

**Keynote Speech by  
Mr Wesley Wong, SC, JP, Solicitor General  
at the 3<sup>rd</sup> Annual Global Investigations Review Live Hong Kong  
on 18 October 2017 (Wednesday)**

Good morning, Mr [Kyle] Wombolt (the conference Chairman), Distinguished Guests, Ladies and Gentlemen,

Through its extensive network and useful research, Global Investigations Review (“GIR”) allows practitioners in the regulation and compliance industry worldwide to keep abreast of the latest trends and developments on matters of common interest. It is therefore my great privilege to be able to join this gathering of professional players assembled in Hong Kong.

2. The very wide spectrum of legal issues to be fully canvassed will obviously include those arising, for example, from global enforcement actions against tax evasion, money laundering and corruption. No one would be left with any doubt on the usefulness of the exchanges that will take place for the rest of today.

### **The Rule of Law**

3. In an attempt to put things in context, I wish to kick off this third annual GIR Live Hong Kong by examining the rule of law as a core value for this part of China. As a special administrative region of the People’s Republic enjoying a high degree of autonomy, Hong Kong is the only common law jurisdiction in the country.

4. The rule of law as we know it is embedded in the Basic Law which so successfully implements the “one country, two systems” policy since the resumption of Chinese sovereignty 20 years ago. As a national law, the constitutional instrument does more than just covering the relationship between the Central Authorities and the Hong Kong SAR and outlining the SAR’s political structure. It also preserves the Hong Kong way of life in a free and open economy and maintains the city’s capitalist system. How?

5. For a start, a dedicated chapter of the Basic Law is devoted to the fundamental rights and duties of residents. For example,

- (a) Article 25 provides that all Hong Kong residents are equal before the law;
- (b) Article 35 provides for the right to confidential legal advice, access to the courts, choice of lawyers and the right to institute legal proceedings in the courts against acts of the executive authorities and their personnel; and
- (c) the first paragraph of Article 39 secures the implementation, through domestic law, of provisions of the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and international labour conventions as applied to Hong Kong. The second paragraph further provides that rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law whereas such restrictions must not contravene the first paragraph of that article.

6. Outside that chapter, Article 6 of the Basic Law protects the right of private ownership of property whereas Article 105 protects the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

7. Also entrenched in the Basic Law is judicial independence. Under Article 84, the courts shall adjudicate cases in accordance with the laws applicable in the SAR and may refer to precedents of other common law jurisdictions. The power of final adjudication, by virtue of Article 82, is vested with the Court of Final Appeal which may invite judges from other common law jurisdictions to sit. Article 85 protects judges, in the exercise of judicial power, from any interference and provisions governing their appointment and removal also found their way into the Basic Law to pursue this objective.

8. It is under such a constitutional framework, as I have outlined, that the rule of law is maintained as the ultimate institution for protecting and balancing competing interests.

9. By far, the most often quoted and authoritative contemporary explanations of the concept of the rule of law will have to be those offered by the late Thomas Bingham. In his seminal work *The Rule of Law*, eight elements (or sub-rules) are identified, two of which I wish to highlight for the present purpose. “*The law*”, in Lord Bingham’s own words, “*must afford adequate protection of fundamental human rights*”<sup>1</sup> and “*adjudicative procedures provided by the state should be fair.*”<sup>2</sup>

10. I am not a loner in saying that the rule-of-law condition in the Hong Kong SAR measures up to these tests. In fact, this is borne out by international ratings.

11. Hong Kong has once again been nominated as the world’s freest economy by Washington-based Heritage Foundation for the 23rd consecutive year. The report noted that, “*Hong Kong has demonstrated a high degree of economic resilience and remains one of the world’s most competitive financial and business hubs. The high-quality legal framework, which provides effective protection of property rights and strong support for the rule of law, continues to be a cornerstone of strength for this dynamic city. There is little tolerance for corruption, and government integrity is buttressed by a high degree of transparency.*”

12. Another commendation on our rule-of-law position can be found in the Worldwide Governance Indicators project commissioned by the World Bank. Since 2003, the aggregate indicator in respect of the rule of law achieved by Hong Kong has been consistently above 90 out of 100, and the score Hong Kong reached for the year 2016 was 93.27<sup>3</sup>.

13. In the most recent Global Competitiveness Report published by the World Economic Forum last month, the HKSAR remains on top among Asian economies in terms of judicial independence. The fact that eminent

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<sup>1</sup> See *The Rule of Law*, chapter 7.

<sup>2</sup> *Ibid*, chapter 9.

<sup>3</sup> See <http://info.worldbank.org/governance/wgi/index.aspx#reports>

judges from apex courts of other common law jurisdictions are willing to sit at our Court of Final Appeal speaks volumes. That hearings are held in open court according to law and reasoned judgments are uploaded on the Judiciary's official website for all to see for themselves is very telling as to what is going on.

## **Economic Crime as a Social Evil**

14. For an international financial centre with an uncontrolled flow of capital and a freely convertible currency of its own, economic crime, left unchecked, can easily erode the rule of law. This is why Hong Kong, at the same time, must stay vigilant and continue to step up our efforts in combating the eclectic and ever evolving *modi operandi* of perpetrators of crimes such as tax evasion, money laundering and corruption.

15. ***Tax evasion*** poses a major problem to governments around the world by threatening their revenues, which in turns reduces the amount of resources available for infrastructure and services for their citizens. Globally, the fight against tax evasion is gaining momentum. One major initiative for facilitating enforcement action is the enhancement of tax transparency through developing exchange of information networks and promoting information sharing.

16. In this regard, the U.S. *Foreign Account Tax Compliance Act* ("FATCA")<sup>4</sup> was seen as the major stimulus which inspired the Organization for Economic Co-operation and Development ("OECD") to devise an even more all-encompassing exchange of tax information regime called the Standard for Automatic Exchange of Financial Account Information

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<sup>4</sup> The US Congress enacted the Foreign Account Tax Compliance Act ("FATCA") in March 2010 to combat tax evasion by US taxpayers using offshore financial accounts. Under FATCA, foreign financial institutions ("FFIs") were required to sign agreements with the US Internal Revenue Service ("IRS") to identify and disclose detail regarding their US account holders. Under the FFI agreements, the financial institutions were required to withhold tax for relevant US account-holders who did not give consent to such disclosures, or to close such accounts. A FFI which did not sign or was not otherwise exempt would be subject to a 30% withholding tax on all "withholding payments" derived from US sources. In order to alleviate some of the compliance burden, the US Treasury announced in June 2012 its intention to allow FATCA partner countries to enter into intergovernmental agreements ("IGAs") with the United States so as to simplify due diligence and disclosure requirements and eliminate certain withholding requirements. More importantly, IGAs can reduce or eliminate conflicts with local legislation in that they allow for disclosure of information without breaching domestic laws on bank secrecy, client confidentiality and data privacy. Hong Kong is among one of 113 jurisdictions worldwide to have entered into an IGA with the US.

(“AEOI”), commonly known as the Common Reporting Standard (“CRS”), which was approved by OECD and G20 countries in July 2014.

17. CRS calls on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. It sets out:

- (a) the financial account information to be exchanged,
- (b) the financial institutions required to report,
- (c) the different types of accounts and taxpayers covered, and
- (d) the common due diligence procedures to be followed by financial institutions.

This move towards an automatic exchange of information clearly demonstrates a global commitment to enhance tax transparency and combat cross-border tax evasion.

18. It is necessary for Hong Kong, as a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes of OECD, to meet the new global standard on AEOI. In order to provide a legislative framework for implementing AEOI in a timely and effective manner, the *Inland Revenue (Amendment) (No. 3) Ordinance 2016* (“the Amendment Ordinance”) came into effect on 30 June 2016.

19. Under the Amendment Ordinance, a financial institution resident in Hong Kong is required to identify the financial accounts held by tax residents of reportable jurisdictions, i.e. tax residents who are liable to tax by reason of residence in the jurisdictions with which Hong Kong has entered into an AEOI agreement. The financial institution will collect information of the identified accounts holders (individual or legal entity) and the financial account information and furnish the information to the Inland Revenue Department (“IRD”) which will exchange the information with the tax administration of the relevant AEOI partner jurisdictions on an annual basis.

20. In order to collect and report the required information to IRD, financial institutions have to apply due diligence procedures to identify reportable accounts. The new standard on AEOI is to be implemented on a reciprocal basis with appropriate partners which have sufficient safeguards in

their domestic law for protecting the privacy and confidentiality of information exchanged and ensuring proper use of the data.

21. Currently, Japan and the U.K. are listed as reportable jurisdictions in Schedule 17E of the *Inland Revenue Ordinance* (Cap. 112). First information exchanges are expected to commence by the end of 2018. By putting in place the legal framework for effecting AEOI, Hong Kong can maintain its position and competitiveness as an international business and financial centre.

22. It is also expected that information exchanged by AEOI will enable the IRD to detect unreported taxable income of Hong Kong taxpayers sourced from Hong Kong and held in overseas accounts. Those who evade tax in Hong Kong may be charged with offences of making an incorrect return or statement or wilfully making a false statement in a return with intent to evade tax under section 80(2) and section 82 of the *Inland Revenue Ordinance*.

23. Hong Kong is also committed to another major OECD initiative – that of countering ***base erosion and profit shifting*** (“BEPS”). BEPS refers to tax avoidance strategies of multinational enterprises (“MNEs”) that exploit gaps and mismatches in tax rules to artificially shift (a) profits to low or no-tax locations where MNEs have little or no economic activity and (b) expenses to where they are relieved at higher rates.

24. Whilst BEPS might be technically legal, it is highly sophisticated and relies on carefully planned interactions of a variety of tax rules and principles. The overall effect of BEPS is to undermine the fairness and integrity of tax systems because businesses operating cross borders can use BEPS to gain a competitive advantage over domestic enterprises. It also undermines voluntary compliance by taxpayers when they see MNEs legally avoiding income tax.

25. A final package of 15 action plans meant to equip governments with the domestic and international instruments needed to tackle BEPS was released by the OECD in October 2015<sup>5</sup>.

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<sup>5</sup> The 15 action plans include (1) addressing the tax challenges of the digital economy, (2) neutralizing the effects of hybrid mismatch arrangements, (3) designing effective controlled foreign company rules, (4)

26. In order to properly and fully implement the BEPS package, all interested countries and jurisdictions (including those from the developing world) may join what is called an “Inclusive Framework”. All members joining this process commit themselves to implementing the minimum standards and participating in peer reviews. As of 6 July 2017, a total of 102 countries/jurisdictions, including Hong Kong, have joined.

27. Upon its indication of commitment to implementing the BEPS package in June 2016, the Hong Kong SAR Government has conducted a consultation exercise in the same year. A consultation report on implementation measures was released by the Financial Services and the Treasury Bureau and the IRD in July this year.

28. The Government’s proposed implementation strategy focuses on the four minimum standards set by the OECD, namely:

- (a) countering harmful tax practices more effectively and taking into account transparency and substance (Action 5),
- (b) preventing the granting of treaty benefits in inappropriate circumstances (Action 6);
- (c) giving guidance on transfer pricing documentation and country-by-country reporting (Action 13); and
- (d) improving dispute resolution mechanisms (Action 14).

29. The proposed strategy has received broad support as it allows Hong Kong to maintain its simple, territorial-based, predictable and low tax regime. A majority of the respondents of the consultation exercise have agreed that a pragmatic approach should be adopted so as to minimise the regulatory burden and compliance costs on the businesses, especially those small and medium enterprises as far as practicable whilst trying to make utmost efforts to meet the international tax standards.

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limiting base erosion involving interest deductions and other financial payments, (5) countering harmful tax practices more effectively and taking into account transparency and substance, (6) preventing the granting of treaty benefits in inappropriate circumstances, (7) preventing the artificial avoidance of permanent establishment status, (8 to 10) aligning transfer pricing outcomes with value creation, (11) measuring and monitoring BEPS, (12) implementing mandatory disclosure rules, (13) giving guidance on transfer pricing documentation and country-by-country reporting, (14) improving dispute resolution mechanisms; and (15) developing a multilateral instrument to modify bilateral tax treaties.

30. As I speak, the Government is trying to act swiftly in order to put in place the relevant legal framework. Preparatory work for the legislative exercise is underway with a view to introducing an amendment bill into the Legislative Council by the end of this year.

31. Economic crimes are about greed and self-aggrandisement. It invariably involves the making of illicit profit through criminal acts or enterprise. The object is not only to make such profit but to keep it. **Money laundering** is therefore understood by the courts to involve “*a scheme whereby the proceeds of crime are ‘laundered’ by transforming them into other types of property so that they are clothed with legitimacy and their origin is concealed.*”<sup>6</sup>

32. “*In its typical form, money laundering occurs when criminals who profit from their criminal enterprises seek to bring their profits within the legitimate financial sector with a view to disguising their true origin. Their aim is to avoid prosecution for the offences that they have committed and confiscation of the proceeds of their offences.*”<sup>7</sup> This is why money laundering often involves transnational transactions with intricate money trail transcending multiple jurisdictions.

33. As financial crime has become more sophisticated, diverse and global in operation, money laundering has also grown in nature and scope. In the year 2012, there were 23,282 suspicious transaction reports filed with the Joint Financial Intelligence Unit (“JFIU”) in Hong Kong. By 2016, there were 76,590 reports filed. As at 31 August 2017, the number has already reached 57,311. We can see a sharp increase over the years.

34. From 2012 up to the end of August 2017 (a period of five years or so), a total of over HK\$2 billion were restrained and approximately \$1 billion were ordered to be confiscated by the courts. By comparison, in the 2004, say, only HK\$4.5 million were confiscated. These figures serve to show how enormous the aggregate size of illicit funds has reached when it comes to money laundering. It is obvious why we must step up our efforts

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<sup>6</sup> *HKSAR v Yan Suiling* (2012) 15 HKCFAR 146 at [47].

<sup>7</sup> *R v Montila & Others* [2004] 1 WLR 3141 *per* Lord Hope of Craighead at [3].



in combating money laundering so as to maintain the integrity of Hong Kong's legal and financial systems.

35. The primary anti-money laundering regime in Hong Kong can be found in the *Organized and Serious Crimes Ordinance* (Cap. 455) ("OSCO") which was enacted in 1994. It effectively implements the provisions of the 1988 *Vienna Convention*<sup>8</sup> and the 2000 *Palermo Convention*<sup>9</sup>. Financial institutions in Hong Kong are well aware of their reporting duties under Section 25A of OSCO which creates an obligation to make disclosure of knowledge or suspicion that any property represents proceeds of an indictable offence. It at the same time stipulates, in one of the identified situations, that if proper disclosure has been made, dealing with the subject property with the consent of an authorized officer would not constitute the substantive offence of money laundering under Section 25<sup>10</sup>.

36. To keep pace with heightened expectations, the *Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance* (Cap. 615) ("AMLO") came into force on 1 April 2012. Offences are introduced to regulate failure to observe the customer due diligence provisions specified in Schedule 2 of AMLO. It broadens and strengthens anti-money laundering measures in relation to financial institutions. The legislation provides statutory underpinning for customer due diligence ("CDD") and record keeping requirements with appropriate sanctions. A range of supervisory and enforcement powers and a regulatory regime for money service operators (namely, remittance agents and money changers) are provided.

37. Regulatory bodies, including the Hong Kong Monetary Authority, the Office of the Commissioner for Insurance, the Securities and Futures Commission and professional bodies have issued guidelines on money laundering to those regulated. These guidelines stipulate standards

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<sup>8</sup> The context of the *Vienna Convention* was drug trafficking and this imposed on parties an obligation to establish as criminal offences the laundering of the proceeds of drug trafficking and to adopt measures to enable the confiscation of proceeds derived from drug trafficking offences.

<sup>9</sup> The *Palermo Convention* obliged state parties to extend the criminalization of money laundering to other serious offences. It criminalized money laundering in materially the same terms as the *Vienna Convention* but in respect of "serious crime" as defined and provided for the confiscation of the proceeds of such crime.

<sup>10</sup> Section 25(1) of OSCO (Cap. 455) provides, "*Subject to section 25A, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he deals with that property.*"

and procedures to be observed in record keeping, customer identification and reporting of suspicious transactions to JFIU. The guidelines are updated regularly to be in step with latest legislative changes.

38. A 2017 Amendment Bill has just been introduced to the Legislative Council in June. It seeks to extend the scope of CDD and record-keeping requirements to solicitors, accountants, real estate agents, and trust or company service providers (or designated non-financial businesses and professions) when they engage in specified transactions. A licensing regime will also be introduced for trust or company service providers which similarly require them to satisfy “fit-and-proper” test. The relevant Bills Committee formed will scrutinise the proposed amendments.

39. In the foreword to the 2003 *United Nations Convention Against Corruption*, the then U.N. Secretary General, Mr Kofi Annan, probably best summed up the destructive and deleterious effects of *corruption* on the individual and society by this description of it,

*“Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and it allows organized crime, terrorism and other threats to human security to flourish.”*

40. In Hong Kong, the *Prevention of Bribery Ordinance* (Cap. 201) creates distinct statutory offences which are clearly defined for public<sup>11</sup> as well as private<sup>12</sup> sectors corruption. Together with the *Independent Commission Against Corruption Ordinance* (Cap. 204), there is a comprehensive legal framework, with a range of effective investigatory powers, to combat corruption.

41. The Court of Final Appeal’s decision in *HKSAR v Rafael Hui Junior & Ors* (2017) 20 HKCFAR 264 more than amply demonstrates that no one, even those occupying high positions in the public and private sectors, is above the law. It is a case where the common law offence of misconduct in public office which, in essence, covers official misconduct when a public

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<sup>11</sup> Section 4 of the *Prevention of Bribery Ordinance* (Cap. 201).

<sup>12</sup> Section 9 of the *Prevention of Bribery Ordinance* (Cap. 201).

official commits serious abuse of any power, duty or responsibility exercisable for the public good has, again, been closely examined.

42. Once considered rusty, it is now well recognised as a trusty tool to complement (or, supplement, if you wish) graft-busters' tool kit to deal with misfeasance, which may not be bribery related, by a holder of public office. Although the Law Commission of England and Wales, having conducted two rounds of public consultations, is still analysing the responses with a view to making final recommendations as to how the law in this area may be reformed by replacing this common law offence with codified statutory offences, it recognises that an outright abolition would likely leave unacceptable gaps in the law.

## **Conclusion**

43. Whether you are an investigator, regulator or a compliance officer (or somebody advising or representing them), if you find the substantive and procedural law to be applied in combating economic crime complicated, you probably would not envy the position of those scrutinising the legality of proposed changes to the laws in Hong Kong from the constitutional and human rights perspectives.

44. In a quest for enhanced international cooperation, the Hong Kong story is, I hope you will agree, a story of respect for the rule of law.

45. Thank you once again for giving me this opportunity to share with you some thoughts over what we do for the common good and how we do it. It only remains for me to wish you a day of very fruitful exchanges.