justice at the Ceremonial Opening of the Legal Year* (January 13, 2014), available at www.judiciary.hk/en/index/index.htm. [↑](#footnote-ref-17)
18. Ibid. [↑](#footnote-ref-18)
19. Tong Cheung, Chris Lau and Jasmine Siu, ‘National Security Law: What You Need to Know About the Decision to Hold a Trial Without a Jury’, *South China Morning Post* (11 February 2021), available at <https://www.scmp.com> >…>Law and Crime. [↑](#footnote-ref-19)
20. Respectively, sections 24(3)(b)(i) and (ii) JO. [↑](#footnote-ref-20)
21. Section 4 JO deals with the qualification requirements. [↑](#footnote-ref-21)
22. Department of Justice, *Prosecutions. Hong Kong*. *Statistic*s *2020* (31 December 2021) 65, available at https://www.doj.gov.hk/eng/about/stat.html. [↑](#footnote-ref-22)
23. Eva Ng, “Do They Understand? English Trials Heard by Chinese Jurors in the Hong Kong Courtroom” 3(2) *Language and Law/Lignuageme Direito* (2016) 172 at 176. [↑](#footnote-ref-23)
24. Ibid 176-184. [↑](#footnote-ref-24)
25. Ibid 185. [↑](#footnote-ref-25)
26. Roger Matthews, Lynn Hancock and Daniel Briggs, Home Office Online Report 05/04, *Jurors’ Perceptions, Understanding, Confidence and Satisfaction in the Jury System; A Study in Six Courts. Home Office Online Report* (05/04) 41, available at https://webarchive.nationalarchives.gov.uk/.../http:/rds.homeoffice.../rdsolr0504.pdf. [↑](#footnote-ref-26)
27. Ng (n 23) 187. [↑](#footnote-ref-27)
28. Note for Finance Committee, *FCR(2014-15)15.* *Allowances for Jurors and Witnesses*, available at [www.legco.gov.hk/yr14-15/english/fc/fc/papers/fi14-15e.pdf](http://www.legco.gov.hk/yr14-15/english/fc/fc/papers/fi14-15e.pdf); Law Reform Commission of Hong Kong, *Criteria for Service as Jurors* *Executive Summary* 9, available at www.hkreform.gov.hk/. [↑](#footnote-ref-28)
29. Ibid 2. [↑](#footnote-ref-29)
30. Ibid. [↑](#footnote-ref-30)
31. The Law Reform Commission of Hong Kong, *Report. Criteria for Service as Jurors* Chapters 4 and 5, (June 2010), available at https://www.hkefrom.gov.hk>. [↑](#footnote-ref-31)
32. Legislative Council Panel on Administration of Justice and Services, *2018 Policy Initiatives of the Department of Justice)* *CB(4)20/18-19(01)* (For discussion on 29 October 2018) paragraph 68, available at https://www.legco.gov.hk/yr18-19/english/panels/ajls/papers/ajlscb4-20-1-e.pdf. [↑](#footnote-ref-32)
33. Legislative Council Panel on Administration of Justice and Services, *2019 Policy Initiatives of the Department of Justice CB(4)318/19 -20(02)* (For discussion on 24 February 2020) paragraph 63, available at [www.joj.gov.hk](http://www.joj.gov.hk) >eng > public > pdf > 2019. [↑](#footnote-ref-33)
34. Mark Findlay, “Juror Comprehension and Complexity: Strategies to Enhance Understanding” 41(1) *British Journal of Criminology* (2001) 56, 58. [↑](#footnote-ref-34)
35. Ibid referring to P Duff, M Findlay, C Howarth and T F Chan, *Juries: A Hong Kong Perspective* (Hong Kong: Hong Kong University Press 1992). [↑](#footnote-ref-35)
36. Le Cheng, Winnie Cheng and Jian Li, “Jury Instructions in Hong Kong: A Gricean Perspective” 22(1) *International Journal of Speech Language and the Law* (2015) 35, 35-55. [↑](#footnote-ref-36)
37. Specimen Directions in Jury Trials (n 12). [↑](#footnote-ref-37)
38. Department of Justice, *Prosecutions Hong Kong* (n 22) 63. [↑](#footnote-ref-38)
39. Morley Chow and Seto, “The Jury and the Internet” *Hong Kong Lawyer* (July 2016), available at www.hk-lawyer.org/content/jury-and-internet. [↑](#footnote-ref-39)
40. HK Judiciary, *Jury,* availableat https://www.judiciary.hk/en/jury/jury.html. [↑](#footnote-ref-40)
41. Franklin Koo, “Power to the People: Extending the Jury to Hong Kong’s District Court” *City University of Hong Kong Law Review* (2010) 301, 309-317. [↑](#footnote-ref-41)
42. Michael T Nietzal, Denis M McArthy and Monica J Kerr, “Juries: The Current State of the Empirical Literature” Chapter 2 in Ronald Roesch, Stephen D Hart and James R P Ogloff (eds.), *Psychology and Law. The State of the Discipline. Perspectives in Law and Psychology* Volume 10 (US: Springer 1998) 25; Bradley D McAuliff, Robert J Nemeth, Brian H Bornstein and Steven D Penrod, “Juror Decision-making in the Twenty-first Century: Confronting Science and Technology in Court” Chapter 3.1 in David Carson and Ray Bull (eds.), *Handbook of Psychology in Legal Contexts* (Second Edition Chichester: New York John Wiley and Sons, 2003). [↑](#footnote-ref-42)
43. Mark Findlay, “Juror Comprehension and the Hard Case-Making Forensic Simpler” 36(1) *International Journal of Law, Crime and Justice* (2008) 15, 50-52. [↑](#footnote-ref-43)
44. Jeremy Rose, “How Juries Perceive Expert Witnesses” *Trial. Juries* (June 2000) 51, 51-55, available at www.njp.com/wp-content/uploads/article/article18.pdf. [↑](#footnote-ref-44)
45. Cora Y T Hui and T Wing Lo, “The Feasibility of Expanding the Jury Pool in Hong Kong: A Comparison of Legal Decision Making Between Youth and Adult Mock Jurors” 32(3) *Journal of Contemporary Criminal Justice* (2015), 225, 225-242. [↑](#footnote-ref-45)
46. Ibid referring to the Juries Sub-Committee of the Law Reform Commission, *Criteria for Service as Jurors: Consultation Paper* (Hong Kong: Hong Kong Law Reform Commission2008) 89, available at http://www.hkreform.gov.hk/en/docs/juroes\_e.pdf. [↑](#footnote-ref-46)
47. Hui and Lo (n 45). [↑](#footnote-ref-47)
48. Matthews and others (n 26) 46. [↑](#footnote-ref-48)
49. Koo (n 41) 309-317. [↑](#footnote-ref-49)
50. Matthews and others (n 26) 37. [↑](#footnote-ref-50)
51. The Law Reform Commission of Hong Kong, *Report. Criteria for Service as Jurors* (June 2010) paragraphs 2.14-2.16. [↑](#footnote-ref-51)
52. Anon, “Silence is Golden on Jury Service” *The Law Society Gazette* (11 November 2005), available at https://www.lawgazette.co.uk/people/silence-is-golden-on-jury-service/44065.article. [↑](#footnote-ref-52)
53. Wendy Lou Noble, “A Juror’s Verdict” 336 *British Medical Journal* (2008) not paginated, available at [www.bmj.com](http://www.bmj.com) >336 >s.11.abstract. [↑](#footnote-ref-53)
54. Tony Upham, “Criminal Trial Courts” in Wing Hong Chui and T Wing Lo, *Understanding Criminal Justice in Hong Kong* (2008) 157. [↑](#footnote-ref-54)
55. [2009] 6 HKC 234. [↑](#footnote-ref-55)
56. In England and Wales and the USA, defendants have a right to a jury trial where they face more than six months imprisonment, whereas in Hong Kong a judge in a non-jury trial may impose up to seven years imprisonment: Koo (n 41) 303. [↑](#footnote-ref-56)
57. The Law Reform Commission of Hong Kong, *Report. Criteria for Service as Jurors* (n 51) paragraph 4.12. [↑](#footnote-ref-57)
58. The Department of Justice. The Government of the Hong Kong Special Administrative Region, *Percentage of Criminal Cases Conducted in Chinese*, available at www.doj.gov.hk/eng/about/stat.html. [↑](#footnote-ref-58)
59. Albert Wong, “District Court Jury Trials Review Rejected” *South China Morning Post* (12 November 2009), available at www.scmp.com/article/698046/district-court-jury-trials-review-rejected. [↑](#footnote-ref-59)
60. I. Grenville Cross, “Prosecuting Crime” in Wing Hong Chui and T Wing Lo (eds.) *Understanding Criminal Justice in Hong Kong* (Hong Kong: Willan Publishing 2008) 117. [↑](#footnote-ref-60)
61. The Code of Conduct for the Bar of Hong Kong can be accessed through <http://www.hkba.org/the-bar/code-of-conduct/code-of-conduct.html>,which is the Hong Kong Bar Association website. The relevant sections where a barrister is appearing for the prosecution are paragraphs 10.65 to 10.73A in that Code. [↑](#footnote-ref-61)