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### Anti-Corruption and Human Rights Protection: Hong Kong's Jurisprudential Experience

**Daniel R. Fung**

Ladies and Gentlemen,

1. I am honoured and delighted to be asked to address you today on a matter of critical importance to law enforcement in a great many developing as well as developed economies, namely, the interface between society's interest in the combating of corruption and, the competing social interest in the protection of human rights and civil liberties. Coming as I do from Hong Kong, I shall focus on our experience in this fast-growing field, namely, how to maintain a clean government as well as probity of commercial and other conduct in the private sector with the legitimate aims of a civil society in safeguarding the rights of individuals against the state and promoting the rule of law.
2. Thanks to more than 23 years of hard work by the Independent Commission Against Corruption ('the IACA') established by the Hong Kong Government on February 15 1974 which has survived intact China's resumption of the exercise of over Hong Kong on July 1, 1997 and answers directly to the Chief Executive of the Hong Kong Special Administrative Region ('HKSAR') under Article 57 of the Basic Law being Hong Kong's new miniconstitution, I am proud to say that we now have a fundamentally clean public service, a private sector that is vigilant against corruption, and a community which no longer accepts corruption as a way of life. There is, however, no cause for complacency, I hasten to add, since the war against corruption is very much an ongoing concern for all right-minded governments and the arsenal required to service such a war requires constant maintenance and upgrading.
3. As highlighted by our Court of Appeal in the leading decision of Attorney General v Hui Kin-hong [1995] 1 HKCLR 227 (CA) at 229 (per Bokhary JA, as he then was):
 

"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 Independent Commission Against Corruption in early 1974. And there have been recent reminders. 'Bribery is an evil practice which threatens the foundations of any civilised society.' That is how the Privy Council put it in the recent case of Attorney General v. Reid [1994] 1 AC 324. And even more recently ... this Court, speaking, of corruption in the same breath as drug trafficking, characterised both as cancerous activities'."
4. In a society like Hong Kong which holds steadfast to the rule of law and respect for human rights, striking the right balance between the protection of individual rights and the combating of corruption has called for the greatest degree of judicial wisdom. The above exercise has not disappeared upon the establishment of Hong Kong as a Special Administrative Region ('SAR') of the People's Republic of China on July 1, 1997. On the contrary, it has been constitutional embodiment in the **Basic Law** as I have given the imprimatur of earlier mentioned.
5. The standard of human rights protection adopted in the HKSAR follows the regime stipulated in, arguably, the two most successful multilateral human rights treaties ever sponsored by the United Nations, namely, the *International Covenant on Civil and Political Rights* (the *ICCPR*) and the

*International Covenant on Economic, Social and Cultural Rights* ('the *ICESCR*').

6. The *Basic Law* is Hong Kong's first comprehensive, written constitution. Comprising 160 articles covering all aspects of Hong Kong life and drafted by a combined team of Mainlanders and Hong Kongers, after extensive public consultations with all sectors of Hong Kong society stretching over a five-year period from 1985 to 1990 in order to reflect domestically the international treaty obligations assumed in 1984 by both the outgoing sovereign (Britain) and the incoming sovereign (China) as defined in the *Sino-British Joint Declaration*, the *Basic Law* ('the *BL*') was promulgated by China's parliament the National Peoples Congress, on April 4, 1990.

7. *BL Chapter III* constitutes a mini bill of rights in itself with 19 articles, 18 of which articulate forms of protection for discrete individual rights such as freedom of expression, freedom of movement and travel, freedom of association etc. The remaining article is the most significant and pregnant with implication. This is Article 39 which stipulates in its first paragraph that:

"The provisions of the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative region.

8. The second paragraph of *Article 39* is even more significant in that it provides:

"The rights and freedoms enjoyed by the Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

In other words, the bottom line for human rights protection' in Hong Kong today are the universalist principles of the *ICCPR* and the *ICESCR* themselves.

9. This is reinforced by the *Hong Kong Bill of Rights Ordinance* ('the *BOR*') enacted by our legislature in 1991 incorporating into our domestic law the provisions of the *ICCPR*. The *BOR* constitutes one of the most prominent landmarks in Hong Kong's legislative landscape. Enacted as a government initiative after a gestation period of four years during which systems for protection across the spectrum of comparable common law human rights jurisdictions were studied and advice taken both locally and overseas particularly from Canada, the *BOR* is unique the world over in reproducing almost verbatim the exact the same language of the *ICCPR*. The United Nations has confirmed to us that of the 138 states-parties to the *ICCPR*, none has made a similar attempt at *verbatim* domestic incorporation of the treaty provisions.

10. Additionally, as a common law jurisdiction, our courts have interpreted the provisions of the *BOR* thereby transforming the same into living law using case precedents not just from Hong Kong, but also from authoritative overseas common law courts including the House of Lords in England, the Privy Council, the High Court of Australia, the New Zealand Court of Appeal, the Supreme Court of India, the South African Constitutional Court, the Supreme Court of Canada and the United States Supreme Court, to give but a few examples from the extensive stretch of the common law patrimony. Further, Hong Kong courts have gone beyond the common law world in its quest for judicial guidance by way of persuasive and not binding authority and have consulted regularly decisions of the European Court of Human Rights at Strasbourg as well as those of the United Nations Human Rights Committee on individual petitions under the *Optional Protocol*. As a result, Hong Kong has over the last six years built up a unique corpus of case law being a synthesis of home-grown and international jurisprudence which, I am told, is studied with great interest the world over.

11. This jurisprudence has survived the resumption of Chinese sovereignty over Hong Kong to form very much a part of SAR law. Since *Article 8* of the *Basic Law* specifically provides that the common law (amongst other components of Hong Kong's pre-existing system) shall be a part of SAR law to the extent that it does not conflict with the Basic Law. This basic principle was recently confirmed by our Court of Appeal in the most important judicial decision ever made in the SAR, namely, *HKSAR v David Ma* (CA) (M of 1997, unrep.) judgement delivered July 29, 1997 where the Court of Appeal unanimously held that the common law has indeed survived the transition as an crucial component of SAR law.

12. I now propose to highlight by reference to recent court decisions the salient features of Hong Kong's jurisprudence in balancing society's interest in combating corruption as against the competing social interest in protecting human rights and the rule of law, focusing on the justification or otherwise of our legislature reversing the onus of proof and limiting freedom of expression in the ongoing war on corruption.

Principle of Proportionality

13. A key principle deployed by the Hong Kong judiciary in undergoing this balancing exercise is that of proportionality. Since most of the rights set out in the *ICCPR* and *BOR* are qualified in that they are subject to **reasonable limitation**, application of the principle of **proportionality** requires that a **balance** be struck between two competing sets of public interests, namely, the wider interests of society **as a whole** (e.g. national security, public order and public safety) as against the rights of **particular individuals**. Restrictions on individual rights are justified provided they pursue a **legitimate aim** and are **proportionate** to that aim. In other words, the restriction must be proportion to the problem being addressed and, given that it is restricting guaranteed rights, should go no further than is reasonably necessary to safeguard the relevant public interest. The availability of **other** effective, but less rights-restrictive, measures to tackle the problem will usually indicate a failure to comply with the principle of proportionality.

Two Landmark Anti-Corruption Cases

14. Illustrating this principle of proportionality, may I now turn to two landmark cases in which our anti-corruption legislation was challenged on human rights grounds. The first case deals with the right to presumption of innocence of criminal defendants. The second one addresses the right to freedom of expression.

RIGHT to PRESUMPTION of INNOCENCE: ICCPR Art 14(2)/BOR Art 11(1)The Guarantee

15. The right to presumption of innocence is protected in Hong Kong under **ICCPR Art 14(2)/BOR Art 11(1)** and *Basic Law Art 87*. This is one of the most frequently invoked provisions of the *BOR*. Under this provision, anyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. The courts have sought to strike a balance between the concerns of **law enforcement** on the one hand and the right to presumption of innocence on the other by recognising that the latter can be limited provided such limitation were **rational and proportional**.
16. Such a balancing exercise is called for in respect of **reverse onus** clauses, which form an exception to the general principle that the Government is required to prove beyond reasonable doubt every element of a criminal offence. A reverse onus clause is one which casts a burden of proof as to certain matters onto an accused person. Such matters are presumed to be proved against the accused unless he disproves them on the **civil** standard of a **balance of probabilities** (e.g. "until the contrary is proved") or unless he can point to evidence to the contrary (e.g. "in the absence of evidence to the contrary").
17. Such a restriction of the right to presumption of innocence is justified provided there is a **rational link** between the presumed fact and the proved fact and the presumption is a **proportional** response to the social problem being addressed, e.g., drug trafficking or smuggling.
18. This principle can best be illustrated by the Court of Appeal decision in the case of Sin Yau Min (1991) 1 HKPLR 88 and the Privy Council's decision in the case of Lee Kwon Kut (1993) 3 HKPLR 72.

Sin Yap, Ming (1991) 1 HKPLR 88: Presumption of Innocence and Rationality /Proportionality Tests

19. This was Hong Kong's first ever Court of Appeal decision on the *BOR* and laid down far-reaching principles governing the proper approach to **interpretation** of the *BOR* which has been followed ever since. The Court of Appeal declared that certain mandatory presumptions in the *Dangerous Drugs Ordinance (Cap. 134)* to be an unjustifiable infringement of the presumption of innocence guaranteed under *BOR Art 11(1)* and had consequently been repealed by the *BORO*.
20. The *Dangerous Drugs Ordinance* provided that a person found in possession of more than five packets, or 0.5 gram of salts of esters of morphine shall, until the contrary is proved, be presumed to have been in possession of the said dangerous drug for the purpose of unlawful trafficking. It had further stated that a person found in possession or control of any premises, or the key of any premises, in which a dangerous drug is found shall, until the contrary is proved, be presumed to have such a drug in his possession. Finally, it had stipulated that a person found to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug.
21. The Court of Appeal held that for a mandatory presumption to be consistent with *BOR Art -11 (1)* (the presumption of innocence), the Government would have to show firstly that it was rational - - that the presumed fact would more likely than not flow from the proved fact. Secondly, the

presumption, to be valid, must be rationally capable of achieving an important social objective and be proportional to the attainment of such objective.

22. According to the Court of Appeal, while no one doubted that drug trafficking was a serious social problem in Hong Kong and its eradication an important social objective, in respect of the first group of presumptions, the Government had not demonstrated that the presumed fact (possession of dangerous drugs for the purpose of trafficking) in the above provisions of the *Dangerous Drugs Ordinance* rationally followed the proved fact (possession of half a gram, or six or more packets, of salts of esters of morphine). On the contrary, setting the trigger point for the operation of the presumption at such a low level meant that many drug **addicts** as opposed to **traffickers** would also be caught in the net. The Court of Appeal held that they would catch, and force to mount a rebuttal, an ordinary inhabitant of an apartment house who had the keys to the front door of those premises inside of which (including servants' quarters) drugs were found. Such presumptions were, therefore, inconsistent with and repealed by, the *BOR*.

Attorney General v. Lee Kwong Kut (1993) 3 HKPLR 72: Presumption of Innocence and Rationality/Proportionality Tests

23. The principles of rationality and proportionality were further refined by the Privy Council, sitting on appeal from Hong Kong, in Attorney General v. Lee Kwong Kut (1993) 3 HKPLR 72. In this case, the Privy Council was called to review the compatibility of *section 30* of the *Summary Offences Ordinance* with the right to presumption of innocence guaranteed under *BOR Art 11(1)*. *Section 30* rendered it an offence for a person to fail to give a satisfactory account of possession of goods reasonably suspected of having been stolen or obtained unlawfully.
24. The Privy Council has held that provisions such as *BOR Art 11(1)* are always subject to implied limitations so that a contravention of the provision does not automatically follow as a consequence of a burden on some issues being placed on a defendant at a criminal trial. This implicit flexibility allows a balance to be drawn between the interest of the person charged and the interests of law enforcement. There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict application of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt.
25. According to the Privy Council, whilst some exceptions may be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of the accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which *BOR Art 11(1)* enshrines. If the exception requires certain matters to be presumed until the contrary is shown, then, it will be difficult to justify the presumption unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.
26. Applying the above approach, the Privy Council found that the substantive effect of *section 30* of the *Summary Offences Ordinance* was to place the onus on the accused to establish the most significant element of the offence, namely that he can give an explanation as to his innocent possession of the property. This reduces the burden on the prosecution to proving possession by the defendant and facts from which a reasonable suspicion can be inferred that the property has been stolen or obtained unlawfully matters which are likely to be a formality in the majority of cases. It was not a reasonable exception to the general rule and was thus inconsistent with *BOR Art 11(1)*, and repealed by the *BOR*.

Attorney General v. Hui Kin-hong: Presumption of Innocence versus Eradication of Corruption

27. The foregoing two judgements laid down important guidelines governing the approach of the court to balancing the rights of individuals as against the wider interests of society. This approach was more recently applied in Attorney General v. Hui Kin-hong [1995] 1 HKCLR 227 ('Harry Hui's Case').
28. In this case, Mr. Hui a former civil servant being a senior estate surveyor with the Buildings and Lands Department was charged with an offence under *section 10(1)(a)* of the *Prevention of Bribery Ordinance (Cap. 201)*. Before he was arraigned, his counsel submitted that *section 10(1)(a)* was inconsistent with *BOR Art 11(1)* and was thereby repealed. Under that provision, any person who, being or having been a Government servant maintains a standard of living above that which is commensurate with his present or past official emoluments shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living, be guilty of an offence.

29. That the provision imposes a burden on the accused to establish facts on the balance of probabilities was never in dispute. The entire debate before the District Court and, later, the Court of Appeal, was whether that provision was a justifiable derogation from **BOR Art 11(1)**. The submission that it was not a justifiable derogation succeeded before the District Court and the Attorney General appealed by way of case stated. The Court of Appeal found the provision to be consistent with the presumption of innocence.
30. The Court of Appeal emphasised the importance of striking a right balance between the **presumption of innocence** and the need of society to **combat corruption**, the latter characterised as a cancerous activity and an evil practice. Before the Court of Appeal came to its conclusion, it noted that the prosecution was not simply required by the provision to prove that expenditure was greater than income. The Government is under an obligation to establish the following:
- a. the amount of pecuniary resources and other assets in the accused's control at the charge date;
  - b. the accused's total official emoluments up to the same date; and
  - c. a disproportion between (a) and (b) i.e. the acquisition of the total assets under the accused's control could not reasonably, in all the circumstances, have been afforded out of the total official emoluments up to that date. In other words, the disproportionality must be sufficiently significant as to call out for an explanation:
31. The Court of Appeal noted the notorious evidential difficulty in proving that a Government servant had solicited or accepted a bribe. The primary facts on which the accused's explanation would be based, such as the existence of any capital or income of his independent of his official emoluments, would be peculiarly within his own knowledge. The standard was described as the mere balance of probabilities. The Court is then asked to decide whether the factual matters on which the accused bases his explanation might reasonably account for the incommensurate standard of living. The Court of Appeal pointed out that once the expenditure had reached a threshold level of incommensurateness or disparity, the smaller the disproportion, unreasonable the easier it would be 'to give an explanation.
32. Harry Hui's case is an application of the Privy Council's decision in Attorney General v. Lee Kwong Kut. It involved a balancing exercise between individual rights and the wider needs of society - to combat corruption. It also confirms the legal principles applicable in assessing the validity of reverse onus clauses and sends a clear message to the Government and the public that the judiciary is prepared to accept some limitation of rights where wider public interests so warrant. With this provision law enforcement officers, such as the ICAC, will be able to continue to combat corruption.

### **Freedom of Expression: ICCPR Art 19/BOR Art 16**

#### The Guarantee

33. **Freedom of expression** is guaranteed under **ICCPR Art -19/BOR Art 16**. **ICCPR Art 19(1)/BOR Art 16(1)** provides that everyone has the right to hold opinions without interference. **ICCPR Art 19(2)/BOR Art 16(2)** further guarantees the right to freedom of expression, which includes freedom to **seek, receive and impart information** and **>ideas** of all kinds, regardless of frontiers, either **orally**, in **writing** or in **print** in the form of **art** or through **any other media** of his choice. However, it is emphasised in **ICCPR Art 19(3)/BOR Art 16(3)** that the exercise of the rights provided for in **ICCPR Art 19(2)/BOR Art 16(2)** carries with it **special responsibilities**. It may therefore be subject to certain **restrictions**, but these shall only be such as are **provided by law** and are **necessary**:
- a. for respect of the **rights** or **reputations** of others; or
  - b. for the protection of **national security** or of **public order** (*order public*), or of **public health** or **morals**.

#### Attorney General v. Ming Pao Newspapers Ltd [1996] 3 WLR 272: Free Expression v. Integrity of Bribery Investigation and Protection of Suspect's Reputation

34. The Ming Pao case concerned a disclosure of details of an ICAC investigation to the readers of the Ming Pao Daily News ('Ming Pao') by Ming Pao Newspapers Ltd., its editor-in-chief, its executive chief editor and its deputy chief editor. The disclosure allegedly took place when the article appeared in the Ming Pao on 3 August 1994. The relevant part of the article read:

"The ICAC took steps to meet reporters in its investigation in relation to the developers' joint bidding (for) land"

followed by:

"The ICAC is investigating whether anyone had infringed any Ordinances in a land auction held on 26 May this year in which over 10 developers combined to bid for land."

35. As a result of the publication of this article, the respondents were charged with **section 30** of the **Prevention of Bribery Ordinance (Cap 201)**. **Section 30(1)** of **Cap. 201** renders it an offence for any person, without lawful authority or reasonable excuse,
  - a. to disclose to any person who is the subject of an investigation in respect of an offence alleged or suspected to have been committed by him under **Cap. 201** the fact that he is subject to such an investigation or any details of such an investigation, or
  - b. to disclose to any other person either the identity of any person who is the subject of such an investigation or any details of such an investigation.
36. Apart from disclosure on the basis of lawful authority or reasonable excuse under **section 30(1)**, **section 30(1A)** further provides that once such a person is arrested in respect of such an offence, **section 30(1)** no longer applies. **Section 30(2)** empowers the ICAC Commissioner to reveal the identity of the person under investigation under the circumstances therein specified.
37. The case was heard before a magistrate. At the close of the prosecution case, defence counsel made a submission of no case to answer to the magistrate. The submission was to the effect that **section 30** of **Cap. 201** was inconsistent with **BOR Art 16** and was thus repealed by **section 3** of the **BOR** wherefore the four respondents had no case to answer. The defence submission was upheld and the defendants acquitted and discharged.
38. The Government appealed against the decision of the magistrate and the appeal was allowed by the Court of Appeal, holding that **section 30** was a necessary restriction of Ming Pao's right to freedom of expression guaranteed under the **BOR**. Ming Pao thereupon appealed to the Privy Council, which heard arguments both on the issue of the proper construction of **section 30(1)** of the **POBO** and its consistency with the **BOR**.
39. The appeal by Ming Pao was allowed on the technical point that there could only be an offence under **section 30(1)** of the **POBO** where there was a suspect or an allegation of a bribery ordinance offence against a specified person. As there was no evidence that at the date of publication of the newspaper anything other than a general investigation was being carried on by ICAC with no suspect being in view, no offence could have been committed under **section 30(1)**.
40. On the primary **BOR** issue, the Privy Council took the view that **section 30(1)** of the **POBO** was a necessary restriction on freedom of expression under **BOR Art 16(2)**. They noted that the primary object of the second limb of **section 30(1)** was to preserve the integrity of investigations into corruption in Hong Kong. Protection of the suspect's reputation was merely a secondary by-product of the provision. The Privy Council held that the provision was a proportionate measure necessary to attain the aim of protecting the integrity of an investigation by the ICAC as:
  - a. the second limb of **section 30(1)** is subject to the defence of lawful authority or reasonable excuse;
  - b. disclosure ceases to be restricted after the arrest of a suspect;
  - c. bribery offences are particularly difficult to detect and the maintenance of secrecy as to an investigation is even more important than in relation to other types of offences in order not to put the suspect on his guard;
  - d. the effectiveness of the first limb of **section 30(1)**, which had been accepted as necessary, would be completely destroyed in the absence of the second limb;
  - e. the fact that disclosure of investigations into other offences is not so severely restricted does not render **section 30(1)** disproportionate or unnecessary in view of the secretive nature of bribery offences.
41. The Privy Council also stated that the second limb of **section 30(1)** cannot be restricted to disclosure where prejudice was caused or likely to be caused to an ICAC investigation because of the difficulty of establishing prejudice. If the restriction is to be effective, it cannot draw distinctions between prejudicial and non-prejudicial disclosures, nor have regard to the state of mind of the disclosure. (Notwithstanding the decision of the Privy Council, **section 30** was liberalised as a Hong Kong Government initiative in July 1996).

### The Future

42. The case law I have outlined constitutes eloquent testimony to the impartiality of Hong Kong's judicial system. The Hong Kong Government's commitment to the protection of human rights in course of waging a war against corruption has ensured widespread community support for the work of the

ICAC. With our anticorruption legislation which has survived intact the resumption of Chinese sovereignty over Hong Kong and the ICAC operating within the human rights framework established in the *Basic Law*, I have every confidence. that we Will continue our success in marginalising, if not totally eliminating, corruption from the Hong Kong society.

Thank you.

return to [table of contents](#)