Chief Justice's Address at the 8th ICAC Symposium –
'Charting a New Path to Combat Corruption'
(22 May 2024)

Keynote Speech: Combating Corruption and the Rule of Law

Commissioner WOO, Deputy Director FU, Director-General WALY, Acting Secretary for Justice CHEUNG, Deputy Chief Prosecutor KLEMENT, honoured guests, ladies and gentlemen,

1. It is a great pleasure for me to address you all today.

Introduction

2. I would like to start by congratulating the Independent Commission Against Corruption on their Golden Anniversary. Founded in 1974, the ICAC investigates complaints of corruption offences and, beyond conducting anti-corruption operations, works on the prevention of corruption and raising public education and awareness about corruption.

3. In these 50 years, it can truly be said that the ICAC has been the difference for Hong Kong, bringing an end to the systemic corruption that plagued Hong Kong's development in the 1960s and early 70s. Equally, if not more important than tackling such cases of blatant corruption, the ICAC also brought about a sea change in public attitudes in Hong Kong to corruption. Whilst it was important for the ICAC to diligently weed out corruption case-by-case, for the long term benefit of Hong Kong, the ICAC has played a significant

role in tackling corruption at its very roots. In particular, the ICAC has played a central role in public education to bring about a fundamental change in the values of society against corruption. Such is the success of this public education effort over the past decades that one can quite confidently say the type of systemic corruption in the pre-ICAC days I just mentioned is frankly unthinkable in Hong Kong in this day and age.

4. In addition to the establishment of the ICAC, another significant component of Hong Kong's anti-corruption culture is the Prevention of Bribery Ordinance, which was first enacted in 1971 'To make further and better provision for the prevention of bribery'. That the Long Title of the Ordinance, that is, its stated purpose, refers not merely to the prevention of bribery, but also to further and better provision for its prevention speaks to the depth of determination at the time to weed out corruption from our society.

Corruption and the rule of law

5. Hong Kong's continued economic success is usually tied to the strength of its rule of law, with the rule of law serving as the cornerstone on which commerce and now financial services and the continued development of Hong Kong as a hub for dispute resolution and intellectual property, amongst others, are based. Without a culture of anti-corruption and values against accepting advantages, it

is quite certain that there can be no rule of law. Combating corruption thus goes to the very core of what Hong Kong is, and stands for.

6. Corruption is insidious as it takes many forms. The more obvious forms one might think of include bribery, the use of improper gifts or favours for personal gain; embezzlement, by which someone with access to funds or assets illegally takes control of them; graft, by which public funds are misdirected for private gain; and blackmail, the use of threats and abuse of secrets to obtain personal gain. Corruption can occur on many different scales, from petty levels that may not even seem worth pursuing, all the way up to systemic. Corruption can affect all areas of society, in both the private sector and the public sector.

7. In order to address all these different forms of bribery, the Prevention of Bribery Ordinance is not limited in scope to bribes in monetary form only, but is extended to ‘advantages’, which include money, gifts, loans, contracts, services, and so on. The definition of ‘advantage’ does not include ‘entertainment’, which is defined under the Ordinance to mean the provision of food or drink for consumption on the occasion it is provided, and of any other entertainment connected with or provided at the same time as such provisions. For these purposes, it is worth noting that ‘hospitality’, such as tickets to performances or sporting events or hotel accommodations, are covered under advantages, and not entertainment under the Ordinance.

Further, there is no minimum value or threshold for an advantage to qualify as a bribe.

8. Here, it would be appropriate for me to mention some recent examples of how the anti-corruption and related laws in Hong Kong work in practice before the courts. The first I would like to mention arises out of the Court of Final Appeal case in *HKSAR v Chu Ang* (2020) 23 HKCFAR 194, where the defendant gave private violin lessons, and was asked by the parent of a student to help purchase a new violin. The defendant took the parent and student to an instrument shop, and on the recommendation of the defendant, they purchased a violin. Subsequently, the shop paid the defendant a commission, which the defendant did not disclose to the parent or student. The defendant was therefore charged with accepting an advantage as an agent under section 9 of the Prevention of Bribery Ordinance. The issue the Court had to deal with was what is the proper approach to who is an 'agent' for the purposes of the corruption offence.

9. The Court found that an agent is a person 'acting for another', having agreed to act in circumstances giving rise to a reasonable expectation, and thus a duty, to act honestly and in the interests of that other person to the exclusion of the agent's interests. There is no need to prove any pre-existing legal relationship between the two sides, or even necessarily proving a request by the other

person for the agent to act. The Court decided that whilst a fiduciary duty often arises in similar circumstances, it is unnecessary to burden the Prevention of Bribery Ordinance with discussion of the law of fiduciaries or other areas of law – it is clear that the Ordinance goes beyond ordinary principles of agency law.

10. On the facts of the case, the Court found that the conflict of interest was clear, as the evidence was that the lower the price of the violin sold, the smaller the commission was. Thus, the integrity of the relationship between the defendant, the violin teacher and the parent of the student would be subverted. It was therefore unnecessary to prove a pre-existing legal relationship for the defendant to be treated as an 'agent', nor was it correct to focus on the fact that the purchase of the violin fell outside the scope of the contract for violin lessons. In addition to the broad approach to deciding who is an agent for the purposes of corruption, the Court also found there is no requirement that someone such as the parent in this case suffered any economic loss. More importantly, the suggestion that the acceptance of an advantage in situations where commissions may be considered 'normal practice' overlooks section 19 of the Prevention of Bribery Ordinance, which states that 'it shall not be a defence to show that any such advantage as is mentioned in this Ordinance is customary…'.

11. In *HKSAR v Cheng Wing Kin* (2020) 23 HKCFAR 83, the Court of Final Appeal had the opportunity to consider the meaning of the word 'corruptly' under the Elections (Corrupt and Illegal Conduct) Ordinance. Here, the defendant had offered money to persons associated with certain political agendas to stand as candidates in District Council Elections.

12. The Court found that the positive objective of the Ordinance is to ensure elections are conducted 'fairly, openly and honestly', and the negative objective is to keep elections 'free from corrupt conduct and illegal conduct'. Plainly, 'corrupt and illegal' conduct is antithetical to 'fair, open and honest' elections. The Ordinance therefore prohibits, amongst other things, corrupt conduct to bribe candidates or prospective candidates. The Court held that the use of the word 'corruptly' in regard to the offering of an advantage to a prospective candidate makes it clear that the offence is confined to conduct which has the tendency to undermine fair, open and honest elections.

13. In this case, it was clear the defendant's offer of money was done 'corruptly', as his objective was to divert votes from other candidates and manipulate the outcome of the election against them. Such conduct plainly tended to undermine a 'fair, open and honest' election.

14. A third example relates not so much to a substantive corruption offence, as to the protection of the integrity of the criminal investigation process. In *HKSAR v Lew Mon Hung* (2019) 22 HKCFAR 159, the defendant was arrested and investigated by the ICAC for a corruption offence. The defendant, who was active in the political circle, wrote to both the Commissioner of the ICAC and the then Chief Executive of the Hong Kong Special Administrative Region protesting his innocence and asking them to stop the investigation; otherwise, so he intimidated, unpleasant political consequences would follow. He was convicted of attempting to pervert the course of justice. On appeal to the Court of Final Appeal, the defendant argued that his conduct had not been shown to have a tendency to pervert the course of justice. This was because the prosecution had not established that the Chief Executive and the Commissioner could, by the lawful exercise of their legal powers, stop or interfere with the ICAC investigation.

15. The Court unanimously rejected the argument. In his position, the Commissioner could, if he wanted to, directly or indirectly interfere with the investigation, if not terminate it prematurely. As for the Chief Executive, as the head of the Hong Kong Special Administrative Region and the person to whom the Commissioner was accountable, he was in a position to influence the Commissioner's and, through the Commissioner, his officers' handling of the investigation, if not stop it altogether. Whether they

had the legal powers to do so was beside the point. In the circumstances, the Court held that the defendant was rightly convicted and dismissed his appeal accordingly.

16. These examples illustrate that the courts in Hong Kong take corruption offences as well as the investigation and prosecution of these offences both seriously, and with a broad view. Corruption in all its forms should be combatted. Nonetheless, it is not possible to write all permutations of corruption into the law. Moreover, what makes corruption particularly insidious is that it may not always be a criminal offence. There may be more subtle and dangerous forms of corruption, such as influence peddling, by which one uses one's influence to obtain preferential treatment or favours in exchange for personal gain; abuses of discretion, which involve the misuse of one's authority in exchange for personal gain; and favouritism or nepotism, the favouring of someone connected to the person in a position of authority regardless of merit. Depending on the method, these forms of corruption may not always be caught by the scope of the Prevention of Bribery Ordinance, or indeed the scope of any offence.

17. This brings me to the point that corruption is not a phenomenon that is easily measured and thus not easily detected or studied. As was noted by my predecessor at the last ICAC Symposium, 'the insidious and secretive nature of corruption makes it extremely hard to investigate'. For example, the Corruption

Perceptions Index, which ranks countries on corruption, does so on the basis of perceived levels of public sector corruption. Corruption may be measured by counting criminal cases for corruption, but this measure assumes that all forms of corruption have been criminalised and are being caught. Information on corruption is thus derived from more subjective methods, such as survey studies like the Corruption Perceptions Index.

18. The academic study of the economics of corruption can be traced back to the 1970s, and some economists have even argued that corruption may not be entirely bad, and there are potentially economic benefits to corruption. For example, so it is suggested, bribery may be used to make an overly bureaucratic system more efficient, motivating the bureaucrats to take action and essentially functioning as an unofficial tax. There are economies, so the argument goes, where cronyism and graft were taking place that nonetheless experienced economic booms, including Hong Kong in the 1960s and early 70s.

19. This view of the so-called benefits of corruption is unfortunately an exceedingly short-term and narrow one. Whilst, for example, a bribe may perhaps clear some bureaucracy immediately, the practice of taking bribes to overcome bureaucracy certainly serves as a disincentive to make things more efficient – in fact, it will most probably create an incentive to make processes less efficient to create

more bribe-taking opportunities. In this way, corruption is not merely the product of a bad institution; it actually helps create bad institutions.

20. Moreover, whilst corruption is perhaps most keenly felt in economic terms by the inefficiencies that it breeds, it may also lead to the distortion of markets through the manipulation of market mechanisms to establish unfair monopolies, allowing prices to be set high and offering no incentive to improve the quality of goods and services. Connected to the creation of inefficiency is the drag effect corruption has on the growth of economies. One particular aspect which is worth highlighting is the need for investment, both domestic and foreign, to drive economic growth. However, investors are likely to be discouraged by corruption from making investments, as they would prefer fair, transparent and competitive markets in order to protect their capital. The prevention, detection and prosecution of corruption is thus as much an economic issue as it is an ethical or legal issue.

21. But perhaps much more fundamentally, regardless of what short-term economic benefits, if any, corruption might bring, the harm it does to the rule of law is beyond measure. For corruption is diametrically opposed to the rule of law in a society. Whereas the rule of law requires that all persons and institutions are governed by and accountable to the same rules and standards, and that nobody is above the law, corruption is the misuse of power that leads to some

not being subject to or held accountable under the same rules, thereby placing them above the law. Where corruption is allowed to flourish, the rule of law is necessarily compromised and fundamental rights such as the right of equality before the law are not protected. Instead, power is misused, unfair monopolies are allowed to arise, bureaucracy intensifies whilst transparency, accountability and access to justice fail. Most critically, corruption erodes public faith in governments and institutions where the rule of law is built on public trust. Just as corruption may be hard to measure, the rule of law is intangible, largely built on the public belief in institutions such as the courts and government. Thus, even the appearance of corruption, never mind corruption on a micro scale, will lead to the erosion of the public's belief in the rule of law.

22. Therefore, if for no other reasons than the upholding of the rule of law in a society, it is vital that corruption be subject to continuing vigilance and efforts to combat it at all levels and in all forms. In this context, perception is reality: corruption is difficult to detect or measure, and the rule of law is an intangible substantially based on belief, and most importantly, the perception of one precludes the perception of the other.

23. Therefore, even if it may not be possible to write all permutations of corruption into the law, and even if not all forms of corruption may be criminal offences, corruption should still be

opposed, as its prevention inspires faith in the rule of law, and *vice versa*.

Combatting corruption

24. Given the different forms of corruption, different scales of corruption, and the fact that corruption may occur in all sectors of society, it is critical for anti-corruption authorities such as the ICAC and other institutions represented by many of you who attend today's Symposium to continue to expand their knowledge and expertise in order to effectively enforce the laws against corruption. This may be referred to as a compliance-based approach, which essentially involves making the cost of engaging in corruption so high that it simply is not worth risking. This is in line with most other forms of crime control, through the use of penalties and punishments to prevent the criminal conduct by deterrence. Studies have shown that this approach of controlling corruption is dependent on the likelihood of detection. Sessions such as the one on law enforcement at this Symposium are thus invaluable for the exchange of knowledge and experiences between different jurisdictions, particularly as we live in an age where money is easily moved electronically across borders and digital assets are accessible from different geographical locations across the world. By increasing expertise in corruption, anti-corruption authorities are better able to detect corruption and bring the full force of deterrence against it.

25. In addition to criminal sanction, however, increasing public awareness and promoting participation in corruption prevention are also key to combatting corruption. In this regard, the ICAC has been no less active than in any other aspect of their work, including their television drama series, TV commercials, public posters, and anti-corruption material for youths and minorities to ensure that the most vulnerable sectors of the community are included and informed about combatting corruption.

26. In order to ensure that anti-corruption values are embedded in society, public awareness about corruption must continue to be raised, and in turn, supported by public education about all the negatives that corruption brings. A society that is intolerant of corruption is one in which not only is the rule of law strong, but is also highly valued.

27. Thus, a significant component of this Symposium are the sessions on community engagement and youth perspective. These are also perhaps the most difficult levels at which to engage the battle against corruption, but are also arguably the most important in order to ensure that anti-corruption values are embedded in society itself.

Conclusion

28. Combatting corruption is not easy, as it must be tackled and weeded out at its very roots, which are the personal values and

honesty of the people who may be tempted to engage in corrupt behaviours. However, to ensure that society continues to enjoy the benefits of the rule of law, it is a battle that is most certainly worth taking on. This battle has now become multi-faceted – where traditionally one might focus on law and enforcement, with new developments in the law continuing to take place, the importance of public awareness and education cannot be overstated. The theme to this Symposium is 'charting a new path to combat corruption', which I believe encapsulates different approaches to combatting corruption, and thus in all the different sessions that will make up this Symposium. The emergence of different approaches reflects that cures are important, but prevention is always better than cure.

29. I am sure that you are all looking forward to the contributions of the speakers on all of these topics over the course of this Symposium, which given its richness promises to be very useful and successful. I take this opportunity to thank the ICAC for their tireless efforts against corruption, and in organising this Symposium along with the International Association of Anti-Corruption Authorities, and to all the speakers for their forthcoming input. Thank you all for your time and attention to this most important topic, and I wish you all the best!