

ALB Hong Kong In-House Legal Summit 2016

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Speech by the Honourable Mr Justice Tang PJ

In-house Lawyers & The Rule of Law

(Greetings)

1. It was only after I was asked to speak here today that I realized that although when I was in private practice, I had worked with in-house lawyers, I knew very little about them. I set out to learn more. I searched the internet, read speeches and interviews given by prominent in-house lawyers and articles written by them.

2. I also noticed that in the last 2 years, for 2 years in a roll, your keynote speaker was none other than, the Secretary for Justice. That is entirely appropriate. The Secretary is certainly the most important and prominent of all in-house lawyers.

3. I also learned that about 25% of all locally qualified solicitors work in-house and that 65% of them have at least 10 years of post qualification experience. The Hong Kong Bar Association does not say what is the percentage of barristers who work in-house but it is likely that the percentage is considerably lower.

4. Then there are foreign lawyers in Hong Kong. The Law Society has a list of over 1000. Many no doubt work in law firms practicing foreign law. I believe a fair number of them are in-house lawyers.

5. It is obvious that in-house lawyers are a substantial force in the legal community in Hong Kong. It is the importance of in-house lawyers which prompted the title of this morning's talk: "In-house Lawyers and The Rule of Law".

6. It is often said and is taken for granted that the rule of law is our most important core value. But what is the rule of law? The best introduction to the subject is Lord Bingham's short book "The Rule of Law". He said in the preface "the expression was constantly on people's lips, I was not quite sure what it meant, and I was not sure that all those who used the expression knew what they meant either, or meant the same thing." There is a statement in the jacket of Lord Bingham's book which summarized it well. It reads:

"He makes clear that the rule of law is not an arid legal doctrine but is the foundation of a fair and just society, a guarantee of responsible government, and an important contribution to economic growth, as well as offering the best means yet devised for securing peace and co-operation."

7. It is not surprising that Hong Kong wish to embrace the rule of law. Today, I wish to confine myself to only one narrow aspect of the rule of law, namely, the due administration of justice.

8. In-house lawyers' role in the administration of justice is well recognized. As Mr Justice Brennan of the High Court of Australia said:

“Administration of the law is not the function of the courts alone. The law is administrated more frequently and more directly by legal advisers than it is by judges.”¹

In *Crompton Ltd v Customs and Excise Commissioners*, which was decided in [1972] 2 QB 102 at 129 Lord Denning said of salaried legal advisers, using the language of a by-gone age, that although they are servants and agents of the employer:

“They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges.”

9. Lord Denning then went on to say:

“I speak, of course, of their communications in the capacity of legal advisers. (this morning's talk is about in house lawyers as legal advisers) It does sometimes happen that such a legal adviser does work for his employer in

¹ *Carter v The Queen* (1995) 183 CLR 121 at 127.

another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction. Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser.”

10. In Hong Kong, the Court of Appeal in an important judgment in 2015² recognized that legal privilege could exist over communications between the client and its legal advisers, as well as documents generated during the information gathering process. So in-house lawyers and their employers are entitled to the full benefit of Article 35 of the Basic Law.

11. But because an in-house lawyer may be under more pressure from his client, that is his employer, as Lord Denning said: “he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser.” I want to discuss whether there are ways in which in-house lawyers might be assisted in maintaining their independence.

12. When preparing for this talk, I have come across a number of interviews given by senior in-house lawyers in sizeable companies or organizations which show clearly their awareness that while they would not want (and rightly not) to be seen as nay-sayers, it was their job to anticipate

² *Citic Pacific Ltd v Secretary for Justice* (No 2)[2015] 4 HKLRD 20.

unseen risks, to be mine sweepers as it were. They believe their employers should know that an ounce of prevention is better than a pound of cure. Indeed, why employ in-house lawyers at all unless one wants to know what can be lawfully done and what cannot. A yes man would only land his employer in trouble later. I believe they represent the understanding and attitude of the majority of the employers of in-house lawyers, especially large institutions and corporations, whose operations often cover other jurisdictions where the rule of law are deeply entrenched. But, regretfully, there are employers who may not be fully committed to the rule of law.

13. So there will be occasions when in-house lawyers will face obstruction or pressure from their employers. Sometimes, such pressure may come from client-side colleagues. Pressure from client-side colleagues are more easily handled. When I was in private practice, I had come across cases where there were internal disagreement over disclosure in prospectuses. In this kind of situations, often outside lawyers can provide an independent view and there would be no hard feelings. But pressure could come from one's employers or the corporate culture was inimical to the rule of law. It is here where the integrity and strength of character of the in-house lawyer or the team of in-house lawyers is important.

14. The professional rules of the Bar and the Law Society do not go into much detail. In their book “The Professional conduct of lawyers in Hong Kong”³ Professors Michael Wilkinson and Michael Sandor said the Solicitors’ Guide:

“deals only briefly with the professional responsibilities of employed solicitors. Most importantly the Solicitors’ Guide provides that a solicitor who works for a non-solicitor employer must comply with the Solicitors Practice Rules, Practice Directions and the rules and principles of professional conduct. It also requires that this obligation takes priority over any conflicting demands or requirements of non-solicitor employer.”

I have not gone into the rules and principles of professional conduct in any detail. Undoubtedly, the rules and principles require the employed solicitor to uphold the rule of law and the proper administration of justice, to act with integrity and not allow his/her independence to be compromised. The Bar Code hardly mentions employed barristers at all, but essentially requires that they behave with independence and integrity.

15. But do employers know what the professions require of their employed lawyers. I believe it may help if prospective employers are formally informed of the professional rules governing their employed lawyers. Perhaps, some means of formal communication can be devised. Then the employer and the employed lawyer will both know where they stand. I do not know enough

³ Volume 4 division XIV(2).

of the practicalities to say what will or can work. I raise it just in case it may be thought it is worth exploring.

16. Another important topic I wish to talk about is knowledge of improper dealings. This is particularly important if the wrong doing is ongoing or about to commence.

17. This is a difficult problem. In Professors Michael Wilkinson and Michael Sandor's book,⁴ they referred to the Model Rules of Professional Conduct of the American Bar Association. The model rules provide a helpful guideline to conduct in such event. And it may be that the Hong Kong professional bodies can consider whether their own guidelines need amplification.

18. It is clear however that given the absolute nature of legal professional privilege in Hong Kong, an in-house lawyer could not be a whistleblower. More important principles are at stake here. If one admits of further exceptions⁵ to the absolute nature of legal professional privilege, I fear that may give rise to serious mischief.

⁴ Volume 4, XIV 151.

⁵ The well settled exceptions are communications which are themselves part of a criminal or unlawful proceedings. *Bullivant v Attorney General for Victoria* [1901] AC196 at 201.

19. But Model Rule 1.13 (b) ended with these words:

“If, despite the lawyer's efforts above, the highest authority (in his employer) ... insists upon action or a refusal to act, that is clearly in violation of the law and is likely to result in serious injury to the organisation, the lawyer may resign.”

Given the requirements of confidentiality that maybe the only practical way out for an in-house lawyer.

20. Resignation or the threat to do so is an underappreciated weapon.

21. A good example is the case of James Brien Comey Jr who was Deputy Attorney General of the Unites States between 9 December 2003 and 15 August 2005 under President George W Bush. The events appeared to have been confirmed by the principal protagonists, including President Bush himself. The matter concerned the legality of certain National Security Agency (NSA) domestic surveillance programme which required certification by the Attorney General. Mr Comey was the acting Attorney General during the hospitalization of the Mr Ashcroft, the incumbent, who was in hospital suffering from life threatening pancreatitis. As I understand it, Vice President Cheney had devised and President Bush had approved, an NSA operation to monitor the phone calls and emails of US citizens without a warrant, part of which later became known as the Terrorist Surveillance Programme. After more than 2 years of going along with “the Vice President’s special program,” the Justice Department concluded that the surveillance was illegal. Both Mr Ashcroft, before he was

hospitalised and Mr Comey who assumed his responsibilities afterwards refused to certify that the surveillance might continue. It appeared that President Bush was prepared to sanction the continuation acting on his own authority as president thereby going over the head of the Attorney General. In response both Mr Comey as well as the Director of the FBI threatened to resign. That forced President Bush to back down and he modified the program so as to comply with the law.⁶

22. Another notorious incident which resulted in the actual resignation of the Attorney General and his Deputy took place on 20 October 1973 during the presidency of President Nixon over his sacking of the Watergate special prosecutor, Mr Archibald Cox.⁷ That was a serious blow to President Nixon and contributed to his subsequent downfall.

23. These are examples which we can all be proud of. And they show the power of resignation or threats to do so. However, in the case of an ordinary in-house lawyer, a resignation or a threat to do so would have less impact. Although, if the chief legal officer or an entire in-house team of in-house lawyers from a listed company or large institution were to resign, it is bound to have an impact. But whether or not one's resignation will have an impact, I

⁶ Decision Points President George W Bush's memoir: https://en.wikipedia.org/wiki/Decision_Points

⁷ https://en.wikipedia.org/wiki/Archibald_Cox

believe that would be the right thing to do consistently with integrity and professional ethics.

24. Of course, resignation should be regarded as the last resort, and in-house lawyers must try their best to bring the attention of the breach of the law, actual or threatened to the attention of the highest authority in their organization. It is only when all has failed, one should resign.

25. I have spoken to you this morning about a narrow aspect of the rule of law. One might say that there are more important issues in the rule of law that one ought to be talking about, for example, freedom of expression, which I regard as the lynch-pin of our freedoms and the rule of law. Be that as it may, on this occasion, I think it is right that I should speak about one aspect of the rule of law which is of more direct concern to you. I leave you with the thought, that when it comes to our freedoms and the rule of law, there is no aspect which is unimportant. They are inter-dependent and one should guard all of them vigilantly.