

Building Confidence and Trust - The Role of IPCC in the Evolving Future

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Police Powers and Civil Rights

The legal framework for building confidence and trust

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Building trust and confidence

- Perhaps as important as my academic credentials is the fact that I was for many years an independent member of the Cambridgeshire Police Authority (now abolished).
- As such I ran:-
 - (i) the lay visitors scheme (whereby members of the public would have the right to inspect police cells at any time without notice)
 - (ii) chaired appointment committees to appoint CCs and ACCs
 - (iii) chaired disciplinary committees to discipline CCs and ACCs
 - (iv) monitored the investigation and treatment of complaints

Building trust and confidence

- All this has led me to the firm belief that systems of police accountability that incorporate substantial independent (non-political; non partisan) elements are best placed to build the public's trust and confidence.
- If people whom the public already trust confirm that particular police behaviour was not untoward then that will be accepted by the public in general.
- And If people whom the public already trust confirm that particular police behaviour fell below the standard required then that will be accepted by the police.

The rule of law

- The position of the police in Hong Kong is unenviable.
- They are caught up in the growing public frustration over the stalemate in the constitutional developments promised in the Basic Law and the Joint Declaration
- Where there are real threats to order some force has to be used by the police.
- And (as a general rule) the use of force is corrosive of public trust in the police.

The rule of law

- But one point is clear: public trust will be destroyed if the police act in an arbitrary or abusive manner.
- What this means, in the first instance, is that the exercise of police powers must be subject to the rule of law.
- But what is meant by that?

The rule of law

- Here is Chief Justice Ma speaking at a conference in Singapore:
- “My own working definition of the rule of law encompasses two connected facets: for me, the rule of law presupposes first, the existence of laws that respect the dignity, rights (including economic rights) and liberties of the individual and secondly, the existence of an institution (we of course mean here an independent judiciary) to enforce these rights and liberties. The references to dignity and liberties in the context of rights are important; they underline the point that laws must themselves be just and respect what we term “human rights”.” (The importance of the rule of law in promoting development, p 159)

The rule of law

- As Ma CJ's dictum shows the concept of the rule of law forms a valuable part of Hong Kong's legal heritage...Significantly he sees the principle of the rule of law as being relatively substantive...this more substantive view of the rule of law is sometimes called the principle of legality.

- More traditional of formal views of the rule of law are said to be “thin” rather than “fat”.
- And theories of the rule of law may be ranked from thin to fat depending upon how substantive rather than formal they are.
- Here is the statement of the very influential thin theory of AV Dicey in the *Law of the Constitution*

The rule of law

- [The rule of law] means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts ...
- AV Dicey *Law of the Constitution* summed up in three propositions

The rule of law

- [and], lastly,.. . that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land...

The Rule of Law

- The fact that there are these contrasting concepts of the rule of law is irksome.
- But it is a reflection of the fact that the rule of law is not a law but is a cultural phenomenon.
- The rule of law is not to be secured by passing a law or enacting a constitution (like the Basic law)

A practical example

- Let us turn to the most fundamental police power of all: the power to arrest.
- The general power to arrest is to be found in section 50 in Section 50 of the Police Force Ordinance (Cap 232)
- Which is as follows:

Section 50 of the Police Force Ordinance (Cap 232)

- (1) It shall be lawful for any police officer to apprehend any person who he reasonably believes will be charged with or whom he reasonably suspects of being guilty of—
 - (a) any offence for which the sentence is fixed by law or for which a person may (on a first conviction for that offence) be sentenced to imprisonment; or
 - (b) any offence, if it appears to the police officer that service of a summons is impracticable because—
 - (i) the name of the person is unknown to, and cannot readily be ascertained by, the police officer;
 - (ii) the police officer has reasonable grounds for doubting whether a name given by the person as his name is his real name;
 - (iii) the person has failed to give a satisfactory address for service;
 - or (iv) the police officer has reasonable grounds for doubting whether an address given by the person is a satisfactory address for service.

The Rule of Law

- This clearly envisages a bounded discretion as to whether to arrest.
- But it must be stressed the police officer is not free to arrest any one within those boundaries.
- The essence of the Rule of Law is that a police officer does not have any unfettered discretion to arrest anyone “within the statute”.
- The officer has a choice and the question is how that choice is made.
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Lord Diplock in GCHQ case

[1984] UKHL 9

- Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds.

Rule of Law

- These words have become canonical to sum up the principles of judicial review.
- These then are the principles that will determine how police powers may be lawfully exercised.
- “Illegality” concerns simply determining whether the arrest is “within the statute”
- But in addition the discretion must also be rational and procedurally fair.....
- These are the principles of judicial review that form the basis on which the actions of police officers may be assessed.

The Rule of Law

- But there is something else...the legal status of a constable or police officer...conceived of in the golden age of political liberty early nineteenth century a police officer – or constable - holds a public position, that of peace officer, in which he or she owes obedience to no executive power outside the police force.

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- The responsibility for deciding whether, for example, the police shall arrest some particular person or investigate a particular offence rests upon the police and no one else. This is a prime safeguard against the evils of a police state.
- Wade and Forsyth, *Administrative Law*, 11th ed 101-104

Fisher v Oldham Corporation 1930 2 KB 364

- Thus, for example, in the leading English case, where the police had by mistake arrested the wrong man on a criminal charge, an action for damages against the local police authority met with no success because the police, in making the arrest, were acting on their own authority not that of the police authority.
- Confirmed in *Mousa v MOD* 2013 EWHC 1412

- That then is a sketch of the police's accountability to the law.
- If the police exceed or abuse their powers they can be called to account by the courts....
- But there is not only accountability to the court

Accountability to the public....

- Many devices to establish accountability to the public:
- Lay visitors schemes
- Investigation of complaints
- Independent investigation of complaints
- Systems of independent observers

- All Building Confidence and Trust

- The End

Strategic objectives

- **Public Events**
- Enhance public understanding of, and support for, the roles and responsibilities of the Police in maintaining public order and safety for the community.
- Engage organisers, media and other stakeholders of public events to enhance mutual understanding and enlist their support.
- Ensure public order and safety of public events through effective planning, communication and execution.