

Reflections, Questions & Answers

1. Answer Styannes, INDONESIA: Thank you Mr Leung for the presentation. I have a practical question: when there is a torture case taken to court in Hong Kong, what is the standard for presentation of proof? In Indonesia, torture has not yet been criminalised, but we can make reference to ill-treatment or assault, which is a crime. When we want to convict a perpetrator, we need two witnesses. In torture cases, it is almost always impossible to find witnesses/there are no witnesses. Could that burden of proof be shifted to perpetrators?

Y. L. Cheung: To my recollection, we haven't had any torture case in our criminal courts yet. Any charges of physical abuse are usually referred back to common law (i.e. crime of assault, force, intent to injure...). We therefore have no real precedents. In the common law system, burden of proof always lies on prosecution – presumption of innocence is a central principle of law. If a torture case is made out against someone, those who make the complaint should and must prove guilt. For the victim of torture, medical or forensic evidence should support the charges being made. It may be risky to begin placing the initial burden of proof already upon the alleged perpetrator, because it undermines the suspect's right to be presumed innocent, and, as we are well aware, rights are universal, indivisible, inalienable and equal to all. It certainly is true that the alleged will often also have to prove then why he had the complainant in custody because arbitrary detention, particularly for periods exceeding 48 hours, is illegal – the person detained has a right to liberty and himself be presumed innocent until proven guilty.

Basil Fernando: There are certain provisions that already exist concerning shifting burden of proof to crimes committed earlier. If a person has been taken into custody, his detention must be explained by the officer too (person detained has right to presumption of innocence). If a man dies in police custody, he obviously cannot testify against the person who killed or tortured him. The detention in itself requires investigation. Once a person is proven to have been taken into custody and there is no evidence that he was released from custody (of course, prior to his death), the police have to account for his injuries/death.

2. Mohammad Fazlul Azim, BANGLADESH: I have three points/questions.

(i) Independent prosecution in HK, yet you have to obtain prior permission from the Department of Justice (DoJ). Might refusals by the Department of Justice to prosecute a case not dishearten the police who investigated the case?

(ii) What will the mainland government's influence on prosecution be like in the future? Does this mean the independence of the judiciary cannot be assured?

(iii) The Supreme Court has two divisions. Questionable judicial review means that appeals have different tiers. If I understand correctly, only having exhausted all other courts and avenues, a judicial review is requested. Appellate division of High Court conducts pre-appeal review.

Y. L. Cheung: The decision to prosecute is made independently. I'm not sure to what extent currently or in future there'll be mounting government influence from mainland. In China, the Chinese Communist Party (CCP) oversees everything and there's no such thing as "independence". This may spill over into Hong Kong if the Chinese cannot or simply refuse to understand separation of powers (suspicions concerning CY Leung's political independence).

Just last week, a cabinet member of Leung's government, Mak Chai-kwong resigned for misconduct in 1980s following investigations by the Independent Commission against Corruption). He has not been prosecuted yet. This may be a political or politicised matter, but at least ICAC is seen to be "independent" for its ability to arrest a suspected high-ranking official just 12 days after his swearing-in (refer to Radio Television Hong Kong's narrative at http://rthk.hk/rthk/news/englishnews/20120712/news_20120712_56_854455.htm#). Whether or not he is prosecuted will have serious implications for Hong Kong. In 1999, Secretary of Justice Elsie Leung Oi-sie decided not to prosecute a Sing Tao Group chairman, Sally Aw Sian, allegedly because she was a personal friend of the then Chief Executive, Tung Chee-Hwa. This decision was explained to the public very unpersuasively (there will be unemployment if her newspaper goes bust and her arrest is therefore against public interest).

This is an excerpt from

http://www.thestandard.com.hk/news_detail.asp?pp_cat=&art_id=45861&sid=&con_type=1&d_str=19990205&sear_year=1999:

"Apart from the staff losing employment, the failure of a well-established and important media group at that time could have sent a very bad message to the international community. At a time when unemployment was on the rise, the prospect of a prosecution occasioning yet further widespread redundancies filled me with foreboding. It was my duty, in those circumstances, firstly, to consider the potential effects of a prosecution upon other people."

The result of such blatant cronyism was public outrage bordering on full-scale revolt. I provide this example so as to demonstrate that there have been instances wherein we have seen not entirely 'clean' or independent action on the part of the Department of Justice. However, I still assert that this is an exception, and that most public institutions in Hong Kong tend toward transparency and public accountability. This is owed not only to the public spirit and civic consciousness of the citizen, but also to the political will of the government and the specific sociopolitical circumstances Hong Kong past and present has found itself in.

To answer your other question: Judicial review commences in High Court (court of first instance, court of appeal, high court and court of final appeal) and targets government policies/decisions/actions. It's not used for individual cases against other individuals; these are referred to courts of appeal. If judicial review decision is objected to by the aggrieved party, this is also referred to courts of appeal.

3. Hari Phuyal, NEPAL: Would there be judicial review on whether or not to prosecute?

Y. L. Cheung: If we approach it logically, we realise that if a case has not even reached court yet, there can be no appeal. An aggrieved party should appeal to the Prosecution Division (which determines if there is sufficient or persuasive evidence before deciding whether or not to prosecute). Judges cannot step into the shoes of the Prosecution Department. Judges have their own mandate, and that is restricted to matters within court. Judges also usually do not have expertise in specific fields such as environmental regulations, but they may still arbitrate on the basis of procedures and fundamental principles of law.

4. Nandana Manatunga, Sri Lanka: A defence lawyer will certainly present facts to aid his client. There seems to be selectivity on both sides. Does this count as misleading the counsel?

Y. L. Cheung: No. So long as there's no falsehood or deliberate misrepresentation, this selectivity does not count as misleading. It is only perjury if you lie. Both sides have to tailor their defence and prosecution otherwise there would be no case, just a body of facts. Yet this body of facts must be weighed up (evaluated), usually in favour of one side. Lawyers may or may not trust their clients' account of the matter, but they have a duty first and foremost to represent their clients before the court in order for the sentence to match the crime or to obtain an acquittal. A person may have murdered another person but there could have been "mitigating factors" – insanity, for instance – that need to be taken into account when the sentence is passed.

There is a funny rule in the Bar Council's code of conduct: a barrister cannot decline to act for a person who wishes to engage and pay for his services. It is his duty to take up the case. In this respect we are similar to taxi drivers; we "act on instruction". Short of incompetence or personal threats, you have to defend even the terrorist. This is in accordance with a fundamental principle in rule of law – presumption of innocence. Even if your client is unreasonable, inarticulate or incoherent, you have to plead for the jury/judge to accept his version of the story. Lawyers therefore also work under difficult or hopeless circumstances. We have to believe that every person is also entitled to justice anyway.

5. Sharif Islam, BANGLADESH: In pre-Independent Commission against Corruption days, Hong Kong experienced a high degree of police corruption. How can we explain the correlation between corruption and torture?

Y. L. Cheung: The Independent Commission against Corruption (ICAC) is not a magic potion to remove torture. It is an answer/response to corruption specifically. I heard from my uncle, who was a police officer, that the police were brutal. They thought (and he did too), and proudly so, that to beat up criminals was to do your job, particularly during investigations to elicit information or confessions. There obviously is police brutality, even today, and even in public arenas (e.g. to break up public assembly, truncheon to disperse protestors). Yet I do not recall systematic and persistent cases of torture approved by people from above.

Basil Fernando, AHRC: Please refer to Asian Human Rights Commission's documentation of torture cases. A case from Bangladesh concerned a man named Razak, a law graduate who is now a lawyer and human rights defender. He was helping victims and therefore infamous amongst the police for making complaints against them. Razak was brought in for questioning regarding a complaint he did not make. His family had to give his tormentors USD2000 to prevent his torture during the two weeks he was detained. Torture is closely linked to corruption because it's a tool of exercising absolute power over others to illegally induce payments. The right against torture becomes non-absolute, non-guaranteed and something that must be purchased from those in power, instead of being naturally protected by them. If the top officials disapprove, it will be difficult for the entire system to have such prevalent practices of torture because of the checks available to those suffering below. It is precisely because those at the top also condone or commit those practices that all forms of redress are rendered improbable, if not impossible. Superiors have to take the responsibility for enforcing organisational discipline and internal codes of conduct. They must also be given the mandate to bring punitive action against those who disobey their

orders. It is in this way the vicious cycle of torture and cover-ups can be broken and the law enforcement agents can take pride again in professional and morally acceptable work.

John Joseph Clancey, AHRC: The UN Convention against Torture (CAT) covers both physical and psychological abuse, so even in HK the CAT remains pertinent. Corruption and torture are manifestations of impunity. If you have a system wherein the police can do whatever they like knowing nothing can/will be done about it, that is where rule of law has been subsumed by rule of rex ("king") and the tyrannical principle of "might is right".

6. Abbasi Nusrat Bano, PAKISTAN: If a person is tortured and dies in custody, who can bear witness to the incident?

Y. L. Leung: We have not had such a case before but I can describe a death in custody. In HK about 10 years ago, there was a drug trafficker who was arrested and died in custody. He had been injected with a substance (torture), but the police were not responsible. The case was not prosecuted because the forensic evidence did not point to foul play by the police, but the deceased's family went for civil remedy anyway. Your question was regarding the finding of proof? The case explains itself – if someone goes in a healthy person and dies there is full reason for demanding an explanation because there would be great suspicion he was extra-judicially killed. The burden would therefore be upon the police officer to prove his innocence. (Other examples of inadmissible or unacceptable evidence: video recordings obviously tampered with, where persons are suddenly blacked out or audio cut off). All in all, forensic evidence is still necessary for the prosecution of any person. A person who is tortured should attempt to get himself medically examined. In Hong Kong, most if not all doctors operate independently and have no incentive to do otherwise. In other countries, the victim should still attempt to get a professional medical report detailing the injuries sustained; this is one of very few pieces of evidence available to such victims owing to the secretive nature of the crime committed against them.

Basil Fernando, AHRC: There must be proper post-mortem to support circumstantial evidence (e.g. a neighbour witnesses someone taken into custody, next day his corpse is found on railway track. Witness can identify the individual(s) who came to arrest the deceased).

7. John Joseph Clancey: I would like to make a couple of points.

(1) "Zero corruption" would not be true, but zero systemic corruption probably is the case in Hong Kong at the moment. Construction companies, for instance, and other business interests, may continue practising corruption. This is why complaints still keep being registered with the ICAC today.

(2) Cooperation with civic society: public invited to report corruption.