

6th ICAC Symposium, 11-13 May 2015:

“A Future Without Corruption – One Vision, Multiple Strategies”

Keynote Address by the Hon. Mr Justice Fok PJ on

11 May 2015:

“The importance of the rule of law to a corruption-free future”

Commissioner, Ladies and Gentlemen,

1. I am most honoured to have been invited to address you today at this 6th ICAC Symposium to offer some personal observations on the challenges of creating a corruption-free future. I do so not only from my perspective as a member of the Hong Kong Judiciary but also from my experience, when I was still in practice at the Hong Kong Bar, as a member of the ICAC’s Operations Review Committee, in which capacity I saw first-hand the value of independent oversight and review of the operational aspects of the ICAC’s work.

2. 2014 marked the 40th Anniversary of the ICAC and so it is fitting that, having just passed that milestone anniversary, the theme of this symposium in 2015 should look to the future, specifically with the aspiration of a future without corruption. In this regard, keeping to the theme of this symposium, I wish to examine the content of the “one vision” for the implementation of which different anti-corruption

and law enforcement agencies may devise “multiple strategies”. That vision, I suggest, must include recognition of and adherence to the rule of law.

3. Like many other places, Hong Kong has known corruption to a greater or lesser extent for many years. From the earliest days of its colonial history, there have been those who have fallen prey to the temptation to have resort to the dishonest or preferential abuse of power or position in order to gain advantages whether pecuniary or otherwise. Large-scale police corruption, for example, was encountered at least as early as 1867 in respect of the regulation and inspection of unregistered brothels and illegal gambling houses¹. More recently, the Privy Council recognised that: “It is notorious, as indeed the decided cases make all too clear, that for many years corruption has been endemic in Hong Kong.”² Indeed, in 1995, the Court of Appeal reminded us: “Nobody in Hong Kong should be in any doubt as to the deadly and insidious nature of corruption. Still fresh is the memory of the days of rampant corruption before the advent of the [ICAC] in early 1974.”³

4. Judges in Hong Kong have frequently had resort, when describing corruption and its pernicious effects, to the metaphor of

¹ See Bribery and Corruption Law in Hong Kong, 2nd Ed., Ian McWalters SC (LexisNexis, 2010) at pp.4-5.

² *Mok Wei-tak v R* [1990] 2 AC 333 at 342B-D

³ *AG v Hui Kin-hong* [1995] 1 HKCLR 227 at 229

cancer⁴, an apt description evoking both the devastating damage to the well-being of society and also the fear, anxiety and psychological damage it causes. In the opening words of a landmark judgment in 2007, Li CJ stated, in characteristically succinct terms, “Corruption is an evil which cannot be tolerated.”⁵

5. In the international sphere, the States Parties to the United Nations Convention Against Corruption (UNCAC)⁶ express, in the Preamble, their concerns “about the seriousness of problems and the threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law”.

6. In Hong Kong, we are privileged to live in a place subject to the rule of law. Its singular importance in safeguarding our stability and prosperity and, more importantly, our freedoms and way of life is well-recognised. It can properly be described as the cornerstone of Hong Kong’s success. However, it is an attribute of our society that we must not take for granted and it is worthwhile to remind ourselves from time to time of its content.

⁴ See, e.g. : *SJ v Li Cheuk-ming* [1999] 1 HKLRD 63; *AG v Leung Kin-wai* [1996] 4 HKC 588.

⁵ *P v Commissioner of Independent Commission Against Corruption* (2007) 10 HKCFAR 293 at §1

⁶ The PRC signed the UNCAC on 10 December 2003 and ratified it on 13 January 2006. In accordance with Article 153 of the Basic Law, the PRC has decided, with the agreement of the Hong Kong SAR Government, that the UNCAC should also apply to Hong Kong.

7. Lord Bingham, in his seminal book *The Rule of Law* identifies the core of the existing principle as follows: “that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”⁷

8. In discussing the core principle, Lord Bingham has identified eight suggested principles as constituting the ingredients of the rule of law. Of these, there are at least four which are directly relevant to any anti-corruption agenda⁸. These are that:

- The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation⁹;
- Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably¹⁰;

⁷ *The Rule of Law*, Tom Bingham (Allen Lane, 2010) at p.8

⁸ The other four are: (1) The law must be accessible and so far as possible intelligible, clear and predictable; (2) Questions of legal right and liability should ordinarily be resolved by the application of the law and not the exercise of discretion; (6) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve; and (8) The rule of law requires compliance by the state with its obligations in international law as in national law.

⁹ Lord Bingham’s principle (3)

¹⁰ Lord Bingham’s principle (4)

- The law must afford adequate protection of fundamental human rights¹¹; and
- Adjudicative procedures provided by the state should be fair¹².

9. The first two principles just mentioned should be self-evident propositions in a society governed by the rule of law. As to the first, the law applies equally to all and all are subject to it. There is not one law for the rich and one for the poor; or one for the powerful or politically well-connected and one for the weak or marginalised. The second principle neatly reflects Klitgaard's paradigm¹³ that corruption equals monopoly plus discretion minus accountability. Those engaged in public service must not exploit the power at their hands for personal gain or advantage. The public entrusts them to act in good faith and honestly. There can be no compromise of these two principles in the context of the fight against corruption. Corruption exploits weakness and seeks to use greed to create the environment in which advantage and preference may be traded like commodities. Lastly, it is difficult if not impossible to see how there is any basis on which the non-application of anti-corruption laws or any differentiation in treatment could be objectively justified.

¹¹ Lord Bingham's principle (5)

¹² Lord Bingham's principle (7)

¹³ Robert Klitgaard, *Controlling Corruption* (Berkeley: University of California Press, 1988)

10. The latter two of Lord Bingham's principles referred to are equally as important as the first two. Without protection of our fundamental human rights and the provision of a fair trial to those accused of a criminal offence, even offences as insidious and deleterious as bribery or corruption, we would not be a society subject to and regulated by the rule of law in any meaningful way. Instead, we would quickly degenerate into a society subject to the rule by law in which the ends of securing convictions justified the means used and where those means were wholly arbitrary and unconstrained. This, I would suggest, is not a society in which any of us should wish to live.

11. There is clearly, therefore, a potential for tension or even conflict between the public interest in eradicating corruption and the public interest in protecting individuals' rights. How is that to be resolved?

12. Let us first consider the rights which must be protected. In Hong Kong, the laws by which all persons and authorities are bound and to the benefit of which they are entitled include, first and foremost, the Basic Law (BL) as our constitution. The Basic Law contains constitutional guarantees of rights and freedoms and also imposes duties and obligations. In addition to the Basic Law, the laws previously in force in Hong Kong, including the common law, are all maintained¹⁴.

¹⁴ BL Articles 8 and 18

13. A number of our constitutionally protected rights are directly relevant in the context of law enforcement. In Hong Kong, these are contained in the Basic Law and in the Bill of Rights (BOR) contained in the Hong Kong Bill of Rights Ordinance (HKBORO)¹⁵; similar provisions will exist in the constitutional instruments, laws and conventions of other jurisdictions. These rights include:

- The right to equality before the law¹⁶;
- Freedom of the person and protection against arbitrary or unlawful arrest, detention or imprisonment, as well as against arbitrary or unlawful search of the body, and the prohibition against torture or unlawful deprivation of life¹⁷;
- The inviolability of, and prohibition against arbitrary or unlawful search of or intrusion into, a resident's home or other premises¹⁸;
- The freedom and privacy of communications of residents¹⁹;

¹⁵ (Cap.383); the HKBORO was enacted for the purpose of incorporating into the domestic law of Hong Kong the provisions of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong: see, *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743 at §§6, 42-44 and 73-76.

¹⁶ BL Article 25 (BOR Article 1)

¹⁷ BL Article 28 (BOR Article 5)

¹⁸ BL Article 29 (BOR Article 14)

¹⁹ BL Article 30 (BOR Article 14)

- The right to confidential legal advice, access to the courts, choice of lawyers for the timely protection of lawful rights and interests and for representation in the courts²⁰; and
- The right when charged with a criminal offence to be presumed innocent until proved guilty according to law²¹.

14. So far as the fair trial requirement of the rule of law is concerned, the Bill of Rights prescribes a list of certain minimum guarantees in the determination of a criminal charge²², which include an accused's right:

- to be informed of the nature and cause of the charge against him;
- to have adequate time and facilities to prepare his defence;
- to be tried without undue delay;
- to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and

²⁰ BL Article 35

²¹ BL Article 87(2); BOR Article 11(1)

²² BOR Article 11(2)

- not to be compelled to testify against himself or to confess guilt.

15. But what of the public interest in fighting corruption? Given its pernicious effects, special powers of investigation have long been recognised as necessary in order to fight corruption²³. It is widely accepted that there are three features of corruption that justify the need for such powers, namely: (1) the fact that corruption is a secret or invisible crime taking place in private between willing participants; (2) the paucity of physical evidence and ease with which it can be concealed; and (3) the absence of a complaining victim to report corruption²⁴. As Li CJ said, in *P v Commissioner of Independent Commission Against Corruption (supra)*, a case concerned with section 14(1)(d) of the Prevention of Bribery Ordinance²⁵:

²³ See *HKSAR v Chan Sze-ting*, unrep., HCMA 106/1997, 4 September 1997, at §14.

²⁴ *McWalters (supra)* at pp.523-524

²⁵ (Cap. 201); section 14(1)(d) provides: “Where on an application under subsection (1A) the Court of First Instance is satisfied that there are reasonable grounds for suspecting that an offence under this Ordinance has been committed it may make an order authorizing the Commissioner by a notice in writing to require –
... (d) any other person whom the Commissioner believes to be acquainted with any facts relevant to such investigation or proceedings to furnish to the investigating officer specified in such notice all information in his possession or to which he may reasonably have access (not being information readily available to the public) respecting such matters as are specified in the notice or, as the Commissioner sees fit, to appear before the investigating officer specified in such notice or such other person specified in the notice and to answer orally on oath or affirmation any questions relevant thereto; and, on demand by the investigating officer specified in such notice or such other person, to produce or deliver or otherwise furnish to him the original or a copy of any document in his possession or under his control or to which he may reasonably have access (not being a document readily available to the public) which, in the opinion of the investigating officer specified in such notice or such other person, may be relevant to such investigation or proceedings; for the purposes of this paragraph the investigating officer specified in such notice or such other person shall have authority to administer any oath or take any affirmation;”.

“For the purpose of combating corruption, special powers of investigation have been conferred by statute on the [ICAC]. These powers are necessary as crimes of corruption are inherently difficult to investigate and prove. But as their exercise intrudes into the privacy of citizens, the statutory scheme provides that they are exercisable only after judicial authorization has been obtained. In this way, the scheme seeks to balance the public interest in fighting corruption and the public interest in the protection of the individual.”²⁶

16. Therefore, whilst recognising these features of corruption and the consequent special needs that these give rise to, there is nevertheless a balance to be struck between the desire to defeat corruption and the safeguarding of civil liberties to ensure that we do not “throw the baby out with the bathwater” or, to return to a medical analogy, that the “cure” does not “kill the patient”. It is by striking that balance that the tension or conflict I have referred to is to be resolved.

17. In the context of anti-corruption legislation in Hong Kong, the striking of that balance is commonly the task of the Judiciary. In the case of section 14(1)(d) of the Prevention of Bribery Ordinance, a judicial safeguard is introduced between the citizen and the state to

²⁶ (2007) 10 HKCFAR 293 at §1

provide an independent scrutiny by the courts to protect the citizen against the unjustified use of the special investigatory powers²⁷.

18. To take another example, legislation sometimes creates reverse onus provisions which may interfere with the presumption of innocence. Where the presumption of innocence is abrogated by the placing of a persuasive burden of proof on an accused to prove, on the balance of probabilities, an ultimate fact which is necessary to the determination of his guilt or innocence, it is the duty of the court to consider if its abrogation is justified. The court will ask whether the state has proved: (1) that the derogation is rationally connected with the pursuit of a legitimate societal aim (this is the rationality test); and (2) that the means employed, for example the imposition of the reverse persuasive onus, are no more than is necessary to achieve that legitimate aim (this is the proportionality test). The application of these two tests of rationality and proportionality are the means by which the court determines if an infringement of a fundamental human right is justified. If it is not justified, the court will be duty bound to declare the provision invalid, unless its validity can be saved by the application of some rule of construction, severing or reading down the offending part, or adopting some other available remedial technique. These were the issues with which the Court of Final

²⁷ Its proper functioning was the subject of the decision in *P v Commissioner of Independent Commission Against Corruption* (*supra*).

Appeal was concerned in *HKSAR v Ng Po On*²⁸ in relation to section 14(4) of the Prevention of Bribery Ordinance²⁹.

19. A further example of the balancing exercise, where the courts have to strike a balance founded on the right to a fair trial, is in determining whether evidence obtained in breach of a constitutionally protected right is admissible in court proceedings. The Court of Final Appeal has rejected the suggestion of an absolute bar to the admissibility of evidence obtained in breach of a constitutional right³⁰. Instead, there is a discretion whether to receive such evidence. In the recent case of *Ho Man Kong v Superintendent of Lai Chi Kok Reception Centre*, Ribeiro PJ observed³¹:

“The well-established balance here is between the public interest in the Court having access to relevant and probative evidence on the one hand, and the exclusion of evidence with a prejudicial effect which is out of proportion with its probative value on the other. The Court might also be asked to consider whether the conduct of the prosecution in securing such evidence constitutes an abuse of the process on a stay application. [In] determining

²⁸ (2008) 11 HKCFAR 91

²⁹ Section 14(4) provides: “Every person on whom a notice under subsection (1) is served shall, notwithstanding the provisions of other Ordinance or rule of law to the contrary save only the provisions of section 4 of the Inland Revenue Ordinance (Cap 112), comply with the terms of that notice within such time as may be specified therein or within such further time as the Commissioner may, in his discretion, authorize, and any person on whom such a notice has been served, who, without reasonable excuse, neglects or fails so to comply shall be guilty of an offence and shall be liable on conviction to a fine of \$20000 and to imprisonment for 1 year.”

³⁰ *HKSAR v Muhammad Riaz Khan* (2012) 15 HKCFAR 232

³¹ (2014) 17 HKCFAR 179 at §8

the admissibility of evidence or a stay application, the Court carries out its judicial function in the light of the defendant's constitutionally protected right to a fair trial. ...”

20. Some rights do not involve any balancing exercise. The right to confidential legal advice, sometimes referred to as legal professional privilege (LPP), is an absolute right based not merely on the general right to privacy but also on the right of access to justice. Accordingly, as the Court of Final Appeal recently noted³², it must be jealously protected by the courts.

21. Essential to the fair and proper discharge of these functions of the courts, and to achieving the latter two of Lord Bingham's principles to which I have referred, is an independent judiciary. This encompasses both independence from the parties and also institutional independence. As to the former, fairness means fairness to both parties and an absence of bias, a concept enshrined in the judicial oath and well-illustrated figuratively by the blindfolded statue of Themis atop the Old Supreme Court Building in Central, soon to be put to its original use as a court when the Court of Final Appeal moves there later this year. As to institutional independence, independent judicial power is referred to in articles 2 and 19 of the Basic Law and its exercise, free from any interference, and the immunity of members of the judiciary from legal action in the performance of their judicial

³² See *Secretary for Justice v Florence Tsang Chiu Wing* (2014) 17 HKCFAR 739 at §§25-29.

functions, are guaranteed by article 85 of the Basic Law. The appointment of judges by the Chief Executive is on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors³³. Judges are chosen on the basis of their judicial and professional qualities³⁴. They enjoy security of tenure in that they may only be removed for inability to discharge their duties or for misbehaviour on the recommendation of an independent tribunal consisting of other judges³⁵.

22. I began my remarks by referring to the fact that the ICAC celebrated its 40th Anniversary last year. This year, 2015, marks the 800th Anniversary of *Magna Carta*, identified by Lord Bingham as the first of the important historical milestones on the way to the rule of law as we know it today. Consider the enduring relevance of the evocative words found in clauses 39 and 40 of the 1215 Charter³⁶:

“39. No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

³³ BL Article 88

³⁴ BL Article 92

³⁵ BL Article 89

³⁶ There were four original versions of the Magna Carta: 1215, 1216, 1217 and 1225. Clauses 39 and 40 of the 1215 Charter were amalgamated and re-numbered as clause 29 in the 1225 Charter: see *Magna Carta* in its Medieval Context, an address by The Hon James Spigelman AC QC, Banco Court, Supreme Court of New South Wales, 22 April 2015 (downloadable at <http://www.academyoflaw.org.au/publication?id=16>).

40. To no one will we sell, to no one deny or delay right or justice.”

23. The importance of this reference point should not be forgotten, given the continuity of the common law under articles 8 and 18 of the Basic Law, a common law that was, until 30 June 1997, English common law.

24. In his Keynote Address at the 5th ICAC Symposium in 2012, Ma CJ concluded his remarks thus:

“There is no doubt that for many jurisdictions, Hong Kong included, the existence of an effective anti-corruption agency has changed forever the culture of society. No longer do people grow up accepting, directly or indirectly, that corruption is in any way normal, a way of life or worse still, acceptable. However, as we have seen, there are legally defined and principled limits. All of this represents the public interest, and that is common to every one of us. These are the signs of a society based on the rule of law.”

25. And so I conclude by suggesting that the public interest in the eradication of the evils of corruption, not by any means at all but rather in a principled manner in accordance with the rule of law,

should be the central focal point of any vision of a corruption-free future.

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