INTERNATIONAL ANTI-CORRUPTION CONFERENCE (IACC)

Programme
Papers
Organisers
Sponsors

Lima Declaration

8th INTERNATIONAL ANTI-CORRUPTION CONFERENCE

The Papers

Reversing the Onus of Proof: Is it Compatible with Respect for Human Rights Norms

Bertrand de Speville
Anti-Corruption consultant, de Speville & Associates

The subject of this paper. Those of us who are not lawyers would be justified in asking for some explanation of the title of this paper: "Reversing the onus of proof: is it compatible with respect for human rights norms?" What is this proof? What does onus of proof mean? How and why would the onus be reversed? If I can offer intelligible answers to these questions, the non-lawyer would then ask what does reversing the onus of proof have to do with human rights? Which human rights are we talking about? And anyway why does it matter whether human rights and "reversing" the onus of proof are compatible? In the unlikely event that he received complete replies to these questions, he and anti-corruption policy-makers everywhere would want to know what this topic has to do with fighting corruption - a battle which is surely difficult enough without being distracted by human rights and the onus of proof, reversed or unreversed..

In attempting to give replies to these questions, let me set the context. Those who have any experience of fighting corruption know how difficult it is to discover what is going on, how difficult it is to get evidence of specific wrongdoing by any particular person and how difficult it is prove in a court of law that that person has committed a corruption offence. It was a famous and highly experienced Hong Kong judge who many years ago said: "Bribery is probably the most difficult of all offences to detect and prosecute successfully in the courts. Any law-enforcement agency entrusted with this difficult Job deserves all the assistance the Legislature feels it can reasonably give." Nothing has changed - indeed the sophistication of modern criminality probably makes his words even truer today.

Let me try to answer the last question first: what does the topic of this paper have to do with fighting corruption? The hint has already been given. One of the essential ways of combating this universal phenomenon is to make specific corrupt conduct a criminal oftence, then to investigate and prosecute that offence in the criminal courts of justice. Another is to take disciplinary proceedings against a suspected official or employee in order to dismiss him if he is found to have been corrupt. Yet another is to take action in the civil courts, for example to set aside a contract awarded by means of bribery.

These proceedings of enforcement have at least one thing in common: they all require particular matters to be established before the tribunal can take action, whether it be to punish by imprisonment, or to dismiss from employment, or to set aside a contract and award damages. As a general rule applying to all these proceedings, the party that asserts a case against the other must establish or prove it by evidence suffident to satisfy the tribunal that the assertion is made out. He who asserts must prove. It is said that he bears the onus of proof.

Proof is the evidence required by the law to be put before a tribunal so as to satisfy it that a matter in issue in the proceedings is established to its satisfaction. The law may require issues in different kinds of proceedings to be established to different degrees of probability. In the same proceedings different issues may require different degrees of proof. The evidence may take various forms, one of the most usual being oral testimony. Human rights norms require testimony to be given in the presence of the party against whom it is given, with the opportunity to question the witness.

The Onus of proving an issue, or of producing evidence in proof or disproof of an issue, is cast on one party or the other. The burden of proving an issue is sometimes called the legal onus. The burden of producing evidence is sometimes called the evidential onus. Once evidence of an issue is adduced sufficient to require a decision from the tribunal on that issue, the evidential burden is said to be discharged. The legal burden remains however, and may sometimes rest on the party other than the party who bore the evidential burden.

A few more words of explanation are necessary. The placing of an onus of proof on one party or the other can often be expressed as the obligation to displace a presumption, that is that a certain conclusion will follow unless proof, or at least evidence, to the contrary is given. The offence of driving a car without a licence provides an example: the defendant driver can be said either to have the onus of showing that he did have a licence or of being under an obligation to displace the presumption that he had no licence. Essentially onus of proof and presumption are two sides of the same coin.

It is a common feature of modern legal systems that in criminal cases the prosecution bears the legal burden of proving all the elements of the offence with which the accused is charged, including disproving any defence put in issue by evidence adduced by the defendant. In some countries, exceptionally, the legal burden of proving certain defences has to be discharged by the defendant himself (for example, the defence of insanity in the Common Law countries). In such cases the legal onus of proof is said to be "reversed" because on the particular issue the onus is put on the defendant. But it is important to realise that the so-called reversal is only in the sense that the issue to be proved by the defendant is one that has been raised by the defendant himself. Reversal does NOT mean (at least not in any modern legal system) that the defendant is ever required to prove the contrary of an assertion made by the prosecution. It is an essential element of a fair trial that he who asserts must prove. The onus of proof is said to lie on the party which makes the assertion. It would be unfair to require a party to disprove a mere assertion made by the other.

So the question here is not so much whether having to contradict an assertion by the other party is inconsistent with human rights norms - such a reversal is in obvious breach of a fundamental precept of every modern legal system - but rather whether requiring the defendant in criminal proceedings to prove any element of his defence is inconsistent with those universal norms established for the protection of the individual.

In relation to corruption offences the question becomes important when anti- corruption policy makers have to decide how to strike the right balance between ensuring the successful prosecution of the corrupt and safeguarding the accused from unfairness or wrongful conviction. Given the difficulty of proving that a bribe was sought or paid, especially in relation to senior officials, is it justifiable, for example, to make it an offence for a public official to own wealth acquired since he took office that far exceeds his official salary and to require him to explain how he came by that wealth? The policy-maker and the legislator need to know whether such a criminal offence would fall foul of the universal norms of human rights and fundamental freedoms.

The universal norms. I believe that few exceptions could be found in the legal systems of our modern world to the proposition that it is in criminal proceedings that the protections afforded to the defendant are pitched at their highest. In some civil proceedings and in some administrative proceedings those protections may be as strong as in criminal proceedings but they would not normally be stronger.

In criminal proceedings the international and regional declarations of human rights and fundamental freedoms all protect the right of the individual to be presumed innocent until proved guilty. Most add the words "according to law" and one the words "by a competent court or tribunal".

Article 11 of the Universal Declaration of Human Rights: "Everyone charged with a penal offence has the right to be presumed until proved guilty according to law..."

Likewise article 14, paragraph 2 of the International Covenant on Civil and Political Rights: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

In Europe article 6, paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms is in almost identical terms: "Evervone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

In the Americas the first sentence of article 26 of the American Declaration of the Rights and Duties of Man provides: "Every accused person is presumed to be innocent until proved guilty." The American Convention on Human Rights in article 8 provides: "Every person accused of a serious crime has the right to be presumed innocent so long as his guilt has not been proven according to law."

In the region of Africa article 7, paragraph 1 of the African Charter on Human and Peoples' Rights provides: "Every individual shall have the right to have his cause heard. This comprises: .... the right to be presumed innocent until proved guilty by a competent court or tribunal..."
While in some of these declarations the right to be presumed innocent is expressly stated to apply in criminal proceedings, nonetheless in at least some kinds of civil cases the principle of the presumption may be embodied in the notion of a "fair hearing". In Europe the presumption has been held to apply in professional disciplinary hearings. [1]

Establishing a defence. It is noteworthy that none of these international legal documents, reflecting as they do the norms accepted by the signatory states, prohibits placing on the defendant the burden of establishing his defence, providing that the onus of proving the charge against him, regardless of any question of defence, remains throughout on the prosecution. The consequence of the prosecution failing to prove any element of the charge is the acquittal of the defendant. It matters not that the defence provided in law is part of the common law (by which I mean judge declared law) or is contained in statute, either by way of general defence, such as provocation or duress or force majeure (that is, circumstances beyond a person's control), or by way of a specific defence contained in the offence provision itself.

If it is accepted that it is consistent with the presumptions of innocence set out in the international human rights declarations just referred to that the accused in criminal proceedings should have to establish a defence raised by him or required to be raised by him (even a defence of lawful authority or reasonable excuse, or possession of the requisite permit or licence), the question arises: to what extent may the state create a criminal or penal offence aimed at conduct that is devoid of moral content public mischief or even social necessity?

Restraints on creating oftences. These international norms, perhaps not surprisingly, are silent on the question as to what conduct should properly be subject to the criminal law, and even as to what elements of culpability should constitute the minimum requirements of a criminal offence. More to the point for the purpose of this discussion is the fact that they do not give any indication of what conduct or degree of culpability ought not to amount to a criminal offence. Does this then mean that in its national law a state is free to create a criminal offence out of any conduct, however innocuous?

The European Court of Human Rights was faced with this question in the Salabiaku Case.[2] The defendant had been found guilty by a French court of the customs offence of smuggling by reason only of the fact that a trunk to which he laid claim contained prohibited goods (cannabis) which he had not declared when passing through customs. The French courts held that he had been in possession of the goods and therefore had smuggled them. In the European Court the French Government conceded that Article 6 paragraph 2 of the European Convention was applicable and indeed its argument made dear "that the presumption of innocence... is the essential issue in the case".[3] This issue arose it seems because "where possession is established the person in possession is deemed liable for the offence'...".[4] It should be noted that before the European Court Mr. Salabiaku's case proceeded not on the basis that the offence consisted simply of possession of undeclared prohibited goods and that he had been proved guilty of that offence according to law[5], but on the basis that his conviction of that offence constituted a breach of his right to be presumed innocent. The Court nevertheless felt obliged to address the question of whether a state could, consistently with the Convention, create an offence of simply possessing undeclared prohibited goods. "In principle", said the Court, "the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention ... and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States."[6]
Thus the position seems to be that a state may criminalise any conduct, regardless of whether the conduct occurs without accompanying criminal intent provided only that the act is not carried out in the normal exercise of one of the recognised human rights.

Restraints on creating presumptions. In the Salabiaku Case the Court went on to consider the relationship between presumptions intended to facilitate proof of the procecution's case and the presumption of innocence. it said: 'Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If.... paragraph 2 of Article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1.

Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words "according to law"' were construed exclusively with reference to domestic law. Such a Situation could not be reconciled with the object and purpose of Article 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law... Article 6, paragraph 2 does not therefore regard presumptions of fact or of law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."[7]

The Court then considered whether those limits had been exceeded to the detriment of Mr. Salabiaku, who, it will be recalled, on proof of possession of the prohibited goods was to be presumed guilty unless he could show force majeure, namely circumstances outside his control. The Court concluded that in the circumstances those limits had not been exceeded.[8]

This important decision seems to be authority for four propositions:

1. States are free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under human rights legislation. States, accordingly, may define the constituent elements of the resulting offence.
2. States may under certain conditions penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence.
3. Presumptions of law or of fact are not prohibited in principle. However States do have to remain within certain limits in this respect as regards criminal law.
4. In the phrase "proved guilty according to law" the words "according to law" are not to be construed exclusively with reference to national law, otherwise states would be free to deprive the presumption of innocence in Article 6 of its substance. The right to be presumed innocent is intended to enshrine the fundamental principle of the rule of law.

Corruption offences. What then of those essential weapons in the fight against corruption, the criminal offences aimed at bribery and related conduct? To what extent is it necessary that such offences should seek to place upon the defendant the onus of proof, whether legal or evidential, of any element of the offence or of any defence?

Bribery. Let us consider first the offence that criminalises the conduct commonly called "bribery". In every modern criminal legal system bribery, at any rate of public servants, is a crime. The crime is variously defined, but its universal elements seem to comprise the soliciting, accepting or offering, without lawful authority or reasonable excuse, of an advantage by or to the servant or agent of another in connection with the performance of that servant or agents duty to his principal without the permission of the principal.

Some jurisdictions require that the act of soliciting, offering or accepting should be done "corruptly" but it is not dear whether that word adds anything to the requirement of "without lawful authority or reasonable excuse". There seems to be no demand of practicality or policy that would require any element of such an offence to be proved by the defendant except one: the existence of lawful authority or reasonable excuse to act as he did will be within the knowledge of the defendant, probably within his exclusive knowledge. It would not be unreasonable to require him to bear the onus, at least the evidential onus, of showing that he had lawful authority or reasonable excuse for doing what he did. On the other hand it would place a wholly disproportionate burden on the prosecution to try to disprove a defence which may not even be raised.

In the light of judicial authority such as the Salabiaku case it is highly unlikely that casting the evidential burden on a defendant to show lawful authority or reasonable excuse when charged with an offence of this kind would be inconsistent with his right to a fair trial and his right to be presumed innocent. As regards lawful authority, there is a case for saying that the prosecution should discharge both the evidential and legal onus of proof since the evidence of lack of lawful authority can be proved simply by the prosecution producing evidence from the accused's principal that the accused had no suthority to accept the advantage.

Reasonable excuse presents a much wider range of possibilities. The excuse would be exclusively within the knowledge of the accused and it would therefore not be unreasonable to expect him to bear at least the evidential burden. In England the Salmon Commission in 1976 discussed whether there should continue to be a provision placing a burden of proof on the defence in corruption cases. It concluded that "Such a burden can be justified only for compelling reasons, but we think that in the sphere of corruption the reasons are indeed compelling. It is difficult enough to prove the passing of a gift to a public servant from an interested party but, when it occurs, it is normally strong prima facie evidence of corruption. If there is an innocent explanation it should be easy for the giver and the recipient of the gift to furnish it; the facts relating to the gift are peculiarly within their own special knowledge... We are satisfied that the burden of proof on the defence is in the public interest and causes no injustice."[9] Recently, a United Kingdom Government statement on the subject of prevention of corruption made the point in the following words: "Reversing the onus of proof in criminal cases is a serious step to take and requires full justification. Nonetheless in circumstances where a person is expected to exercise impartial judgement, it is arguable that that person should order his or her private affairs in such a way as to avoid any impression of corrupt activity. It may be reasonable therefore to expect a person in these circumstances to justify any questionable payments made to them. The Government therefore believes that it is right to consider carefully an extension of the presumption of corruption."[10]

Possession of unexplained wealth. Let us move on to consider another sort of corruption offence, one mentioned at the beginning of this paper Given the universally recognised difficulty of successfully proving the bribery offence just described, several jurisdictions have made it a criminal offence for a public servant to have wealth in excess of his official salary unless he gives a satisfactory explanation for his possession of such wealth. The value of such an offence in controlling the conduct of public servants, especially senior public servants, is being increasingly realised. The question is whether the human rights and fundamental freedoms of a public servant charged with such an offence are infringed. There are two aspects to be considered: first, whether an offence of merely possessing wealth in excess of his official salary infringes his right to a fair trial; second, whether placing on him the onus of establishing the defence of satisfactory explanation infringes his right to be presumed innocent until proved guilty according to law.

One of the jurisdictions that has such an offence and has over the years made effective use of it is Hong Kong Hong Kong has a legal System based on English common law. In 1991 there was incorporated lnto Hong Kongs domestic law the provisions of the International Covenant on Civil and Political Rights. The Hong Kong Bill of Rights Ordinance, in article 11(1), provides In exactly the words of the International Covenant that "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." Not long after the Bill of Rights came into force a senior public servant, charged with possessing excessive wealth (an offence called "illicit enrichment" in some parts of the world), challenged the validity of the offence, arguing that the offence was inconsistent with the BIII of Rights In that it infrlnged his right to be presumed innocent and was therefore repealed. The Hong Kong Court of Appeal rejected the argument.[11] It accepted that placing "the onus on the accused to provide an explanation deviates from the... principle that it is for the prosecution to prove the accused's guilt beyond reasonable doubt, which prlnciple is now entrenched in article 11(1) of the Bill of Rights..." it went on however to pomt out that ".. . there are exceptional situations in which it is possible compatibly with human rlghts to justify a degree of deviation from the normal principle that the prosecution must prove the accused's guilt beyond reasonable doubt." It cited a passage from another Hong Kong case[12] that had been considered by the then final court of appeal, the Privy Council in London: "Whether [such exceptions] are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11(1) enshrines. The less signifleant the departure from the normal prlnciple, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In dedding what are the essential ingredients, the language of the relevant statutory provision will be important. However what will be decisive will be the substance and the reality of the language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difticult to justify that presumption unless, as was pointed out by the United States Supreme Court in Leary v. United States (1969) 23 L. Ed. 2d

57,82, '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'."[13]

In laying down that test, the Privy Council also provided the following guidance as to how it is to be applied: "While the Hong Kong judiciary should be zeabus in upholding an individual's rlghts under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance between the individuat and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serbus crime. It must be remembered that questions of policy remain primarily the responsibility of the legislature it would not assist the individuals who are charged with offences if, because of the approach adopted to "statutory defences" by the courts, the legislature, in order to avoid the risk of legislation being successfully challenged, did not include in the legislation a statutory defence to a charge."[14]

In another appeal to the Privy Council the offence was the possession or control of wealth which could not be satisfactorily explained, "the burden of giving that explanation resting upon the defendant." What that means, said the Privy Council, is that such an offence provision "casts a burden of proving the absence of corruption upon a defendant." The charges against the defendant were drawn simply to allege the control of wealth disproportionate to his official salary. The charge made no reference to any expianation. The Privy Council noted that that was how the charges were drawn against the defendants. And their convictions were upheld.

What the Court of Appeal in Hong Kong and the Privy Council have acknowledged in this sort of offence is that the primary responsibility for proving matters of substance against the accused, beyond reasonable doubt of course, rests with the prosecution. Only when it has shown that the accused's wealth could not reasonably have come from his official salary does the accused have to provide a satisfactory explanation. A satisfactory explanation would be one which might reasonably account for the wealth in excess of his salary. It is a matter peculiarly within the knowledge of the accused. But requiring him to provide a satisfactory explanation needs strong justification if this departure from the fundamental principle of the rule of law that the prosecution has the onus of proving every element of the case against the accused is to be compatible with the protection of his human rights.

What is that strong justification? As the Privy Council has said, "Bribery is an evil practice which threatens the foundations of any civilised society."[15] It has also said there is "notorious evidential difficulty" in proving that a public servant has solicited or accepted a bribe.[16] But there is, the Privy Council said[17] , "a pressing social need to stamp out the evil of corruption in Hong Kong." The Court of Appeal of Hong Kong has echoed that view: "Nobody.... should be in any doubt as to the deadly and insidious nature of corruption."[18] In another case the Privy Council said the offence of possessing excessive unexplained wealth was "manifestly designed to meet cases where, while it might be difficult or even impossible for the prosecution to establish that a particular public servant had received any bribe or bribes, nevertheless his material possessions were of an amount or value so disproportionate to his official salary as to create a prima facie case that he had been corrupted."[19]

In the Hong Kong case of the senior civil servant who challenged the validity of this offence of excessive unexplained wealth (or illicit enrichment) with which this discussion started, the Court of Appeal concluded that the offence was consistent with the Bill of Rights. The offence, it said, is dictated by necessity and goes no further than necessary. The balance is right." The civil servant was brought back to court, tried, convicted and sentenced to imprisonment for 3 years 3 months. Not his lucky day.

But he is not the only public servant to have fallen foul of this law. In the 25 years that the offence has existed in Hong Kong about 50 cases have been prosecuted - not a great number - but some have involved very senior officers against whom it was highly unlikely that sufficient evidence of a particular instance of bribery would have been available.[20]

There is no doubt in the minds of Hong Kong legislators that the offence is still an essential tool in the kit used to keep its civil service clean.

The assessment by legislators that such an offence is necessary to help deal with the problem of corruption in their own country is an assessment with which the courts, whether national or international, will interfere only if they are persuaded that it is a manifestly unreasonable response to the perceived problem. It is for the legislature to gauge the seriousness of the problem of corruption and to devise the appropriate and proportionate response. It is our legislators who maintain the balance between the rights of the individual and the rights of society. A conditioned reflex that placing the onus of proof on the accused must be contrary to his human rights and therefore invalidates any law that seeks to do so cannot be said to be a rational and reasonable view on how to maintain that balance.

Here in parenthesis I ask whether requiring an explanation for the possession of wealth is an interference with the right to peaceful enjoyment of possessions contained in article 1 of Protocol No.1 of the European Convention on Human Rights or the right to the use and enjoyment of property in article 21 of the American Convention on Human Rights. The right to property guaranteed in article 14 of the African Charter of Human and Peoples' Rights no doubt includes the right of use and enjoyment. It is worth noting that the European Court of Human Rights has in the context of peaceful enjoyment of possessions reiterated the view that the Convention as a whole demands that a balance be struck between the interests of the community and the fundamental rights of the individual. It has said: "The notion of 'public interest' is necessarily extensive...

The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is ‚in the public interest' unless that judgment be manifestly without reasonable foundation."[21]

In summary, the right to a fair trial and the right to be presumed innocent until proved guilty according to law require that the onus of proof must fall upon the prosecution, but may be transferred to the accused when he is seeking to establish a defence. Provisions that enshrine the right to be presumed innocent do not prohibit presumptions of fact or law against the accused, although such presumptions must be confined within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. Nor do they prohibit offences of strict liability, namely offences which do not require a criminal intent on the part of the accused. They do however impose certain evidential and procedural requirements, to some of which that bear on the pursuit of the corrupt it is now time to turn.

Presumptions in aid of proving the case. The corrupt often try to conceal their ill-gotten gains by transferring them to friends or relatives but retaining control over them. In response to this trickery, national laws sometimes provide, in relation to the offences of bribery and unexplained excessive wealth, that, where there is reason to believe that any person was holding assets on behalf of the accused or acquired the assets as a gift from the accused, those assets shall be presumed to have been in the control of the accused.

This presumption of fact usually applies only in the absence of evidence to the contrary. The onus of adducing that evidence to the contrary rests on the accused.

Does such a so-called "reverse onus" infringe the right of the accused to be presumed innocent? We have already seen that a presumption of fact or of law which an accused is required to rebut is not necessarily contrary to the accused's fundamental right. While it would be foolhardy to assume that courts everywhere would test the validity of such a presumption in the same way or even arrive at the same conclusion, an indication has recently been given by the Hong Kong Court of Appeal which might find favour in other jurisdictions: "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 give rise to it. The presumption must receive a restrictive construction, so that those facts must make it more likely than not that the pecuniary resources or property were held ... on behalf of the accused or were acquired as a gift from him. And construed restrictively in that way, the presumption is consistent with the accused's fundamental right, being a measured response to devices by which the unscrupulous could all too easily make a mockery of the offences."[22]

The second example is a presumption quite often found in anti-corruption legislation but which, in the experience of some professional investigators, is never relied upon and is therefore not needed. It goes something like this: where in a bribery case it is proved that the accused gave or accepted an advantage, the advantage shall be presumed to have been given or accepted as such inducement or reward as is alleged in the particulars of the offence charged unless the contrary is proved. If the allegation has been properly investigated and if the case against the accused is sound, there is no need to rely on the presumption; to do so would be to invite a challenge that the presumption was an unnecessary and unwarranted interference with the accused's right to be presumed innocent. The better legal view is that such a challenge would succeed on the grounds firstly, that this presumption of corruption is the very essence of the offence alleged by the prosecution and which the prosecution is obliged to prove; and secondly, that the mere fact of the gift does not make it more likely than not that the gift was corrupt.

Concluding remarks. The heavy responsibility on policy-makers and legislators to strike the right balance between the interests of the individual and the interests of the community in the fight against corruption, as in other fields, is reflected in all international human rights declarations. It is perhaps the 1948 American Declaration of the Rights and Duties of Man that puts it most clearly:

"The rights of man are limited by the rights of others,
by the security of all, and by the just demands of the general
welfare and the advancement of democracy."

In present times, when the evil of corruption threatens to undermine, even engulf our societies, our leaders need the level-headed vision to see that political determination and community support to fight this menace must be armed with effective weaponry. The role of our judges is to ensure that legislators, in striking the balance, keep within the limits established by the international and regional declarations of the rights of the individual.
The theme of this session is "Sharpening the Tools for the Fight Against Corruption". I hope that this paper has illustrated that, clear-eyed and with respect for human rights uppermost in our minds, we can and should make our laws the cutting edge.

Notes and References

[1]Albert and Le Compte E.Crt.H.R. judgment of 10.2.83 Series A No. 58.
[2]Eur. Court H.R. 7 October l988 Series A No. 141.
[3]Albert and Le Compte E.Crt.H.R. judgment of 10.2.83 Series A No.58.
[4]Ibid. At para19.
[5]Before the Commission. However. The cases does seem to have been argued by the French Gouvernment on that basis. The Commision concluded that under the relevant article of the costoms Code the offnece was committed by virtue of the "mere

("objective") fact" of "possession of prohibited goods when passing through customs". "without ist beeing neccesary to establish fraudulent intend or negligence" on the part of the "person in possession".
[6]Eur. Court H.R. Salabiaku judgment of 7 October 1988. Series A no. 141-A at para 27.
[7]Eur. Court H.R. Salabiaku judgment of 7 October I988. Series A no. 141-A at para 28.
[8]The European Commission of Human Rights has held acceptable a UK provision to the effect that a man living with a prostitute is in certain circumstances presumed to be living off the carnings of prostitution. the Commission noting that the provision in question is restrictively worded and the presumption is neither irrebuttable nor unreasonable. In a criminal defamation case the fact that the onus of proving the trueth of statements lies on the defence does not infringe the presumption of innocence.
[9]The Royal Commission of Conduct in Public Life (1976) Cmnd 6524.
[10]"Prevention of Corruption: Consolidation and Amendment of the Prevention of Corruption Acts 1889-1916: A Government Statement" 9 June 1997.
[11]Attorney General v. Hui Kin Hong. Court of Appeal No.52 of1995.
[12]Attorney General v. Lee Kwong-kut [1993] AC 951.
[13]Attorney General v. Hui Kin Hong. Court of Appeal No.52 of1995 at pp.7.8.
[14]Attorney General v. Lee Kwong-kut [1993] AC 951 at p 975.
[15]Attorney General v. Reid [1944] 1 AC 324 at p.330H.
[16]Mok Wei Tak v. The Queen [1990] 2 AC 333 at p.343E-F.
[17]Ming Pao Newspapers Ltd. v. Attorney General of Hong Kong. Privy Council Appeal No.8 of 1996.
[18]Attorney General v. Hui Kin Hong supra.
[19]Cheung Chee-kwong v. The Queen [1971] 1 WLR 1454 at p. 1457 A-C.
[20]The case of a former Deputy Director of Public Prosecutions. Charles Warwick Reid. who pleaded guilty to possessing excessive assets valued about US$ 1.5 million and was sentenced to 8 years unprisonment, is a good example. Evidence of particular instances of bribery by the defence lawyers with whom he was in league was, Not surprisingly, unobtainable.
[21]James and Others v. United Kingdom. Eur. Court H.R. 1986.
[22]Attorney General v. Hui Kin Hong *supra* at p.16.

return to table of contents