

4th ICAC Symposium (co-hosted with the European Anti-Fraud Office, European Commission) : “Deals Under the Table – the Doing or Undoing of Business?”

Keynote Address by the Honourable Chief Justice Andrew Li on
15 December 2009 :
“Fighting Corruption under the Rule of Law”

Commissioner, Director General, Ladies and Gentlemen,

1. I am most honoured to be invited to speak at this 4th ICAC Symposium co-hosted with the European Anti-Fraud Office of the European Commission. And I am delighted to be here and to see so many of you.

2. With so many participants coming from all over the world, this Symposium is truly an international event. To those who have come from overseas, may I extend a warm welcome and wish you a most enjoyable stay in Hong Kong.

3. This Symposium’s objective is to focus on the impact of fighting corruption in business on the global

community. This is timely in the wake of the recent financial crisis. Hong Kong as an international financial centre is in a position to share our experience. At the same time, I am sure that Hong Kong has much to learn from the experience in other jurisdictions. I shall offer some thoughts on “Fighting Corruption under the rule of law”. My remarks relate to Hong Kong and are relevant to all forms of corruption, including corruption in business.

Corruption

4. Corruption commonly involves the dishonest or preferential use of power or position which has the result of one person or organization being advantaged over another. It is damaging in that important decisions are determined by improper motives, with no concern for the consequences to the community. Corruption distorts values and standards and creates injustice. Corruption is motivated by human greed.

5. It is universally recognized that corruption is an evil which threatens the foundations of any civilized society and must be eliminated. This is widely and consistently reflected over the years in judgments of the courts in Hong Kong which have always regarded corruption as a serious crime. The following are taken from judgments of the Court of Final Appeal and the Court of Appeal.

- (a) Corruption is indisputably a grave threat to the well-being of any society and is an evil which cannot be tolerated.¹
- (b) Bribery and corruption are cancerous activities in a healthy and sound society. They must be eradicated quickly and thoroughly, otherwise they would spread to the whole community like a prairie fire

¹ *P v Commissioner of Independent Commission Against Corruption* (2007) 10 HKCFAR 293 at paras 1 and 74. (Court of Final Appeal)

that never burns out and the consequence is disastrous.²

6. The following judicial statements relate to corruption in business:

(a) Offences of commercial corruption could be “properly likened to an insidious cancer secretly gnawing at the vitals of commerce”.³

(b) “The probity of its financial institutions and of those who work in them is of great importance not only within Hong Kong itself but also internationally. Secret commissions strike at the root of that necessary probity.”⁴

7. In Hong Kong, since its establishment in 1974, the Independent Commission Against Corruption has worked

² *Secretary for Justice v Li Cheuk-ming* [1999] 1 HKLRD 63 at p.66. (Court of Appeal)

³ See *Attorney General v Leung Kin-wai* AR 5/96 quoted in McWalters : *Bribery and Corruption Law in Hong Kong* (2003) p.356 n 15.

⁴ *R v Turner* [1989] 2 HKLR 123 at p.126H-I.

unswervingly for some 35 years. It has earned the respect and the confidence of the community and it has the well-deserved reputation as one of the most effective anti-corruption agencies in the world. I remember well the days of the ICAC in its formative years. As a young barrister, I had the privilege of serving on its Advisory Committee on Community Relations between 1976 and 1981.

Rapid change

8. We live in a world of rapid change. The last 35 years have witnessed massive advances in all fields of human endeavour and far-reaching developments in all aspects of society. To understand the magnitude of the changes, one only needs to remember that in 1974 when the ICAC was established, there was no compact disc, let alone the Internet. The conditions and circumstances in which the battle against corruption has to be waged are indeed very different today compared to what they were 35 years ago. Three major aspects should be highlighted.

Increasing globalization

9. First, we live in an age of increasing globalization. The rapid advances in information technology and the dynamic growth in international trade and services have brought all of us much closer together. We can talk today without poetic licence of living in a global village. We need to look beyond our traditional concepts of physical location and territories. Business activities straddle physical boundaries and multi-national and cross-border transactions are part of everyday business life. Many are engaged in transactions in cyberspace with no physical boundaries. With increasing globalization, law enforcement agencies dealing with corruption have to tackle cross-boundary criminal activities. And corruption can find its ways in borderless trade and services.

Revolution in information technology

10. Secondly, we are experiencing an on-going revolution in information technology. Cyberspace, a medium which is oblivious of both time and territorial boundaries, brings

to everyone almost instantaneous links with developments elsewhere in the world. This revolution has transformed not only how businesses are conducted but has a far reaching influence on all our lives. But information technology can be used for both good and evil. They can be effective tools to achieve dishonest objectives such as corruption. This would make crime even more difficult to combat and detect.

Expectations of institutions

11. Thirdly, with better education, citizens all around the world have higher and indeed rising expectations of institutions which serve them. These include the law enforcement agencies. Their expectations relate to standards of professional competence and efficiency as well as to benchmarks of transparency and accountability on which they operate. In relation to the private sector, there are expectations of higher standards of corporate governance. At the same time, citizens are more conscious of their rights. With improved access to legal representation, they are more prepared to invoke the law to

protect their rights. In Hong Kong, these rights are guaranteed in our mini-constitution, the Basic Law. They are enshrined in Chapter III entitled “Fundamental Rights and Duties of the Residents” and the Bill of Rights entrenched by the Basic Law which implements the International Covenant on Civil and Political Rights as applied to Hong Kong. The rights in these instruments guaranteeing individual freedoms are greatly cherished and lie at the heart of Hong Kong’s separate system.

12. These changing conditions and circumstances form the context in which the unremitting fight against corruption must continue to be waged.

Independent Judiciary

13. Of cardinal importance to the rule of law is an independent Judiciary. An independent Judiciary must include a number of elements, including institutional independence from other branches of government, a sound system of appointment of judges and security of tenure for judges.

14. In Hong Kong, the Basic Law enshrines the principle of judicial independence and guarantees the essential elements for judicial independence. Article 85 provides that the courts shall exercise judicial power independently, free from any interference and members of the Judiciary shall be immune from legal action in the performance of their judicial functions. Under Article 88, judges are appointed by the Chief Executive on the recommendation of an independent commission composed of judges, persons from the legal profession and eminent persons from other sectors. Article 92 provides that judges shall be chosen on the basis of their judicial and professional qualities. The security of tenure for judges is guaranteed. Article 89 provides that a judge may only be removed for inability to discharge his or her duties or for misbehaviour on the recommendation of an independent tribunal consisting of judges.

15. An independent, competent and incorruptible Judiciary, with judges performing their duties without fear or favour, is of fundamental importance. The courts have the duty of conducting a fair trial for those prosecuted for offences and to sentence those who are found guilty. Further, challenges may be made to the constitutionality of laws, including those relating to the investigative powers of law enforcement agencies, and actions taken by those agencies. The courts have to resolve such disputes between citizen and state fairly and impartially.

Review of laws

16. The laws providing for corruption offences must be kept under review so that they are kept abreast of changing conditions and circumstances. Some laws are of particular relevance to corruption in business. The laws conferring powers of investigation on the ICAC must also be examined from time to time to ensure that they are suitable, having regard to changing times. Both types of laws must be of an appropriate scope, taking into account rapid developments in information

technology and the phenomenon of increasing cross-border criminal activities. Legislative amendments may have to be made to the relevant laws from time to time in order to ensure that the fight against corruption under the rule of law can continue to be effective.

Judicial review challenges

17. There have been a number of challenges on judicial review before our courts to the constitutionality of certain aspects of the statutory investigative powers conferred on the ICAC. The powers of investigation usually restrict guaranteed rights. In judging whether a restriction of a guaranteed right is justified, the courts apply a proportionality test⁵ namely: First, the restriction must have a rational connection with the pursuit of a legitimate aim. Secondly, the restriction must be no more than necessary for the achievement of that aim.

⁵ For example see *HKSAR v Ng Po-on* (2008) 11 HKCFAR 91 at para 28.

18. In applying the proportionality test, the courts have recognized that special powers of investigation are necessary for corruption offences. For example, the Court of Final Appeal had observed :-

“Section 14 [of the Prevention of Bribery Ordinance] confers on the Commissioner [of the ICAC] the power to obtain information concerning suspected POBO offences from suspects and non-suspects after obtaining judicial authorization. As corrupt activities are by their nature difficult to detect and investigate, let alone prove in the normal way, these special powers of investigation are necessary for the purpose of combating corruption. This is well recognized by the courts.”⁶

19. The Court of Appeal had stated:

“Specific corrupt acts are inherently difficult to detect let alone prove in the normal way. The true victim, society as a whole, is generally unaware of the special occasions on

⁶ *P v Commissioner of ICAC* (2007) 10 HKCFAR 293 at para 16.

which it is victimized. And, unlike in dangerous drugs cases for example, there is no obviously unlawful commodity, like the drugs themselves, which the criminals can be caught in possession of.”⁷

These special powers of investigation are of course exercised by the ICAC reasonably and appropriately.

20. Such constitutional challenges to the ICAC’s powers should not be viewed negatively. Rather, these judicial review challenges should be regarded in a positive light. In a society governed by the rule of law, it is right that citizens should have access to the courts to make these challenges. Court judgments dealing with these matters would ensure that corruption will continue to be fought under the rule of law. This is crucial for the maintenance of public confidence and for commanding public support in the battle against corruption.

⁷ *Attorney General v Hui Kin-hong* [1995] 1 HKCLR 227 at p.235 l.30-35.

Mutual legal assistance

21. As criminal activities increasingly engage more than one jurisdiction, it is necessary for each jurisdiction to engage the assistance of other jurisdictions. Co-operation is required in relation to the investigation of and the gathering of evidence for corruption offences. Arrangements have to be made between jurisdictions for mutual legal assistance.

Sentencing

22. Where persons are brought to trial for corruption offences in our courts, as in all criminal cases, guilt must be proved beyond reasonable doubt. Where it is not, the court must acquit. On a finding of guilt, the court has to consider and impose an appropriate sentence. In laying down sentencing principles and in sentencing in individual cases, the courts have recognized that sentences of appropriate severity must be imposed. Soon after the ICAC was established, the Court of Appeal had observed:

“The setting up of the Independent Commission Against Corruption and the provisions of the Prevention of Bribery Ordinance are sufficient indication of the Legislature’s intention to hit hard at offenders guilty of corruption and the courts must do their part in giving effect to that intention.”⁸

23. The Court of Appeal had stated the need for severe sentences⁹ in cases involving corruption in business. In that case, the appellant had accepted a sum of money from his principal’s client, after the client’s business with his principal had been completed. It was not suggested that the appellant had acted corruptly in relation to that business. Although the court noted that his culpability was in the lower range of moral culpability, it stated:

“... The probity of its financial institutions and of those who work in them is of great importance not only within

⁸ *R v Tsang Yau-choo & Anor* Cr App 911/1974 at p.8.

⁹ *R v Turner* [1989] 2 HKLR 123.

Hong Kong itself but also internationally. Secret commissions strike at the root of that necessary probity. They are, of their very nature, difficult to uncover. They are a breach of the trust that commercial enterprises are entitled to expect from those they employ ...”¹⁰

And the court continued:

“... It must be clearly made known to those who are tempted, ... that if discovered and convicted they will be subjected to immediate custodial sentences of a substantial character. ...”¹¹

Conclusion

24. In conclusion, looking into the future, we can only be certain of one thing. There will continue to be changes in the conditions and circumstances which form the context in which the battle against corruption within the rule of law must be fought. For the fight to remain effective, all concerned must be

¹⁰ at p.126 H-I.

¹¹ at p.127 C-D.

alive to these changes and must adapt appropriately to take into account of these changes.

25. Eternal vigilance against corruption is necessary. The mission of fighting corruption must never cease. I wish all of you every success in the never ending battle against corruption. Thank you.