

**Speech by The Honourable Chief Justice Geoffrey Ma
at the 7th ICAC Symposium
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**Understanding the Legal Fundamentals
in Dealing with Corruption¹**

1. My predecessor, Chief Justice Andrew Li poignantly said nearly 10 years ago at the 4th ICAC Symposium²:-

“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

Corruption is indisputably a grave threat to the

¹ I am grateful for the assistance I have received from the Judicial Assistants of the Hong Kong Court of Final Appeal: Mr Griffith Cheng, LLB (University of Hong Kong), LLM (LSE) and Mr Wing So, LLB (City University of Hong Kong), BCL (Oxon), MPhil (Oxon), DPhil (Oxon).

² In December 2009.

well-being of any society and is an evil which cannot be tolerated 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 that never burns out and the consequence is disastrous.”

2. Just as obvious but equally important and bearing repetition is the statement that the rule of law is at all times to be adhered to. All of us wish to believe that the rule of law exists in our home jurisdictions, but on a practical level how does the battle against corruption fit into the fabric of fundamental rights (the existence of fundamental rights and freedoms being one of the core aspects of the rule of law³)? There is hidden in this question conflicts which can in practice

³ The other core component of the rule of law is the existence of an independent judiciary.

be at times difficult to resolve on a principled basis. By “principled basis” I mean a resolution that does not sacrifice either the notion that fundamental rights are to be fully respected and enforced or the societal necessity of dealing adequately with the evils of corruption. I wish to discuss briefly this question using the Hong Kong context, but I hope you will find the analysis useful as far as your own experiences are concerned.

3. The insidious and secretive nature of corruption makes it extremely hard to investigate. This explains, for instance, the wide powers of search that are made available to investigators of corruption. Under the Prevention of Bribery Ordinance (POBO),⁴ extensive powers to obtain information are set out in relation not only to persons suspected of corruption offences, but also to any person who may be able

⁴ Cap. 201.

to assist by providing relevant information.⁵ Such information is obtained by the serving of a notice to the person possessing relevant information (after getting the necessary approval from a court). A neglect or failure to comply without reasonable excuse (notwithstanding any rule of law to the contrary⁶) constitutes a criminal offence.⁷ Other powers available to law enforcement officers can also be described as intrusive to facilitate the investigation and inspection of materials relating to corruption offences, to enable restraining orders to be made and even to restrain the travel movements of suspected persons. Some critics have labelled the wide powers of investigation “Draconian” and in many senses they are but they are necessary. The courts recognize the need for these special powers:-

⁵ Section 14 of POBO.

⁶ Such as a duty of confidentiality.

⁷ Section 14(4) of POBO.

- (1) In *Secretary for Justice v Lam Tat Ming*,⁸ a case involving ICAC investigations into police officers allegedly accepting protection monies to facilitate triad activity, the Chief Justice said in relation to undercover operations:-

“The law recognises that the use of undercover operations is an essential weapon in the armoury of the law enforcement agencies; particularly their use when the criminal activities are ongoing but also their use after crimes are completed to obtain evidence to bring the criminal to book. The use of undercover operations plays an important part in society’s struggle to combat crime especially serious crime, whether it be corruption, trafficking in dangerous drugs or terrorism.”

⁸ (2000) 3 HKCFAR 168, at 180J-181A.

(2) In *HKSAR v Lee Ming Tee*,⁹ this time a case involving investigations conducted by the Commercial Crime Bureau of the Hong Kong Police into a conspiracy to defraud in relation to share issues, Sir Anthony Mason NPJ said:-

“In doing so, the Court must take account of the important public interest in the detection and punishment of crime, more particularly serious crime, as a result of which the investing public has suffered loss. The Court must take account also of the public expectation that persons charged with serious criminal offences will be brought to trial unless there is some powerful reason for not doing so. On the other hand, the Court must have regard

⁹ (2003) 6 HKCFAR 336, at para. 187.

to preserving the integrity of the criminal justice system.”

4. The reference to the integrity of the criminal justice system in the passage just quoted brings me to the imperative of recognizing the legal limits of the wide powers to investigate corruption. In the title of this address, I refer to an understanding of the legal fundamentals. This begins with an understanding of the constitutional landscape in which corruption laws (indeed all laws) are to be viewed.

5. In Hong Kong, the relevant constitutional document is known as the Basic Law.¹⁰ In the Preamble, it is stated that the Basic Law ensures “the implementation of the basic policies of the People’s Republic of China regarding Hong Kong” and one of its aims was the maintenance of the

¹⁰ The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China promulgated by the PRC on 4 April 1990, taking effect on 1 July 1997 when the PRC resumed the exercise of sovereignty over Hong Kong.

prosperity and stability of Hong Kong. The prosperity and stability of Hong Kong obviously included the necessity to deal effectively with corruption.

6. For present purposes, I focus on Chapter III of the Basic Law setting out fundamental rights. Here, one finds those rights common to most jurisdictions:-

(1) Article 25 of the Basic Law (and Article 1 of the Bill of Rights¹¹) refers to equality before the law. In terms of law enforcement, everyone (high or low) is to be treated equally; there is no scope for arbitrary or selective enforcement.

(2) Article 28 of the Basic Law (and Article 5 of the Bill of Rights) states that the freedom of the person

¹¹ I refer in more detail to the Bill of Rights in the next paragraph.

is inviolable and no one should be subject to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited.

(3) Article 29 of the Basic Law (and Article 14 of the Bill of Rights) refers to the prohibition of the arbitrary or unlawful search of, or intrusion into, a resident's home or other premises.

(4) Article 30 of the Basic Law (and Article 14 of the Bill of Rights) refers to the protection of the freedom and privacy of communications of residents.

(5) Article 35 of the Basic Law states that residents shall have the right to confidential legal advice and the choice of lawyers for the protection of their lawful rights and interests. Article 11 of the Bill of Rights, apart from stating the cardinal principle that everyone is to be presumed innocent until proven guilty, emphasizes the importance of the right to communicate with lawyers.¹²

7. Of particular note is Article 39 of the Basic Law which provides constitutional backing to the International Covenant on Civil and Political Rights (the ICCPR) as applied to Hong Kong.¹³ The provisions of the ICCPR are reproduced

¹² Article 35 ensures that the concept of legal professional privilege will assume cardinal importance as far as corruption investigations are concerned: see, for example, *Philip K H Wong, Kennedy Y H Wong & Co v Commissioner of ICAC (No. 2)* [2009] 3 HKLRD 379.

¹³ The ICCPR is a multilateral treaty adopted by the United Nations General Assembly in 1966, being one of the two important conventions on human rights adopted by the United Nations (the other being the International Covenant on Economic, Social and Cultural Rights (the ICESCR)).

almost word for word in Hong Kong's own Bill of Rights.¹⁴ Thus, one finds in the Bill of Rights those rights and fundamental freedoms commonly found in other human rights documents: the guarantee of equality (Articles 1 and 22), the guarantee that no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment (CIDTP) (Article 3), access to justice, and the entitlement to a fair and public hearing in the determination of any criminal charge or of rights and obligations in a suit of law (Article 10), the freedom of thought, conscience and religion (Article 15), the freedom of opinion and expression (Article 16), the right of peaceful assembly (Article 17), the right to marry (Article 19), the right to vote and participate in public life (Article 21) etc.

¹⁴ Contained in the Hong Kong Bill of Rights Ordinance Cap. 383 (HKBORO). It should be noted that the concept of setting out rights for Hong Kong found its origins in the Joint Declaration of the United Kingdom and Chinese Governments on the Question of Hong Kong dated 19 December 1984. Annex I of the Joint Declaration provides (in elaborating on the PRC's basic policies regarding Hong Kong) that fundamental rights and freedoms would be protected and the provisions of the ICCPR (which the United Kingdom extended to Hong Kong) would remain in force after 1 July 1997.

8. I believe the introduction of a bill of rights in Hong Kong marked a considerable change in the legal (as well as social and political) landscape of Hong Kong. It is important in this context to understand that in human rights law, unlike almost every other area of the law, the courts are often faced with having to adjudicate between diametrically opposed legal principles or points of view, which on their face are reasonable if not compelling. It may sometimes be extremely difficult to arrive at the right answer in these circumstances and the court will be put in the position of having to balance the conflicting interests. Crucial questions then arise for the courts: Should there be more weight given to the recognition and enforcement of rights and freedoms than to attempts to restrict them? If so, at what point can rights be restricted? How far should the views of the Government or the legislature in restricting rights be recognized by the courts?

9. These and many other similar questions arise uniquely in the determination by the courts of human rights issues. In almost any other area of the law (perhaps even in every other area of the law), these dilemmas do not arise. It is difficult enough discovering what the law is and how it should be developed when dealing with, say, commercial law or equitable principles, but when one adds to the problem the type of questions just enumerated, the task is made considerably more complex. Furthermore, it must be borne in mind that the stakes are high. In the determination of cases involving basic rights and fundamental freedoms, the public interest is very much engaged. The ramifications of public law cases are often wide. Furthermore, decisions must be made on a principled basis and not seen to be in any sense arbitrary. A principled basis of course means deciding cases according to law, legal principle and the spirit of the law. The stakes are high not just because one is here dealing with

fundamental rights, but also considerable powers are given to the courts. For example, the courts in Hong Kong are able to declare as unconstitutional legislation or measures which offend against fundamental rights. Such declarations have been made from time to time.

10. In our present context, while (as I have earlier mentioned) there is a considerable public interest to deal effectively with the evils of corruption, nevertheless there is also to be taken into account the safeguarding of the rights and freedoms of individuals. This was well put by the Court of Appeal in *Attorney General v Hui Kin-hong*:¹⁵

“Nowadays, the criminal law against corruption is essentially statutory. But the public’s right to protection against corruption is not confined to what

¹⁵ [1995] 1 HKCLR 227, at 231.

is to be found in criminal statutes. The Bill of Rights itself secures that right. Article 22 of the Bill contains an “equal protection” clause. If the law only protected persons accused of corruption, but failed to protect members of the general public from the evils and perils of corruption, then it would deny them equal protection. Whenever two imperatives of a legal system rub against each other, simply sacrificing one for the other is not a real option. Nor is compromising both. An acceptable balance which works in practice has to be found. That may not be easy to do. But it must be done if society is to be truly secure: both clean and free.”

11. And this approach has been applied by the courts when faced with the diametrically opposite considerations just

postulated. I give two examples relating to those provisions of POBO I have earlier referred to:-

- (1) In the first case,¹⁶ the court had to consider the powers of investigation under s 14 of POBO, involving the obtaining of information from persons other than suspects. The procedure involves an application to court for permission to serve a notice on the relevant person to furnish information. Given that criminal sanctions are involved where there was a failure to provide the requested information, the CFA was at pains to emphasize that the court had a discretion to ensure not only that the precise statutory conditions were fulfilled, but that it had the residual discretion to decline to make any

¹⁶ *P v Commissioner of Independent Commission Against Corruption* (2007) 10 HKCFAR 293.

order in favour of the investigating authorities where there was any oppression.¹⁷

- (2) The second case¹⁸ involved s 14(4) of POBO, the provision that makes it a criminal offence if there has been a neglect or failure “without reasonable excuse” to comply with a notice to provide information to investigators. This provision, which placed the persuasive burden on a defendant to prove reasonable excuse, was held to conflict directly with the presumption of innocence.¹⁹ This therefore required the prosecution to justify the incursion into this fundamental right by applying what is known in constitutional law as the

¹⁷ At paras. 28 to 30.

¹⁸ *HKSAR v Ng Po On* (2008) 11 HKCFAR 91.

¹⁹ The presumption of innocence is contained in Article 87 of the Basic Law and in Article 11(1) of the Hong Kong Bill of Rights.

justification test.²⁰ The CFA held that the incursion could not be justified but rather than declaring the provision to be unconstitutional, the CFA instead held that only an evidential burden was to be imposed on a defendant. This meant that although there was no onus on a defendant to prove reasonable excuse, he or she had to place sufficient evidence before the court to raise a reasonable doubt as to the genuineness of the excuse and then leave it to the prosecution to discharge its legal burden of showing beyond reasonable doubt that the excuse was not a reasonable one.²¹ This case provides a good illustration of the balancing exercise a court sometimes has to perform when having to

²⁰ Not all fundamental rights are absolute (such as the presumption of innocence) and may be subject to exceptions. However, in order to constitute a legitimate exception, this must be justified.

²¹ At paras. 72 to 74.

adjudicate on what are on their face reasonable, but diametrically opposite, points of view.

12. There are many more illustrations of the way the courts have had to grapple with difficult issues in the context of corruption offences while at the same time paying sufficient regard to fundamental rights. This is often not a straightforward exercise, but it is a necessary one. It is necessary because in a developed system of criminal justice, the characteristics of fairness, justice, principle and above all, the adherence to the rule of law represent immutable standards to which all of us aspire.

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