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**Countering corrupting conflicts of interest: the example of Hong Kong**

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**ABSTRACT**

This paper views corruption as arising from a conflict of interests, in which the corrupt actor pursues a private interest at the expense of an official or professional duty. In this way, conflicts of interest are at the root of corrupt behaviour in both the public and the private sector. Such conflicts can be countered by structural strategies that subject the agent to limited discretion, increased supervision or transparency. An independent anti-corruption agency is a powerful check of this type. Conflicts of interest can also be combated by increasing the cost of pursuing the private interest, whether that cost be monetary or in the form of a loss of freedom or reputation. Increasing the probability that such cost will be incurred augments the deterrent factor, and thus the quality of oversight, investigation and prosecution will increase the cost of corruption to potential actors and reduce the frequency of its occurrence. The Hong Kong anti-corruption regime combines all of these techniques in exemplary fashion. This paper uses the example of Hong Kong to analyze how corrupting conflicts of interest can be countered through law and related programmes.

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## I. Conflicts of interest and corruption

The undesirable acts referred to with the term “corruption” display conflicts of interest at their core.<sup>1</sup> Organizations like governments and corporations operate by delegating the governing power of collective citizens, owners or their respective leaders to managing agents, whether these be ministers, directors, officials or officers.<sup>2</sup> The organization thus becomes a network of delegated duties and assigned rights, whether of principals and agents, fiduciaries and beneficiaries or some less well-defined relationship of trust and reliance. These “delegations” of power usually exist without a formal agency relationship, such as in the type of fiduciary duties that corporate directors owe to shareholders, or the type of behaviour that investors legitimately expect from the ‘gate-keeping’ rating agencies trusted to rate the safety of investment products.<sup>3</sup> When exercising delegated power, every agent has a duty to his principal, whether such principal be the state, its citizens, or a private employer. When the person charged with such a duty breaches it by serving a private, conflicting interest, the system built on delegated power and trust runs amok, no longer serving the ends for which it was designed, but organically disparate and even conflicting ends.<sup>4</sup>

The outside boundaries of this problematic can be seen as existing even in relationships incapable of being conceived, even analogically, as principal-agent. The recent example of a mortgage crisis caused in part by lending banks that passed their credit risk on to the market by securitizing their loans shows the potentially disastrous effects of disrupting a balanced network of incentives and interests. From the crisis, it became clear that society had depended on lenders’ incentives to act in a manner complementary to the greater interests of a healthy

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<sup>1</sup> “Although there is no universal or comprehensive definition as to what constitutes corrupt behaviour, the most prominent definitions share a common emphasis upon the abuse of public power or position for personal advantage.” ADB (2007: 29).

<sup>2</sup> See e.g., Coase (1937: 403 *et seq.*) and Jensen & Meckling (1976).

<sup>3</sup> In corporate law, the concept of “agency cost” is well established, yet used analogically. No major corporate statute provides for a group of shareholder/principals to issue daily instructions director/agents. There is, legally speaking, no strict agency relationship between the two parties. Rather, the concept of agency is used figuratively to indicate that shareholders ultimately have the power to appoint directors, and directors must act in the best interests – although not always the sole interests – of those shareholders. Directors have fiduciary duties to the company and to the shareholders. The UK Bribery Act 2010 attempts to capture the improper behavior it would prevent without recourse to the agency analogy – rather, it defines the improper behavior in part as a breach of a “relevant expectation”. Bribery Act 2010, sec. 4. On the whole, this attempt to make a clean break from existing concepts by formulating a new, tailor made category of behavior that case law will flesh out, could be wise. For the purposes of the analytical model set forth in this paper, I will continue to use the traditional concepts of “agent” and “fiduciary” to express the dutiful relationship that is breached by pursuit of private interest in a corrupt act. This by no means restricts the relationships I am addressing to the those strictly contained within law of agency.

<sup>4</sup> See e.g., Macey (2008: 1).

credit system, and it was assumed that the interest of the entire system to avoid excess defaults was aligned with the interest of the lenders. When this alignment was broken through securitization, the network of interlocking interests was distorted.<sup>5</sup> In response, reform laws have been “designed to reshape some of the perverse regulatory incentives that contributed to the financial crisis.”<sup>6</sup> In complex social systems built on interlocking duties, law thus acts to channel and adjust behaviour, whether the undesired behaviour will merely cause collateral damage to bystanders (such as when credit risk is passed on), deceive persons reasonably relying on expertise (such as when credit ratings are faulty), breach a fiduciary duty (such as when directors are disloyal to companies), or constitute corrupt behaviour.

In each of the cases mentioned above, the systemic texture of delegated responsibility on which a specific organization or a larger system depends for its wholesome operation becomes “corrupted”, to use a different, but related, meaning of our key term. When the delicate texture of interlocking interests in a society or organization is corrupted, law can step in to repair and prevent such corruption. As Rose-Ackerman observes:

Self-interest and the public interest frequently conflict.... Corruption scandals can then be a sign of a country’s growing political maturity. They show that citizens are beginning to recognize the difference between the public and the private spheres and to complain when the border is crossed. Citizens concerns over bribes paid in return for favors indicate that people recognize norms of fair dealing and competent administration and are beginning to demand that government serve general public purposes.<sup>7</sup>

“Corruption” as the effect of a private, conflicting interest working against the proper exercise of delegated power and duty, can be combated by eliminating, overcoming or at least countervailing the private, conflicting interest.<sup>8</sup> Thus, for example, if a public transport official has a duty to select the lowest priced bidder of high quality to construct a bridge, but is offered a bribe to select another contractor, the official has a private interest to enrich himself, which likely runs counter to the public’s interest that he select the best bidder. This conflicting interest can be combated with a number of techniques: The state can compensate the official so well that he has no interest in receiving a bribe,<sup>9</sup> or create punishments severe

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<sup>5</sup> Stiglitz (2010: 14).

<sup>6</sup> Skeel (2010: 110).

<sup>7</sup> Rose-Ackerman (1999: 225).

<sup>8</sup> This argument benefits greatly from the line of analysis that Rose-Ackerman has for decades pursued by focusing on economic interest at the heart of corrupt activity. *See e.g.* Rose Ackerman (1975), (1997: 40-41), (1999: 39-68).

<sup>9</sup> The United Nations Convention Against Corruption (UNCAC) recommends that “adequate remuneration and equitable pay scales” be established for civil servants. *See* art. 7(c) UNCAC.

enough that – even when discounted by the likelihood of being caught – accepting the bribe would be more expensive than refusing it.<sup>10</sup> The state can also appoint another, independent official whose compensation is tied to detecting and punishing bribes, so that the interest of the policing official countervails the temptation of the transport official.<sup>11</sup> It can also create an ethical atmosphere that increases the reputational value of lawful behaviour and lowers that of pursuing illicit, private interest. A successful anti-corruption regime would employ a combination of these techniques.<sup>12</sup> The overall result is to lessen the attractiveness of the agent’s conflicting interest, so that the agent perceives continued pursuit of his principal’s interests as the more desirable option. Moreover, if the selection process used by the transport official is fair and efficient, this could make it cheaper for potential bidders to compete by means of the quality of their service rather than the largesse of their bribes.<sup>13</sup> These measures can be combined in a number of ways to increase the relative cost, and thereby decrease the probability, of corrupt behaviour.

Thus corruption can be viewed as the result of conflicting interests, and its cures can be conceived as measures that reduce the attractiveness and increase the cost of illicitly serving private interests.<sup>14</sup> “Cost”, however, is a relative value that depends on a position within a system of currency, whether monetary or ideal. One US dollar is more expensive than one HK dollar, and the same relational relevance also applies to cultural values. If a married French political leader were found to have extramarital contact with a person of the opposite sex, it might well have much less impact on his political career than a similar action would for a US politician. Cultural values determine the reputational “cost” of prohibited behaviour. Because a change in the cultural valuation of a certain behaviour can significantly reinforce the strength of a rule seeking to eliminate such behaviour, conditioning the moral opinions of an environment can be an effective technique to make the cost of pursuing illicit private interest in such environment greater than the potential gain. Public education unambiguously

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<sup>10</sup> The OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions recommends that the sanctions imposed on bribery be “effective, proportionate and dissuasive criminal penalties.” *See* art. 3(1) OECD Convention.

<sup>11</sup> *See* e.g., art. 6 UNCAC.

<sup>12</sup> *See* e.g., art. 13(1)(c) UNCAC.

<sup>13</sup> As the United Nations Convention expresses it, “establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.” Art. 7(c) UNCAC.

<sup>14</sup> Rose-Ackerman (1997: 46).

characterizing corruption as personally destructive and detrimental to the good of society is thus another effective tool to combat corrupt behaviour.

While still one of the last remaining outposts of the British Empire, Hong Kong put in place laws and institutions to educate against, discourage, prohibit, investigate, and punish corrupt behaviour, whether in public office or in private dealings.<sup>15</sup> In Hong Kong, public education against corruption begins early, is extensive and is widespread.<sup>16</sup> This helps create an atmosphere in which the value of serving the public interest is appreciated and the value of exploiting office for private gain is depreciated. The acts prohibited in Hong Kong extend beyond the public sector into private agency relationships,<sup>17</sup> thus cultivating a culture in which fiduciary duties generally, not just those of the civil service, are seen as essential to society. The costs imposed on perpetrators by Hong Kong's legal penalties are high.<sup>18</sup> The creation of a separate education, investigation and prosecution body, the Independent Commission Against Corruption (ICAC)<sup>19</sup> guarantees that the interests of at least one body of regulatory officers in Hong Kong are aligned perfectly with those of the public good and against the illicit private interests of individual agents, public and private. The investigative powers of the ICAC are as broad as respect for human rights and civil liberties allow.<sup>20</sup> Presumptions, such as treating a public official's unexplained excessive income as a refutable index of corrupt behaviour,<sup>21</sup> assist the ICAC to overcome the considerable asymmetries of information that hinder the prosecution of corruption. Hong Kong has in this way created an array of initiatives that increase the value to an agent of dutiful behaviour in the principal's best interest while decreasing the value of pursuing illicit private gain.

This paper will use the alignment of interests and the costs of behaviour to analyze the anti-corruption laws and institutions of the Hong Kong Special Administrative Region of the People's Republic of China. Singling out Hong Kong as an example is a valid choice, as the

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<sup>15</sup> An excellent history of anti-corruption and anti-bribery law in Hong Kong is presented in McWalters (2010: 3-45).

<sup>16</sup> See Part III of this paper for the educational activities of the ICAC in Hong Kong.

<sup>17</sup> See The Annotated Ordinances of Hong Kong, Chapter 201, Prevention of Bribery Ordinance (POBO), sec. 9.

<sup>18</sup> POBO sec. 12 provides for imprisonment of up to 10 years.

<sup>19</sup> See The Annotated Ordinances of Hong Kong, Chapter 204, Independent Commission Against Corruption Ordinance (ICACO).

<sup>20</sup> These will be discussed in Part II of this paper.

<sup>21</sup> This is provided for in POBO sec. 10.

SAR enjoys one of the world's most effective anticorruption regimes,<sup>22</sup> while it is also a Region of the PRC, which is both the world's second largest national economy<sup>23</sup> and widely believed to suffer from extensive corruption.<sup>24</sup> In a best case scenario, Hong Kong could serve as the incubator for China's future anti-corruption regime. Looking at Hong Kong's anti-corruption regime as channelling, preventing and punishing interest conflicts allows anti-corruption studies to draw on an older and deeper legal tradition. Courts have addressed the conflicted interests of corporate officers for over 100 years,<sup>25</sup> and the fiduciary duties of agents and trustees for much longer than that. Legislation in the field of "corporate governance" has for decades sought to prevent corporate officers from pursuing their own interests at the expense of the company – by dictating prohibitions, creating presumptions, imposing penalties, inserting independent supervisory bodies, raising ethical standards and aligning the interests of officers with those of the ultimate beneficiaries of their action, the corporate shareholders.<sup>26</sup> These strategies have been applied rather mechanically and quite effectively in company law. A similar attempt to guide behaviour is at work in laws combating public and private corruption, and so these methods of company law may benefit anti-corruption studies.

This paper is arranged as follows: Part II examines the institutional structure that turns interest against interest in combating corruption. An independent ICAC has the sole interest of deterring, detecting and disciplining corrupt behaviour in the public and the private sectors, so that its employees' interests are diametrically opposed to the private interests tempting officials and agents toward corruption. The ICAC is not only independent, but has extensive powers of investigation and prosecution; it also contains a sub-unit whose sole purpose (and thus the interest of its employees) is to detect and discipline corrupt behaviour in the ICAC

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<sup>22</sup> In its 2009 Corruption Perception Index, Transparency International had Hong Kong tied with Luxembourg at 12<sup>th</sup> place with a score of 8.2, while the UK tied with Japan for 17<sup>th</sup> place with a score of 7.7. See [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009/cpi\\_2009\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table).

<sup>23</sup> See the International Monetary Fund's World Economic Outlook Database, gross domestic product based on purchasing-power-parity (PPP) valuation of country GDP.

<sup>24</sup> The People's Republic of China tied with Burkina Faso, Swaziland and Trinidad and Tobago for 79<sup>th</sup> place in the 2009 Corruption Perception Index. See Transparency International, *supra* note 16. Also see

<sup>25</sup> See e.g. *Aberdeen Railway v Blaikie* [1854] 1 Macq. H.L. Sc. at 471.

<sup>26</sup> These legal strategies for reducing agency costs have again been recently mapped out very well in Kraakman *et al.* (2009: 37-45). The debate about exactly whom corporate directors owe duties is longstanding, and some scholars advocate replacing "shareholder primacy" with duties to a much larger field of stakeholders, including employees, creditors, suppliers and the community at large. See e.g., Companies Act 2006, sec. 172.

itself.<sup>27</sup> This resembles the basic system of checks and balances used as the ultimate safeguard against abuse of power in many democratic constitutions.<sup>28</sup> Part III will examine efforts to shape the value system in which the price of corrupt behaviour is assessed, focusing on the ICAC's conditioning of the ethical environment through education. Part IV will estimate the net price of corrupt behaviour in Hong Kong by examining the penalties imposed on the guilty, the presumptions used to increase the probability of their actually being imposed, and the transaction costs entailed by fully complying with the law. Part V will draw conclusions and speculate on the possibility of transferring the Hong Kong anti-corruption regime to other countries.

## II. Turning interest against interest: an independent commission against corruption

Jon Quah argues that, "The most important strength of an independent anti-corruption agency is that its *raison d'être* is the investigation of corruption cases without political interference."<sup>29</sup> If an independent anti-corruption agency is established, the organization and its employees have one interest: to combat corruption, and this interest is diametrically opposed to the interests of those who would exploit their positions of public trust or as private agents to enrich themselves illicitly. Perhaps the clearest converse to an independent anti-corruption agency is the use of the police to combat corruption. As history teaches, the nature of police work places police officers under temptation to abuse their power while lending them unique opportunities to profit from corrupt activity. Indeed, the term "police force" itself contains significant tension: force, but force used to serve order in the polity. Maitland and Montague explain that primitive police activity in pre-Norman England simply aligned self-interest with the desired violence against the accused through the tool of "outlawry": "The contumacious offender is put outside the peace; he becomes a foe of all law-abiding men. It is their duty to waste his land and burn his house, to pursue him and knock him on the head as though he were a beast of prey."<sup>30</sup> Such abuse of the accused only becomes "corrupt" when a countervailing duty to "police" the public order with restraint is imposed on the enforcing official, or when the accusation is false. Then, self-interestedly pursuing a desire to take the property or life of the accused conflicts with another interest: that of the public in

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<sup>27</sup> See McWalters (2010:83).

<sup>28</sup> See e.g., Madison (1788): "This policy of supplying, by opposite and rival interests, the defect of better motives .... We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights."

<sup>29</sup> Quah (2009:25).

<sup>30</sup> Maitland & Montague (1915: 19).

seeing justice done, and seeing it done in an orderly fashion. Self-interested behaviour can then yield corruption as public and private interest do not fall into alignment. Conflicts of this type affecting police are well documented in Western culture: among the very few recorded examples of specific advice given by John the Baptist is his warning to the soldiers policing Palestine: “Do not take money from anyone by force, or accuse anyone falsely, and be content with your wages,”<sup>31</sup> and one of the most beloved figures in English literature vies with a corrupt English officer of the law, the “Sherriff of Nottingham”. Indeed, it was concrete acts of police corruption that prompted the creation both of Singapore’s Corrupt Practices Investigation Bureau (CPIB) and Hong Kong’s ICAC.

In Singapore, in 1951, at a time when corruption was investigated by a special branch within the Singapore Police Force, certain police detectives used information and connections gained from their offices to hijack S\$400,000 of contraband opium.<sup>32</sup> Although investigating police officers did later name and accuse these detectives of corruption, an independent special investigation “uncovered evidence of widespread police corruption,” so that the British colonial government decided to establish in 1952 the CPIB as an independent agency outside of the police force.<sup>33</sup> Approximately 20 years later, in Hong Kong, the director of the police force’s Anti-Corruption Office received information that a Chief Superintendent of the Hong Kong Police, Peter Godber, had remitted over one million HK dollars abroad.<sup>34</sup> Godber was informed he was under investigation, but was not detained, when investigating offices confronted him with a request to search his car and house, and subsequently his name was put on an immigration watch list at the borders of Hong Kong.<sup>35</sup> One step ahead of his investigating colleagues, Godber used his special police security clearance, which had not been revoked, to circumvent the immigration check points and board a flight to Singapore,<sup>36</sup> from where he continued on to the UK.<sup>37</sup> The fact that a chief superintendent of police had used his special police credentials to escape the Hong Kong authorities and, as it appeared, prosecution for corruption, caused a public outcry, and the colonial government created a

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<sup>31</sup> Luke 3:14.

<sup>32</sup> Quah (2010: 23).

<sup>33</sup> Quah (2010: 24).

<sup>34</sup> MacWalters (2010: 26).

<sup>35</sup> MacWalters (2010: 27).

<sup>36</sup> MacWalters (2010: 27).

<sup>37</sup> ICAC (2010: The Escape). Godber was eventually imprisoned in the UK when evidence was obtained that he took a HK\$25,000 bribe in Hong Kong; he was extradited back to Hong Kong for further trial in 1975, and sentenced to four years in prison. ICAC (2010: The Journey to Justice).



commission of inquiry, headed by Judge Sir Alastair Blair-Kerr, to investigate.<sup>38</sup> The Blair-Kerr Commission produced two reports, the first exposing the legal loopholes through which Godber had escaped – such as the police’s lack of power to detain a suspect under investigation – and the second expressing their finding that the Hong Kong police force suffered from extensive, syndicated corruption.<sup>39</sup> Beyond strengthening the existing anti-corruption law to make it more difficult for cases like Godber’s to reoccur, the colonial government decided to create an independent investigative body, the ICAC, which came into existence in early 1974.<sup>40</sup>

The ICAC is indeed independent, funded directly out of the general revenue of the Hong Kong SAR,<sup>41</sup> and answerable only to its Chief Executive,<sup>42</sup> whilst its independence from the latter is strengthened by an express power to investigate and prosecute the Chief Executive for corruption.<sup>43</sup> The ICAC’s mission as stated in the ICACO rests on “three prongs”: investigation, prevention and education, each performed by a separate department of the Commission.<sup>44</sup> To perform its investigative mission, the ICAC has extensive powers, including limited authority to search, seize and arrest without prior judicial oversight.<sup>45</sup> It can on its own authority access all types of financial books and records held with intermediaries before naming a specific person as a suspect,<sup>46</sup> although after its investigation begins to target a specified suspect, it requires approval from the HK Court of First Instance to access confidential accounts.<sup>47</sup> The ICAC can also obtain an order from the Court of First Instance instructing the HK Inland Revenue Department to provide it with investigation-relevant information that is otherwise protected and confidential.<sup>48</sup> Thus the ICAC has all the powers of a normal law enforcement agency, plus some quasi-judicial powers that it may

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<sup>38</sup> MacWalters (2010: 27).

<sup>39</sup> MacWalters (2010: 29).

<sup>40</sup> MacWalters (2010: 33).

<sup>41</sup> ICACO sec. 4.

<sup>42</sup> “The Commissioner shall not be subject to the direction or control of any person other than the Chief Executive.” ICACO sec. 5(2).

<sup>43</sup> POBO secs. 4(2A), (2B); 5(3), (4); 10(1A).

<sup>44</sup> See ICACO sec. 12 and MacWalters (2010: 79).

<sup>45</sup> As for other law enforcement officers, an ICAC official may conduct a search and seize contraband and evidence when making an arrest or an application to the court for a warrant “would seriously impede an investigation.” See ICACO sec. 10C and POBO sec. 17(1B).

<sup>46</sup> POBO sec. 13(1).

<sup>47</sup> POBO sec. 13(1A).

<sup>48</sup> POBO secs. 13, 13A.

exercise in instances where the Legislative Council found the Commission needs freedom to act quickly.

The POBO also gives the ICAC a rather unusual presumption, reversing the burden of proof in the prosecution of corruption, which helps it overcome informational asymmetries. Pursuant to sec. 10 POBO, if a current or retired public official lives or maintains assets incompatible with her “official emoluments” and fails adequately to explain how she manages to do so, she will be guilty of an offence, which under sec. 12 POBO can result in a fine of up to HK\$ 1.0 million and 10 years imprisonment. In this way, the ICAC need merely present numerical proof of assets significantly exceeding emoluments in order to shift the burden to the accused, forcing the person in possession of information, whose existence may be difficult to ascertain, to produce it if she can. This tool is bolstered by the ICAC’s power to inspect any type of books or accounts evidencing the suspect’s wealth,<sup>49</sup> and to obtain confidential information held by the HK Inland Revenue Department on a given suspect if there are reasonable grounds to suspect that an offense under the POBO has been committed.<sup>50</sup> Understandably, the reversal of the burden of proof in a criminal case, bringing with it incarceration of up to 10 years, presents a significant challenge to guarantees offered by human and civil rights.

The UK Law Commission charged with reforming the Bribery Act addressed a comparable presumption found in the Prevention of Corruption Act 1916. That presumption stated that once it is “proved that any money, gift, or other consideration” is conveyed to a public official, it “shall be deemed to have been paid or given and received corruptly.”<sup>51</sup> Consideration was given to whether this and other presumptions of guilt were in contravention of the European Convention on Human Rights, art. 6(2).<sup>52</sup> Presumptions of this sort were ultimately not carried forward into Bribery Act 2010, which carefully requires an element of intent or knowing action and prosecutorial proof of such element in connection with an offense of bribery.<sup>53</sup>

The UK Law Commission certainly did not have the task of viewing the 1916 Act’s presumption in an abstractly conceptual, essentially functional, manner, but when so viewed

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<sup>49</sup> POBO sec. 13.

<sup>50</sup> POBO sec. 13A.

<sup>51</sup> Prevention of Corruption Act 1916, sec. 2, discussed in Law Commission (2008: 2.18).

<sup>52</sup> See e.g., House of Lords and House of Commons (2009: 58).

<sup>53</sup> See Bribery Act 2010, secs. 1, 2, 6

we can see that the Hong Kong POBO's presumption differs significantly. The UK presumption *characterizes* the *quality* of an advantage conferred (i.e., legitimate or corrupt) and must be rebutted with evidence establishing the true quality, which like a finding of innocence itself, can require complex evaluation of many elements. The POBO's presumption is triggered by a simple, mathematical formula (assets significantly exceeding official remuneration equal corruption) and can be rebutted by the simple proof of an alternative source of the excess, such as inheritance or capital gains. Thus while the 1916 presumption requires qualitative proof of legitimacy to rebut a presumption of guilt, the POBO presumption merely requires the production of a source of income. A further element for comparative study is the effect of the European Convention on Human Rights, which like European law in general, has resulted in newly arising distinctions between UK law and the laws of Commonwealth countries and other common law jurisdictions, such as the United States. When the POBO's presumption was challenged as a violation of Hong Kong's Bill of Rights, the courts have repeatedly find it to withstand judicial scrutiny.<sup>54</sup> In one well known Court of Appeals case, Bokhary JA observed:

Where corruption is concerned, one can readily see the need - within reason of course - for special powers of investigation and provisions such as ones requiring an accused to provide an explanation. Specific corrupt acts are inherently difficult to detect let alone prove in the normal way. The true victim, society as a whole, is generally unaware of the specific occasions on which it is victimised.... Before the prosecution can rely on the presumption that pecuniary resources or property were in the accused's control, it has of course to prove beyond reasonable doubt the facts which trigger it.... Section 10(1) is Bill consistent. It is dictated by necessity and goes no further than necessary. The balance is right.<sup>55</sup>

This clearly demonstrates that Hong Kong has the "political will" to fight corruption, which Quah describes as an essential element of a successful anti-corruption regime.<sup>56</sup> It also shows that a combination of informational asymmetry ("corrupt acts are inherently difficult to detect") and well defined elements of the offense (emoluments for a civil servant are precisely defined) allow an important political goal to be served by a presumption. The same type of presumption is used to prevent corporate directors subjected to conflicts of interest from breaching their fiduciary duties in the secrecy of the boardroom. Under the laws of many countries, including the UK and the US as well as the Hong Kong SAR, if a director has a direct or indirect economic interest in a transaction the company enters into, he is

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<sup>54</sup> McWalters (2010: 395).

<sup>55</sup> *Attorney General v Hui Kin-Hong* [1995] 1 HKCLR 227, 235-36.

<sup>56</sup> Quah (2009: 21).

presumed to have committed an offense unless he discloses the matter to the other directors and those directors or shareholders approve the transaction.<sup>57</sup> Both in corporate governance and in combating corruption, the desire to eliminate the abuse, the difficulty of detecting it in specific cases, and the probable causal nexus between the economic element and a resulting abuse – under the POBO the source of excess wealth and under company law the loss of disinterested judgment – support the creation of a presumption. The accused suffering from the presumption is in the best position to produce the information necessary to rebut it. Another angle from which to view the similarities is that in both cases, the offense is committed by a person whose office, duties and compensation are well defined, allowing a presumption to be created when factors (such as conflicting interests or excessive assets) reach a dimension at which there is a high probability a duty will be breached.

The ICAC's powers are significant and its independence is guaranteed, but Hong Kong does not depend on deterrence and enforcement alone. In reviewing “the practices and procedures of Government departments and public bodies, in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures which, in the opinion of the Commissioner, may be conducive to corrupt practices,”<sup>58</sup> the ICAC's Corruption Prevention Department battles corrupting conflicts of interest in a manner very similar to those bodies that seek to improve corporate governance in business corporations. Codes or rules of “best practices” in corporate governance attempt to separate decision-making from conflicts of interest, introduce independent directors to provide unbiased supervision, give such independent directors sufficient funds to act independently, and ensure that they are indeed qualified enough to fulfil their obligations.<sup>59</sup> This introduction of structural safeguards is a preventative and pre-emptive activity that supplements deterrence through investigation and punishment.<sup>60</sup> The ICAC has likewise studied the processes of government decision-making and isolated points at which safeguards and supervision against conflicts of interest should be introduced, such as in the process of tendering for public sector contracts.<sup>61</sup> Structural measures introduced at high risk bottlenecks reduce the probability that

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<sup>57</sup> See e.g., as to the UK, secs. 182, 190 Companies Act 2006, as to the US, *Cooke v. Oolie*, 1997 WL 367034, Del.Ch., 1997, Cahn & Donald (2010: Chapter 12), and as to Hong Kong, The Annotated Ordinances of Hong Kong, Chapter 32, Companies Ordinance sec. 157H.

<sup>58</sup> ICACO sec. 12(d).

<sup>59</sup> See e.g., The Financial Reporting Council, *The Combined Code on Corporate Governance*, applicable to companies listed on the London Stock Exchange on a voluntary basis, and the New York Stock Exchange, *Listed Company Manual*, sections. 303A and 307. Cahn & Donald (2010: Chapter 15).

<sup>60</sup> For a general discussion of this technique in corporate law, see Donald (2003).

<sup>61</sup> McWalters (2010: 86).

private and public interests will interact, conflict and lead to corrupt action in the administration of official business.

The ICAC also undertakes a significant conditioning of the cultural environment in Hong Kong, which has the effect of raising the reputational cost of engaging in corrupt activity, and educating potential actors about the missteps that can lead to such loss of reputation. This cultural backdrop that the ICAC attempts to create adds an additional layer of prevention beyond the deterrence offered by the threat of fines and loss of freedom. In the next section, after briefly outlining the extent of the ICAC's community outreach programs, I provide an aesthetic analysis<sup>62</sup> of the television series the ICAC co-produces to provide pedagogical entertainment for the people of Hong Kong.

### III. Teaching the value of the public interest

The Community Relations Department of the ICAC conducts significant conditioning of the Hong Kong environment to increase the reputational cost of corrupt behaviour, or, as the ICAC Ordinance expresses it, to “educate the public against the evils of corruption; and enlist and foster public support in combatting corruption.”<sup>63</sup> In addition to staging information sessions at schools, universities, professional associations and other organizations, the ICAC co-produced a television drama with Hong Kong's leading television provider, Television Broadcasts Ltd., for 15 years. The series, entitled *ICAC Investigators*, does for Hong Kong's ICAC and its struggle against corruption much of the same work that *James Bond 007* and *Mission Impossible* performed for the Cold War or Fox Television's *24* performed for the post-9/11 fight against terrorism, but with significantly less dramatic appeal and substantially more pedagogical focus. A reader who enjoys the moral reinforcement provided in Henry Fielding's *Tom Jones* would perhaps also appreciate *ICAC Investigators*.

Each episode of *ICAC Investigators* is based on an actual ICAC investigation. All of the episodes of *ICAC Investigators 2007* I viewed are set in Hong Kong, so that viewing citizens see the everyday icons of their cultural environment as the backdrop to the film's moral lessons. The language is Cantonese, but it is also possible to view the series synchronized

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<sup>62</sup> The analysis draws heavily from a method developed by Wolfgang Iser, in which a given text is seen to interact with the expected preconceptions ('repertoire') of an audience in order to stage a creative activity in the reader's mind that can simply reinforce a given ideology (propaganda), impart knowledge and techniques of judgment (pedagogy) or make the reader aware of his or her own projections and prejudices (liberating 'estrangement'). Iser's method views texts in an Aristotelian (experiential) and phenomenological perspective. See Iser (1994: 175 *et seq.*).

<sup>63</sup> ICACO sec. 12(g)-(h).

into Mandarin or with English subtitles. The episodes usually present cases of public and private corruption that have an immediate and tangible impact on the quality of life in Hong Kong. The episodes I viewed all used a cathartic, pedagogical approach where one of the main protagonists of the drama gradually succumbs to corruption and is then apprehended by the ICAC, questioned and if necessary incarcerated. The filming focuses on the pivotal decision, the point at which the suspect chooses either to fulfil public duty or to serve private interest. Each episode of the series brings viewers vicarious participation in this fateful decision, including the hollow pleasure of ill-gotten gain and the painful regret that inevitably follows.

In the episode “Empty Wagons,” a middle-aged man of modest income, Mr. Leung, has a loving wife and son, and a good job at the Kowloon Canton Railway company. He is seduced into smuggling by a crafty merchant through medium of an attractive *femme fatale* who works with the merchant to ensure that Leung takes the bribes and assists in smuggling. What is remarkable about this episode is that the contraband being shipped to China in unglamorous, rusty railway cars are seemingly innocuous *cigarette filters*, not components for a neutron bomb or vital crown secrets. In this way, *ICAC Investigators* drives home that point that we, dear viewers, are not the judges of what is legal or illegal, important or unimportant, but rather we must look to and follow the law. The personal cost of breaking the law is starkly revealed during the majority of the episode: first, Leung is apprehended in front of his wife and son, and the disgrace that his criminal activity should rightly trigger is shown in the pain on his son’s face as he stares with disbelief at his father being taken into custody. The investigators later uncover evidence of the relationship between Leung and the *femme fatale*, which Leung’s wife sees, and when Leung leaves his family one evening for a tryst with this woman, his wife decides to leave him. In a very dramatic closing scene, Leung chases his wife and son to the Lo Wu border crossing into China, following a tip his son sends him by SMS, and pleads through tears for his wife to stand by him while he is in prison, affirming between sobs that he never should have taken the money, and he only sought to secure a more comfortable life for his family, particularly a larger flat – something most Hong Kong residents desire. The wife nevertheless abandons him, but the son of some 15 years stands by his dad, his eyes swelling with tears of anguish at his father’s downfall and his family’s destruction. This scene has the potential for heavy cathartic impact on Hong Kong’s adolescent viewers. While the very humane and sympathetic ICAC agents who tracked Leung to the border crossing prepare to lead him away, the picture turns to grainy grey and the camera freezes on the face of a broken man who made a terrible mistake. In that

instant we as viewers have no doubt that crime – even if only allowing cigarette filters to cross a border between two regions of the same country – does not pay.

In addition to the straightforward message that crime does not pay presented with maximum cathartic impact, *ICAC Investigators* also presents some very sophisticated symbolism and character analysis in connection with corruption. The episode “Sand Castle” is about a construction company that saved money by skimping on the foundations of two high-rise buildings, which then had to be demolished at an exorbitant cost. The clear message is that in society, as in construction, if the foundation is not solid, the entire structure will collapse. If this episode were to be broadcast in a region with a majority Christian culture, which Hong Kong is not, it could certainly be seen as a reference to the New Testament parable of building one’s moral house on sand rather than on rock, the latter being able to withstand the storm of temptation and the former crumbling at great cost for the builder. The symbolism packed into the episode goes further, as the two main figures present doppelgangers of each other, a kind of Doctor Jekyll and Mr. Hyde of the Hong Kong young professional set. They were university classmates who studied engineering at the same university, one with solid moral integrity, but rather wooden and dull, and the other confidently outgoing, but not very strong on ethics. During university they had competed for the same girl, and the honest engineer has won her at the episode’s outset, although the dishonest engineer reclaims her at the height of his ill-gotten success. They both find employment with the same construction company. At this company they are befriended and advised by a series of either honest or dishonest co-workers at various levels of the company, basically dividing the visible portion of the workforce into two, mirroring camps. The narrative clearly distinguishes between the character traits of the two camps at various levels of the company, perhaps trying to give young viewers a guide to ethically navigating the workplace.

As in many stories of this type, the dishonest cadre pulls ahead at the beginning, as the bad engineer wines and dines the building inspectors so they do not notice his cost-saving shortcuts, which the highly budget conscious CEO greatly admires. After the good engineer’s expected promotion goes to the bad engineer, the latter also reclaims the college sweetheart, driving the good engineer to attempt suicide. At this point, his life broken, he briefly goes over to the dark side, helping the CEO out of a budget crisis with advice to use compressed water to support the buildings’ foundations, which fatally compromises its structure. When the ICAC swings its investigation into motion, it is made very evident, both in this and in

other episodes, that we are being shown a force that must be respected: they are cool and efficient, and even appear omniscient and omnipresent as they photograph every suspect at every incriminating moment, an all-seeing eye from which one cannot hide. This may well have an impact on the average viewer's estimation of the risk connected with corrupt behaviour. Also typical for the series is that the ICAC apprehends the bad engineer at his attractive flat eating breakfast with his pretty new bride, having reached the peak of happiness, yet this happy house is built not on the rock of lawfulness but on the sand of corruption, and crumbles at the sight of the ICAC badge.

The good engineer is also apprehended, for in that great moment of crisis mentioned above, he agreed to sign a pile of receipts for concrete that was never bought or used, but as in "Empty Wagons" and other episodes of *ICAC Investigators*, we are shown a powerful cathartic moment, an existential crisis that decides his entire life. In the ICAC's interrogation room, when faced with the signed receipts, he begins to sob and scream, and we see a flashback of the good engineer running in a cold sweat through Hong Kong until he reaches land's end and the harbour in anguish and tears; we then see him bursting back to the construction firm, knocking papers to the floor, accusing the CEO of putting lives in danger and, most decisively, in the presence of his evil doppelganger, exclaiming, "I am I, not the person who approved this; I never go against my conscience, and I quit this job!" As the credits roll at episode's end, a factual statement on the persons convicted and their prison sentences makes clear that the good engineer was not charged with a crime. He repented in time, chose the right side of the conflict, and this teaches the viewer that he or she too can repent and be saved in his or her company or agency. This important message of repentance and forgiveness will certainly encourage potential whistle blowers to contact the ICAC.

The five episodes I viewed to prepare this brief analysis all focus on the decision to abandon public or professional duty for private gain. The choice to behave corruptly is, of course, always shown to be disastrous. However, the ICAC is always depicted as showing sympathy for the weak protagonist who goes astray, and the investigative officer is always ready to receive him back into the fold of responsible citizens. The office culture of the ICAC as depicted in the episodes is also interesting: it appears based on fairness, reason and teamwork, and superiors deserve respect because they are more able, more dedicated and more experienced than the bright, young professionals who work under them. On the other hand, in the criminal organizations and businesses run in a corrupt manner, authoritarian figures control their cronies through greed and fear. They are usually shown in shadowy light,



often consuming alcohol, unlike the officers of the ICAC, who are inevitably seen in well-lit offices or bright daylight, consuming water, tea or coffee. In another episode, entitled “Prison Courier”, the television drama draws on popular lore surrounding the ICAC, as the warden of Stanley Prison jokes with an ICAC inspector who visits his office that the tea at the warden’s office is quite good, but of course the ICAC has the best coffee. In popular Hong Kong parlance, being “invited to drink a coffee” at the ICAC means being under investigation. Here the work of the ICAC’s Community Relations Department draws on and reaffirms the same popular culture that it has conditioned in preceding decades. Pedagogical art and popular culture become one.

In a population of approximately seven million, the ICAC’s educational activity has had a significant impact on the perception of corruption. The reputational cost of corruption is seen as very high, particularly for employees in the public sector, and its potential gains are seen as of uncertain value. This conditioning of the cultural environment has worked in complement with the ICAC’s actual investigative prowess and respected independence to greatly increase the perceived cost of breaching the public trust.

#### **IV. The discounted net value of corrupt behaviour in Hong Kong**

If the problem of corruption can be understood as a conflict between an official or agent choosing dutifully to fulfil his obligations as the society expects or choosing to exploit his position to pursue a private interest, the value of the two competing options may determine the agent’s choice. It is therefore possible to view a successful strategy against corruption as one that increases its cost to the offender, discounted by the probability of being successfully prosecuted for an offense, to a quantum exceeding the value of corrupt behaviour, thereby giving corrupt behaviour a negative net value. Rose-Ackerman has expressed a very similar formula: “The expected cost of bribery is the probability of being caught times the probability of being convicted times the punishment levied.”<sup>64</sup>

Cost would include a number of quantifiable elements, such as fines, loss of employment, and loss of consortium with family and friends (in the case of imprisonment), as well as some non-quantifiable elements, such as loss of reputation. The potential value of corrupt behaviour would be limited to the value of decisions made by agents acting against their the best interests of those persons to whom their duty runs. For example, if an agent with delegated decision-making power to award contracts were constrained to decide within set

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<sup>64</sup> Rose-Ackerman (1997: 40).

price bands for the service, detailed quality guidelines were set for the purpose of assessing the competing contractors, and the procurement process was transparent and fair, this would reduce the value of the agent's corrupt influence to a potential bidder. The bidder might see competing purely on the quality of products or services as the less expensive route. The converse is also true: if a procurement process were opaque and the agent had a free hand in deciding the best contractor and setting the price, that agent would be able to give the bidding contractor great value in return for a bribe.

As this paper has explained, the laws and institutions of Hong Kong have reduced the value of corrupt behaviour and increased its cost in a number of interlocking and complementary ways. Under the POBP, the maximum fine is HK\$ 1.0 million and the maximum prison term is 10 years.<sup>65</sup> Although at about £83,000, the value of the fine discounted by the probability of conviction would likely not outweigh the gains of more significant forms of corrupt behaviour, the potential prison sentence certainly presents a substantial deterrent. *ICAC Investigators* and the extensive educational programmes of the ICAC's Community Relations Department have significantly shaped the Hong Kong cultural view of ethical behaviour so as greatly to increase the reputational cost of corrupt behaviour. This is substantiated by a recent public poll in which 98% of respondents said the ICAC deserved their support.<sup>66</sup> Thus, the maximum cost of corrupt behaviour for a civil servant in Hong Kong could be HK\$ 1.0 million, a prison term of 10 years, and social ostracism. To understand its actual impact on decision-making, this must be discounted by the probability of conviction.

If a corrupt actor has a 1% chance of being forced to pay a one million dollar fine and serve 10 years in prison, the discounted value of that fine is thus one million multiplied by 0.01 or only \$10,000, and the discounted prison term, using the same formula, is only about 36 days. Increasing the probability of conviction is therefore a very important part of making corruption too costly to undertake. As discussed above, the ICAC has investigatory powers as extensive as the law enforcement agencies in most developed countries, particularly when it comes to accessing financial and tax records. Moreover, the presumption of guilt in the case of civil servants holding assets significantly above their emoluments reverses the burden of producing otherwise unavailable financial information, eliminating a substantial asymmetry

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<sup>65</sup> POBO sec. 12. These penalties would be applicable to a civil servant convicted of holding assets well above her income. Other forms of corruption involving civil servants have much lower fines, but prison terms that are either equivalent or still significant (i.e., seven years).

<sup>66</sup> Information Services Department (2010: 2).

of information between the ICAC and the suspect.<sup>67</sup> As discussed above, similar presumptions may not be available in other, comparable jurisdictions. Through application of these powers in trials before Hong Kong's courts, which are generally considered to be of high-quality, the conviction rate for completed prosecutions based on ICAC investigations in 2009 was 85%.<sup>68</sup> This conviction rate increases the discounted value of the maximum fine from \$10,000 in the hypothetical example given above to \$850,000, and lengthens the prison term from 36 days to 8.5 years. These figures should also be slightly increased for the bias created in the public mind by the investigative prowess put on display in *ICAC Investigators* and the high reputation for efficiency the ICAC enjoys in Hong Kong's public mind.

The value of corrupt behaviour to an official or agent will equal the advantage this official or agent can offer the person who would purchase his breach of duty, minus a profit margin for the latter. Thus, as said, this quantum will depend on the potentially corrupt actor's freedom to reach a decision without external constraints or supervision and the efficiency of the decision-making process. To this end, the ICAC's Corruption Prevention Department examines the Hong Kong government for red flags like excessive discretion and insufficient supervision or transparency, as well as for red tape like unnecessary procedures and outdated or excessive instructions,<sup>69</sup> so as to promote structural change to prevent corruption. By increasing efficiency and subjecting discretion to transparency and accountability, the resulting changes reduce the value of corrupt behaviour to the buyer of disloyalty. Transactional efficiency is tied to the general business practices of a jurisdiction, and those practices thus influence the value of corrupt behaviour to a participant: the more cumbersome the bureaucratic hurdles, the more valuable the corrupt detour around them. The Hong Kong government is of course famously diligent in promoting efficient bureaucracy and low barriers to business dealings.<sup>70</sup> Indeed, it has been voted the world's freest economy 16 years in a row.<sup>71</sup>

The result is a high, discounted net price for corrupt activity. When faced with a choice whether to pay for a shortcut, an unearned privilege or a favourable decision, or compete

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<sup>67</sup> The presumption found in POBO sec. 10 is discussed above, in Part II of this paper.

<sup>68</sup> Information Services Department (2010: 2).

<sup>69</sup> See McWalters (2010: 86).

<sup>70</sup> Yasheng Huang calls Hong Kong "the most laissez-faire economic system ... a safe harbour for some of the talented Chinese entrepreneurs ... an alternative to China's poorly functioning financial and legal systems." Huang (2008: loc 228-30).

<sup>71</sup> The Heritage Foundation (2010: 1).

legally on the basis of quality, the potential corrupt actor will be faced with a fairly clear choice. On the one hand, business dealings and regulatory approvals in Hong Kong are carried out in an efficient manner on the basis of quality, even if the economy itself might be tilted toward the large corporate groups that dominate its economy. In short, the system works well and at a reasonable cost. On the other hand, an independent agency watches for corrupt behaviour in Hong Kong using solid investigatory techniques, benefiting from presumptions of guilt in some cases, and achieving an 85% conviction rate in the cases that go to trial. Moreover, an ethical atmosphere has been created in which corruption has been clearly marked out as unacceptable among the population, 98% of which think the ICAC deserves their support. Using financial terminology, one might say that the option to commit corruption in Hong Kong is “under water”, so that it is very unwise to exercise it. For 14 years the foolishness of the decision to engage in corruption in Hong Kong has been painted on the faces of those tragic protagonists of *ICAC Investigators* who traded sailing in capitalism’s safe harbour for sinking in the quicksand of corruption, and the sobs of their remorse are tucked among the various mental impressions that will figure a Hong Kong citizen’s decision-making.

#### **V. A matter of culture: is the Hong Kong anti-corruption regime transferable?**

No discussion of law in Hong Kong would be complete without addressing at least in passing its chance of future survival in and impact on the massive mother country into which it is being absorbed day by day: the People’s Republic of China. Pursuant to its Basic Law, Hong Kong’s legal system will remain separate from that of the PRC at least until 2047.<sup>72</sup> However, Shenzhen, the free trade zone city that borders Hong Kong immediately to the Northwest, has now reached a population of approximately nine million,<sup>73</sup> and its economy is increasingly integrating with that of Hong Kong. The transfer of Hong Kong’s manufacturing to the Mainland,<sup>74</sup> and the steady increase of the RMB-denominated products in Hong Kong,<sup>75</sup> indicate that the amalgamation of Hong Kong and Shenzhen into a “Greater Hong Kong” of about 16 million souls could be on the medium-term horizon. The gem that Hong Kong can offer its young bride will certainly be the rule of law, a great example of which is

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<sup>72</sup> The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, art. 5.

<sup>73</sup> The Shenzhen government website offers general demographic and economic information on the city and the Pearl River Delta region, at <http://english.sz.gov.cn/gi/>.

<sup>74</sup> See Li (2006: 304 *et seq.*).

<sup>75</sup> The Hong Kong Monetary Authority keeps an updated account of the development of the Renminbi business in Hong Kong at <http://www.info.gov.hk/hkma/eng/renminbi/index.htm>.

its anticorruption regime. However, as we have seen, law is only one institution that orders a society; law interacts with the political, economic, social and cultural context in which it is found. Although law can be a causal factor in a society taking a particular shape, it is also a product of the same society, and thus the characteristics of a given legal regime will be complementary and congruent with the society in which it is embedded.<sup>76</sup> Thus not only the Chinese Communist Party (CCP) offers a possible impediment to transplanting the Hong Kong legal system. Not every legal technique can be effective in all cultural circumstances. For this reason, it is not unproblematic to transplant any set of laws, including an anticorruption regime, from one country to another.

In discussions of business ethics, corruption and bribery, much is made of the unique characteristics of Asian culture, particularly the centrality of *guanxi*, as presenting greater challenges than the culture of Western societies.<sup>77</sup> The specifically Asian understanding of personal relationships referred to with this term, particularly the notion that private obligations can be owed to friends and family so as to override public duties, is seen as a cultural catalyst for corruption.<sup>78</sup> Under the pressure of these cultural values, when a private obligation to a friend or family member conflicts with a duty to serve the public good, the private will gain and the public will wane in significance, thus lowering the net price of corrupt behaviour to the actor considering it. Moreover, a related culture of gift-giving can help transform an act we might otherwise see as bribery into a traditional gesture of respect and friendship. These elements of Asian culture can thus both increase the motivation to pursue private interests and camouflage acts of bribery.

In evaluating whether the Hong Kong anti-corruption regime is transferable to the PRC, the Asian culture of *guanxi* and custom of gift-giving, discussed above, would not present obstacles to a transplant. Hong Kong and the PRC share a common cultural heritage. They do not, however, share a common history during the 20<sup>th</sup> century or a common political system, and these are significant factors in shaping their cultures in relation to congruence with laws and techniques to combat corruption. These factors are thus relevant for evaluating the transplant of an anti-corruption regime. Of particular importance for the acceptance of corrupt behaviour is whether a given population lives under a government whose laws it can

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<sup>76</sup> See Milhaupt & Pistor (2008: Loc. 516 *et seq.*).

<sup>77</sup> A leading comparative jurist well summarizes a widely held conception: “Most importantly, a society of relations, or *guanxi*, may easily slide towards cronyism, the ongoing cultivation of reciprocal, unjustified advantage, to the exclusion of considerations of the outside world.” Glenn (2010: 341).

<sup>78</sup> Provis (2007: 58).

respect. Take, for example, the case of a people under the laws of an occupying foreign power, such as was the case in much of Europe during World War II:

To live normally in occupied Europe meant breaking the law: in the first place the laws of the occupiers (curfews, travel regulations, race laws, etc.) but also conventional laws and norms as well. Most common people who did not have access to farm produce were obliged, for example, to resort to the black market or illegal barter just to feed their families .... In occupied Europe authority was a function of force alone .... Violence bred cynicism.<sup>79</sup>

When a government or the rules it imposes are widely perceived to violate natural law or popular custom, the subject population may well create a parallel code of behaviour and a black market that contravenes the government's rules. Persons who practice such defensive, clandestine civil disobedience for extended periods of time are naturally marked by it. A continuity bias would carry forward an expectation that corrupt behaviour is acceptable, regardless of whether it was a behaviour adopted in protest or one expected by the government itself. Much of the corruption during the first 130 years of the Hong Kong colony could be seen as European cynicism when faced with a Chinese culture they did not fully understand, and Chinese cynicism when faced with an English culture they did not fully understand. Accurately or inaccurately, Hong Kong's second governor, John Francis Davis, saw the Chinese of Hong Kong as:

[B]orn and bred in the universal belief of official venality and corruption from the undisguised habits of their native magistrates, who avowedly receive only a nominal pay from Government, and make up the bulk themselves. So indelible is this habitual conviction, that many of them in this Colony will never believe that the fines imposed by our Magistrates, under the Police and other Ordinances, are not for those Magistrates' own benefit; whereas in this Colony there is not even a fee in existence that is not paid into Her Majesty's Treasury.<sup>80</sup>

On the other side, as Munn observes, “[t]here is little doubt ... that European and other non-Chinese police were quite prepared to exploit their positions, and were perhaps restrained from certain sophisticated forms of extortion more by linguistic handicaps than by moral inhibitions.”<sup>81</sup> By 1859, Chief Magistrate and Colonial Secretary William Caine had been credibly charged with, *inter alia*, dispensing justice for fees and sexual favours, operating a private pirate network, falsely registering land in his own name, accepting bribes in administering the opium monopoly, profiting from a prostitution protection scheme, and

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<sup>79</sup> Judt (2005:37).

<sup>80</sup> Correspondence of 9 August 1847, cited in Munn (2001: 294)

<sup>81</sup> Munn (2001:296).

covering up the crimes of other officials.<sup>82</sup> The gradual consolidation of Hong Kong society on the edge of an imploding Chinese empire and through decades of hot and cold war led to the creation of a people of Hong Kong, which might be thought of as a Chinese culture with western characteristics.<sup>83</sup> This may well be a factor in the success of numerous legal measures taken to create an anticorruption regime in Hong Kong. The growing awareness that Hong Kong offered a viable, societal alternative to the Mainland could support a sense of “national” pride in establishing a clean Hong Kong. Another factor is simply a prescient policy that consequently removed opportunities for profitable corruption. As Goodstadt has argued, a reason for Hong Kong’s famed *laissez faire* policy was to reduce the opportunities for business to seek favours from government.<sup>84</sup> The simple absence of government from most business activity may be another pillar supporting the growth of Hong Kong’s strong anti-corruption culture.

Returning to China, and its own culture vis-à-vis corruption, there is little dispute that at least by 1976, many Chinese found themselves under a form of government that seemed to breed lawlessness and be driven by irrationality.<sup>85</sup> Indeed, a major target of the Cultural Revolution was the rule of law itself.<sup>86</sup> Under these circumstances, it is quite normal that many Chinese people would have turned to parallel systems of private ordering even if they violated the official rules imposed by the Chinese Communist Party (CCP); it also appears normal that this resort to private ordering would have continued under and even be confused with the official sanction of private enterprise that began in 1978. As Luo observes, “In the 1970s and 1980s, *guanxi* largely meant to obtain scarce consumer goods or to find a better job for one’s children through the ‘back door’.”<sup>87</sup> Luo argues that the Chinese government has offered no widely accepted moral norms to accompany China’s economic growth, so that “[a]lthough *guanxi* is not necessarily an origin or a source of corrupt behavior, it is a critical facilitator of corruption in a demoralized society. In a demoralized environment, the general

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<sup>82</sup> Munn (2001: 300).

<sup>83</sup> As Steve Tsang remarks, “[t]he rule of law is more than an Anglo-Saxon political idea or legal concept. It is a way of life. It diverts completely from the Chinese legal tradition and remains an alien concept in the PRC, where it is routinely confused with ‘rule by law’. It took Hong Kong a long time to understand and appreciate its value. By the 1990s, this idea had generally been accepted among the people of Hong Kong as a great gift from the British. They were proud that the rule of law prevailed in Hong Kong.” Tsang (2004: 274).

<sup>84</sup> Goodstadt (2005: 13, 121).

<sup>85</sup> See e.g., Peerenboom (2002:55-56, 169-70).

<sup>86</sup> Peerenboom (2002: 56).

<sup>87</sup> Luo (2008:192).

principle of *guanxi* is shifted from favor exchange toward power exchange and gain sharing without obligating formal laws and informal relational norms.”<sup>88</sup> Unlike Hong Kong’s *laissez faire* economy, moreover, the structure of China’s state managed commercial environment injects government officials into every aspect of business in China, from granting licenses to allowing an IPO to go forward. This offers ample opportunity to profit from breaches of duty. As Mcgregor observes, “[t]his combination – of wide administrative discretion amidst unprecedented economic opportunity – means that on-the-ground officials can make or break businesses, especially in localities far from larger cities, where there is less scrutiny and accountability. The potential for corruption is obvious.”<sup>89</sup>

In evaluating the transferability of the Hong Kong anti-corruption regime to the PRC, the question is thus whether the current pervasive acceptance of corrupt behaviour in China could be reversed through a comprehensive and powerful system designed to educate against, investigate into and prosecute corruption. Given the current structure of the PRC economy, the opportunities for corrupt behaviour by public officials are significantly greater than under Hong Kong’s *laissez faire* regime. It seems that if the CCP is perceived as unable to provide necessary services, a fair employment market, a safe environment and some mechanism for redistributing the excess wealth of the country’s most fortunate citizens, strong anticorruption measures would not be enough to stem the tide of private self-help. Anti-corruption measures would inevitably catch in their net private attempts by frustrated citizens to counterbalance governmental failures, amplifying an existing conflict between public order and human rights. Gradual retreat of the public sector involvement in commercial dealings would reduce the opportunities of public officials to profit from corrupt behaviour, but could lead to a corresponding increase in the corrupt behaviour of private agents unless a culture of trust in the rule of law and duty is satisfactorily introduced. As such, unless accompanied by the broad reforms many citizens see as necessary, a campaign against corruption might well meet with the kind of cynical avoidance that Judt describes as dominating occupied Europe at mid-20<sup>th</sup> century. Even significant increases in the cost of corruption through China’s liberal application of capital punishment might still have insufficient impact to reverse the tide of corruption. Anticorruption measures could then be seen as just another tool “used by the political leaders against their political rivals.”<sup>90</sup>

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<sup>88</sup> Luo (2008:189).

<sup>89</sup> Mcgregor (2010: 93-94).

<sup>90</sup> Quah (2009:45).



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