FIRST REGIONAL SEMINAR ON GOOD GOVERNANCE FOR SOUTHEAST ASIAN COUNTRIES

CORRUPTION CONTROL IN THE JUDICIARY AND PROSECUTORIAL AUTHORITIES

Co-hosted by UNAFEI, the Office of the Attorney General of Thailand, and the UNODC Regional Centre for East Asia and the Pacific under the auspices of the Japan International Cooperation Agency (JICA)

17-21 December 2007, Bangkok, Thailand

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CORRUPTION CONTROL IN THE JUDICIARY AND PROSECUTORIAL AUTHORITIES

FOREWORD

It is my great pleasure and privilege to present this publication of the report of the First Regional Seminar on Good Governance for Southeast Asian Countries which was held in Bangkok from 17 to 21 December 2007. It was fortunate that we had the opportunity to hold the Seminar in Bangkok, a city which combines Thailand's gentle culture with the liveliness of a great and dynamic metropolis.

The main theme of the Seminar was "Corruption Control in the Judiciary and Prosecutorial Authorities" and it was attended by criminal justice practitioners from Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Thailand and Vietnam. UNAFEI, the Office of the Attorney General of Thailand, and the UNODC Regional Centre for East Asia and the Pacific, under the auspices of the Japan International Cooperation Agency (JICA), held this Seminar to deepen mutual understanding of the situations facing the respective countries in regard to corruption in the judiciary and prosecutorial authorities and to assist them in strengthening their rule of law, judicial systems and legal infrastructure.

It is one of the most important duties of a criminal justice system to detect corruption and impose appropriate punishment on corrupt politicians and/or public officials through the criminal justice procedure. However, if the criminal justice system itself is corrupt, there are grave consequences for society. In particular, corruption in the judiciary and prosecutorial authorities, which have the important role of maintaining the rule of law, not only decreases the capacity to curb corruption, but leads to the deterioration of trust in justice and ethical standards in general.

The United Nations endeavours to promote the eradication of corruption and one of its most significant achievements in this regard is the United Nations Convention against Corruption (UNCAC). Other essential agreements include the Bangalore Principles of Judicial Conduct"[1] and the "Guidelines on the Role of Prosecutors".[2] UNAFEI, as a UN Crime Prevention Programme Network Institute, reflects the concern of the United Nations that the UNCAC and other guidelines be used as effective frameworks for controlling corruption, including that of the judiciary and prosecutorial authorities. UNAFEI regularly focuses its training courses and seminars on the issue of corruption and the benefits of implementing the UNCAC and other international standards and norms.

In addition to the United Nations' efforts, the countries of Southeast Asia themselves, at the Tenth Summit of ASEAN in 2005, adopted the Vientiane Action Programme, declaring that Member States should "Establish programmes for mutual support and assistance among ASEAN member countries in the development of a strategy for strengthening the rule of law, judiciary systems and legal infrastructure, effective and efficient civil services, and good governance in the public and private sector". The respective countries are making efforts to follow the Action Programme and this Seminar was a precious opportunity for them to further their work on this vital issue by exchanging information and experiences on the efforts of their respective governments to combat judicial and prosecutorial corruption.

The five-day Seminar concluded with the adoption of the final recommendations, the quality of which reflect the hard work, dedication and enthusiasm of the participants. It is my sincere wish that the work of this Seminar will not only contribute to the development of human resources who will promote the advancement of sound criminal justice administration in Southeast Asian countries but will also contribute to their mutual understanding and friendship.

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1 ECOSOC Resolution 2006/23 of 27 July 2006, annex.

2 Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. C. 26, annex. General Assembly resolution 217 A (III).

Finally, on behalf of UNAFEI, I would like to express my sincere gratitude to the Office of the Attorney General of Thailand, especially the International Affairs Department, and the UNODC Regional Centre for East Asia and the Pacific for their unwavering support and commitment to the realization of this Seminar.

Keiichi Aizawa
Director, UNAFEI

19 September 2008

SCHEDULE

FIRST REGIONAL SEMINAR ON GOOD GOVERNANCE FOR SOUTHEAST ASIAN COUNTRIES

17-21 DECEMBER 2007

CORRUPTION CONTROL IN THE JUDICIARY AND PROSECUTORIAL AUTHORITIES

17 December	**Opening Ceremony** Introductory Remarks by Mr. Keiichi Aizawa, Director, UNAFEI Opening Address by Mr. Chulasingh Vasantasingh, Deputy Attorney General of Thailand Address by Mr. Akira Fujino, Representative, UNODC RC for East Asia and the Pacific Special Address by His Excellency Mr. Hideaki Kobayashi, Ambassador of Japan - Election of the Chairperson - Information from the General Editor of the Seminar - Photo Session
	Presentation Session I **Presentation** by Mr. Michel Bonnieu, Senior Legal Adviser, UNODC RC for East Asia and the Pacific **Individual Presentation** by Ms. Piyaphant Udomsilpa, Deputy Director General, Legal Counsel Department, Office of the Attorney General, Thailand **Individual Presentation** by Ms. Sar Chanrath, Deputy Director, Legal Education and Dissemination Department, Ministry of Justice, Cambodia **Individual Presentation** by Mr. Ferdinand Tandi Andi-Lolo, Investigator and Prosecutor, Office of the Deputy Attorney General for Special Crimes, Attorney General's Office, Indonesia **Individual Presentation** by Ms. Ifa Sudewi, Judge, National Court of Central Jakarta, Indonesia Supplementary Commentary by Mr. Mangasi Situmeang, Public Prosecutor, Head of Genocide Section Attorney General's Office, Indonesia **Individual Presentation** by Mr. Anthony Kevin Morais, Deputy Public Prosecutor, Law and Prosecution Department, Anti-Corruption Agency, Malaysia

18 December	**Presentation Session II** **Individual Presentation** by Ms. Lwin Lwin Aye Kyaw, Judge, Director, Supreme Court, Myanmar **Individual Presentation** by Ms. Deana Perez, Senior State Prosecutor, National Prosecution Service, Department of Justice, the Philippines **Individual Presentation** by Mr. Nguyen Dang Thang, Legal Expert and Prosecutor's Assistant, International Co-operation Department, Supreme People's Prosecution Office, Vietnam **Individual Presentation** by Mr. Nitithorn Wongyuen, Judge, Office of the President of the Supreme Court, Office of the Judiciary, Thailand **Joint Presentation** by Ms. Sirirat Vasuwat, Senior Investigator, Level 9, Bureau of Corruption Suppression I, Office of the National Counter Corruption Commission (NCCC), Thailand and Ms. Supinya Berkfah, Senior Officer, Bureau of Inspection of Assets 1, NCCC, Thailand
	Discussion Session I Current situation and issues concerning corruption in the judiciary and prosecutorial authorities. **Discussion Session II** Causes of corruption in the judiciary and prosecutorial authorities.
19 December	**Presentation Session III** **Presentation** by Mr. Takeshi Seto, Deputy Director, UNAFEI **Presentation** by Mr. Jun Oshino, Professor, UNAFEI **Presentation** by Visiting Expert, Mr. Oliver Stolpe, Drug Control and Crime Prevention Officer, Anti-Corruption Unit, Rule of Law Section, UNODC Headquarters
	Discussion Session III Anti-corruption measures affecting judges. **Discussion Session IV** Anti-corruption measures affecting prosecutors and their equivalent.
20 December	**Presentation Session IV** **Presentation** by Visiting Expert, Mr. Patrice Davost, Prosecutor General, Court of Appeal, Toulouse, France **Presentation** by Visiting Expert, Mr. Peter J. Ainsworth, Senior Deputy Chief for Litigation, Public Integrity Section, Criminal Division, Department of Justice, United States of America
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	Closing Ceremony Address by Mr. Keiichi Aizawa, Director, UNAFEI Address by Mr. Keisuke Senta, Senior Legal Expert, UNODC RC for East Asia and the Pacific Closing Remarks by The Honourable Mr. Chaikasem Nitisiri, Attorney General of Thailand

LIST OF PARTICIPANTS, VISITING EXPERTS & ORGANIZERS

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Mr. Mangasi Situmeang	Head of Genocide Section Attorney General’s Office Indonesia
Ms. Ifa Sudewi	Judge National Court of Central Jakarta Indonesia
Mr. Samarajoo Manikam	Director Malaysia Anti-Corruption Academy Malaysia
Mr. Anthony Kevin Morais	Deputy Public Prosecutor Law and Prosecution Department Anti-Corruption Agency Malaysia
Mr. Arichindarem Sinappayen	Assistant Superintendent Malaysia Anti-Corruption Academy Malaysia
Ms. Lwin Lwin Aye Kyaw	Director Supreme Court (Yangon) Myanmar
Mr. Rommel Heredia	Police Senior Superintendent, Executive Officer Directorate for Human Resources and Doctrine Development Philippine National Police Philippines
Ms. Deana Penaflorida Perez	Senior State Prosecutor Department of Justice Philippines

Mr. Prasartchai Tontapanish	Director General Department of Administrative Litigation Office of the Attorney General Thailand
Ms. Piyaphant Udomsilpa	Deputy Director General Department of Legal Counsel Office of the Attorney General Thailand
Mr. Nattachak Pattamasingh	Deputy Director General Department of Legal Advisory Office of the Attorney General Thailand
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Mr. Karn Kanungsukkasem	Legal Officer 4 Anti-Money Laundering Office Thailand
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Pol. Maj. Khemmachat Hiruntoe	Inspector Foreign Affairs Division Royal Thai Police Thailand
Mr. Nitithorn Wongyuen	Judge Office of the President of Supreme Court Office of the Judiciary Thailand
Mr. Krerkrit Ittarat	Judge Office of the President of Supreme Court Office of the Judiciary Thailand

Mr. Chalermchai Khunha	Court Officer Office of the Judiciary Thailand
Mr. Dheerasittha Nopmongkol	Legal Officer Office of the Judiciary Thailand
Mr. Thammanoon Sanguankhiew	Legal Officer Office of the Judiciary Thailand
Ms. Sirirat Vasuwat	Senior Investigation Level 9 Bureau of Corruption Suppression 1 Office of the National Counter Corruption Commission Thailand
Ms. Supinya Berkfah	Senior Officer Bureau of Inspection of Assets 1 Office of the National Counter Corruption Commission Thailand
Ms. Sathima Chintanaseri	Officer Office of the National Counter Corruption Commission Thailand
Mr. Ruthai Hongsiri	President Central Administrative Court Thailand
Mr. Prapot Klaisuban	Judge Central Administrative Court Thailand
Mr. Nguyen Dang Thang	Legal Expert and Prosecutor's Assistant International Co-operation Department Supreme People's Prosecution Office Vietnam

B. Visiting Experts

Mr. Oliver Stolpe	Drug Control and Crime Prevention Officer Anti-Corruption Unit, Rule of Law Section Human Security Branch Division for Operations UNODC
Mr. Patrice Davost	Prosecutor General Court of Appeal, Toulouse France

Mr. Peter Ainsworth	Senior Deputy Chief for Litigation Public Integrity Section, Criminal Division US Department of Justice USA

C. Organizers

UNAFEI

Mr. Keiichi Aizawa	Director
Mr. Takeshi Seto	Deputy Director
Mr. Shintaro Naito	Professor
Mr. Jun Oshino	Professor
Mr. Etsuya Iwakami	Senior Officer
Ms.Yoko Hosoe	Officer
Ms. Grace Lord	Linguistic Adviser

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Mr. Chaikasem Nitisiri	Attorney General
Mr. Chulasingh Vasantasingh	Deputy Attorney General
Mr. Anuchart Kongmalai	Deputy Attorney General
Mr. Thaworn Phanichaphan	Deputy Attorney General
Mr. Trakul Winitnaiyapak	Inspector General
Mr. Vudhibhongse Vibulyawongse	Inspector General

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Mr. Akira Fujino	Representative UNODC Regional Centre for East Asia and the Pacific
Mr. Burkhard Dammann	Senior Programme Management Officer UNODC Regional Centre for East Asia and the Pacific

Mr. Michel Bonnieu	Senior Legal Expert, Corruption Control UNODC Regional Centre for East Asia and the Pacific
Mr. Keisuke Senta	Senior Legal Expert in Terrorism Prevention UNODC, Terrorism Prevention Branch UNODC Regional Centre for East Asia and the Pacific
Ms. Laura Perrier	Intern, Legal Advisory Programme UNODC Regional Centre for East Asia and the Pacific
Ms. Haruka Ezaki	Intern, Legal Advisory Programme UNODC Regional Centre for East Asia and the Pacific
Mr. Alexandre Baillon	Intern, Law Enforcement Programme UNODC Regional Centre for East Asia and the Pacific

RAPPORTEUR'S REPORT

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FINAL RECOMMENDATIONS

December 17: **A. Opening Ceremony**
B. Presentation Session I

December 18: **C. Presentation Session II**
D. Discussion Session I
Current situation and issues concerning corruption in the judiciary and prosecutorial authorities.
E. Discussion Session II
Causes of corruption in the judiciary and prosecutorial authorities.

December 19: **F. Presentation Session III**
G. Discussion Session III
Anti-corruption measures affecting judges.
H. Discussion Session IV
Anti-corruption measures affecting prosecutors and their equivalent.

December 20: **I. Presentation Session IV**
J. Discussion Session V
Practical issues in the investigation, prosecution and trial of corruption cases in the judiciary and prosecutorial authorities.
K. Discussion Session VI
Best practices for controlling corruption in the judiciary and prosecutorial authorities in the respective countries.

December 21: **L. Discussion and Adoption of the Recommendations**
M. Closing Ceremony

Final Recommendations

OPENING CEREMONY AND PRESENTATION SESSION I OF 17 DECEMBER

A. Opening Ceremony

1. Opening Addresses

The First Regional Seminar on Good Governance for Southeast Asian Countries, focusing on "Corruption Control in the Judiciary and Prosecutorial Authorities", commenced on 17 December 2007 in Bangkok, Thailand. After the arrival of the distinguished guests and participants, the Seminar began with introductory remarks by Mr. Keiichi Aizawa, Director of UNAFEI, who expressed his deepest appreciation to the Office of the Attorney General of Thailand and the UNODC Regional Centre for East Asia and the Pacific for their enormous contribution and support in organizing the Seminar.

Next, the Seminar was privileged to hear an opening address by Mr. Chulasingh Vasantasingh, Deputy Attorney General of Thailand, who extended, on behalf of Mr. Chaikasem Nitisiri, the Attorney General of Thailand, a warm welcome to all of the overseas participants and his best wishes for the success of the Seminar.

The following address was by Mr. Akira Fujino of the UNODC Regional Centre for East Asia and the Pacific, who noted the timeliness of the Seminar, coming just a few days after International Anti-Corruption Day on 9 December, which commemorates the signing of the United Nations Convention against Corruption.

In addition to these distinguished speakers, the Seminar was addressed by His Excellency Mr. Hideaki Kobayashi, Ambassador of Japan to Thailand. His Excellency Mr. Kobayashi noted that the new Constitution of Thailand, promulgated in August of 2007, demonstrates the commitment of the Kingdom of Thailand to fighting corruption, and expressed his hope that the Seminar would facilitate co-operation on the issue in transnational cases.

2. Election of Chairperson of the Seminar

Mr. Takeshi Seto, Deputy Director of UNAFEI and General Editor of the Seminar, proposed that Mr. Samphan Sarathana, Director General of the International Affairs Department of the OAG be elected Chairperson of the Seminar, and this was enthusiastically endorsed by all participants. The opening session concluded with a group photo of organizers, participants, and visiting experts.

B. Presentation Session I

Six papers were presented in this session. The first was a presentation by Mr. Michel Bonnieu, from the UNODC Regional Centre for East Asia and the Pacific, where he is a Senior Legal Adviser. His paper was entitled "Corruption Control and Judicial Integrity: An International Perspective with Illustrations in Southeast Asia". The second paper was delivered by Ms. Piyaphant Udomsilpa, Deputy Director General of the Legal Counsel Department of the OAG of Thailand. Ms. Udomsilpa's paper was entitled "Corruption Control in the Judiciary and Prosecutorial Authority".

Following lunch, the third and fourth papers were presented. Ms. Sar Chanrath, Deputy Director of the Legal Education and Dissemination Department of the Ministry of Justice of Cambodia, delivered a paper entitled "Corruption Control in the Judiciary and Prosecutorial Authorities: The Case of the Kingdom of Cambodia". Mr. Ferdinand Tandi Andi-Lolo, Investigator and Prosecutor of the Directorate of Investigation of the Office of the Deputy Attorney General for Special Crimes, Indonesia, presented his paper, entitled "Corruption Control in the Indonesian Prosecution: Mechanism and Obstacles".

The fifth and sixth papers were delivered following a short recess. The fifth speaker was Ms. Ifa Sudewi, a judge of the National Court of Central Jakarta, Indonesia, who was assisted by Mr. Mangasi Situmeang, Head of the Genocide Section, Attorney General's Office, Indonesia. Ms. Sudewi's paper was entitled "Corruption Control Over the Judicial Authorities in Indonesia". The final paper of this session was delivered by Mr. Anthony Kevin Morais, Deputy Public Prosecutor of the Law and Prosecution

Department, Anti-Corruption Agency of Malaysia. Mr. Morais spoke about “Corruption Control in the Judiciary and Prosecutorial Authorities”.

Mr. Bonnieu focused his presentation on identifying possible vulnerabilities of judges and prosecutors to corruption and the remedies which could be applied to maintain judicial integrity in the face of such problems. He noted that the UNCAC is a major step forward in advancing judicial integrity and that its breakthrough provisions on asset recovery are an essential element in reducing and preventing criminal enterprise. However, it will be the prosecutorial and judicial authorities of Member States who will be responsible for implementing these provisions with little prior training, leading to a risk of improper influence and possible misconduct. He explained the potential sets of vulnerabilities. The first such set are of an economic nature, where low salary scales and a lack of adequate compensation systems lead to passive bribery, trading in influence and conflicts of interest. The second set of vulnerabilities concern the demarcation of certain roles and responsibilities within the investigation process, potentially discouraging thorough, complete and impartial investigations. The third set of vulnerabilities relates to the core functions of the positions involved: prosecutors and judges have an ethical requirement to investigate the truth, not to pursue a conviction at all costs. A fourth potential obstacle may be the uncertainty of the priorities of different criminal justice systems: is it sufficient to convict the ‘small fish’, or should an investigation continue until the whole truth is uncovered, with no constraints of time or money? In the opinion of Mr. Bonnieu, it is very important that the prosecutorial and judicial authorities do not take only straightforward cases and, without putting the State budget in danger, that they do not become bound by time and money. Finally, the improper use of the innovative asset recovery provisions of the UNCAC, intentionally or otherwise, may be the source of a fifth set of vulnerabilities. The careful examination and investigation into proceeds of crime induced by Chapter V of the UNCAC will necessitate a new spirit of teamwork between financial and criminal investigators. This is a vital matter for the judiciary; however, Mr. Bonnieu fears that the new paradigm has yet to be internalized by practitioners in many countries. He elaborated that these problems have been anticipated by the drafters of the UNCAC and that it will be interesting to see if the great maturity of that Convention, built as it was on previous experience in these matters, will ease the vulnerabilities he discussed above. In closing, he urged participants to use the UNCAC to best effect.

Ms. Udomsilpa gave a brief overview of the functions of the public prosecutor in Thailand and outlined contributing factors to corrupt behaviour and possible countermeasures. She noted that dishonesty, unchecked power in a hierarchical system, conflicts of interest or even appearances of conflicts of interest, a poorly defined power of discretion, and an inappropriately close relationship between investigators and prosecutors can lead to corrupt conduct. Ms. Udomsilpa further remarked that conflicts of interest are not yet defined in the regulations governing prosecutorial behaviour and that a Royal Decree on Good Governance promulgated in 2002 addressed benefitting the public interest but did not specify exactly how this should be achieved. She suggested a number of means to reduce corruption: efficient personnel management, a clear delineation of responsibilities among senior prosecutorial administrators and the cultivation of an attitude among prosecutors that the discharge of their powers is a duty for which they will be held accountable, not a privilege which they may exercise without consequence. She outlined in more detail further anti-corruption measures undertaken by the Thai authorities. Since 2002, a Commission of the State Attorney, a body responsible for the appointment and rotation of prosecutors around the country, has included lay members. She noted that, in her opinion, the records of the Commission meetings with inspectors general of the OAG should be a matter of public record. A further measure is the fixed rate salary and allowance system established by the Act related to the Salary and Allowance of the State Attorney B.E. 2001, Section 4. The philosophy of sufficient economy as promoted by His Majesty the King is also a cultural value that should encourage prosecutors to avoid self interest. Ms. Udomsilpa outlined the disciplinary measures in place to punish prosecutors for breaching their duty. She recommended the establishment of a committee to screen out false accusations against prosecutors in order to avoid the demoralizing effects of such incidents. The paper also addressed the formation of ethical habits and behaviour and the establishment of a new committee to scrutinize

reports of unethical behaviour and to provide ethical education. Finally, Ms. Udomsilpa discussed the matter of discretion. The effects of prosecutorial discretion are very serious; if an order of non-prosecution is delivered, a suspect may never be tried for the offence for which he or she was investigated. However, the bounds of a prosecutor's discretion and a number of the grounds on which it may be exercised are not well defined, and Ms. Udomsilpa outlined some suggestions for establishing a clear concept of 'precise discretion'.

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Ms. Chanrath first outlined some of the challenges facing anti-corruption agencies in her country and then focused on three intertwined essential factors in the fight against corruption in Cambodia: the passage of anti-corruption laws, legal and judicial reforms, and enforcement of existing laws. Among the challenges facing the country is the low priority given to the justice system by the Royal Government of Cambodia, which is reflected in its allocated budget; interference from either the executive or legislative branches of government; and the drafting of laws in general terms, allowing for subjective interpretation by jurists. Ms. Chanrath stated that during its third term, the government will focus its efforts on implementing its Governance Action Plan which was formulated with the participation of government, civil society and development partners. The three pillars of the plan are: combating corruption, reforming the legal and judicial systems, and enforcing existing laws. Regarding the first pillar, Ms. Chanrath noted that a lack of political will has thus far hindered the enactment and implementation of the Anti-Corruption Law, which provides for a much needed autonomous Supreme National Council for Anti-Corruption (SNCAC). She further suggested that, before they are strengthened, existing anti-corruption bodies should be reviewed in terms of their capacity to handle complaints and for any overlap of their responsibilities. Reforms of the judicial and legal system include strengthening the authority and independence of the Supreme Council of the Magistracy, improving the training of judges, prosecutors and court clerks; and recruiting and promoting personnel through an impartial and merit-based process. Ms. Chanrath then listed some recommendations for moving the process of reform forward. The third pillar of the anti-corruption plan, enforcing existing laws, requires, *inter alia*, respecting the constitutionally guaranteed separation of powers. Human resource training; assuring the integrity, effectiveness, transparency and accountability of the system through monitoring agencies; and promoting the publication and dissemination of Supreme Court decisions were further recommended. In closing, Ms. Chanrath noted that fundamental change requires commitment from the top and a willingness to follow through on anti-corruption efforts.

Mr. Andi-Lolo began by stating that various international institutions such as the World Bank and Transparency International have painted a bleak picture of the Indonesian judicial system, and that this perception is reflected in the attitudes of the Indonesian people. Mr. Andi-Lolo outlined the nature of corruption in Indonesia, noting that there are two main types of corruption, which he termed judicial corruption and bureaucratic corruption. The former refers to the illegal handling of cases while the latter refers to prosecutors' career paths and is more widespread. Judicial corruption is almost always triggered by pecuniary motives and may be initiated by the suspects/defendants or the investigators/prosecutors. Mr. Andi-Lolo stated that prosecutors also collude with judges. Bureaucratic corruption afflicts the prosecutorial and judicial recruitment process, which is competitive and often requires candidates to have connections with high-ranking officials or to offer financial sweeteners. The promotions system is also corrupted, Mr. Andi-Lolo stated, by the long delays existing between notification of the possibility of promotion and the time that it takes effect. The process can be expedited by offering financial rewards. Mr. Andi-Lolo then moved on to outlining the various control measures in existence. In addition to the Prosecution Service, which alone has the power to prosecute cases and execute verdicts, anti-corruption agencies consist of the National Police and the Corruption Eradication Commission (KPK). The Attorney General's Office (AGO), which is both a judicial body and an executive body, has a supervisory function exercised by the Office of the Deputy Attorney General for Supervision and may issue sanctions in any form depending on the degree of violation. Prosecutors and administrators may appeal to the Attorney

General, whose decision is binding. Further appeals by former prosecutors must be taken to the administrative court, where action is taken against the State on behalf of the appellant by his or her former colleagues. Preventive measures are also provided in the Law on the Indonesian Prosecution (Law No. 16 of 2004) which prohibits prosecutors from becoming involved in certain activities which may cause conflicts of interest in the exercise of their prosecutorial functions. The Office of the Deputy Attorney General for Supervision accepts complaints from the public who may also lodge their complaints with the Prosecution Commission. Having outlined the control measures, Mr. Andi-Lolo then examined their effectiveness. He stated that the measures are not implemented for various reasons and that consequently there is little deterrent effect to the sanctions enumerated therein. The leading cause of corruption among prosecutors and judges is a result of the low remuneration they receive, which is a tenth of that earned by those in private practice. Many lobbyists and business people are happy to supplement a luxurious lifestyle for prosecutors in order that they (the prosecutors) will one day 'return the favour'. The absence of clear operating procedures allows corrupt practices to flourish, according to Mr. Andi-Lolo, who concluded by saying that the public demand for a clean and independent judiciary post-Suharto has not led to significant progress on the ground.

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Ms. Sudewi opened by noting that the Corruption in Government resolution (UN Economic and Social Council Resolution 1990/23 of 24 May 1990) adopted at the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders in Havana identified the impact of corruption on government programmes, national development, individuals and groups. The resolution also identified the strong link between corruption and the presence of economic crime. Ms. Sudewi stated that the eradication of corruption will require a new approach in crime-fighting. Following an outline of the Indonesian court system, Ms. Sudewi moved on to the legislation currently in place to tackle corruption. From 1960, specific legislation has been drafted in attempts to target corrupt actions. Ms. Sudewi outlined some of the principal features of Act No. 31/1999, which aimed to be the first law to cope with embezzlement. Act No. 20/2001 introduced further innovations in the struggle against corruption by reversing the burden of proof in corruption probes and by addressing the use of electronic evidence at trial.

Ms. Sudewi then moved on to describe the process of law enforcement as it affects the judiciary in corruption matters. The establishment in 2002 of the Corruption Eradication Commission (KPK) was an important milestone in the fight against corruption. The KPK has the authority to intercept communication, seize evidence, arrest suspects and examine and prosecute cases in the same way as a prosecutor and has contributed to a decline in corrupt activity among the judiciary, she said. Furthermore, the Supreme Court justices have undertaken a number of initiatives to build a positive image of the legal system. These measures include moves to assure judicial independence from the executive, and improvements to the court management system such as administering justice in public, making judgments accessible and computerizing databases. Ms. Sudewi then outlined the internal and external control systems applied to monitor judicial behaviour. Internal control is the ultimate responsibility of the Supreme Court but there are supervisors at every level of the judicial system. Ms. Sudewi mentioned that in November 2007 five judges were dishonourably discharged for accepting bribes, but were not given prison sentences. External control is exerted by three bodies: the newly established Judicial Commission; the KPK; and the State Finance Controlling Agency (BPKP), which has the authority to control the state finances managed by the courts.

Ms. Sudewi concluded by saying that despite many attempts to eradicate corruption and the many supports available in the fight, the most important factor is the necessity of goodwill and good morals.

Mr Situmeang, supplementing Ms. Sudewi's speech, then made the point that in law enforcement, the activities of human beings rather than the existence of laws is most important. He acknowledged that Indonesia faces a problem fighting corruption and noted two types of widespread judicial corruption: political interference and bribery. Elaborating, he explained that judicial corruption commonly takes the

form of misuse of judicial power and funds, biased case allocations and biased pre-trial procedure, and exertion of influence. He moved on to state that corruption has a long history in Indonesia and listed some of the obstacles to eradicating corruption according to Mr. Mardjono Reksodiputro, a prominent figure in the Indonesian and ASEAN legal community: the lack of a consensus within the judiciary, within the legal profession, within the executive and within the public body as a whole. He also noted that any action to fight corruption must be based on the rule of law. Moving on, Mr. Situmenag stated that the success or failure of anti-corruption measures depends upon the enforcers and the political will of the government to eradicate it. The latest legislative effort in the fight against corruption was the establishment of the Commission for Corruption Eradication (KPK) by Law Number 30 of 2002. This law gives the KPK the right to carry out independent investigations.

Mr. Situmeang suggested further efforts to aid the fight: promoting a consensus in and among the groups mentioned above that corruption will not be tolerated; promoting political will; establishing a mechanism to make judicial appointments and promotion on the basis of integrity and merit; allowing an independent commission to investigate complaints; making the aforementioned commission accountable to a legislative committee; and introducing a fully computerized data system which should also be accessible by the public. Mr. Situmeang also suggested strengthening the moral quality of judicial personnel and removing the cultural tolerance of corrupt behaviour.

Mr. Situmeang concluded by stating that improving the quality of information technology and the relationship between prosecutors, banking institutions, and communications providers would also be a great step forward in fighting white collar crime.

Mr. Morais began by noting that a prosecutor is the quintessential public interest lawyer whose responsibility it is not to win a case at all costs but to see that justice has been done. When discussing the reality of the criminal justice system though, Mr. Morais noted that the asymmetry of the system places unrealistic demands on prosecutors, who may resist conceding a tactical advantage to their opponents. The considerable powers vested in prosecutors and the deep-seated human need to rationalize one's own errors sometimes make it difficult for prosecutors to admit to any wrongdoing. Moving on to address the position of the judiciary, Mr. Morais reflected that the implementation of all other rights depends upon the proper administration of justice, and yet judicial corruption appears to be a global problem. He listed some common indicators of the phenomenon.

Mr. Morais next addressed how to eradicate corruption in the judiciary, making a number of suggestions, *inter alia*, encouraging alternative dispute resolution (ADR) which would remove the fear and suspicion among litigants that judges could be bribed to deliver a particular verdict. He highlighted the efforts of the Malaysian authorities to curb and prevent corruption of government officials generally, mentioning the Anti-Corruption Act of 1997, which describes in Section 8 the core functions of the Anti-Corruption Agency. The measures provided for in the Act, namely the power to examine practices, systems, and procedures that may be conducive to corruption and to advise the relevant authorities accordingly, are a much needed boost for the Agency's preventive abilities. Mr. Morais also gave special mention to section 32(3) of the Act, which provides for a prosecutor to require a public officer to explain under oath the means by which he or she acquired property which is of greater value than he or she could afford within his or her legitimate means of income. Failure to provide a satisfactory response will warrant imprisonment. This provision may however only be triggered in the course of an on-going investigation. The Public Officers (Conduct and Discipline) Regulation 1993 and the Judges Code of Ethics 1994 are also used in Malaysia to regulate the conduct of public servants, prosecutors and judges included. Mr. Morais also outlined the independence of the Malaysian Attorney General from the executive branch and stated that all prosecutors, as representatives exercising delegated powers, are accountable to the Attorney General for their decisions.

Mr. Morais then turned to the subject of making improvements to the existing legal and institutional frameworks. Malaysia's National Integrity Plan, launched in 2004, aims to establish a fully moral society with citizens who have high ethical standards. The National Integrity Institute was created to implement this Plan. The government has also applied management integrity to its own activities by setting up committees to implement the Prime Minister's Circular No. 1 of 1998.

To conclude, Mr. Morais stated that the law does not of itself provide an answer to the problem of corruption. It provides a backdrop to answers which must be based on institutional reform and the regeneration of ethics.

PRESENTATION SESSION II, DISCUSSION SESSION I AND DISCUSSION SESSION II OF 18 DECEMBER

C. Presentation Session II

There were five presentations in this session. The first was delivered by Ms. Lwin Lwin Aye Kyaw, Judge and Director of the Supreme Court of Myanmar, and was entitled "Corruption Control in the Judiciary and Prosecutorial Authorities". Ms. Deana Perez, Senior State Prosecutor, National Prosecution Service of the Department of Justice of the Philippines, presented a paper entitled "Corruption Control in the Judiciary and the Prosecutorial Authorities in the Philippines".

Following a short recess, Mr. Nguyen Dang Thang, Legal Expert and Prosecutor's Assistant of the International Co-Operation Department, Supreme People's Prosecution Office, Vietnam, gave a presentation entitled "Prevention and Anti-Corruption in Vietnam". The fourth presentation was delivered by Mr. Nitithorn Wongyuen, Judge, Office of the President of the Supreme Court, Office of the Judiciary, Thailand, and was entitled "Corruption Control in the Judiciary of Thailand". The final presentation of the afternoon was a joint presentation by Ms. Sirirat Vasuwat, Senior Investigator, Level 9, Bureau of Corruption Suppression I, Office of the National Counter Corruption Commission (NCCC), Thailand and Ms. Supinya Berkfah, Senior Officer, Bureau of Inspection of Assets 1, NCCC, Thailand. Their paper was entitled "Anti-Corruption in Thailand".

Ms. Lwin Lwin Aye Kyaw explained the present judicial system of the Union of Myanmar, addressing the role of the judiciary and the principles by which it works; the court system and the powers of the courts; and the education and training system for jurists. She next addressed the scope of corruption, noting that is it difficult to find a definition that encompasses all variations and perceptions of corrupt actions and that there may be economic and commercial models, and political models, as well as legal models. Ms. Aye Kyaw then listed the characteristics of corruption.

She discussed the legal framework for eradication of corruption and noted a particularly relevant piece of legislation: the Suppression of Corruption Act 1948, which allows a court to presume a person guilty of corruption if it is proved that the accused has a large sum of money or properties of a value out of all proportion to his or her official status or salary.

Ms. Aye Kyaw next described the measures for the eradication of corruption implemented in Myanmar. The Special Investigation Department and the police force send cases to the courts following their investigations. A law officer or government advocate pleads on behalf of the government and may appeal any sentence which is considered to not have a sufficient deterrent effect. Similarly, the government may appeal an acquittal. The Supreme Court supervises the implementation of justice in the lower courts and conducts anti-corruption schemes for all judges. Such schemes include displaying signage proclaiming that prosecution will follow if a person is found guilty of giving or receiving a bribe; exhorting jurists to take pride in their integrity rather than inducing fear of the consequences of being caught; and admonishing judges to behave in such a way that encourages public confidence in the integrity of the judiciary. The Supreme Court also gathers information from the public, from its own officers and from its observation of judicial personnel. Important Supreme Court rulings are published annually. The government has also implemented a number of measures to ease financial burdens on public servants in order to reduce the likelihood of them accepting a bribe.

To conclude, Ms. Aye Kyaw noted that the Bangalore Principles of Judicial Conduct of 2002 list six values which should guide judges and lawyers, the executive, the legislature, and the public to work together to create societies free of corruption.

Ms. Perez highlighted in her introduction the existence of a special anti-graft court, the *Sandiganbayan*, which has jurisdiction in cases of corruption involving officials occupying a public position of a certain rank. The power to prosecute cases in the *Sandiganbayan* is under the exclusive control of the Independent Office of the Ombudsman, who may deputize prosecutors from the National

Prosecution Service or may collaborate with them in the process.

Moving on to describe what the laws punish, Ms. Perez stated that the most comprehensive piece of legislation, Republic Act No. 3019 or the Anti-Graft and Corrupt Practices Act, defines unexplained wealth and requires every public officer to file a sworn statement of assets and liabilities annually. In discussing administrative discipline, Ms. Perez explained that the Constitution provides for the removal of members of the Supreme Court and the Ombudsman on the grounds of, *inter alia*, culpable violation of the Constitution, bribery, corruption and graft. The Supreme Court has the authority to discipline other justices and judges. Prosecutors may be investigated and disciplined by the Secretary of Justice or the Ombudsman. Ms. Perez took the opportunity to recommend the development of a code of ethics for prosecutors to guide them in specific circumstances and to improve administrative discipline.

Ms. Perez quoted a 2005/2006 survey of the general public which showed that 33% of respondents believe that corruption in the judiciary is something they must live with. The increase in the number of prosecutors charged with corruption has led to a decline in public levels of respect for the profession. Addressing the causes of corruption, Ms. Perez noted that low salaries, the Filipino practice of showing gratitude for kindness, and the desire to be on good terms with political leaders in order to receive greater benefits, are contributory factors to acts of corruption. Practical issues in investigation and prosecution include the difficulty involved in detecting and proving corruption; the frequency with which complainants and witnesses sign affidavits of desistance or simply do not appear to testify; the care with which entrapment operations must be executed due to the subject's familiarity with the procedures; the reversal of findings and/or reduction of penalties on appeal to the President, which, it is suspected, result from entreaties from ranking politicians who were requested by a prosecutor to intercede; and the lack of criminal convictions which follow administrative proceedings.

The final topic of address was anti-corruption measures in the judiciary and prosecutorial service which include, *inter alia*, security of tenure for prosecutors and judges; the publication by the Office of the Ombudsman of its Annual Report; and the designation of funds from aid organizations for the computerization of the case management system. Concluding, Ms. Perez recommended the use of entrapment operations to apprehend corrupt officials as this would mean that withesses testifying for the prosecution would be law enforcement professionals who would not be as easily intimidated or coerced as an ordinary citizen. Finally, Ms. Perez noted that prosecutors and judiciary derive their authority from the trust placed in them by the public, making it imperative therefore, that such trust is retained.

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Mr. Nguyen outlined some of the worthy initiatives of the governments of Singapore, Korea and China in their respective battles against corruption. He moved on to say that despite the great socio-economic gains Vietnam has made in the past two years the nation still faces problems, one of which is increasingly complex acts of corruption. Some measures which have been adopted include the approval on 1 June 2006 by the National Assembly of the Law on Anti-Corruption and the establishment on 28 July 2006 of the Anti-Corruption Steering Committee which is led by the Prime Minister. Vietnam has also paid attention to the education and training of public officials in order that they can lead by example. While successful in part, difficulties remain, such as the recovery of funds siphoned away from the State by corruption. Of a total of VND286 billion owed to the State, only VND70 billion has been recovered. The fear of revenge and lack of State resources to offer protection to witnesses are factors which contribute to the difficulties of gathering information on corrupt actions. Other factors are the inexperience of the newly-established anti-corruption agencies.

Moving on to prevention measures, Mr. Nguyen noted that education and awareness were important tools in the fight and that setting up points of contact with the community was a priority for the government. Education of public officials and the promotion of ethics were also highlighted and Mr. Nguyen noted that such education should include regulations for officials and their families on, *inter alia*, ethics, behaviour, income and property. A clear legal definition of corruption and prohibited conduct is vital, but even more important is the implementation and enforcement of any such law. The transparency of the legal system is imperative in this regard, as is the avoidance of conflicts of interest. Mr. Nguyen

recommended other measures such as implementing a mandatory declaration of assets by public officials and assuring salaries sufficient to deter corruption among public servants. In order for Vietnam to deal more effectively with corruption, Mr. Nguyen made some recommendations such as: encouraging civil society to play a part; providing whistleblower support and guaranteeing the confidentiality of personal details; establishing investigative techniques such as interception; and confiscating property derived from proceeds of corruption.

Concluding, Mr. Nguyen noted that the independence of the judiciary is an indispensible part of the fight against corruption.

Mr. Nitithorn focused his presentation on the systems and processes of the Courts of Justice, which are one of the four types of courts existing in Thailand. The others are the Constitutional Court, the Administrative Court, and the Military Court. Most cases fall under the jurisdiction of the Courts of Justice, which has two parts: administration and adjudication. The independent Office of the Judiciary has sole responsibility for the administration of the Courts of Justice, guaranteeing independence from political interference. This secretariat reports directly to the Head of the Supreme Court. The Office of the Judiciary has three separate Commissions to carry out its work: the Judicial Commission, the Judicial Administration Commission, and the Commission for Judicial Service. The Judicial Commission is chaired by the President of the Supreme Court and the Commissioners are elected from all levels of the Courts of Justice. It deals with the appointment, transfer, promotion and discipline of judges. For judicial officers, such work is carried out by the Commission for Judicial Service. The work of each Commission is transparent as the law requires that a certain number of Commissioners must not be judges.

Mr. Nitithorn moved on to discuss discipline, first noting that the law provides for judges to be removed from office for several reasons. However, there are numerous efforts to prevent such a situation arising, including the principle of judicial independence; sufficient remuneration; the circular distribution of cases to judges; the necessity of swearing an oath of loyalty to His Majesty the King before taking office; the high calibre of candidates accepted as trainee judges; the unlimited timeframe within which the Judicial Commission may investigate a judge; the disciplinary measures available to the Judicial Commission in the event of a serious breach of discipline; and the ban on a judge performing his or her duty in any Court in a province in which his or her family has domicile. Allegations of misconduct will be investigated by an internal committee which may apply a range of punishments: reprimand, suspension of promotion or salary increase, discharge, dismissal, or expulsion. Following investigation, even if there is no prevalent fact proving guilt, a judge may be removed if his or her continued duty could adversely affect the judicial service.

Mr. Nitithorn concluded by stating that internal review alone is not the best way to promote integrity in the judiciary; other organizations should have the opportunity to watch, inspect, and impeach a judge who may be committing corrupt acts.

Ms. Supinya Berkfah and **Ms. Sirirat Vasuwat** made a joint presentation. Ms. Supinya began by stating that three principal components are necessary to tackle corruption: transparency, accountability, and checks and balances. She traced the beginning of anti-corruption efforts to the aftermath of the collapse of the military government in 1973. Due to political interference, these efforts had limited success. The demand for a new Constitution following the general election of 1995 led to the creation four years later of the Office of the National Counter Corruption Commission. Its main functions are: the inspection of assets and liabilities, the prevention of corruption, and the suppression of corruption. Ms. Sirirat highlighted the following powers and duties of the NCCC: to enquire into facts, to summarize cases, and to prepare opinions for submission to the Senate (for consideration to remove an official from office), or to the Prosecutor-General (for the purpose of prosecution). Further powers and duties are to enquire into unusual wealth and to confiscate same if there is no legitimate explanation as to how it was generated, and to investigate the assets and liabilities of selected State officials before and after they assume office.

A major focus of the NCCC's work in preventing corruption is the promotion of personal and national integrity through campaigns aimed at students. The NCCC has also sought the co-operation of

the media in promoting integrity and praising the good work and merit that is evident in society. To suppress corruption, Ms. Supinya listed recommendations such as, *inter alia*, securing the collaboration of other public agencies with the NCCC and the amendment of legislation to grant more power to the NCCC; the close monitoring by all State agencies of their personnel; the adoption of strong and adequate measures for witness protection; the establishment of a special unit to receive complaints and information on corruption in the public sector; and the establishment of a unit in the executive branch, specifically mandated to assist the NCCC.

Some problems hindering the work of the NCCC were addressed. The duty of the NCCC to investigate malfeasance in office increases its workload and existing enquiry procedures slow down its work and should be changed in line with Announcement No. 31 of the Council for Democratic Reform. Greater collaboration with other agencies would be of benefit to the NCCC, as would enforcement of Section 100 of the Organic Act, which addresses conflicts of interest, or policy corruption.

In conclusion, Ms. Supinya and Ms. Sirirat listed recommendations to overcome the problems enumerated above. Some of the recommendations included: a national focal point for the systematic storing of intelligence and a database system on corruption; the required declaration by public officials, and top executives of public limited companies and financial institutions, of their liabilities and assets; the extension of preventive measures against conflicts of interest to cover those public officials in other areas of service; the amendment of the statute of limitations for cases involving corruption in the public and private sectors; and the improvement of current measures requiring international co-operation for the prevention and suppression of corruption.

D. Discussion Session I

Topic: *Current situation and issues concerning corruption in the judiciary and prosecutorial authorities*

The first session was chaired by Mr. Nattachak Pattamasingh, Deputy Director General of the Legal Advisory Department of the Office of the Attorney General of Thailand.

Participants discussed the **significance of judicial and prosecutorial corruption** and agreed that efforts to prevent corruption in all its forms rest upon the premise of a fair and just legal system; hence, the integrity of the judiciary and prosecutorial authorities is vital. Furthermore, crime, including transnational crime and terrorism, will flourish if criminals can 'buy' lenient sentences, or verdicts of not guilty. Corruption also poses a problem for investment in the economy of the country so affected. Investors will lack trust in a corrupt government and legal system. Participants also suggested that those who offer bribes should receive deterrent sentences.

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The participants spent considerable time discussing **control measures**, in particular, the obligation to declare assets, and the need for an independent, powerful agency to investigate, enforce, and penalize incomplete or untrue declarations. Mr. Ainsworth noted that it would be impossible to check every single declaration, and consequently would result only in scrutiny of the opponents of those currently holding power. Despite that, it is useful for prosecutors and investigators to have access to such information in the event that a person is later under investigation for corruption. Participants from the Philippines and Malaysia also suggested that investigators can look beyond the official declaration and monitor the lifestyle of public officials. The media can also highlight instances of profligate spending or extreme wealth and then dig deeper and try to expose the problem.

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Ms. Santanee Ditsayabut, of the OAG of Thailand, stated that the **discretion** afforded to prosecutors in deciding whether or not to indict a suspect also leads to corruption and that there should be a way to monitor or review prosecutorial decisions in this regard. She also noted that more attention should be paid to people who commit corruption by omitting to do their duty.

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Rendering **verdicts at variance with those of established practice** and procedure can also indicate corruption. Mr. Morais noted however, that there was some resistance to introducing guidelines for judges to follow in passing sentence as this could amount to an infringement of judicial freedom. Other participants countered that discretion is not a whim, and that greater discretion often leads to greater corruption. The issue of intellectual dishonesty was raised; however, its inclusion for discussion was dismissed.

E. Discussion Session II

Topic: *Causes of corruption in the judiciary and prosecutorial authorities*

This session was chaired by Mr. Chatchom Akapin, Executive Director of the Thailand Criminal Law Institute, Office of the Attorney General of Thailand.

Addressing the causes of corruption, participants first discussed **remuneration** of legal professionals and agreed that huge pay rises cannot of themselves eliminate a culture of corruption. High salaries and low morals can co-exist and the power and influence of judicial and prosecutorial positions are often seen as ways to amass wealth. A new breed of professionals with a new mindset must be relied upon to bring change. Educating the wider population in this regard can help to shift perceptions of ethical behaviour. Mr. Nguyen asserted that the law must be very clear on what constitutes acceptable behaviour and what does not. Mr. Andi-Lolo argued that, apart from a high salary, the risk of ruining a stable career with a comfortable salary and benefits such as health care can have a deterrent effect, as can bringing disgrace on one's family. High salaries will only be supported if judges and prosecutors are regarded as well educated, dedicated, moral, ethical people. Attracting high-calibre candidates with a genuine interest in justice is therefore important. It was pointed out that if criminal justice personnel ask for more money in order to maintain their integrity, it could be interpreted as a threat.

The participants agreed that they had given much time to the topic of salaries and had established that maintaining a high level of morality was of more importance than earning a high salary, but had not yet agreed the best way to maintain that high level of morality. Mr. Morais pointed out that some countries appoint senior lawyers as judges and that it might be difficult to educate people in ethics at that stage of their lives. Some participants suggested that candidates should be evaluated before they are appointed. Mr. Morais responded by asking by what standards do we judge ethics and integrity and who shall administer the evaluation? Mr. Andi-Lolo suggested that a probation period ought to be applied to see if the candidate can operate ethically within the culture of their country's system.

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While discussing the **high concentration of judicial and prosecutorial power** some participants suggested that it could be diluted by a jury system. While a jury system is expensive, it is more difficult to 'buy' 12 jurors than one judge. However, jurors of modest means can still be susceptible to bribes.

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Sentencing guidelines, their role in preventing corruption, and their effect on judicial discretion were also discussed at length by the participants. Some Thai participants stated that standardized sentences should be introduced in Thailand. It was noted that even in those countries without sentencing guidelines, a prosecutor should be aware of judicial discrepancies in sentencing similar crimes and should investigate variances. Publicizing the process leads to public familiarity with sentencing which is also a form of monitoring and accountability as well a way to build appreciation of the system.

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The discussion then moved on to **monitoring of prosecutorial and judicial powers.** Weak monitoring can encourage low standards, as can being accountable only to your own ranks. Participants noted some difficulties when they discussed raising public awareness of judicial powers and responsibility; for example, a person commenting on sentences rendered by a Thai judge risks being held in contempt of court. Mr. Naito highlighted the importance of maintaining investigative secrecy. Those who monitor judges must be above suspicion themselves and the public must be made to feel that they can approach investigators with their own information as they are an important resource, but investigators must bear in mind the possible vulnerability of whistleblowers to revenge attacks.

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Regarding the **lack of transparency**, the participants agreed that public access to the justice process and verdicts can reassure the people of the trustworthiness of the system. The participants discussed at length the importance of providing written judgments in all cases which correspond with earlier oral judgments issued by the judge. Because judges are often overworked, there is sometimes a lag between making a ruling and providing a written account of a decision.

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The participants also discussed the prevalence of **patronage** in their legal systems and societies in general. The familial obligation that many people feel for their higher ranking colleagues has serious implications in the fight to eradicate corruption. Mr. Ainsworth agreed that this problem is not confined to Asia. In the USA, recruitment on the basis of political views is also a problem. Deciding how best to sanction such behaviour is also posing difficulties for the anti-corruption authorities of the USA.

PRESENTATION SESSION III, DISCUSSION SESSION III AND DISCUSSION SESSION IV OF 19 DECEMBER

F. Presentation Session III

There were three presentations during this session. The first was delivered by Mr. Takeshi Seto, Deputy Director of UNAFEI. His paper was entitled "Corruption Control in the Prosecutorial Authorities in Japan". The second presentation was by Mr. Jun Oshino, Professor of UNAFEI. Mr. Oshino's paper was entitled "Corruption Control in the Judiciary in Japan".

After lunch, the final presentation of the session was delivered by Mr. Oliver Stolpe, Visiting Expert from the Anti-Corruption Unit, Rule of Law Section, UNODC Headquarters. Mr. Stolpe's paper was entitled "Strengthening Judicial Integrity and Capacity – Successes and Lessons Learned".

Mr. Seto first addressed the legal and other institutional frameworks for preventing corruption in Japan, explaining that Japanese public prosecutors, as holders of prosecutorial authority, are independent of political influence through the Justice Minister and are also independent, as individuals, from any other powers, including the powers of their supervisors. Under the Public Prosecutors Office Law, there is a guarantee of status and conditions for all prosecutors, and protection from unfavourable treatment. Prosecutors also receive a higher salary than other public officials. The National Public Service Ethics Law was enacted in response to a series of incidents of high-level corruption and it stipulates standards of conduct for all national public servants and their related parties. Internal control, through supervisors at various levels, and external control, though the Prosecution Review Commission, also contribute to fighting corruption.

In his assessment of the manifestation of corruption among Japanese prosecutors Mr. Seto attributed the low number of convictions of criminal justice personnel for corruption offences to a number of factors. These include the strong sense of ethics, responsibility, and professionalism inculcated in prosecutors by the competitive entry process to the profession, and the guarantee of status and salary provided by law. The organization of Public Prosecutors Offices and the close supervision to which they are subject are another contributing factor. Finally, the independence of the mass media and the alertness of the public in general to possible corruption further discourage unethical behaviour.

Finally, Mr. Seto addressed the investigation techniques used to fight prosecutorial or judicial corruption. He noted that the lack of material evidence can be a major hindrance to an investigation and the search and seizure of possible evidential articles is vitally important in this regard. Investigating the flow of funds through financial institutions is also important. The careful analysis of documents can contribute to building a sufficiently strong picture of the case to persuade a suspect to confess during interrogation. Prosecutors in such cases should ensure that the process is seen to be fair and impartial, as the public may have suspicions that the relationship between investigator and suspect is collusive, due to them being of the same profession. In a similar vein, the prosecutor must be careful to which court he or she applies for a warrant when investigating a judge.

Mr. Oshino began by noting that it is generally believed that almost no Japanese judges abuse their status or authority for private interest. To explain this, Mr. Oshino outlined the background, legal framework, and actual working style of Japanese judges.

The first of Japan's constitutions, the Meiji Constitution of 1889, was interpreted to guarantee judicial independence from the executive authority. This was exemplified in the *Otsu Case*, where the President of the Supreme Court rejected an attempt by the government to interfere in the judicial process.

The present Constitution, promulgated on 3 November 1946, strengthened the independence and autonomy of the judiciary. The *Urawa Incident* and the *Hiraga Letter Incident* and the *Episode of Judge Yamaguchi* are well-known examples of cases involving the issues of judicial independence and integrity.

Mr. Oshino further explained that the structure and regulations of the Japanese system contribute to the maintenance of high standards of behaviour. The assistant judge system aims to provide professional ex-

perience through on-the-job training before qualification as a fully-fledged judge. Training involves practical experience with senior judges who pass on the high standards and good examples of the profession. Judges are protected from being unwillingly removed, transferred, relocated or suspended, and from a deduction in remuneration. In practice, a job rotation system exists, which helps to prevent judges from establishing collusive relationships with particular persons in one area, as well as offering exposure to different types of cases. Judges also receive a guaranteed salary, sufficient to avoid the temptation to take bribes. Mechanical case assignment, a collegiate court system, transparent proceedings and accountable judgment further reduce opportunities for corrupt or self-serving acts.

Regarding administrative supervision, the Supreme Court can issue cautions to judges for misbehaviour or misconduct, as long as it does not infringe their independence (Court Organization Law, Art. 80, 81). More formal sanctions under the Law of Impeachment of Judges or the Law Concerning Status of Judges are available, and there is no immunity for judges in criminal cases. Under the Law of Impeachment of Judges, the Judges Indictment Committee, a legislative body composed of Representatives and Councillors drawn from the Diet, has the sole authority to indict a suspected judge in the Judicial Impeachment Court. Anyone can file a complaint to the Committee. If a judge is dismissed by the Judicial Impeachment Court, he or she will also be disqualified as a jurist and cannot work as a private lawyer. Under the Law Concerning Status of Judges, each High Court can impose disciplinary sanctions on judges under its jurisdiction.

Concluding, Mr. Oshino stated that it was his belief that the combined effects of the measures and attitudes outlined above contribute to the low incidence of corrupt acts among the Japanese judiciary.

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Mr. Stolpe gave an informative account of the Global Programme against Corruption which has been implemented by the UNODC since 2000. He drew in particular on experiences of the UNODC as it implements agreed international standards, such as the UNCAC and the Bangalore Principles, through technical assistance programmes for judicial reform in Indonesia, Nigeria and South Africa, which focus on improving access to justice, enhancing the quality and timeliness of justice delivery, strengthening public trust in the judiciary, establishing safeguards for professional ethics, and facilitating co-ordination across justice sector institutions.

As a first step, the UNODC supports a comprehensive assessment of justice-sector integrity and capacity in the country concerned, seeking the opinions of a wide range of stakeholders. The second step, planning, draws from the assessment findings and the main aim is to ensure ownership of the action plan by stakeholders. This has proven more difficult than expected, for a range of reasons. UNODC sought to foster local ownership through the formation of implementation committees, typically composed of stakeholder groups.

One of the challenges judicial reform efforts are likely to face is that judiciaries often have neither the capacity nor the skill sets to carry out and sustain reforms. Thus, identifying and strengthening an institution within the judiciary which can do so is vital. Much effort is spent monitoring action plan implementation.

The projects undertaken by the UNODC in the countries mentioned above focused heavily on improving access to justice by bettering legal education and making information more accessible, reducing delays, and improving complaints mechanisms. Posters, flyers, stickers, and TV and radio programmes were also used to educate the public about their rights under the constitutions of their respective countries, as well as the relevant procedural codes and codes of conduct for judges, prosecutors and police. In Nigeria and Indonesia the UNODC organized town-hall meetings so citizens could meet local justice-sector representatives. As well as measures to enhance the timeliness and quality of justice delivery, the UNODC also provided equipment essential to enhancing transparency and efficiency in court, such as photocopiers, computers and electronic court-recording machines. Sustainable maintenance was a real challenge. In Nigeria the most often cited impact of the programme was the establishment of a complaints system. Pilot courts in Nigeria have begun reporting on complaints received and have taken action through websites, annual reports and newsletters. In Indonesia, however, the same system did not achieve

a similar impact, due to the conspicuous and hence off-putting location of boxes where the public could post their complaints and restricted access to same.

An overriding challenge the UNODC faced was ensuring that the criminal justice institutions all worked together towards a common objective. Despite efforts to include all stakeholders, the police and sometimes the prosecutors offices were uninterested and in some cases even obstructive. Other conflicts stemmed from the parallel existence of several systems of justice delivery that were not well integrated and did not necessarily recognize each other's legitimacy and jurisdiction, for example, religious versus secular courts.

In evaluating the impact of the programmes, Mr. Stolpe said that it is possible to draw important conclusions from the projects carried out so far. They have delivered positive results, in particular in raising awareness, have illustrated the value of pilot testing, and have produced sound data upon which future expansion of the programmes could be based. Efforts in Nigeria have been particularly successful.

G. Discussion Session III

Topic: *Anti-corruption measures affecting judges*

This session was chaired by Ms. Sudewi, a judge of the National Court of Central Jakarta, Indonesia, and Mr. Andi-Lolo, a public prosecutor, Attorney General's Office, Indonesia.

Participants first focused on the usefulness of an **objective survey** on which to base future actions and benefitted from discussion of the Philippine experience with such a project, where there were many positive responses to the idea and where judges felt some sense of ownership of the reforms which resulted from the survey, increasing their co-operation with the implementation of same. The Philippine project included questions for the general public. Participants from Thailand and Malaysia raised the issue of protecting whistleblowers who may use the opportunity to expose wrongdoing.

The Chair reiterated the importance of objective data and explained that in Indonesia's experience, government surveys tend to be less objective as people answer as directed by their superiors. He explained that not many sources can be trusted to supply objective data in his country. The issue of objective data was discussed at length. Mr. Stolpe added that there is a balance to be struck between gathering generic perceptions and concrete experiences. The formulation of questions is therefore very important. The UNODC insists that surveys are conducted according to its own rules and by trusted institutes to minimize problems of credibility. He also explained that surveys are really only useful if conducted at regular intervals, which naturally raises the issue of costs. He did reiterate that positive data gleaned from surveys is a good way to generate political will for change and is good value for money, particularly as the cost of the survey would amount to only a negligible rise in salary when distributed among a nation's judges or prosecutors. Mr. Morais pointed out that leaders will be reluctant to commission surveys which reflect disquiet with the legal system, thereby scaring off investors. Alternatively, politicians may hope to benefit from exploiting public anxiety about the legal system.

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Moving on, the participants discussed **consultation** with concerned parties to establish countermeasures and suggested that in addition to the judiciary, NGOs, law schools, the police force, and court users should be consulted. Regarding the inclusion of politicians in the consultative processes, opinions ranged from excluding them, because of their lack of experience with the subject, to the inevitability of dealing with parliamentarians who will pass any reform laws. Mr. Stolpe interjected that it is important to clarify the purposes for which the data is being gathered and that each society should keep an open mind and decide for itself what stakeholders will be involved.

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Discussing the necessity of **anti-corruption measures established by the judiciary**, the Chair asked if it is necessary to establish a new body to carry out this task. Mr. Aizawa explained that the

question seemed to be whether or not the anti-corruption measures ought to be the initiative of the judiciary. He said that, in his opinion, it should be so. He and Mr. Davost agreed that objective data must come from the judiciary and that the creation of a new agency depends on the situation existing in individual countries. Safeguards must be in place to protect judicial independence.

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Appointment, training and education of judges and prosecutors were the next topics for discussion. Mr. Naito explained that human resources are the most important asset of the judiciary and prosecutorial authorities, and therefore the selection process is very important. Choosing people of integrity is paramount. Mr. Morais explained that in Malaysia, there is a prevailing belief that the current system is based on patronage, not ability, and the government is facing calls for an independent council to appoint judges, which it is resisting.

Thai participants called for ethics training to be part of legal education and also recommended that candidates for the legal professions should complete another degree in addition to their legal studies, so as to broaden their understanding of the wider world. Another recommended that an impartial committee should be established to choose which prosecutors will be promoted, as there are eight levels of seniority for Thai prosecutors and a corresponding large increase in salary. Mr. Davost explained that in France a prosecutor's salary does not increase dramatically throughout his or her career. The participants also discussed the probation periods existing in their countries and their effectiveness and susceptibility to patronage.

H. Discussion Session IV

Topic: *Anti-corruption measures affecting prosecutors and their equivalent*

This session was chaired by Mr. Jumpon Phansumrit from the International Affairs Department of the OAG of Thailand.

The participants first discussed how to formulate and enforce judicial and prosecutorial codes of conduct. Mr. Stolpe recommended that the Bangalore Principles, which embody universal values drafted by judges themselves, and their related commentaries, are a useful benchmark and guide for formulating a code for each country. The Guidelines on the Role of the Prosecutor, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in 1990, are a useful model for prosecutors, as is the code drafted by the International Association of Prosecutors, which is more up-to-date and precise, being completed in 2005. Mr. Stolpe also suggested that ethics training on the basis of any code so produced would be very useful. Mr. Andi-Lolo contributed that a clear list of proscribed behaviour, as is currently being devised in Indonesia, is better than a list of ideals. Mr. Davost remarked that a list of principles might be a more flexible approach and that a fixed approach may actually restrict disciplinary matters relating to this issue. Mr. Stolpe agreed with Mr. Andi-Lolo that aspirational standards are not sufficient and said that practitioners ought to be obliged to report wrongdoing, and also that declarations should be made to outside agencies regarding investments, assets, and other employment. He also mentioned that many codes fall down because they have no link to disciplinary procedures. Ms. Perez said that she favoured the inclusion of sanctions in the code, so that prosecutors and judges will be aware of the consequences of their actions, and so that the code would also have a deterrent effect. Mr. Stolpe also mentioned making disciplinary cases public as a deterrent and as an educational tool. He also suggested that incentives for good behaviour should be included, rather than focusing entirely on disincentives.

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Moving on to **transparency and accountability**, the participants discussed disclosure of assets and income. Mr. Andi-Lolo said that the public should be able to see if and how wealth is accumulated, and that the burden of proof must be on the person making the declaration. Mr. Ainsworth agreed that the

public should be assured that a judge will be fair and impartial in any trial. If they are aware of a possible conflict of interest in their case because of information contained in the judge's declaration of assets, they can request that the judge recuse himself or herself from the case.

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The discussion then moved to the **assignment of cases and judges**. The participants mentioned the circular system used in Japan. Mr. Andi-Lolo told the Seminar that prosecutors are also sometimes approached by families hoping to exploit a good relationship. Mr. Aizawa explained that assigning cases to a prosecutor in the same way as they are assigned to a judge does not take into account the differences between the functions and working styles of the two positions.

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The next topic for discussion was the **transparency of legal proceedings**. Participants agreed that investigations should be protected, while guaranteeing the rights of the suspect. They also agreed that victims should be informed of decisions not to prosecute and be kept informed of the progress of an investigation. The Chair asked how public access to the progress of a case could be implemented. Mr. Morais explained that in Malaysia, information on the charge, trial dates, lawyers, judges and rulings are posted online. Mr. Stolpe asserted that without access to written judgments, efforts to increase transparency will be futile. Mr. Aizawa pointed out that written judgments serve the purpose of explaining the decision to the parties involved and provide a clear basis for any further consideration of the case by a superior court. Judgments must contain facts and the interpretation of law to be of any use. Making substandard decisions public will achieve nothing.

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The discussion moved on to the **review of prosecutorial and judicial decisions**. The Chair noted that all jurisdictions allow for review by the appeal or supreme courts. Mr. Ainsworth qualified that by stating that in the US system, an acquittal by a jury cannot be appealed, because of the double jeopardy rule. In Thailand, a summary court acquittal may be appealed by the prosecutor, and a conviction may be appealed by the defendant.

PRESENTATION SESSION IV, DISCUSSION SESSION V AND DISCUSSION SESSION VI OF 20 DECEMBER

I. Presentation Session IV

This session saw two presentations, both by Visiting Experts. Firstly, Mr. Patrice Davost, Prosecutor General of the Court of Appeal, Toulouse, France, gave a presentation entitled "Deontology and Disciplinary Law of Magistrates in France". The second presentation was delivered by Mr. Peter Ainsworth. Mr. Ainsworth is the Senior Deputy Chief of Litigation of the Public Integrity Section, Criminal Division, US Department of Justice. His paper was entitled "Investigation and Prosecution of Judicial and Prosecutorial Corruption".

Mr. Davost explained that the jurisprudence of the Superior Council for the Magistracy encapsulates the ethical and deontological obligations of magistrates and prosecutors, and that the legal requirements are defined and contained in a statutory instrument from 1958. This also sanctions a code of discipline and allows a prosecutor or magistrate to be assessed for having breached his or her oath or statutory obligations.

Mr. Davost outlined the current sanctioning mechanism, which has two components. The first element is the disciplinary procedure. The President of the Republic is assisted in guaranteeing judicial independence and authority by the State Council for the Judiciary, which has 18 members, twelve of whom are elected by judges and prosecutors. A disciplinary action is usually initiated by the Minister for Justice and is passed on to the Supreme Court or to the body responsible for investigating the conduct of prosecutors, depending on who is under investigation. Adversarial proceedings, the right of defence, and the principle of a public hearing are guaranteed. Protection of public or private life or the prevention of an attempt to undermine the judiciary may lead to an *in camera* hearing. The disciplinary system is thus indisputably 'proceduralist' and, since 1990, has improved greatly. From 1970 onwards, the deontological guidelines have become more and more influential in assessing adherence to professional duties. The second sanctioning mechanism is known as admonition and is not used for instances of corruption, but in less serious cases of poor behaviour.

There has been a huge increase in the number of disciplinary cases taken since 1992. The increase in the number of disciplinary actions does not signify laxity on the part of the judiciary, but rather higher standards of behaviour expected of magistrates and prosecutors.

Moving on to the very important mechanism of prevention, Mr. Davost explained that French prosecutors and magistrates undergo a professional evaluation every two years. Since reform in the 1980s, evaluations are carried out transparently, and those subject to them have a right of participation and appeal. Mr. Davost believes that this has had an effect on the sincerity of the evaluations, leading to inflated praise and extreme prudence in criticizing poor behaviour. Nevertheless, the newer system has more advantages than its predecessor. Mr. Davost recommended that the system could be improved by sharing benchmarks from the evaluator, the evaluated, and the user of the evaluation.

Making prosecutors and magistrates aware of the jurisprudence of deontology behind the State Council for the Judiciary's own decisions and their own ethical obligations as legal professionals is also considered to have a preventive effect. This is achieved by compiling and disseminating the deontological corpus of the State Council of the Judiciary. Since 1994, this has been published in the annual report of that body. Also, a compendium of judicial decisions rendered between 1959 and 2005 was distributed to each of the 8,100 magistrates in France.

Deontological education also takes place during initial training at the National School of Magistracy and continuously, as in-service training. The latter type of training was introduced in 2007. This occurs annually, and lasts for eight days.

Mr. Davost concluded with a quotation from Ms. Dominque Commaret of the Court of Cassation who said that "Independence does not derive only from recruitment or from professional guarantees. It is a constant exercise that the magistrates must exercise on themselves", and his own observation that

magistrates should approach their work with humility, honesty, humanism, and humour.

Mr. Ainsworth began by noting that the participants had reached agreement on a number of important principles in combating corruption, such as the necessity of the integrity of the judiciary and the equally necessary ability of state agencies to punish those who lack such integrity. Mr. Ainsworth explained that he would focus on the kind of punishment for which his office is specifically responsible – criminal sanctions. Balancing the independence of judges and the ability to punish them is an important question, and a solution may be found in the appointment of an independent prosecutor. The USA learned this lesson from the Watergate scandal in the early 1970s; the Public Integrity Section of the Justice Department was a direct result of reforms instituted to prevent such a situation reoccurring. The prosecutors of the Public Integrity Section take over an investigation when it is necessary to have a case prepared by those with no personal, professional or political ties to any person or institution under suspicion. He illustrated some of the problems encountered in his work by outlining a real case.

The case was that of Robert F. Collins, who was a federal judge in New Orleans. It involved a defendant charged with drug offences and an intermediary who offered to broker a deal with Judge Collins in return for US$100,000. The drug defendant offered to co-operate with investigative authorities in return for more a lenient sentence; his credibility therefore was an obstacle which had to be carefully overcome. Furthermore, the participation of the intermediary meant it was possible that the judge was entirely innocent of this allegation by the drug defendant. Corroborating the allegations was therefore vital. The best way to do this was to hear Collins incriminate himself, which required a wiretap or other form of interception. Seeking warrants for wiretaps or for other investigative activities from a judicial colleague of the subject could have resulted in a conflict of interest or the appearance of one; therefore the investigators had the case overseen by a judge from a superior circuit. A further difficulty was how to proceed with the prosecution of the suspected drug dealer and informer. This was overcome by the defendant agreeing to the withdrawal of any sentence imposed on him by Collins and the transfer of the case to another court.

Mr. Ainsworth outlined how the investigation was planned in stages, the investigators waiting to establish credible evidence before seeking permission for more invasive investigative techniques. Surveillance teams followed up on evidence gleaned from such techniques, and pre-recorded bills were traced passing from the judge to local vendors. Collins and the intermediary were charged, convicted and sentenced.

Mr. Ainsworth also outlined the *Minor* case, in which dated and signed copies of a judge's participation in ethics training proved to be helpful evidential articles in securing a conviction for corruption. The prosecution could prove beyond a reasonable doubt that the judge knew he was acting unethically in not disclosing the financial help he had received from a litigant. Mr. Ainsworth recommended that the participants make use of this simple procedure if they are involved in providing training to judges or prosecutors.

In closing, Mr. Ainsworth reiterated the importance of having an independent prosecutor to evaluate the evidence before him or her without any political bearing on his or her decision, and the prosecution of corrupt individuals to ensure the effective functioning of a fair and impartial system of government.

J. Discussion Session V

Topic: *Practical issues in the investigation, prosecution and trial of corruption cases in the judiciary and prosecutorial authorities*

This Session was chaired by Mr. Uthai Arthivech, Expert Public Prosecutor, Acting Executive Director of the Office of International People's Rights Protection of the OAG of Thailand.

The participants discussed the 40 **ongoing cases** involving Thai prosecutors; two cases involving Indonesian prosecutors; the dismissal of five Indonesian judges; the investigation and charge of a Malaysian magistrate and two Malaysian prosecutors for corruption offences; and the charge of a Malaysian Sharia Court judge for a corruption offence. Mr. Arichindarem Sinappayen of the Malaysian

Anti-Corruption Academy said that he believed Malaysia was moving in the right direction in the investigation and prosecution of such cases, although he did mention **difficulty in accessing information and the aloofness and protective tendencies of judges and prosecutors** towards their colleagues. He told the Seminar of a whistleblower in the judiciary who was asked to leave and did resign but who was later vindicated following an investigation by the anti-corruption authorities. Mr. Nguyen also spoke of difficulty in gathering sufficient evidence. He told the Seminar of two judges in his country who were prosecuted in 2005 for bribery after witnesses were offered money. He also spoke of five ongoing cases, and of the five judges currently in detention. Four court clerks are also awaiting trial in Vietnam.

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Mr. Rommel of the Philippine National Police spoke of the use of **preventive suspension** in the Philippines, which he said was not a sufficient punishment. He spoke of the retraction of witness statements and the helplessness of anti-corruption officers in those circumstances.

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Some Thai prosecutors mentioned the possibility of **weakening public trust** in the administration of justice by dealing with corruption cases publicly, and the converse problem of not knowing how to report or pass on information of corrupt behaviour because of the secretive manner in which the problem is currently addressed.

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The next item discussed was the **necessity of criminal sanctions**. The participants discussed the prevailing situations in their respective countries and most agreed that corrupt judges and prosecutors should receive harsher punishments than other people involved in corruption, as they bear a responsibility to uphold the rights of others.

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The next topic for discussion was the **concrete characteristics of individual cases**. Mr. Jumpon pointed out that if an investigator uncovers well-concealed facts or a sophisticated cover for wrongdoing, this may be a clue that the perpetrator was familiar with investigative and legal proceedings. He mentioned the *Collins* case and the *Minor* case, both of which Mr. Ainsworth outlined in the morning session, as examples of this. He also reminded the participants of the guidelines that Mr. Oshino explained in his presentation of the day before, including prohibitions on wining and dining and receiving unlisted stock, which may be indicative of collusive relationships. Mr. Ainsworth added that the Public Integrity Section of the US Department of Justice has experience of cases where attempts have been made to disguise very large bribes as “commissions”. As a very pertinent example, he pointed out that allegations of corruption against a Thai public official outlined in that day's edition of the Bangkok Post newspaper uses the same word to describe the funds given to the official.

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When discussing the **prerequisites for a successful investigation and trial** of corruption, Mr. Davost raised the issue of false accusations and the damage that they can cause to judges and prosecutors. Mr. Aizawa spoke of the necessity of limiting the application of judicial and prosecutorial immunity to criminal activity. Mr. Akapin noted that the investigation of such cases in Thailand is undertaken by the NCCC, not the police, and wondered if a similarly specialized group of prosecutors and judges ought to be established also. Mr. Morais raised the issue of requiring the consent of a judge before intercepting telephone communications, which are vital to many corruption investigations. He explained that in

Malaysia, the consent of a public prosecutor is sufficient for such action to be undertaken. This also applies to the investigation of banking facilities and is in tandem with special investigative techniques of the UNCAC and UNODC guidelines. He also highlighted a peculiar feature of Malaysian law in corruption cases whereby evidence from a bribe-giver does not need to be corroborated for it to be admissible, despite the bribe-giver being an accomplice to corruption. Mr. Ainsworth added that corroborating the evidence of a witness is important to secure the evidence in case that witness does not appear in court, possibly as a result of being paid off. Mr. Jumpon made a final point, echoing the first Thai comment on the subject, that impartiality is vital and that this is best achieved by having the investigation conducted by a team with no links to the suspects. He asked if a special team or a special court was necessary. Mr. Naito agreed that public trust would be increased by such practices, and that impartiality must be apparent to the general public. He also mentioned that sensitive investigative information must not be allowed to leak to corrupt judges or prosecutors.

K. Discussion VI

Topic: *Best practices for controlling corruption in the judiciary and prosecutorial authorities in the respective countries*

This session was chaired by Ms. Deana Penaflorida Perez, Senior State Prosecutor of the National Prosecution Service, Department of Justice, the Philippines.

The participants discussed **court management structures** and the Chair mentioned that the Philippines has implemented a computerized reminder system for judges which informs them of their deadlines. A further innovation is the Speedy Trial Act which discourages any delay for which there is no good basis. Ms. Perez also mentioned that many donors or lenders were found to be interested in assisting with the establishment of a case tracking system. Organizations such as the Asian Development Bank, USAID, and the Asia Foundation can offer such assistance.

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The next topic for discussion was the **statistical analysis of cases**. Mr. Naito quoted the UN Toolkit saying that statistical analysis is useful in identifying and establishing norms and standards, which form a basis for establishing judicial accountability measures. Complete objective data will establish what constitutes a speedy procedure or what constitutes a simple procedure. The Chair pointed out that like wild deviations from jurisprudence or substantive law, data which is dramatically different from established statistics can signal something amiss and can be a useful starting point for an investigation. She urged delegates to make good use of their respective planning offices. Mr. Ainsworth then pointed out that statistics can show how often legislation is used to fight corruption and could therefore be useful in demonstrating that merely enacting legislation is not sufficient. Using and enforcing the legislation is also vital.

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Moving on to **public awareness and education**, the participants discussed the rights of the public to know where and how to complain when there is a problem with judges and prosecutors.

A Thai participant said that this topic was closely related to the strength of the press, and that contempt of court laws must be relaxed to allow more freedom to report and discuss cases. At present in Thailand, only concerned parties attend court cases despite the principle of justice being administered in open court. Disciplinary matters are also conducted in private as members of the judiciary do not wish to be open to examination and the risk of losing their credibility. Hearsay and notification of a dismissal of a judge are the only sources of information on these matters. Another Thai participant cautioned that the press may write the reports to reflect their own opinion and may not fully understand the law. Mr. Davost mentioned that in France, during a long trial, a magistrate not involved in the case will address journalists and brief them on developments. He also added that even among well-educated people, the law is not

often clearly understood and that justice should be explained and made known to the people. This may help to counter the tendency of dramatizing legal matters and events in order to sell papers. Addresses by the judiciary to the public on thematic subjects would help in this regard. The Chair agreed and told the Seminar of the recent establishment by the Philippine Supreme Court and Department of Justice of a Public Information Office which offers correct and exact statements to avoid biased or uninformed reporting by journalists.

A representative of the OAG Policy and Planning Office informed the participants that all OAG offices in Thailand are required to display a flow chart showing the procedure of an investigation and trial, and the person or body responsible for each stage of it. This is a new policy and its effects are being monitored. Mr. Andi-Lolo advocated educating children about the detrimental effects of corruption and the discussion of legal procedures among older students. Such a programme has been implemented in Indonesia. The Chair also mentioned the use of comics to teach children about the problems of corruption and their rights as citizens.

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Mr. Jumpon raised the issue of **participation by civil society in legal processes** to ensure and make apparent judicial impartiality. He pointed out that this could be a positive consequence of the new lay judge system in Japan, despite it not being the motivation for the implementation of the system. Mr. Ainsworth pointed out that it may be of use in corruption cases also, although the Japanese system will not use lay judges for bribery or corruption trials.

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There was strong debate on whether or not the matter of **protection for judges and their families** ought be discussed or included at an anti-corruption seminar and there was no unanimous agreement.

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Finally, **training and dissemination of best practices** was addressed, and the Chair recommended that participants talk to their compatriots who have attended courses or seminars such as those organized by UNAFEI to understand the benefit to be gained by participating in such international forums.

DISCUSSION AND ADOPTION OF THE RECOMMENDATIONS AND CLOSING CEREMONY OF 21 DECEMBER

L. Discussion and Adoption of the Recommendations

This session was chaired by Mr. Samphan Sarathana, Director General of the International Affairs Department of the OAG of Thailand. The General Editor was Mr. Takeshi Seto, Deputy Director of UNAFEI. The rapporteur was Ms. Grace Lord, Linguistic Adviser of UNAFEI. Participants debated and finalized the recommendations of each of the six discussion sessions of the Seminar and adopted eighteen Recommendations of the Seminar. The Recommendations are listed overleaf.

M. Closing Ceremony

The Guest of Honour at the Closing Ceremony was the Honourable Mr. Chaikasem Nitisiri, Attorney General of Thailand, who delivered the primary closing address. The Attorney General commended the participants for their hard work over the course of the Seminar and praised the comprehensive recommendations produced by their efforts. He urged the participants to be mindful of their great responsibilities in the exercise of their powers and to remember that the fight against corruption must be undertaken as a long-term effort. The Honourable Mr. Chaikasem also expressed his thanks to the co-hosts, UNAFEI and UNODC Regional Centre for East Asia and the Pacific, and to all of the organizing staff for their hard work in preparation of, and throughout, the Seminar.

Following the speech by the Honourable Attorney General, the Closing Ceremony was addressed by Mr. Keiichi Aizawa, Director of UNAFEI, who expressed his thanks to the co-organizers, the Office of the Attorney General of Thailand and the UNODC Regional Centre in Bangkok. Director Aizawa took this opportunity to announce that UNAFEI is planning, on the basis of the success of the First Regional Seminar, to organize another seminar to address the issue of corruption in public procurement. He expressed a wish to see as many as possible of the current participants at this second event. Mr. Aizawa concluded by thanking the participants for their hard work and expressed his sincere wish that they would disseminate and utilize the knowledge gained at the Seminar for the benefit of good governance in this region.

Next to speak was Mr. Keisuke Senta, Senior Legal Expert, UNODC Regional Centre for East Asia and the Pacific. Mr. Senta spoke on behalf of Mr. Akira Fujino, Representative of the United Nations Office on Drugs and Crime, Regional Centre for East Asia and the Pacific. Mr. Senta commended the work of the Seminar but emphasized that this was not the conclusion of the participants' efforts. He encouraged them to proceed on the basis of what they had achieved at the Seminar and assured them of the willingness of the UNODC to involve itself in their endeavours. He welcomed UNAFEI's announcement of the planned Second Regional Seminar and also expressed his thanks to UNAFEI and the Office of the Attorney General of Thailand for their help in co-organizing the Seminar.

FINAL RECOMMENDATIONS

We hereby acknowledge the following points.

Preamble - Recognition of Current Situation

Since the judiciary and prosecutorial authorities have the essential duty of maintaining the rule of law, the integrity of the judiciary and prosecutorial authorities must be guaranteed. Judicial and prosecutorial corruption devastates public confidence in the administration of justice. The judiciary and prosecutorial authorities are instrumental in upholding the law of their respective countries, and ensuring that it is applied fairly and impartially. Failure to maintain the integrity of the judiciary and prosecutorial authorities will not only undermine all other efforts to control corruption in other state bodies or by other state agencies, but will also have serious consequences for public regard for the rule of law. Apart from the danger to the public good which may result, a further consequence might be hesitation on the part of foreign countries to invest in the nation so affected. In addition, corruption in the judiciary and prosecutorial authorities facilitates safe haven for international criminals, who can bypass justice by bribing corrupt judges and prosecutors. This has particular ramifications in the global effort against transnational organized crime and terrorism.

Causes of judicial and prosecutorial corruption vary significantly from country to country. It is recognized that weak ethics is a major cause of corruption. Broad discretionary powers, without proper safeguards, and ambiguity of the law also allow possibilities for corruption in the judiciary and prosecutorial authorities. In addition, lack of transparency, low remuneration, conflicts of interest and close relationships with the relevant parties are also recognized as causes of corruption.

In recognition of the causes enumerated in the previous paragraph, we agree that the following concrete measures should be implemented to combat judicial and prosecutorial corruption. The major focus of our discussion of anti-corruption efforts was placed on prevention: to strengthen integrity and establish adequate accountability structures. We believe that, in spite of best efforts to prevent corruption, instances of corrupt behavior do occur and must be acknowledged and dealt with. We hold that, in order to restore public confidence in the criminal justice system, corrupt judges and prosecutors should be indicted and punished in accordance with the law, like other defendants, through a fair trial, by collecting sufficient evidence.

We hereby adopt by consensus the following Recommendations:

Recommendations:

1. Efforts to combat judicial and prosecutorial corruption should be based on an objective assessment of the nature and scope of the problem, if available;
2. Measures against judicial and prosecutorial corruption should be developed, based on consultations with stakeholders such as judges, prosecutors, private lawyers, investigative organizations, court users, law faculty, politicians, non-governmental organizations and the mass media;
3. Establishing new independent agencies to combat judicial and prosecutorial corruption should be considered, if existing agencies do not enjoy the public's trust. Agencies for that purpose already in existence should be empowered, allowing them to implement anti-corruption policies effectively;
4. The selection of new judges and prosecutors should be based on merit and be devoid of conflicts of interest. The processes of recruitment and promotion should be accountable and transparent; the participation of external personnel in those processes should be encouraged. Training or education to ensure and maintain integrity after appointment should also be engaged;
5. The status, salary, tenure, etc. of judges should be substantially guaranteed by law. These measures should also be applied to prosecutors, to the extent possible;
6. Codes of conduct for judges and prosecutors should be developed in accordance with the domestic

legal framework of the respective countries. Article 8 of the United Nations Convention against Corruption, the Bangalore Principles of Judicial Conduct, the United Nations Guidelines on the Role of Prosecutors and other relevant instruments should be duly considered, respectively. Corresponding disciplinary actions should be provided where the code is breached. Codes of conduct should be disseminated and used for training;

7. Introducing a periodic declaration of assets by judges, prosecutors and their families and associates should be considered, with sufficient corresponding powers of verification and sanction granted to monitoring bodies. Declaration of assets should also be considered prior to a judge or prosecutor being promoted;
8. The procedure for allotting cases in court should be random in order that judges, court officials and court users cannot unfairly influence the outcome of the procedure;
9. Legal proceedings at the trial stage should be conducted in open court to the extent possible. Decisions by a court should be rational, founded on evidence and applicable law, and open to public scrutiny. If a public prosecutor decides not to prosecute a case, the victim should be informed;
10. There should be common guidelines on sentencing, bail variations and prosecutorial discretion;
11. Review structures should be considered, or existing structures should be strengthened and enhanced as necessary, to allow comprehensive examination of judicial and prosecutorial orders and decisions;
12. The reform of judicial and prosecutorial administration, such as adequate remuneration and the computerization of case management, should be encouraged;
13. Judicial and prosecutorial authorities should provide the public with information for the sake of the transparency of, and accountability for, their actions, with due regard for the confidentiality of judicial deliberations and investigations. In this context, the role of the mass media should be duly acknowledged, recognizing the necessity on its part to refrain from speculation;
14. Public awareness of, and education in, the procedures and principles of the criminal justice system should be encouraged in order to improve the understanding of the role of judges and prosecutors;
15. Criminal sanctions should be sufficiently punitive, reflecting the seriousness of corrupt acts by judges and prosecutors and maximizing the deterrent effect of the penalty. Judicial immunity, if applicable in any country, should not extend to crimes of corruption;
16. Bearing in mind the characteristics of judicial and prosecutorial corruption, every special investigative technique, including financial investigation, interception of communication and international co-operation, should be considered;
17. The investigation, prosecution and trial of acts of judicial and prosecutorial corruption should be conducted fairly and properly;
18. Participation in international forums to share the experiences and good practices of other jurisdictions, such as JICA-UNAFEI group training courses, should be encouraged and attendees should disseminate the knowledge gained to their respective jurisdictions in their own capacities.

OPENING CEREMONY

Introductory Remarks by
Mr. Keiichi Aizawa,
Director, UNAFEI

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Opening Address by
Mr. Chulasingh Vasantasingh,
Deputy Attorney General of Thailand

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Address by
Mr. Akira Fujino,
Representative,
UNODC Regional Centre for East Asia and the Pacific

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Special Address by
His Excellency Mr. Hideaki Kobayashi,
Ambassador of Japan to Thailand

INTRODUCTORY REMARKS

Mr. Keiichi Aizawa
Director, UNAFEI

Excellencies, honourable guests, distinguished participants, ladies and gentlemen,

It is a great pleasure and privilege for me to have organized the Regional Seminar on Good Governance for Southeast Asian Countries, in conjunction with the Office of the Attorney General of Thailand and the United Nations Office on Drugs and Crime (UNODC) Regional Centre for East Asia and the Pacific, under the auspices of the Japan International Cooperation Agency (JICA). On behalf of UNAFEI, I would like to extend my heartfelt welcome to all of the honourable guests and the distinguished participants who come to join this significant forum.

The topic to be discussed at the Seminar is "Corruption Control in the Judiciary and Prosecutorial Authorities".

The integrity of the judiciary and the prosecutorial authorities is the cornerstone for securing the rule of law and maintaining the confidence of the general public in the judiciary. The judiciary is entrusted with the vital role of delivering judgments in legal disputes in civil matters, as well as rendering decisions in criminal cases, including cases of corruption by politicians and other public officials, thus protecting and materializing the rights of the people. A fair and impartial judiciary, independent from the legislative and executive branches of the government, is essential in order to fulfill its important task. The status of judges and prosecutors should be firmly secured for the same reason.

The independence and autonomy of the judiciary and the prosecutorial authorities requires a high level of integrity in order to hold themselves accountable to citizens. With a view to securing their integrity, a holistic approach should be employed. Firstly, the institutional framework necessary for preventing corruptive activities by judges and prosecutors should be strengthened. Secondly, a high level of ethical standards and norms should be implemented and prevalent within the judiciary and the prosecutorial authorities. Thirdly, effective law enforcement against the violation of ethical duties by judges and prosecutors should be realized, in as far as such violation constitutes a crime. In short, both prevention and law enforcement are the two major elements to be considered simultaneously when addressing the issue of corruption by judges and prosecutors.

Regarding institutional safeguards, realistic and positive steps should be taken to recruit the highest calibre persons as judges and prosecutors. They should be resistant to the possible inducements to engage in corruption. Furthermore, every effort should be made to ensure an adequate level of remuneration for judges and prosecutors.

In addition to those safeguards enumerated above, judicial conduct should be reviewed so as to make the working methods and working environment of judges less corrupt. An example is to change the method of drafting judicial decision documents. In some jurisdictions, judicial decision documents drafted by the court do not necessarily clarify the facts that were established by evidence, nor clearly indicate the interpretation or application of law to the case. As a consequence, the reason why a litigating party won the case, while the other lost, is not reasonably understood. This type of drafting practice unfortunately affords some immoral judges an opportunity to carry out judicial business in a corrupt manner. Therefore, efforts should be made to reform the structure of judicial decision documents in line with the basic principle of justice that the court decision should only be made on the grounds of evidence-based facts and the applicable law. I am confident that efforts aiming at such a reform would greatly contribute to the reduction of judicial corruption.

With respect to ethical standards and norms, they have to be clarified in writing, and shared by all members of the judiciary. In many countries, some of the key elements of these ethical norms are enshrined in the constitution or other relevant statutes. In parallel with that, drafting of the ethical principles and rules is of vital importance. However, mere words on paper can never be enough. They should be effectively implemented and enforced.

Taking of bribes by judges and prosecutors is the most typical and gravest form of violation of their ethical obligations. Such conduct damages the public confidence in the judiciary, because such conduct demonstrates an imminent risk for the judges and prosecutors to distort their decisions by receiving unlawful benefits from the interested parties.

Furthermore, taking of bribes by judges and prosecutors clearly constitutes a crime in almost every part of the world. Therefore, people who commit such crimes should not be immune from punishment. In this connection, I would like to recall our common experience that effective law enforcement is the best way of crime prevention. I believe that this is also applicable to bribery in the judiciary. The independence of the judiciary should not be invoked as a pretext to justify impunity. The criminal conduct of judges and prosecutors deserve severer punishment than ordinary public officials, because they are vested with a special power and authority to make legal impeachments, and impose criminal sanctions, against wrongdoers.

Ladies and gentlemen,

The United Nations has played a leading role in the fight against corruption, including the one within the judiciary, through, *inter alia*, the adoption of the United Nations Convention against Corruption, the provision of technical assistance, and the drafting of the Bangalore Principles of Judicial Conduct.

As a United Nations affiliated institute in the field of crime prevention and criminal justice based in Japan, UNAFEI attaches utmost importance to the effective prevention and control of corruption cases, and continues to provide international training services in this area. UNAFEI hopes to further contribute to the promotion of good governance in Southeast Asian countries by holding this meeting on the basis of our training experiences. This Regional Seminar also serves as a follow-up forum to the International Training Course on Corruption Control in Criminal Justice which UNAFEI has been conducting over the past eight years in co-operation with JICA.

I would like to take this opportunity to express my deepest appreciation, on behalf of UNAFEI, to the Office of the Attorney General of Thailand and the UNODC Regional Centre for East Asia and the Pacific for their enormous contribution and support in organizing this Seminar. I would also like to thank the Government of Japan for making a major financial contribution to convene this conference, in its capacity as the host country of UNAFEI.

In this connection, I would like to briefly share with you the fact that the Government of Japan is making a significant contribution to some of the Southeast Asian countries by providing legal technical assistance, mainly in the field of civil and commercial law, in strengthening the civil litigation process and importantly, the delivery of judicial decisions. The Japanese contribution includes assistance in the practical legal education of qualified legal trainees, and collaborative efforts with the judiciary for enhancing the practice of the drafting of court decision documents.

Ladies and gentlemen,

In closing, I look forward to seeing this Seminar provide a useful forum for bringing together expertise and knowledge in the field of our common endeavour, and generating workable solutions which

will contribute to the further promotion of good governance in this region.

Thank you very much for your attention.

OPENING ADDRESS

Mr. Chulasingh Vasantasingh
Deputy Attorney General of Thailand

His Excellency Mr. Hideaki Kobayashi, Ambassador of Japan; Mr. Keiichi Aizawa, Director of UNAFEI; Mr. Akira Fujino, UNODC Representative; International Experts; Distinguished Participants; Ladies and Gentlemen.

On behalf of the Attorney General, Mr. Chaikasem Nitisiri, and the Office of the Attorney General as a co-host of this very important event, I would like to welcome all of you to Bangkok and to the Regional Seminar on "Corruption Control in the Judiciary and Prosecutorial Authorities". It is my great pleasure and honour to be with all of you today.

We are here today to begin our deliberation on a highly significant topic. Corruption is a not only a serious crime but also a social cancer. It is pervasive in nature and has become a global problem with developing countries being affected the most. Corruption undermines democratic institutions, slows down economic development and causes inequality and injustice to society. Root causes of corruption are difficult to eradicate. However, the problem would be much worse if the judiciary and prosecutorial authorities, who have the responsibility to uphold the rule of law, are themselves corrupt. Whenever the public lose their faith and trust in the justice system, we – judges and prosecutors – cannot live in peace.

I personally admire UNAFEI in meticulously designing this Regional Seminar to focus on the integrity of the judicial and prosecutorial authorities. Please allow me to take this opportunity to share some thoughts with you about corruption control in prosecutorial and judicial authorities. Under the Penal Code of Thailand, there are specific provisions with severer penalties for prosecutors and judges corrupting or abusing their powers. On the prevention side, high level prosecutors and judges are required by the constitution to declare their assets and are subject to the impeachment process by the parliament. The Senate can remove high level prosecutors and judges from office based on evidence showing unusual wealth, dishonesty, misconduct in public office, corruption or abuse of power. However, as a lawyer, I think we all agree that what matters the most in having good laws is implementation and enforcement. Therefore, I am keen to learn from the recommendations at the end of this forum how we - *prosecutors, judges, police officers, anti-corruption and anti-money laundering authorities, and inspectors* - can actually make anti-corruption legal measures truly effective.

Excellencies, Ladies and Gentlemen, on behalf of the co-host, I would like to encourage each and every one of us here to take this opportunity to openly discuss, exchange views and experiences, and to learn from each others' lessons in order to search for some, if not all, of the best practices, especially the ones that work well within eastern cultures. In addition, please take this great opportunity to establish and enhance our criminal justice network in order to strengthen our efforts in pursuing and achieving the ultimate goal of a corruption-free society.

Please let me express again that it is truly my pleasure to welcome all of you here today. I wish you all the best of success in your deliberation for the next five days. However, please do not forget to make the best of your time after work to enjoy Bangkok during this festive season.

Thank you very much for your attention. I now declare this Regional Seminar OPEN.

ADDRESS

Mr. Akira Fujino
Representative,
UNODC Regional Centre for East Asia and the Pacific

His Exellency Mr. Hideaki Kobayashi, Ambassador of Japan; Mr. Chulasingh Vasantasingh, Deputy Attorney General of Thailand; Mr. Keiichi Aizawa, Director of UNAFEI; it is indeed an honour and pleasure for me to address the Regional Seminar on Good Governance for Southeast Asian Countries, with the theme of "Corruption Control in the Judiciary and Prosecutorial Authorities".

This important event takes place just a few days after International Anti-Corruption Day, commemorating the signing conference of the United Nations Convention against Corruption.

UNODC has been co-operating with UNAFEI and Thai authorities for a number of years in various areas in crime prevention and criminal justice. I have also been discussing with Directors of UNAFEI possible joint activities and I am pleased that it has now materialized. This will further strengthen our close relationship.

I wish to thank you all for your presence today, especially the criminal justice officials who are involved or are expected to be involved in the training and/or in corruption control of judges, prosecutors or their equivalent. With your current positions, you have all obtained this level in your professional careers due to your high competence and integrity.

This Regional Seminar on Good Governance for Southeast Asian Countries provides a unique opportunity for the ASEAN countries, UNAFEI, and UNODC to explore opportunities towards the development of human resources to promote and strengthen the rule of law, judicial systems, and legal infrastructure and good governance in the public and private sectors.

When the United Nations Convention Against Corruption was adopted in 2003, the UN Secretary-General stated that corruption

"*… is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately – by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development.*"

The United Nations Convention against Corruption is a landmark achievement responding to these concerns. This global Convention reflects the increased political will of States Parties to counter corruption more effectively.

And yet, there are important next steps:

(i) For the Convention to become the global standard that it was negotiated to be, we must secure the largest possible number of ratifications of the Convention within the shortest possible time and;
(ii) It is essential to ensure the robustness of the implementation mechanism of the Convention, and its effective functioning.

The Convention is an operational tool enabling countries to fight corruption in both the public and private sectors. With its detailed provisions obliging States Parties to carry out a wide range of anti-corruption measures, the Convention offers countries international standards against which to adapt their national legislation. It further provides benchmarks that enable civil society to hold their governments accountable for anti-corruption activities. As you know, the Convention also has a mechanism that provides for international co-operation in the recovery of assets illicitly acquired by corrupt officials, making it a unique international instrument.

However, all these mechanisms and frameworks would remain mere documents unless implemented by people of the Member States who have integrity and competence. People in the judiciary and prosecutorial authorities are expected to do more in taking effective measures against corruption, especially within their own ranks. As the saying goes, it is difficult to spot corruption in people wearing the robes of integrity and expected to apply justice objectively.

As part of UNODC's initiatives, we have assisted several countries, including those in the region, in the development of anti-corruption strategies, supporting prevention measures and the establishment and institution-building of anti-corruption bodies. The activities reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability. We offer practical widely-agreed standards for investigators, prosecutors and judges; best practices for prevention of corruption; and promote a common global effort against corruption.

Our only hope of controlling corruption is through the effective application of the rule of law. Your presence is an indication of your support in addressing crime and corruption.

The opportunity is clear. We have an opportunity to be bold, to break with the past; to work with dedicated people around the world to control corruption. You, as members of the judiciary and prosecutorial authorities, can control corruption, starting within your own backyard and within your own ranks because corruption is not some vast impersonal and inevitable force. It is a crime committed by people who decide to break the rules for their own gain.

Judges and prosecutors, your 'no' counts when you refuse a pay-off to pervert the course of justice. As persons of integrity from the judiciary and prosecutorial authorities, your "no" should be louder than most in order to help societies build integrity and prevent corruption. Governments must provide such agencies with the independence and resources to be able to say 'no' more often.

The UNODC Regional Centre for East Asia and the Pacific, together with colleagues at our Headquarters, looks forward to future co-operation with all the countries and agencies represented here, through the development of concrete programmes and projects in this field.

I wish to reiterate our appreciation to UNAFEI and the Attorney General's Office for the preparation of the Seminar, to visiting experts for coming, and to the Government of Japan and JICA for financial support.

I wish you fruitful deliberations in the next five days and look forward to hearing about practical and doable courses of action which you will devise towards corruption control in the judiciary and prosecutorial authorities.

SPECIAL ADDRESS

His Excellency Mr. Hideaki Kobayashi
Ambassador of Japan

Mr. Chulasingh Vasantasingh, Deputy Attorney General of the Office of the Attorney General of Thailand; Mr. Keiichi Aizawa, Director of the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders; Mr. Akira Fujino, Representative of the United Nations Office of Drugs and Crime Regional Centre for East Asia and the Pacific; Distinguished Participants; Ladies and Gentlemen.

On behalf of the Government of Japan and the JICA Thailand office, it is my great pleasure to say a few words at the opening of this Regional Seminar on Good Governance for Southeast Asian Countries focusing on "Corruption Control in the Judiciary and Prosecutorial Authorities".

First of all, I would like to welcome Mr. Aizawa and the other staff members from UNAFEI, participants from countries in the Southeast Asian region, and visiting experts. I would also like to express my sincere appreciation to the staff members of UNAFEI, the Office of the Attorney General, and the UNODC Regional Centre for their great efforts in organizing this Seminar.

As every participant may be aware, the new constitution of Thailand, promulgated last August, includes provisions to preserve the National Counter Corruption Commission set up under the previous constitution. The criminal court procedures for the prosecution of politicians who are suspected of corruption are also carried over to the new constitution. They demonstrate that Thailand views the fight against corruption as one of its most important challenges, and also underlines this country's firm determination to continue implementing counter corruption measures after the general election to be held on Sunday.

Of course, we know as well that various measures are being taken to combat corruption in each participant's country. It is not easy, however, to totally eliminate this problem, all the more because cases of corruption have become more and more complicated. Therefore, we have to constantly reinforce measures with a view to eradicating corruption. I think that in order to seriously tackle corruption, the establishment of the absolute integrity of the criminal justice system is a fundamental prerequisite.

In this Seminar, participants will be able to share their experiences and learn about measures against corruption from a range of countries. I am confident that this Seminar will lead to strengthening of measures in each country and to facilitating co-operation among us in transnational cases.

I should like to conclude by extending my heartfelt wishes for the success of this Seminar. Thank you very much.

PRESENTATION SESSION I

Presentation by
Mr. Michel Bonnieu,
Senior Legal Adviser,
UNODC Regional Centre for East Asia and the Pacific
***
Individual Presentation by Ms. Piyaphant Udomsilpa,
Deputy Director General, Legal Counsel Department, Office of the Attorney General,
Thailand
***
Individual Presentation by Ms. Sar Chanrath,
Deputy Director, Legal Education and Dissemination Department, Ministry of Justice,
Cambodia
***
Individual Presentation by Mr. Ferdinand Tandi Andi-Lolo,
Investigator and Prosecutor, Office of the Deputy Attorney General for Special Crimes,
Indonesia
***
Individual Presentation by Ms. Ifa Sudewi,
Judge, National Court of Central Jakarta,
Indonesia
with
Mr. Mangasi Situmeang
Public Prosecutor,
Head of Genocide Section,
Attorney General's Office,
Indonesia
***
Individual Presentation by Mr. Anthony Kevin Morais,
Deputy Public Prosecutor, Law and Prosecution Department,
Anti-Corruption Agency,
Malaysia

Please note that the following papers have not been edited for publication.
The opinions expressed therein are those of the authors, and
do not necessarily reflect the position of the departments or agencies they represent.

CORRUPTION CONTROL AND JUDICIAL INTEGRITY
An International Perspective with Illustrations in South-East Asia

Michel Bonnieu[*]

I. INTRODUCTION

Ehrlich, a famous Austrian legal scholar has said that in the long run justice cannot be guaranteed except by the integrity of the judges.

Judicial integrity is a sensitive issue to address in any State in the world. In the first place it is a controversial topic since, it touches upon the statutory rules which govern the professional conduct of judges as well as more personal behaviours, sometimes trespassing private life. In the second place, the perception and subsequent criteria to define judicial integrity vary from one culture to another and the mechanisms, if any, set in place to assess its quantum are therefore questionable.

Historically, common law and civil law systems differed in their conceptualization of the institution of the judiciary and therefore in the way to address and ensure judicial integrity.

In systems with roots in the common law, the separation of powers model has always viewed the judiciary as traditionally powerful and independent. Common law system judges typically have security of tenure, and considerable autonomy over their budgets and internal governance.

In some civil law systems, the judiciary has been necessarily viewed as a separate arm of government, but rather placed under the governance of a "supreme council" including the Head of State and the Minister of Justice in its composition. Judges and prosecutors have long been regarded as unpredictable and unreliable.

In countries undergoing transition from one political system to another, the challenges are greater as the judiciary itself is often required to transform its role under the previous regime while working to build public trust in the new regime. This often takes place against a backdrop of political and economic struggles to articulate what the profile of the new state will be, as well as problems with crime and corruption that are often present in transitional societies. In most cases there is no or little public trust in the judiciary.

South East Asia provides a good illustration of the array of different cultures and judicial systems in place and therefore of the perception of judicial integrity.

Notwithstanding differences, the trend worldwide still complies with French 17th century philosopher Montesquieu's base definition of democracy. Therefore, inevitably the issue of integrity in the judiciary resurfaces because it is linked to the notion of the separation of powers and the related independence of the judiciary.

Notwithstanding the different perspectives, nobody should seriously challenge the idea that integrity should be the corner stone of the judiciary because judicial decisions impact all aspects of life in

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the society. In each country, the judiciary plays an important role in stabilizing the balance of powers within government, and its performance can enhance public confidence in the integrity of government as a whole.

Indeed the judiciary has a vital role. It reaches not only the traditional domains of peace and order, but almost every aspect of national and community life – be it social, economic, political or humanitarian. Moreover, the judiciary stands as the last bulwark of democracy and the ultimate recourse of the people in redressing grievances committed to people.

For those reasons, the systems allow judges and prosecutors to determine the laws which have to be applied to personal behaviours. True to the doctrine of judicial independence, they should be free of force, fear, and political considerations to carry out their duties.

And yet, judges are fallible and human, and they inherently bring with them values instilled in them by society, education, and their family that subtly influence their decision making.

These are inevitable and even desirable aspects of decision making. And yet, when it comes to the integrity of the judiciary, judges and prosecutors often consider themselves beyond reproach even though – like any human being – they are also vulnerable. They are often reluctant to be held accountable and quite often there seem to be a confusion between the notion of the independence of the judiciary and the personal independence of the judges and prosecutors both in professional and private activities.

Today, judges and prosecutors operate in a global world driven by market economy and acts of corruption may tear down in a short time the hard-won trust in public institutions. Proceeds of international crime are huge and the UN conventions contain provisions which try to address this issue by urging each State party to empower its judiciary to seize them. As the latest to come into force, the UNCAC reflects an international agreement on the necessity to strengthen judicial integrity in the judiciary in order to foster cooperation among States to seize and return assets derived from the proceeds of crime to their legitimate owners. Intensive negotiation has been necessary to reach this agreement as the needs of States seeking such illicit assets have to be reconciled with the legal and procedural safeguards governing the judiciary of States whose assistance is sought.

Since the judiciary is often identified as an area whose dysfunctions may have a major impact on the efficiency of the anticorruption fight, measures are required to lead to high performance and integrity standards for Judges.

In this context the issue is to determine whether the judiciary (judges and prosecutors) can remain a kind of Mount Olympus where the ‘’Gods’’ would be unapproachable and untouchable in both their individual and institutional capacities?

II. THE NOTIONS OF JUDICIAL INSTITUTIONAL INDEPENDENCE AND JUDICIAL INTEGRITY IN INTERNATIONAL INSTRUMENTS

The notion of judicial independence and its corollary – judicial integrity – are expressed in major international instruments which have to be incorporated within the framework of their national legislation by Governments of member countries which are parties to the UN Conventions. For that reason, the notion of judicial independence is expressly or implicitly safeguarded by the constitutions - or relevant internal documents - in a large number of countries.

A. International Legal Framework

1. Judicial Independence

The right to a competent, independent and impartial tribunal is asserted in international instruments protecting fundamental human rights. Thus article 10 of the *Universal Declaration on Human Rights* provides that "everyone is entitled in full equality to a fair and public hearing by an *independent* and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". Similarly, article 14 of the *International Covenant on Civil and Political Rights* provides that "in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". Regional charters of human rights and other regional instruments reinforce and supplement these universal principles, the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Article 6)[1], the American Convention on Human Rights (Article 8)[2], and the African Charter on Human and Peoples' Rights (Article 7)[3].

Recognizing the essential role played by a competent, independent and impartial judiciary in the protection of human rights and fundamental freedoms, the seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders adopted in 1985, the *Basic Principles on the Independence of the Judiciary*, which are to be "taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general." The Principles cover the independence of the judiciary, freedom of expression and association, qualifications selection and training, conditions of service and tenure as well as discipline, suspension and removal. As such, the Guidelines provide a basic framework of international standards useful to assess the situation of the judiciary in any country.

2. Judicial Integrity

In its resolution 51/59 of 12 December 1996, entitled "Action against corruption" the General Assembly adopted the International Code of Conduct for Public Officials and recommended it to Member States as a tool to guide their efforts against corruption. The International Code of Conduct includes general principles for the professional conduct of public officials, as well as principles concerning the prevention of conflicts of interest, the disclosure of assets, the acceptance of gifts, the handling of confidential information and involvement in political activity.

As a further recognition that judges must conduct themselves in a manner that supports the key values of an independent judiciary, the UN Economic and Social Council adopted in July 2006 a resolution entitled: *Strengthening the basic principles of judicial conduct that seeks to finalize the principles of judicial conduct* set down in the Bangalore Principles of Judicial Conduct[4]. The Bangalore Principles of Judicial Conduct establish the standards for the ethical conduct of judges and provide both guidance to judges as well as a framework in which the judiciary may regulate judicial conduct. The Principles are organized around the key values of: independence, impartiality, integrity, propriety, equality, competence and diligence. The Principles are clearly drafted to assist both executive and legislative branch officials, lawyers and members of the public to understand and support the judiciary.

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1 "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law''

2 "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature''

3 "Every individual shall have the right to have his cause heard (d) the right to be tried within a reasonable time by an impartial court or tribunal.''

4 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002

B. Domestic Legal Framework

1. The Constitution

The three core features of a modern judiciary are therefore: competence, independence and integrity. The judiciary itself must protect those essential characteristics. But it also requires support from other "pillars of integrity" which are inter alia: governments, legislators, administrators, the media, civil society organisations, private sectors, law enforcement institution and the community generally. It is impossible to sustain democracy and the rule of law if the judiciary is deprived of theses values.

Therefore, the authority granted to the judiciary by the Constitution as well as any other enabling statute is critical in determining its role and its scope of activities. It is also essential to create a clear line of separation between the judiciary and other powers of the State and to set up a working mechanism to ensure the smooth running of the institutions and appropriate relationship between the different powers.

2. Other Sources Setting Ethics Regulations for the Judiciary

Quite often the general constitutional framework is complemented by a set of statutory rules that regulate the recruitment and career of judges. Even in countries where judges and prosecutors are considered civil servants, they usually benefit from a derogatory set of statutory rules which is meant to take into consideration the core characteristics of the function. This statutory framework may also be complemented by sets of rules of guidance and a code of conduct.

In addition, the source of authority for the administration of justice may be found in provisions contained in the penal and criminal procedure codes. This is mainly the case where operational powers are considered. Those legal provisions governing every phase of the proceedings are supported by precedents in common law countries or cases of "jurisprudence" in civil law countries which are basically courts decisions whether binding or not. Where the conduct of judges is concerned disciplinary proceedings are usually conducted by an *ad hoc* disciplinary committee.

This tight domestic framework is meant to ensure a high standard of judicial conduct, impartiality and equality of treatment to all before the courts which is essential to the due performance of the judicial office and necessary to retain public confidence

The high standard of judicial conduct requires the observance by members of the judiciary of guarantees of a fair trial and the respect of the rights of the defendants. Judges must be cautious to avoid contacts that may give rise to speculation to a special relationship with someone. Public confidence in the judiciary would be eroded if judicial decision-making was perceived to be subject to inappropriate outside influences. It is essential to maintain the public's confidence in the justice system that neither the executive nor the legislature nor the judge should create a perception that the judge's decisions could be coloured by outside influences. As far as personal behaviour is concerned, judges must conduct their extra-judicial activities so as to minimize the risk of conflict with judicial obligations. In all circumstances judges should avoid impropriety and the appearance of impropriety in all of their private activities.

C. Independence of the Judiciary as a Prerequisite to Judicial Integrity

The independence of the judiciary is a pre-requisite to judicial integrity and a fundamental guarantee for a fair trial. Judicial independence should not be understood as a privilege or prerogative of the individual judge. It is the responsibility imposed on each judge to enable him or her to adjudicate a dispute honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone.

1. Core Conditions for Institutional Independence

There are several core conditions to ensure the institutional independence and integrity of the

judiciary.

In order to assess whether the judiciary can be considered "independent" of the other branches of government, focus is usually initially directed towards the selection and appointment of judges and prosecutors. Other aspects are also crucial to judicial integrity such as inter alia: the training of the members of the judiciary, the security of tenure, the conditions of service and career opportunities, the notion of accountability, the existence of guarantees against outside pressures and of course the budget and financial autonomy of the institution in general and of the Courts in particular.

A specific initial and continuing training of judges and prosecutors is therefore crucial both to develop the technical skills necessary to carry out the proceedings in compliance with international and domestic legal frameworks and to create a proper institutional culture based on integrity.

We also believe that systems of appointment and transfer of judges are of a high importance for the establishment and strengthening of judicial independence and integrity. Persons selected for judicial office should be individuals of proven integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives.

Institutional independence with respect to matters of administration that relate directly to the exercise of the judicial function must be safeguarded. No external power should be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists. Although there is a necessity of institutional relations between the judiciary and the executive, such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the constitution.

2. A Specific Statutory Framework

Similarly judges and prosecutors should be placed within a specific set of statutory rules clearly determining their rights and obligations. Their rights should of course encompass security of tenure. Different systems are in place ranging from a tenure, whether for life, until an age of retirement, or for a fixed term that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience. Another important factor is financial security. Judge and prosecutors are carrying out a public mission, therefore their right to salary and pension should be established by law and not subject to arbitrary interference by the executive in a manner that could affect judicial independence.

Judicial independence, established by law, is the prerequisite for judicial integrity. However integrity cannot be established only by law. It is a notion that is above the laws. Therefore it is expected that the judges and prosecutors fully understand the crucial necessity to comply with the highest standards of integrity.

D. Brief Overview of the Situation in South East Asia

The above principles naturally apply to countries in South-East Asia where legal systems with roots in civil or common law countries sometimes combined with Muslim influence (Brunei, Indonesia, and Malaysia) have developed appropriate instruments to strengthen judicial independence and promote integrity in the judiciary in accordance with their own history and culture.

In most Constitutions of the ten ASEAN countries for instance an explicit reference is made to the independence of the judiciary and the crucial need to ensure judicial integrity. It is a clear indication that the judiciary is now perceived, at least by policy makers, as a key element of democracy. Yet, States sometimes have a "schizophrenic" behaviour when it comes to actually vest the Judiciary with the arms

of independence. Today, judicial systems have become very complex, the scope of the different laws has been broadened and rules of procedure plagued with technicalities. Therefore it is true that the smooth running of such intricate legal frameworks is easy to jeopardize and therefore the enforcement of legal provisions is quite often at stake. The community often has the feeling that those legal notions are only words on paper which have been drafted by politicians and as a consequence the judiciary does not inspire trust and confidence.

The South-East Asia region, especially within the framework of ASEAN offers a very interesting example of a mosaic of countries addressing similar issues with cross judicial perspectives. A particularly interesting illustration of the above is the situation in Cambodia. This country as a post conflict country has engaged in a very ambitious legal and judicial reform with the coordinated assistance of the international community. Almost all the agencies and bodies required to ensure judicial independence have been established, a very courageous step has been taken to set up the Extraordinary Chambers for the trial of the former Khmer Rouge with the assistance of UN, and yet the ministry of justice and the judiciary are not yet perceived as trustworthy institutions by both the community and the foreign investors.

III. TENTATIVE IDENTIFICATION OF POSSIBLE VULNERABILITIES AND RELATED REMEDIES TO SUSTAINJUDICIAL INTEGRITY

There is a clear link between corruption and judicial integrity. Judicial integrity is a crucial aspect of the overall fight against corruption because it is an area where dysfunctions have invaluable consequences. The entry into force of the UN Convention against Corruption is a major step forward for judicial integrity because it incorporates crucial elements of the fight against corruption in the public sector in general and in the judiciary in particular. Specific provisions tackle the bribery of national public officials and the criminalization of the obstruction to justice. The provisions on asset recovery – the first of their kind – which require Member States to return assets obtained through corruption to the country from which they were stolen is also a major breakthrough. However, as a result of the entry into force of the UNCAC, the judiciaries of member states including developing countries where corrupt elites have looted billions of dollars are going to be responsible for and empowered to implement these innovative provisions related to the recovery of the proceeds of crime with no or little prior training. Given the magnitude of corruption and the amounts at stake, there is a serious risk of improper influence and possible misconducts not to say bribery within the judiciary itself. Therefore, it is crucial to be aware of possible vulnerabilities of judicial integrity in order to try to prevent or remedy them.

For that reason it is of core importance that the implementation of the provisions of the UN Convention against Corruption shall be fully supported by the UN in order to ensure proper impartial practice. Impartiality is essential and shall apply not only to the Court decisions but also to the process by which the decision is made. Therefore, measures are required to lead to high performance and integrity standards for magistrates through appropriate trainings. This cannot be achieved without addressing the issue of the accountability of judges and prosecutors. In our perspective, integrity should also be understood as a clear willingness from the judiciary to adapt itself to new legislations and series of norms with a view to improve the action capacity of the institutions in charge in investigating these serious crimes. To maintain integrity the judiciary has to demonstrate that it is ready to change its mindset where necessary.

A. Major Possible Vulnerabilities to Judicial Integrity

Nobody would seriously believe that a legal framework in place – regardless of its quality – is

sufficient to ensure judicial integrity. Different possible vulnerabilities which have to be anticipated as early as possible already exist or will develop and appear sooner or later. Whereas we are quite conscious of these existing or potential risks, we also sincerely believe that a proper implementation of the UNCAC provisions related to public officials will greatly limit that risk. However, quite paradoxically the major breakthrough of UNCAC Convention in addressing asset recovery which is explicitly referred to as a fundamental principle of the Convention and the related priority given to the return of confiscated property to the requesting State may, if not implemented properly, open a serious breach for acts of misconducts and even corruption. UNCAC encourages member states to vest the judiciary with more powers to secure evidence, initiate inquiries against high ranking public officials or deal with offenders and proceeds of crime. Obviously, the objective is to set in place the best mechanisms to carry out independent and impartial inquiries against those suspected of having participated in and benefited from criminal acts. However there is a clear risk that the judiciary does not make the necessary efforts to change its mindset in its approach of what an investigation of this nature should be and the related necessity to use new investigative powers. Notwithstanding the fact that this risk has clearly been taken into consideration during the intensive negotiations which led to the agreement, we believe that it is a core priority to put in place checks and balances to control the new powers of the judiciary and ensure its integrity

One of the most frequent possible vulnerabilities has an economic nature. It is widespread in developing countries where judicial integrity is often impaired due to the fact that a significant number of judges and prosecutors have allegedly been involved in passive bribery, conflicts of interest, trading of influence or misuse of official positions ever since they took their positions. As a result, Courts are already corrupt, or may have fallen into counter-productive internal practices, or may not have the confidence or resilience to resist inappropriate political or economic influence. It is often explained that the situation is unavoidable because it is an aspect of informal economy resulting from low salary scales and the lack of adequate systems of compensation to sustain appropriate livelihood according to the level of the economy of the country. At this point, the challenge is to assist a system in distress to recognize and achieve its highest, not lowest, aspirations.

A second set of vulnerabilities has a more institutional nature and relates to the line of separation between the respective roles of the prosecutor and the investigative authorities – police, gendarmerie and investigating judge. The failure in a system to distinguish between the role and powers of the investigators and that of the prosecutor is not a good way to conceptualize the investigation of a crime as it can discourage a thorough, impartial and complete investigation and thus seriously affect judicial integrity.

In many cases, the procedures to ensure the prompt information of the prosecutor or investigating judge in charge of serious cases, by the intelligence and investigations structures through the transmission of any information or evidence are not always in place.

In addition, the position of the prosecutor in relation with the hierarchically superior prosecutor is also often underlined as a possible vulnerability. Systemic problem often arise because no clear provisions for the application of the continuity principle during the criminal pursuit are in place and no objective criteria exist for the initial assignment of cases to public prosecutors or to investigating judges restricting the possibilities for cases to be reassigned, taken over hierarchically or dropped.

In other cases, specifically in some civil law based systems there is no efficient control of the prosecutor or the investigative Judge upon the investigation activities conducted by the judicial police under their authority. Citizens have the right to expect a judicial system that works hard to find the truth and that tries to treat all who come in contact with it with professionalism and fairness.

A third set of possible vulnerabilities which in fact complement the previous one is linked to the

rules of procedure and relates to the core functions of the positions involved. In this respect, regardless of the systems they are operating in, investigating judges and prosecutors alike have to act under ethical constraints which state that their jobs is to seek truth and justice and not merely to prosecute and try to get a conviction. For that reason, in the interest of justice most of the systems place on prosecutors, investigating judges and trial judges both an ethical and legal obligation to gather and share with the defence counsel any information in their possession that may, in any degree, tend to negate the defendant's guilt. This obligation applies even if they are firmly convinced of the defendant's guilt and have plenty of other incriminating evidence to establish this guilt. This is indeed a specific characteristic of judicial integrity which greatly complicates the role of judges and prosecutors whereas a similar obligation is not imposed to the defendant's lawyer who can in some common law countries even organize rehearsing of testimonies in order to better prepare the defendant not to tell the truth.

A fourth obstacle is the uncertainty over the priorities of the criminal systems in respective countries. What is the true objective of the investigative phase? Is it to try to ascertain the truth irrespectively of the time and related costs involved or is it merely to obtain easy convictions of *prima facie* offenders with the inconvenience to only catch "small fishes"?

Some critics have said that systems where plea bargaining is practiced are not focused on the truth but merely on the duration of the proceedings and financial gain. If such is the case is it still appropriate, in those circumstances, to refer to judicial integrity?

This vulnerability may also be illustrated by the role and jurisdiction of investigating judges in some civil law systems. Under the basic principle of criminal law, cases assigned to an investigating judge must be investigated "*in rem*" as opposed to "*in personam*". The consequence of such a conceptualization is extremely important. It means that the investigating judge has the obligation to indict and notify charges to all persons who appear to have been involved in the fraudulent activities and not only the persons mentioned at the initial stage of the investigation if any. In current situations serious transnational organized cases are at the initial stage investigated against one identified person or sometimes against X. At the completion of the investigation phase, scores of persons may have been indicted and are ready to be sent to trial.

It is critical for the integrity of the judiciary that the investigating judge carries out his mission in full compliance with these procedural obligations no matter what the consequences may be in term of cost, duration or political considerations. Any person who appears to have a link in fraudulent activities being investigated must therefore be indicted and thorough investigations related to his conduct have to be carried out. Unfortunately investigating judges are very often left alone to fight very powerful organized institutions with very high profile skilled and well connected offenders heading them who have all means to avoid criminal proceedings.

A fifth set of vulnerabilities we anticipate, could result from the improper use of the innovative provisions related to asset recovery under chapter V of the UNCAC, either through mere ignorance or with a clear intent to breach the law. With the entry into force of the UNCAC, judges are requested to address more and more complex organized crime cases where, quite often, an organization structured for acts of corruption is also finally involved in other equally serious crimes such as trafficking in persons, illegal drug dealing or trafficking of arms for terrorist groups.

It is obvious that all significant organized crimes are committed for profit. Attacking criminal assets and preventing criminals from benefiting from their crimes must accordingly, become a high priority for judiciaries and investigators. There is also a need for financial investigations parallel to criminal investigations. Financial investigators are able to find relevant material such as account details, real property locations, material bought, etc., that an investigator not trained in financial investigation may not see the relevance of. The development, therefore, of a team-working ethic between financial and

criminal investigators enables both more focused and thus successful criminal investigations and also provides a greater likelihood that the proceeds of the criminal activity will be traced, restrained and, subsequently, recovered. It is the overall strategy of the investigation phase which has to be shifted.

We are concerned that this new paradigm has not yet been internalized by practitioners in many countries as the main strategy for reducing crime and as a consequence the judiciary is not prepared or does not have the means to fight those groups. We are also concerned that some practitioners may loose their integrity when exposed to such valuable assets. Therefore risks of mishandling the asset recovery mechanisms leading to a possible dissipation of the proceeds of crime have to be anticipated.

B. Possible Preventions and Remedies to Strengthen Judicial Integrity Through UNCAC Implementation

The UNCAC also called Merida Convention is the latest Convention in criminal matters adopted in 2005 by the UN. Although it is quite recent, it has a great maturity because it was built on the lessons learnt through the implementation of the previous conventions addressing transnational organized crime. Typically, the vulnerabilities that we have tried to identify in supra have somehow been anticipated by the drafters of the UNCAC. They have deliberately chosen to go farther than the previous Conventions on a series of crucial provisions especially where the proceeds of crime are involved. Therefore, it is quite interesting to speculate whether the entering into force of UNCAC in many countries will ease the above described vulnerabilities and whether it will be of help for future measures strengthening judicial integrity.

1. General Requirements

Integrity in the public sector is one of the pillars of the UNCAC. Pursuant article 1 (c) the purpose of UNCAC is to "promote integrity, accountability and proper management of public affairs and public property". Article 2 provides a broad definition of the term "public official": "a public official" shall mean any person holding a legislative, executive, administrative or judicial office of a State Party, whether permanent or temporary or a person who performs a public function.

It is quite clear that, pursuant to article 1 and 2 judges and prosecutors as well as law enforcement agents undoubtedly fall into the above category of "public official". Chapter 1 also deals with measures regarding the prevention of corruption in the judiciary and prosecutorial services of countries.

The notion of integrity is further mentioned in paragraph 1 of article 5 which deals with "preventive anti-corruption policies and practices" and also applies to the judiciary and prosecutorial authorities.

Moreover, Art 11 which specifically deals with measures relating to the judiciary and prosecution services urges member States "to take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary".

Under chapter three related to criminalization, the Convention requires States to establish a wide range of acts of corruption related to public officials as criminal and other offences if such acts are not already considered crimes under domestic law. The convention goes beyond previous instruments of this kind, criminalizing not only basic forms of corruption such as active and passive bribery of public officials and the embezzlement of public funds, but also trading in influence and obstruction of justice. It also requires member states to criminalize offences related to money laundering of the proceeds of crime.

This clearly shows that the Convention anticipates the fact that the nature of corruption and the possibility of co-opted or corrupt members of the judiciary in a given state render preventive measures and international controls necessary, including assistance from financial institutions and other agencies.

Given the serious risks at stake, pursuant to article 7 of UNCAC States have to adopt, maintain and strengthen systems for the recruitment, hiring, promotion and retirement of public officials. Judges and prosecutors should also be, in our view, regularly exposed to specific continuing training sessions aimed at building a judicial culture on ethics. The minimum common denominator of those sessions should be to raise awareness within the judiciary upon the fact that they are themselves seriously exposed to all kinds of corrupt behaviours. This point is also clearly stated under article 7 (d) of the UNCAC.

It is crucial that the principles and ethical rules are known and accepted by all officials of the judiciary. The adoption and dissemination of deontological codes are important measures in view of increasing the integrity and resistance to corruption of the judiciary, especially if it is complemented with the filling in by the magistrates of declarations regarding their wealth and earnings.

In that respect, article 8 paragraph 3 of UNCAC requires that States take note of relevant initiatives such as the International Code of Conduct for Public Officials contained in the annex to General assembly resolution 51/59 of 12 December 1996.

Article 11 of the UNCAC emphasizes the independence of the judiciary and its crucial role in combating corruption and preventing corruption among members of the judiciary themselves.

Some systems provide members of the judiciary with immunity from investigation and prosecution. Such immunities should only apply to acts carried out in the performance of official duties and for the duration of the person's term of office. This point relates to the notion of independence. In our perspective, judges and prosecutors should not, intentionally or not, interpret the notion of independence as personal independence. What is meant here is of course institutional independence. It means that judges and prosecutors are independent when they carry out their functions which are to prosecute and decide a case according to the laws and procedures in force. In criminal cases judges have to try to establish the truth from facts in order to decide on guilt and punishment under the law in force. In civil cases judges have to apply the rule of law to the disputes brought before them and decide on compensation issues. There is no purpose here to question the capacity for a judge to interpret the law and bring his own human values in the adjudication of a case. However in the exercise of his personal independence the judiciary has to act in accordance with the principle of integrity that is to say in a fair manner and in full compliance to the law.

As opposed, the private conduct of a judge or a prosecutor should not be protected by any immunity. Whenever a judge is involved in frolics of his own or breaches of the criminal law he should then be applied the same procedure and laws as any other citizen. In private life judges and prosecutors are but ordinary citizens. However, sanctions according to the gravity of the offence will necessarily impact their professional lives and may culminate with suspension or even removal from the judiciary.

In order to maintain and strengthen ethical standards various countries have established an individual evaluation of the judiciary. This mechanism may infringe on judge's independence and have important consequences on their careers albeit no disciplinary measures can be taken within the framework of this evaluation. Therefore, the evaluation has to be strictly delimited by law to avoid potential problems of arbitrary. In France for example evaluation is a complex biannual process which includes a self- description of the activities conducted by the judge or prosecutor and culminates with a written report by the supervisors, namely the President of the Court of Appeals for a Judge and the Prosecutor General for an assistant prosecutor since they allegedly understand the complexity of the function and its ethics. An alternative solution is implemented in other countries where a collegial evaluation in which the supervisor is involved is favoured.

Personal evaluation should be understood as a means for the judiciary to improve the quality of work, and to design career development. It is therefore a soft way to ensure that the principle of integrity

is respected by the judiciary. In particular cases of serious breaches of judicial conduct, the evaluation can be filed to an independent organ in charge of disciplinary measures.

However, there is a necessity to strike a balance between the preservation of judicial independence and the proper exercise of judicial oversight. Best practices may include the establishment of self-disciplinary committees in the courts of all levels made up of judges aiming at the enhancement of judges' self-disciple. However, accountability mechanisms must be carefully balanced so that judges do not fear arbitrary removal if for instance; they deliver judgments that go against a powerful branch of government or individual.

Where, occasionally, it is necessary to consider discipline of a judge or prosecutor for an alleged breach of non-criminal rules, this should be initiated internally within the judiciary rather than externally by other organs of the government. In France the "Conseil Superieur de la Magistrature" is solely vested with the power to take disciplinary measures against a member of the judiciary. The existence of an effective procedure for discipline, in a way respectful of judicial independence, presented a challenge which has been addressed in different ways in different countries.

Judges are the final announcer of the laws and protectors of social justice. Therefore it is crucial that court users understand the judicial system and their rights. Only when judges observe a high ethical standard can the judiciary earn the trust of the people and be appreciated by the people.

A complaints system has sometimes been created to restore public confidence. This system has to be trusted and used by the public. Court users should know where to complain when judicial officers are not complying in a timely and transparent reporting system. Public awareness campaign can also be organized. In Indonesia, UNODC organized town hall meetings providing an opportunity for citizens at the grass-roots level to interact with local justice sector representatives. UNODC has also supported broadcast Radio-TV programmes to strengthen general trust and understanding of the formal justice delivery system and has diffused information materials such as posters, flyers and stickers informing the court users and prisoners awaiting trial on their basic rights, legal aid, conditions of bail and existing complaints mechanisms.

2. Specific Requirements Relating to Asset Recovery

Chapter 5 of UNCAC tackles the prevention and detection of serious organized corruption crimes through the mechanism of asset recovery which pursuant to article 51 is a "fundamental principle of the convention". Because money and the status that it brings are what motivate organized criminals, UNCAC promotes a total confiscation approach and a return of the criminal profits to the country of origin even though the organization has successfully transformed illegal profits into goods having legal appearance, not only nationwide, but above all, in the international system. However, this innovative approach will require some adjustments within the judiciary.

The very first necessity will be to overcome jurisdictional issues where legal systems are incompatible or different. Such will happen when cases require cooperation between civil law and common law systems which have been historically difficult. To overcome that obstacle article 55 requires States to provide assistance to one another to the greatest extent possible. The judiciary and prosecutorial authorities will have to be prepared to overcome cumbersome procedures by understanding different systems and adapting working habits.

As previously mentioned it is part of judicial integrity to conduct efficient and fair investigations. But because organised crime has become transnational and assets involved are huge and moved easily from one country to another, the judiciary has to be ready to face a new challenge.

The magnitude of the problem, will oblige to built a specific system, where not only judges,

prosecutors and the police are specialized in the investigation and judgment of these facts, but, above all, that both the State entities that in such a way are involved in the effort to fight against and/or prevent corruption, as well as the private sector or the civil society coordinate efforts to avoid impunity, that is one of the main generators of corruption.

Therefore this strategy will require a change of mindset. Judicial investigators and prosecutors have always naturally placed an emphasis on convicting perpetrators of corrupt activity and sending them to prison. The issue of seizing their assets has often been almost an afterthought. In the future, the conduct of the investigations will therefore have to be adapted to confront international criminal networks of huge proportions. From lessons learn both in successful and unsuccessful cases we believe that teams of specialised judges and prosecutors complemented by financial and technical experts will have to be setup in order to provide a rational response to an increasing workload of complex cases.

A high degree of integrity will then be required to make those new teams work properly and the judiciary will have to accept to share a part of its powers and jurisdiction with other agencies. In addition, international cooperation and special cooperation with financial intelligence units will have to be strengthened pursuant articles 54 to 58 of UNCAC.

The prosecutorial authorities and the judiciary working on the criminal investigations will benefit from this earlier involvement of financial investigators. This is because their investigation of property dealings and banking transactions very often fill gaps in the criminal investigator's knowledge of the case and often points towards the involvement of other persons in the criminal activity. Furthermore, the extent of the offending, in terms of both its duration and the financial gain will be available to the criminal investigators at an early stage. This may steer the investigation in a particular direction and will certainly assist in subsequent interview of the suspects.

Almost all countries, whether developed or developing, have deficiencies in capacity and expertise in the areas of mutual legal assistance and asset recovery cases. This has been exploited by corrupt officials across the world. Spontaneous cooperation between the judiciaries is therefore an important recommendation of UNCAC under article 56. Joint investigations will be necessary as recommended under article 49.

In order to carry out more efficient investigations, the powers of the judiciary and prosecutorial authorities will have to be broadened to issue orders aiming at preventive arrests, searches of private premises, seizure of documents and wiretapping communications during the investigation phase.

The judiciary will also have to be ready to use such method as the shifting of the burden of proof to the defendant to show that alleged proceeds of crime were actually from legitimate sources as recommended under article 31, paragraph 8 of UNCAC.

It will also be critical to institute a plea bargaining mechanism by which prosecutors and judges will be vested with a real power to grant benefits such as reduced sentences to the offenders who enter into collaboration with the justice. The widening of investigative powers as well as the plea bargaining mechanism are contemplated under article 37 (1) of the Convention.

In addition, this new challenge will require the use of unfamiliar methods for criminal experts such as civil recovery because the evidentiary threshold is not as demanding as it is with criminal actions.

In today's environment criminal activities especially where serious crime is at stake has to be addressed differently. A shift of the traditional investigative techniques is going on. It is critical for the judiciary and prosecutorial authorities to be ready to adjust their expertise and operational methods to

address the new challenges. Checks and balances will be necessary to control the new powers vested in prosecutorial authorities and the judiciary. Given the importance of the assets involved proper mechanisms will have to be developed in order to ensure that proceeds of crime are returned to a requesting state and how the interests of other victims and legitimate owners are to be considered.

IV. CONCLUSION

Undoubtedly, the fight against transnational organized crime and the related prioritization of the recovery of the huge criminal proceeds it generates pose a new serious challenge to judicial integrity. What is additionally required today to strengthen and maintain judicial integrity is a change of mindset in the judiciary and prosecutorial authorities. States should not hesitate to seize the wonderful opportunity that UNCAC provides to address this issue as a top priority.

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ANNEX I

A. The Cambodian Illustration:

After the fall of the Khmer Rouge regime, the signature of the "Paris Peace Agreements" on 23rd October 1991 and the transitional period administered by UNTAC, the newly established Government of Cambodia in 1994 was confronted to the urgent necessity to establish a judiciary. Given the drastic situation of this post conflict country where the majority of the intellectuals had been exterminated and law books destroyed the new Government had no choice but to appoint individuals with no or little legal background and sometimes very basic education as judges and prosecutors to carry out the complex functions of the administration of justice. The only legal framework available was the Constitution of Cambodia and the UNTAC code which only provided for 35 offences and basic rules of procedure for the investigation, prosecution and trial of a range of offences against the persons, the property and the State. Some of the judges and prosecutors managed to carry out their duties from commonsense and universal ideas of justice. But no consistency could be ensured because of the absence of a record of the decisions. That situation was worsened by a similar necessity-based approach to appoint law enforcement officers and a lack of properly trained lawyers. Eventually this situation led to a complete failure of the system and a lack of confidence in the institutions by the citizens who considered that most judges and prosecutors were corrupt.

B. Establishment of the Royal School for Judges and Prosecutors (RSJP)

The current Cambodian Government having learnt from the previous situation decided to engage in a vast legal and judicial reform aiming inter alia at building a new independent judiciary with a specific focus on the integrity of judges and prosecutors in view of restoring public confidence in the system. After extensive consultations with donors and experts from various countries representing different systems, preference was given to a system of selection, training and appointment of judges and prosecutors inspired by the French system. This choice led to the establishment of a "sui generis" school in Phnom Penh which was to become the sole institution in charge of training the judiciary. Trainees are admitted after a merit-based selection through a very competitive and "anonymous" exam and receive the same ground initial academic training based on substantive knowledge on laws and procedures complemented by a lengthy professional training within the Courts and under the constant guidance of senior peers. The system is meant to provides flexibility by allowing the graduates to change from the function of judge to that of prosecutor all along their career in the judiciary.

Part of the challenge was to create a school for all judges and prosecutors meaning a school that would be accepted and recognized by the judges and prosecutors currently in place. This was achieved by organizing continuous training for all and involving some carefully selected senior judges as trainers, lecturers and tutors in the school.

The curriculum of the RSJP is articulated around three major modules:

1. Knowledge of new fundamental legal documents :
   Codes: Criminal, Criminal Procedure, Civil, Civil Procedure
   Special Laws: Corruption, Protection of Heritage, domestic Violence

2. Acquiring technical professional skills:
   Methodology of each and every judicial function,
   Training on technical fields related to the judiciary.
   Ex: forensic medicine.

3. Sharing of professional culture and ethics:
   Reflecting on the powers of the judge

Considering full impact of the Court decisions

The last module emphasizes the notions of integrity, ethics and institutional culture. Moreover trainees are constantly monitored by the institution and in case of signals of lack of ethics or inappropriate behavior may be barred from entering the judiciary.

CORRUPTION CONTROL IN THE JUDCIARY AND PROSECUTORIAL AUTHORITY

Piyaphant Udomsilpa[*]

I. GENERAL INTRODUCTION

Office of the Attorney General of Thailand (hereinafter called "the Office") was formerly called the "Public Prosecution Department" having function and duty as a key role in criminal justice system as well as the legal adviser for executive branch for more than 110 years.

Nearly two decade ago, the Office had undergone a major structural and organizational change. In 1991, on the eve of its centennial celebration, it was separated from the Ministry of Interior and assumed an independent status as an autonomous agency under the direct supervision of the Prime Minister. In addition, its name was changed from the "Public Prosecution Department" to the "Office of the Attorney General". Under the current Constitutional Law, since 24 August 2007 the Office becomes the independent organization. The Attorney General must be approved by the parliament. After the approval, he will be appointed by his Majesty the King. The Constitutional Law also guarantees the independence of prosecutor to making decision on cases.

II. OVERVIEW OF FUNCTION AND DUTY OF THE ATTORNEY GENERAL OFFICE

The function and duty of the Office can be classified into 3 main categories.

A. Criminal Justice Administration

The criminal justice system in Thailand is the system that the state provided the organization to check and to review the fact in criminal cases. The criminal proceeding is not the dispute between the private parties. Thus, the prosecutor is not the adversary party. The prosecutor plays a key role to deliver the justice to the injured person as well as the accused.

The major duty of prosecutor is to conduct criminal prosecution as to protect state and public, as well as to defend innocent government officials who have been charged with criminal cases relating to the lawful performance of their duties. The goal of criminal procedure is to find the fact and to punish the accused to prevent from re-committing a crime; therefore, the prosecutor has the duty to prove the guilt or innocent of the accused. To issue the prosecution order or non – prosecution order is the independent power of the prosecutor according to the Criminal Procedure Law. The prosecutor has power to issue prosecution order if the accused committed the crime. The public prosecutor is empowered to consider and to issue non – prosecution order and to release the accused based on discretion even though he is guilty.

Besides, the public prosecutor working for the Special Case Litigation Department has the duty to prosecute the persons holding political position and state officials on the account of malfeasance or cor-

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ruption. However, the National Counter Corruption Commission was granted by Organic Law 1999 to have independent prosecutorial authority, even if it means overruling the Attorney General's decision.

B. Government Interest Protection

This duty is to render legal opinions to government agencies and state enterprises as well as to review draft contracts both domestic and international, between the government, to government or between the government and private sector, and between the government agencies and the state enterprises and between the government agencies or the state enterprise and other entities.

The mega project such as express way construction, Suvarnabhumi Airport Rail Link And City Air Terminal Project, and public television channel contract were reviewed by the Office. To review the contract, the public prosecutor has discretion to raise legal issue or make comments to the agency concerned to be aware of the advantage of the country. Furthermore, the Office is charged with the power to sue or to defend civil cases whereby the government agencies or state enterprises are parties either claimant or defendant.

C. Public Interests Protection

This duty is to educate the public in the fields of democracy, human rights, environment and other laws. These functions have been carried out by public prosecutor going to meet people in community and through mass media such as television, radio, and newspapers. In addition, the Office renders legal aid to the poor and assists them in appointing the counsel to represent them in civil lawsuits and proceeding conciliation process without fee. At present, the Office focuses on eradication of the violation in school. Recently, the Office will sign the Memorandum of Understanding with United Nations Children's Fund to take joint country programme for juvenile protection. Additionally, the Office initiates the program to protect the overseas Thai as well as the stateless persons.

III. THE CAUSE OF CORRUPTION

Corruption occurred since Socrates era. Socrates could bribe the warden to escaping from prison but he denied escaping and was executed.

Corruption has long been recognized as unacceptable conduct. In the last few years, the international dimension of corruption has moved up the agenda. Widespread availability of bribes has fuelled failure of States, conflict and discrimination. It also undermines business confidence and stability throughout world markets and economic development. The need for a consistent international response to corruption has been recognized in the several international anti–corruption conventions such as Organization for Economic and Development Anti–Bribery Convention, United Nations Convention against Corruption. Corruption is a two – way transaction with a supply and demand side. There should be the effective means to control corruption and to refrain both sides from bribery or abusive power.

As corruption has many types and different occasions, such as bribery, abuse of power, fraud, thus the cause of various forms occurred as described below.

A. Merit System

Merit system is embedded in the history in Thai society. The merit system shall influence in the transfer prosecutor or appointment the prosecutor in the department of the Office. If the prosecutor

having connection with the authority asks for preference, therefore, it is possible to allow the inappropriate prosecutor to be appointed or be moved to the department as wished. The prosecutor shall feel loyal to the authority and pay back by doing or omit to do duty as requested.

B. Dishonesty

The public expects that the prosecutor should be in corruptible. People also shall expect that the prosecutor must be reasonable, fair, justified and honest as well as accountable. Why do people expect like this? The prosecutor works as the legal professional, moreover, the legal professional who having power to decide the freedom or taking liberty of man. In case of reviewing the contract or giving opinion to the agency concerned, the prosecutor shall weight the benefit for country's sake. Therefore, the honest as ordinary people is insufficient. The prosecutor must be honest as trusty and worthy legal professional.

To be honest prosecutor is very difficult to explain. The honest is not the moral norm but it is involved in the activity to decide the right or wrong. The honest is abstract but we can lay down the norm for honest.

Honest is the most important qualification for prosecutor because the prosecutor has to decide the rightness or wrongful. If the prosecutor is dishonest, he can not be trusted to decide the guilt or innocent of the accused. He shall not aware of the benefit of the country. Additionally, he shall ignore the fairness for poor people. The prosecutor shall not be stable and neutral without honest.

C. Power

Power is a major cause of corruption. As long as public prosecutor is in the high position with having power to command his subordinate, such as an executive, gradually, the power shall disguise him to be corrupted by his power. To concentrate and prolong the grip on power, man shall not stay on the job with rightness.

I try to illustrate the abuse of power by example described below.

While being the Provincial Chief Public Prosecutor, the Provincial Chief Public Prosecutor has duty as follows;

(i) To review and to convert the discretion of subordinate to issue prosecution order or non-prosecution order.
(ii) To administer the office of Provincial Chief Public Prosecutor
(iii) To grant bail
(iv) To be the adviser for the provincial governor.

In respect to the above mentioned duty with having enormous power, if the Chief Provincial Public Prosecutor is dishonest to his professional, he has a chance to corrupt his duty such as to grant bail for some benefit in exchange.

Besides, the Chief Public Prosecutor has power as hierarchically commander, so he has dual duty. The hierarchy reflects the status and power of consideration as a prosecutor and as an executive; therefore, he can set personal relationship as patronage. If he disguises his dual duty, so it will defect and thwart the goal of justice because the prosecutor has to secure his position not to be moved or dismissed. If the prosecutor is not firm in himself, he will depend on whatever the Provincial Chief Public Prosecutor orders.

Under the executive status, the Provincial Chief Public Prosecutor can undermine the work of his subordinate by proposal to moving his subordinate from position in case of bias or discrimination. Some-

times, he himself does not realize that he is corrupted by his power. For example, his subordinate surrounding him approaches him and gives him the present. If he feels in favour of to that person and gives the special promotion, in return his subordinate shall pay back for special treatment in any way.

D. Conflicts of Interest

The conflict of Interest means a conflict between certain interest and obligation arising from your profession. The details of conflict of interest might be different. The concept of conflict of interest is rather ambiguous. The conflict of interest for the prosecutor has not yet been defined. In my view, in the situation that the prosecutor can not fulfil his or her duty while making decision in the matter of case because of the other person's interest, that is the conflict of interest. A conflict of interest exists even if no improper act results from it. The prosecutor is obliged to be trusted, if he or she exploits his or her professional, thus he or she undermines the confidence in his or her duty.

E. Discretion

Before issuing the prosecution order or non – prosecution order the prosecutor must review the investigation file made by the police. The reviewing file is the important step. The legal process must be performed precisely. The evidence should be reliable and reasonable to prosecute the criminal. The duty of prosecutor is to find the fact thoroughly. Even though the evidence supports the charge against the accused, the prosecutor has discretion to issue non – prosecution order on the ground of the public interest, public order, security policy, or economic policy. This discretion is not the law but it is legal power. The discretion can be abused based on many things such as money or personal gain.

Additionally, the prosecutor does not represent the individual but represents the state; therefore, the prosecutor has discretion to withdraw the case from trial. The important factor to be weighed to withdraw the case is the public interest, the security policy, and economic policy.

In 2002, a Royal Decree on Good Governance was promulgated. It provided about the benefit of public interest a little bit but it was not clear about this concept. The Office announced the Regulation of the Office of the Attorney General, it also provides the ground to issue non – prosecution order on the ground as mentioned – above. The framework of discretion has not yet established.

F. Co-operation with the Investigative Agency

Nowadays, with respect to some special cases, according to the Criminal Procedure Law B.E. 2499, and Special Case Act B.E. 2547, the prosecutor collaborates with the investigator (police or Special Investigation Agency) at the initiated stage of investigation. The prosecutor shall work with the agent who has been well trained and has experience. The prosecutor interaction with a skilled law – enforcement agent will be a factor of a smooth atmosphere for cooperation, on the contrary, the prosecutor who had work on the case with such agent would be influenced for issuing prosecution order or non – prosecution order by the close relationship between the investigator and the prosecutor.

IV. THE CONTROL OF CORRUPTION

The control of corruption is not simple. It should be monitored by the new mechanism to expose the corrupted conduct and to reward the clean and good prosecutor. The punishment should be effective and severe by means that are fair and transparent. The Office should embed and emphasize on the moral and ethics conduct. The standard of discretion to issue non – prosecution order must be the same concept

and same framework.

I would like to suggest various means for achieving the control of corruption as described below.

A. Personnel Management

To select the qualified prosecutor working in the right workplace is the first essential step to prevent corruption. The personnel management can ensure the appropriated performance of the Office. It is not true that each prosecutor can perform equally. The prosecutor who has experienced in specific area shall perform better than the prosecutor not having that skill. The right prosecutor in the right workplace is benefit the Office directly, meanwhile, the prosecutor shall benefit in specific skills. Unskilled performance of the prosecutor is detrimental to the Office.

In case of appointment the working group, the qualified prosecutor should be careful selected. The chairman of the working group should lead and advise the case properly both legal and practical issue. If the disqualified leader was appointed so the case may be failed. The failure of the case will destroy the compatibility of the Office.

B. The Responsibilities among Authorities

There are many commanders – in – line among the prosecutors; in some situation the prosecutor has dual duty as the prosecutor and as the executive. That can be the vacuum to abuse of power. It requires that the allocation of responsibilities for instruction, implementation and enforcement among different levels of prosecutor should be defined.

C. Good Work as Professional

Prosecutor should be viewed as the legal professionals by their expertise and the justice delivered. Prosecutor should think that the issuing the prosecution order or non – prosecution order is not the power but it is the duty with the accountability. The prosecutor has a duty to do what is right in order to achieve the purpose of law. The prosecutor should not be influenced by any person or pressure. In the course of their work, they should contribute to the development of Thai society for the common good.

D. Transparent Administration

Formerly, the Act on Regulation of the State Attorney 1978, Section 15, provided that; "A Commission of the State Attorney shall be set up. This Commission comprises:

(i) President (elected from retired State Attorney at least serving the position of the level of the Deputy Attorney General),
(ii) Attorney General as the Vice President,
(iii) Deputy Attorney General, the Director-General of Criminal Litigation, the Director-General of Technical Affairs, and the Director-General of Legal Counsel,
(iv) The elected six qualified State Attorneys, three out of six from retired State Attorney, three from State Attorneys at least serving the position of 4th class.

Since September 2002, the Commission has been changed as follows:

(i) President (the Commission nominated the name lists of retired State Attorneys to be elected),
(ii) Attorney General,
(iii) Four Deputy Attorney Generals,
(iv) Three elected public prosecutors
(v) Three elected from retired public prosecutors
(vi) Two academics represented the Senate

(vii) One representative from the Cabinet.

This is the first time of 110 historical years of the Office to permit the lay people chosen by the other institutions to administer and to review the management the Office of the Attorney General. The function of the Commission is to examine the appointment, movement of the prosecutor around the country, including advice the disciplinary sanction.

However, it will be better to clarify the qualification and background of the person chosen by the other institutions to the public. The process of election from the other institutions should be transparent and respected. The other institutions should have responsibility to ensure that the elected person is proper. Although, the elected persons from the other institutions are not an appropriate subject for approval by the prosecutor, then should be a mean by which the prosecutor can express their views.

Meanwhile, the information about the elected person should be of concerned to the prosecutor, the elected persons from other institutions should have access to accurate, relevant and timely information of prosecutor before the appointment or movement.

In respect to the appointment, the sub – committee appointed by the Attorney General shall look after this matter. At this stage, it will be transparent if the sub – committee announces the timing for consideration to propose to the Commission of the State Attorney and opens mind to receive the information about the prosecutor being transferred or appointed from the prosecutor across the country. After the sub – committee makes their decision, the said sub – committee shall propose the name lists of prosecutor to be transferred or appointed to a part of the Commission of State Attorney comprised the Attorney General, the Deputy Attorney Generals, the selected prosecutors. The inspector generals will attend this meeting. To be respected by this meeting, it should be recorded the argument or any comment made during the meeting as evidence. The record should be allowed to disclose as requested on reasonable ground.

Later, the name lists of the prosecutor will propose to the Commission of the State Attorney for approval. It should be recorded the view of each committee to be evidence. The said record should be disclosed to the public.

E. Payment

The Act related to the Salary and Allowance of the State Attorney B.E. 2001, Section 4, provides the fixed rate for salary and allowance for each level of the public prosecutor. The yearly promotion for salary step was given up. Each level of State Attorney has to serve the position for the fixed period before moving to the upper level. During serving the same position, the salary step has not been increased.

The table shows the fixed salary and allowance is attached as appendix I.

As the salary and allowances are high, therefore, the demand to seek the wealth by engaging in corruption conduct is decreased. The high payment will deter the prosecutor or the other agency working in the criminal justice system to refrain from the risk to behave corruptly and being punished. Additionally, the prosecutor should bear in mind about the concept of the sufficient economy philosophy established by his Majesty the King. Although the high salary, if the prosecutor is absorbed by passion and abundant desire he will be prone to self – seeking interest.

F. Disciplinary Sanction

Where misconduct allegation or breaching the duty complaint is lodged against the prosecutor, the Office may take the disciplinary action by setting the internal committee to find the fact. After finding

that the prosecutor is in fact guilty of misconduct, the disciplinary sanction shall inflict. All the process for disciplinary action must be proposed to the Commission of the State Attorney to make decision.

The disciplinary sanction has many steps, namely: reprimand, parole, reduction salary, suspension, release, discharge, to dismiss, or to dismiss without pension.

If the allegation was proved to be spurious, the disciplinary sanction was discharged. Prosecutor who had been subject to the spurious allegation will be demoralized by this disciplinary action; therefore, it should establish the filter system to prevent the prosecutor from being the victim of false allegation. In my view, if the false allegation made by the prosecutor intentionally, there should be sanction against the prosecutor for his action.

The statistics shown the disciplinary sanction is attached as appendix II.

Where the charges of misconduct by a prosecutor are of more serious nature and applied to be the criminal offence, the matter shall be enforceable by the criminal procedure law.

G. Ethical Conduct

The most effective mean to control corruption is setting ethical conduct as the principle of conduct for prosecutor to follow on their work to be consistent with justice and due process.

The code of ethical conduct of Thai prosecutor exists. Its basic contents are honest, neutral, etc. The ethics for prosecutor gives the general guidance for prosecution. It states that; the prosecutor must be independent, honest, fair, precise, promptly, transparent. It also states that the prosecutor must not seek self interest. The prosecutor must not decide the case based on personal views about race, national origin, gender, religious belief, victim or witness or influence matter. It also contains the general principle that the prosecutor must consider the case on its own facts and evidence.

In my view, the code of ethical conduct should rely on moral norm, for example, right thinking, right decision, right working, right words, right earning. The acceptance of the code should be voluntary recognized as the commitment of prosecutor to satisfy its standard. The code of conduct is not a basic principle of responsibilities but it should be a well refined commitment to govern all duty of prosecutor. This will prepare the prosecutor to be honest, fair and accountable as expected.

The new committee to scrutinize and to expose the abusive action or improper conduct under the principle of ethical conduct should be established. The said committee will comprise three prosecutors and two academics with having experience in teaching moral or ethics. The prosecutor who abuses of power by motivation or by character will feel fear to be exposed to public.

The other duty of the new committee is to provide ethics education to the prosecutor. The new committee should also integrate ethics values and the work of prosecutor together. The duty and function of the new committee should be clear and separated from disciplinary sanction; otherwise the overlapped function will occur.

H. Discretion

As I mentioned earlier, the prosecutor has discretion to issue non- prosecution order on the ground of public policy, economic policy, and security policy. Then, the said order shall be sent to the Police Commissioner- General to agree or to disagree. The final decision is the decision of the Attorney General. The Attorney General has power to issue non- prosecution order as well as to withdraw the case from trial based on the public interest, economic policy, and security policy. The effect of such discretion is

very serious because the decision is finalized. No one can file the criminal case against the accused.

The discretion was raised for the ground to issue non – prosecution order based on public interest, economic policy, and security policy. However, it has not yet been clarify either the meaning of discretion or the meaning of public interest, economic policy, and security policy.

The decision to issuing the non- prosecution order or to withdrawing the case is the matter purely for the Attorney General's discretion. The discretion seems to be uncertain and depends on the emotion of each person. What is the precise discretion? There must be the rule to cover and prevent to use discretion as a mean to abuse of power.

In my view, the Office should establish the clear concept of those policies.

The meaning of the discretion should be as follows:
(i) The decision being in consistent with the nature of thing and justice
(ii) The decision based on the larger proposal of law not emotion
(iii) Not being capricious or ambiguous

The discretion should be considered in a disciplined and responsible manner. The idea of discretion must not be impetuous. Evidentially, the desire for the discretion must be honest.

With respect to the public policy, it means the internal public policy, for example, any action causes the damage to the justice or general government administration. The public policy includes the external public policy which causes the inappropriate relationship or disadvantage for Thailand. The freedom of citizen is also included in this meaning. However, the public policy shall be raised when there is no law to apply.

Regarding the economic policy, it means the policy that affects the status of country in a whole, such as inflation or repercussion.

In regard to the public order, it means the action being adversary to the public good, moral or against the public good. The moral norm is not the same criteria as the religious practice but it is the moral norm for ordinary people's behaviour.

V. CONCLUSION

The control corruption is not a dream if we can concrete the norm, principle, and development the Office in various means. The ethics standard is also the hope to refrain the prosecutor from self – seeking behaviour or abuse of power. The transparency administration in the process of appointment or transfer the prosecutor must be reasonable and reliable.

In the historic transition under the current Constitution Law the Office should implement the new measures to be the criteria for working as a trusted prosecutor. Even it is not simply to control corruption but the strong desire of the Office to focus and support on resolution this problem will help to reduce corruption.

APPENDIX I

Level	Position	Salary	Allowance
8	The Attorney General	62,000	42,500
7	The Deputy Attorney General	61,000	42,000
6	The Director General the Executive Director General, the Special Expert State Attorney	60,000	41,500
5	The Expert State Attorney	59,090	41,000
4	The Provincial Chief of State Attorney, the Provincial Chief of State Attorney to the Office of the Attorney General	58,140 57,190	40,000 30,000
3	The Senior State Attorney, the Deputy of Provincial Chief of State Attorney	56,240 44,910 40,790 34,610 30,810 27,180	29,000 23,300
2	The State Attorney to the Office of The Attorney General, the Assistant Of the Chief of State Attorney	25,370 23,570 21,800	7,900
1	Assistant State Attorney	16,020 14,850	

APPENDIX II

DISCIPLINARY SANCTION

YEAR	CASES	SUSPENSION			REPRIMAND	PAROLE	ADVICE	DISAPPROVE	PROCEEDING	TOTAL
		3 YEARS	2 YEARS	1 YEAR						
2005	106	1	1	1	3	2	21	72	5	106
2006	110			1			20	64	25	110
2007	122						3	38	81	122

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CORRUPTION CONTROL IN THE JUDICIARY AND PROSECUTORIAL AUTHORITIES
THE CASE OF THE KINGDOM OF CAMBODIA

Sar Chanrath[*]

I. BACKGROUND

Corruption is the factor that entices individuals to act in opposite of their duties by using promises and bribes. Corrupt activities are complicity between individuals in carriying out malicious and illegal actions. For this reason, many countries have identified these kinds of activities as illegal and classified them as crimes. Today, nearly every society and political regime are affected by corruption in different levels. The force of destructive capability of corruption varies accordingly to these levels of gravity. It always has negative impacts on society. Cambodia is no exception. According to speech by the Cambodian Prime Minister that "Corruption affects efficiency in production as well as implementing law" (2005). Corruption is not an unfamiliar term in Cambodia and has pervaded almost every sector of the country. The paper mainly focuses on judicial corruption.

At this time of change, both globally and at the national level, the role of international organizations like the United Nations is very significant. But we should also give similar importance to the cooperation at the regional level as well. It is for this reason, I believe, that this Seminar is being organised and we all are willing to share with each other information related to the process of change which is taking place in our respective countries. The process may differ from one country to another but we are moving towards one common direction, which in this case is the search for an effective, robust and well-coordinated legal framework on anti-corruption. The Kingdom of Cambodia is honored to be invited here to fight with you against this social evil. I believe that it is also our common dream that some day these separate pieces of legislation adopted by our respective countries under the common spirit and guidance of the Untied Nations Coventtion Against Corruption (UNCAC) will be an important means of linking our systems together. Mutual cooperation in this region will hopefully thrive and increase its effects in helping us solve this deep-rooted problem of the society.

With the above mentioned, it is not difficult for us to see the importance to combat corruption which leads to success of economic development of the country. The Royal Government of Cambodia (RGC) has been making efforts to combat corruption, yet the results are not as expected. As experience shows all over the world, controlling and eliminating corrupt practices is a long-term and difficult process. The vast majority of initiatives in the first Governance Action Plan (GAP) directly involve the abolishment of the root causes of corruption. Now, the RGC is implementing its GAP II 2005-2006, which is followed the Government Rectamgular Strategy. The core of Rectamgular Strategy is Good Governance, concerning to (i) combating corruption, (ii) law and judicial reforms, (iii) public administration reform, and (iv) military reforms. Furthermore, Cambodia has joined the Anti-Corruption Action Plan for Asia and Pacific sponsored by the ADB and the OECD. Fighting corruption strategy is an inter-related factor and necessary to forge a common strategy toward development entailing Good Governance. Here, the paper focuses on three intertwined essential factors: passage of anti-corruption law, legal and judicial reforms, and enforcement laws.

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II. PROBLEM STATEMENTS

Cambodia has two levels of courts: the first comprises Municipal and Provincial Courts and the second includes an Appelate Court and a Supreme Court. Military courts also exist as a mechanism to deal with military offences committed by military personnel. The justice system is not high on the government's list of priorities. While it is difficult to obtain reliable figures, "the budget of the Ministry of Justice is said to be less than 1% of the total" (Neilson, 1996:10). Therefore, judicial corruption is no secret. In Cambodia's case, there are three types of corruption that most affect judiciaries: salary of court's personnels and jugdes, political interference, and loophole in laws.

A. Salary of Court's Personnel and Judges

A major problem is the pay scale of the judiciary. Low salaries and the courts' financial structure are significant causes of corruption. The Cambodian government allocated 55.2 billion riel (about US $13.1 million) to the judiciary in 2006, according to the World Bank Development Indicators 2005. Present monthly salary of jugdes and prosecutors is ranked from $320-$550. With regard to court's personnels, their monthly salary is about $50. Such low salaries make it almost impossible for judges to be independence. They expose judges to the temptation of corruption and the necessity to rely upon gifts, etc., which are incompatible with judicial office.

B. Political Interference

Judicial processes are interfered by either the executive or legislative branches of government. Although the Constitution offers a vision of an independent Judiciary, the gap between this vision and reality remains large. Conditions of judicial tenure remain unclear and fragile, providing a means for continuing political influence over judicial officials. The constitution gives the power to appoint and discipline judicial officers to Supreme Council of Magistracy, chaired by the King. Many judges and court staff are under pressure from powerful political and economic entities which can compromise their impartiality in cases involving the government or party officials. This comes about by threat, intimidation, manipulation of judicial appointment, and conditions of service.

C. Legal Loopoles

Laws are drafted in general terms and the government is free to adopt detailed rules for their enforcement. It means that Parliamentary regularly passes new law and the ministries issue their own regulations, but they are not readily available to the public. The law is left open to subjective interpretation Laws are not clear and as a result, the Ministry of Justice (MoJ) regularly provides judges with instructions on how to interpret various laws. This also give possibility to judges and prosecutors interpret laws and regulations depending on their preferences.

III. PRIORITIES AND RECOMMENDATIONS

For the Royal Government of Cambodia, good governance is the most important pre-condition to achieve sustainable development with equity and social justice. Achieving good governance will require the active participation and commitment of all segments of the society, enhanced infornmation sharing, accountability, transparency, equality, inclusiveness, and the rule of law. During its third mandate, the Government of Cambodia focuses its efforts to ensure an effective implementation of its Governance Action Plan, which has been developed with broad participation from various government ministries and

institutions, civil societies and development partners.

A. Combating Corruption

As the center of the Royal Government of Cambodia's Rectangular Strategy anti-corruption reform is rightfull recognised as a crucial element to securing Cambodia's economic, social and cultural prosperity. Fighting against corruption is an inter-related factor and necessary to forge a common strategy toward development entailing Good Governance. The key thrust of the RGC's strategy to fight corruption is to take concrete actions that attack the roots of corruption. The implementation of the anti-corruption strategy will be supported with enough tools and resources to prevent and to sustantially crack down on corrupt entities.

1. Anti-Corruption Law

First and foremost, the government need to follow through on its commitment to enact and implement their Anti-Corruption Law and ensure that this law complies with interenationally accepted standards. This law provides for the creation of a much-needed autonomous Supreme National Council Against Corruption (SNCAC) equipped to investigate allegations of corruption and receive complaints. It also includes essential disclosure rules and whistleblower protection. With regard to penalty clauses, the draft subjects practices of corruption involving judges to the most severe punishments when compared with similar crimes committed by ordinary public servants and perpetrators in the private sector. These practices are defined to include both the offer of bribes to judges and the acceptance of bribes by them. This is undoubtedly the Royal Government's intention to ensure the highest integrity of judges which is indispensable for dealing with such complicated crime as corruption. The draft also makes statement of assets by senior officials of the three branches and a certain categories of other public servants imperative upon their assumption of public office. The statement will be renewed every two years. The last statement shall be made in the year when these officials retire, resign or are removed from office. Any omission or falsification in the statement will result in imprisonment and penalty fine.

2. Anti-Corruption Bodies

The existing anti-corruption bodies such as the Ministry of National Assembly-Senate Relations and Inspection (MoNASRI) and the Anti-Corruption Unit in the Council of Ministers (CoM) should be reviewed in terms of their capacity to handle complaints. Given their level of finacial and operational dependence on the executive branch of government, activities related to education and dissemination of information might be more useful than conduacting investigations. They should also be examined for overlap of roles and responsibilities. Given clear and functional roles, these bodies should be strengthened to carry out their mandates.

B. Legal and Judicial Reforms

Strengthening the rule of law provides an important structural foundation for the development in Cambodia and is a key area of Governance reform (as recognised in the Rectangular Strategy and National Strategic Development Plan (NSDP). The RGC is respecting and promoting the independence and neutrality of the judiciary as stated in the Constitution. This also includes reforms which ensure the independence of Supreme Council of the Magistracy (SMC). Indeed, legal and judicial system reform of the RGC has a detailed action plan derived from vision and strategy appropriate for Cambodia.

(i) Strengthening the authority of the SMC to effectively discipline judges and prosecutors is central to achieving progress in curbing corruption – a key task in the Legal and Judicial Reform Strategy's "Plan of Action". The process that is implemented to discipline judges and prosecutors should be open, fair and transparent.

(ii) Improvement of training for Judges, Prosecutors and Court Clerks at the Royal Academy of

Judicial Professions (RAJP), with the cooperation and assistance of development partners, has been a significant development which provides for the practical implementation and application of the new codes. Continued and sustained efforts are required to assure that the recruitment and appointment of judges is based upon an impartial, merit-based selection process. There is a continuing need to increase the number of qualified legal and judicial trainers at both the RAJP and the Lawyers Training School based on a clearly articulated strategy.

The RGC is pleased with significant progress that has been made. Along with the important that has been made to reform the country's legal and judicial sector, the RGC has expressed its commitment to accelerate the legal and judicial reform, which has been clearly identified as one of the key elements in the political platform. Recently, the Parliament passed two important codes: the Civil Procedures Code and the Criminal Procedures Code which ensure more transparent in the court processes. It is commendable that the RGC is now engaged in a follow-up effort to disseminate the new codes and to teach professionals, conducted by the Ministry of Justice, how the codes should influence their practice. Even these achievements, there are some priorities need to be done to succeed in moving forward the legal and judicial reforms agenda. These activities are:

(i) To finalise and submit to the Parliament a draft of the fundamental laws such as the Statute of Judges, the Law on the Organisation of the Court, Penal Code, Civil Code, the Law on the Organisation and Functioning of Notaries Public, the Law on the Organisation and Functioning of Bailiffs, and any other laws and regulations that are necessary to complete the legal framework required for Cambodia's full international international engagement, especially within the context of the ASEAN and the World Trade Organisation;
(ii) Establish special courts as needed, such as the Commercial Tribunal, the Juvenile Tribunal, the Labor Tribunal and Administrative Tribunal;
(iii) Gradually establish model courts to enhance the quality and effectiveness of judicial services;
(iv) Establish institutions for the training of court clerks, bailiffs and notaires;
(v) Provide training and improve management of the judicial police;
(vi) Provide legal aid to the poor who require legal and judicial protection and assistance;
(vii) Strengthen mechanisms for conflict resolution outside of the court system, particularly in the settlement of disputes related to the ownership and property rights of unregistered lands.

The effort to draft the law is short-term strategy to form a basic legal framework to improve the performance of judicial sector.

C. Enforcement of Laws

Most evident is the need for existing laws to be followed. The constitutionally guaranteed seperation of power among the diffent branches of government must be respected. Legislative powers and review processes must be adhered to, and information should be legally be more accessible. It may be also useful to set up monitoring systems for enforcement of laws and regulations and to strengthen enforcement capacities of relevant agencies. This is an element of the Anti-corruption strategy with the objective of strengthening the rule of law and other factors that determine the effectiveness of the implementation of actions, including:

(i) Preparing Human Resource Training to enhance capacity and skills of civil servants, who are responsible for law enforcement, to fulfill their job effectively;
(ii) Strengthening the investigation mechanism and having the tools to obtain sufficient evidence for fairly, predictably, and effectively convicting or punishing anyone who commits corruption;

(iii) Strengthening monitoring the implementation of laws, Sub-degrees, and existing regulations of the RGC and of the state institutions in order to assure the integrity, effectiveness, transparency and accountability;
(iv) Promoting the publication and dissemination of the Supreme Court's decisions.

IV. CONCLUDING REMARKS

To sum up, as the aboved mentioned, different countries use different strategies to combat corruption. Both theory and practice suggest that there is no simple response that should be adopted across the board once the basic anticorruption statutes are in place. To be precise here, fundamental change requires commitment from the top and a williness to follow through as the anticorruption efforts unfolds in the Cambodia's context.

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CORRUPTION CONTROL IN THE INDONESIAN PROSECUTION: MECHANISM AND OBSTACLES

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I. INTRODUCTION

From the anti-corruption perspective the Prosecutors are considered as public officials with strategic judiciary function making them susceptible to compromising their duties and integrity with corrupt activities. Various international institutions such as the World Bank, the Transparency International, paint a bleak picture on the Indonesian judiciary system. Such illustration is corroborated with the perception of the majority of the Indonesian public. Judges and Prosecutors supposedly stand in the frontline to combat corruption. Instead they themselves often make headlines for betraying their cause.

Surveys by several Jakarta published leading newspapers and Jakarta based televisions on their respondents' attitudes toward government official show unsurprising results. The vast majority of the public, selected from wide range of backgrounds, put three government officials on the top of the list for most corrupt officials. They respectively were the judges, the prosecutors and the police officers.

This paper, in accordance to the theme of the seminar, will focus on the corruption control on the Indonesian prosecutorial authorities. In elaborating the theme, the paper will be divided into four parts. *The first part* provides a concise general background on the nature of corruption in the prosecution. *The second part* discusses the controlling measures taken by the Attorney General Office (AGO) as the central prosecutorial authority to curb corrupt practices among prosecutors. *The third part* analyses the effectiveness of such measures on the ground. The last part will be the conclusion that opens for further discussion.

II. THE NATURE OF CORRUPTION IN THE PROSECUTION

Post Suharto regime, The Prosecution sees two types of corruption within its ranks that commonly occurs, namely: the judicial corruption and the bureaucratic corruption. The judicial corruption relates to illegal handling of cases by prosecutors driven by pecuniary motives. The bureaucratic corruption relates mostly to the prosecutors' career path. According to the Indonesian law, there are three anti corruption agencies. They are the Corruption Eradication Commission (KPK) similar to the ICAC in Australia and Hong Kong, the Prosecution Service and the National Police. These agencies carry out investigation on public corruption. However, compared to its other two counterparts, the Prosecution Service is the only agency that is legally authorized to prosecute the corruption cases before the court and to execute the judge verdict that has been final and binding. At these three stages; the investigation, the prosecution, and the execution prosecutors are susceptible to compromise the integrity of their work as well as their own professional integrity.

The majority cases of engineered judicial procedure involved prosecutors were triggered by pecuniary motives. Both parties, the suspects/defendants and the investigators/prosecutors, may initiate a

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move to compromise the procedure. The suspects or the defendants may offer a bribe, which may come in any forms other than hard cash, or the investigators / prosecutors themselves are the one who open the opportunity by making an offer or to use intimidation to put their target into submission. In the investigation stages, investigating prosecutors usually collude with the defendants through intermediaries such as lawyers for the suspects. In the court, prosecutors collude not only with the defendants, but also with the judges to get the result that, as far as possible, meet the defendant's expectation.

The bureaucratic corruption is more widespread practice. There are several sectors where corruption is common and it is a repeated occurrence. Arguably, one of the weakest parts in the Indonesian Prosecution lies in its human resources management. Several sectors of the management have been a medium for corruption. The potential prosecutors have the first taste of corruption during the recruitment process. The process is hardly transparent by any standard. While it is important to have excellent academic qualification and necessary skills such as English and computer operating, they are not regarded as determining factors. Combination of financial sweetener and connection with high level officials is the real ticket to enter the agency.

Once the applicant accepted to join the agency, they have to perform administrative works for about three years before preparing for another selection. This time is the selection to gain qualification as prosecutors. The candidates are supposedly able to demonstrate professional skills necessary to work as prosecution. As in the recruitment process, the selection is hardly transparent. Objective parameters to determine which candidate succeeds and which one fails are hardly exist. Candidates with, once again, good connection with high-ranking officials are guaranteed a place in the training center.

Completing the training does not end the prosecutors' experiences with corrupt practices. During their career life at some points they have to deal with corrupt colleagues. For example: the promotion to get higher rank or better position involves two factors, i.e. the policy making factor and the administrative factor. The majority of prosecutors who get promoted for their achievement experience difficulties with colleagues who handle administrative matters related to the promotion. Many of officers intentionally do not provide clear explanation on how the procedure goes. The process is prolonged or is not processed until the promoted prosecutors offer some financial favor to speed up the process.

III. THE CONTROLLING MEASURE

The Attorney General's Office (AGO) as the central authority has a supervision mechanism to control prosecutors as well as the administrative staff of the Prosecution Service. The Office of the Deputy Attorney General for Supervision is responsible for supervising around 7,000 prosecutors and 12,000 administrative staffs. The Supervision is designed as a gradual supervision. Prosecutors or administrative staffs suspected of breaching the regulations on the code of conducts for prosecutors and administrative staffs will be examined by panel of supervisory officials at the appropriate level. If the prosecutors or administrative staffs in question are posted in the sub district, district or provincial offices, the office of Assistant to the Head of Prosecutorial Provincial head for Supervision will interview relevant parties and look into evidences. The Prosecutors and/or the administrative staffs in question have the right to defend the charge. They have sufficient time, around seven days, to build their defense and to object the result of the interviews.

If the prosecutors or administrative staffs in question belong to the AGO, the Office of the Deputy Attorney General for Supervision will handle the case.

The prosecutors are granted opportunity to challenge the incriminating testimonies or evidences

against them. If they wish they can do so in writing. They have one week to prepare their defense and to submit them to the examining committee. The committee will discuss the defense and consult the result of the discussion with the chief prosecutor as the ultimate decision maker at the provincial level. With the chief's consent, the committee will impose administrative sanction to the prosecutors' in question. Such sanction may come in any forms depending on the degree of the violation. Prosecutors can get any or combination of sanctions such stern warning; delay in promotion; demotion; being relinquished from the position they are currently holding, or even dishonorable dismissal from the service.

If the prosecutors in question accept the sanction, it will be enforced with immediate effect. However, if they object it, they may exhaust their effort by launching an appeal to the Attorney General through the office of Deputy Attorney General for Supervision. The Attorney General's decision is final and binding. However, if they are still not satisfied with the decision, the now former prosecutor may take their objection to the administrative court. They will launch legal action against the state represented by the state lawyers who are no other than their former colleagues from the Office of The Deputy Attorney General for Civil and Administrative Cases.

If prosecutors are indicated or suspected to engineer the due process of law which is considered as cardinal sin, particularly during the court session, a special hearing will be held. The hearing is presided by the Deputy AG for Supervision; if found guilty the prosecutors are bound to be dishonorable discharged as prosecutors and being dismissed as civil servants. (All prosecutors are both prosecutors and civil servants). In some cases, the Attorney General grants permission to other investigation agencies such as the National Police or Corruption Eradication Commission (KPK) to do the follow up by investigating the prosecutors. Some of prosecutors have ended up in jail.

Public who have complaint about the prosecutors' act may lodge their report to the Office of the Deputy AG for Supervision or alternatively may lodge their complaint to the Prosecution Commission (Komisi Kejaksaan). The Commission will coordinate with the Office of the Deputy AG for Supervision. The latter will lead the investigation and decided on sanction deemed appropriate for the prosecutors breaching the code of conduct or violating any criminal laws.

Beside punitive measures as have been elaborated above, the AGO takes some preventive measures to control prosecutorial corruption. Law on the Indonesian Prosecution (Law No.16 of 2004) prohibits the prosecutors to involve in certain activities that considered have a potential adverse effect on their judicial function. Specifically prosecutors are prohibited to double as business persons, members of the Board of Directors or employee of government owned companies; or in private companies. They are also prohibited to serve as lawyers. The violation of such prohibition will cause a dishonorable dismissal (if the prosecutors in question failed to defense themselves before a Code of Conduct Tribunal set up by the Attorney General).

IV. THE EFFECTIVENESS OF THE CONTROLLING MECHANISM

In general, the mechanism of controlling corruption in the Prosecution Office has already in place. However, as many other government institutions, the Prosecution has been good in making rules but lacking in their effective implementation. The rules are not well implemented due to several circumstances. As a consequence, the Corruption control does not work well as expected by the leadership. Severe sanctions that supposedly serve as a deterrent factor fail to bring effects on many prosecutors. Judicial and bureaucratic corruption are still common phenomenon and pervasive in every levels. Without a well-established connection and strong financial support prosecutors may expect obstacles throughout their career life.

This vicious cycle of corruption is still in existence due to several reasons, either combined or stand alone. The most cited factor as the mother of all cause of prosecutorial corruption is the *low remuneration*. As a comparison, a senior prosecutor with ten year experience in Jakarta get approximately USD.265 monthly as their take home pay, while a senior associate in a leading law firm in Jakarta with similar year of experiences will get approximately USD.2,750 monthly as their take home pay. It is more than ten times of what prosecutors' earn! The benefit scheme for prosecutors as civil servants is far from attractive if compared to their counterparts in law firm.

However, low remuneration scheme and unattractive benefit is not the only factor. Many of the prosecutors develop a *luxurious lifestyle* that needs strong financial support. Unfortunately many of the lobbyists such as defense lawyers, businessmen and bankers are willing to cater the need of prosecutors for such lifestyle. In turn, when the lobbyists entangle with law, the pampered prosecutors are felt obliged to "return the favor." The conflict of interests often leads to an abuse of office to protect their benefactors.

In absence of clear standard operating procedures on how official business should be performed flourish the corrupt practices. Prosecutors are kept in the dark on the process such as the *promotion and the tour of duty*. Such uncertainty creates a long wait. This circumstance has been used by officials in the Human Resources Development to create "a shortcut" for prosecutors tired of being kept in the dark. These officials demand a mostly financial favor in return. The long and unclear bureaucracy to get promoted or the transfer to undesirable posts, mostly to the remote places in outer islands, can be avoided if the prosecutors prepare to meet the HRD officials demand. Automatic four-yearly promotion as regulated by civil servant and internal regulations for prosecutors with clean record is a rare event. The majority of the prosecutors have to do "normal" promotion procedure as mentioned above.

V. CONCLUSION

After the fall of Suharto New Order regime, the succeeding governments bow to the pressing public demand for clean and independent judiciary, in which the Indonesian Prosecutorial authorities are part of. New laws to control the prosecutors have been enforced ever since. Simultaneously, the Prosecution leadership launched an internal reformation in wide range of Prosecutorial aspects, through several initiatives such as the Attorney General's regulation for code of conducts of prosecution, giving more independence and power to the Deputy Attorney General for Supervision and establishing a supposedly independent Prosecution Commission. All of these measures were meant to control the corrupt activities among prosecutors.

However, the effectiveness of such measures is doubted, since the situation on the ground has not shows a significant progress compared to the situation ten years ago, when the New Order regime was still in power. The causes of prosecutorial corruption have not well addressed and have not tackled properly. The current handling is unable to break a vicious circle of corruption among prosecutors.

CORRUPTION CONTROL OVER THE JUDICIAL AUTHORITIES IN INDONESIA

Ifa Sudewi[*]

I. PREFACE

Corruption has been one of the subordinates of special crime law due to its particular specification which is in a few sides commonly different with other crime law, for instance in the way of settlement, law procedure, burden of proof, etc.

The specialities are made as the preventive way so that the corruption would never be rampant and wide spreading as social illness due to its impact which will not only damage national economy stability but also trigger entire social orders of the state to chaos. And worse, the wide spreading and systematic corruption is deemed as a violence of social right and economy.

Corruption as one of white collar crimes, has been always connected with one's power or special authority, yet the more rampant impact caused by and also the quality and quantity of the corruption itself which have been more modern and well organized makes such crime, according to juridical perspective, absolutely become an extra ordinary crimes.

When such crime is found amongst judiciary authorities, consequently, the effect emerging would be worse because it will degrade the image and dignity of law itself and kill the public trust to national justice. And the scepticism to justice will also affect the sector of economy and investment climate as well.

In international scope as in UN Congress on Prevention of Crime and Treatment of Offenders legalizing the resolution in Havana on "Corruption in Government" 1990 concludes that the impacts of corruption are:

1. Corrupt activities of public officials
   (i) Destructive to most potential effective governmental programs.
   (ii) Lumbering national development.
   (iii) Victimizing individuals groups.

2. There is a strong connectivity between corruption and any kinds of economy crimes, well organized felony and money laundering.

The effort of how to eradicate corruption can not be done only by conventional way since it has not been a kind of regular crime anymore, yet the strategy taken must be more extraordinary and significant. All conservative ways of law enforcement as conducted so far has never shown any better progress or even made any changes, been ineffective, and always faced some barriers in practice. Therefore, a very special way of law enforcement, and also a constant control involving all elements of judicial officials as a criminal justice system in particular and public participation in common, is necessary to be introduced.

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II. JUDICIAL AUTHORITY IN INDONESIA

Judicial authority in Indonesia carried out by Supreme Court along with its subordinates divided into four judicial institutions such as General Court, Religion Court, Military Court and Administrative Court.

Supreme Court is led by Chief Justice and assisted by two vice deputies. They are a judicial chief justice supervising the affairs dealing with the case settlement and a non judicial chief justice supervising the affairs of administration and finance.

Beside the two deputies mentioned above, there are some 48 Supreme Court Justices of carrier and non carrier justice, so totally there are 51 Supreme Justices at the Indonesian Supreme Court. Having the highest power of justice, Supreme Court has the authority of case settlement, cassation, judicial review, and also controlling and supervising its subordinate courts as mentioned above.

The appeal court called the high court as well which is established in each capital city of province throughout Indonesia, authorized to handle appealing case process. The lowest court is district court, established in capital city, regency, or municipality. Beside its court as the first level of general justice, there is also Religion Court established and authorized to handle the affairs dealing divorce cases, heritage matter of Muslim. Military court, authorized to handle criminal cases committed by army personnel, and Administrative court, authorized to handle administrative disputes or matter between people and government.

The District court is also a public court due to its comprehensive authority in handling various cases of crime, civil, juvenile, divorce cases of non Muslim, and other cases which are not processed by other courts.

The District court of Central Jakarta as one of district courts is especially authorized to handle commercial cases such as bankruptcies, intellectual property rights disputes, and particularly, corruption cases. Special Corruption Court is one of the subordinates of central Jakarta district court dealing with the cases of corruption committed by government officials or those who have been related and involved, or any other corruption offence suffering the state loss more than 1 billion rupiah and or corruption cases handled by Corruption Eradication Commission (KPK).

The background of establishment of this court is public distrust on corruption settlement by conventional court, thus public demand the government to have such court well established with special board of 5 judges member consisting of 2 special career judges of corruption and 3 ad-hoc judges, selected from various backgrounds such as academician, law practitioner, or ordinary people. Administratively, this court is under control of the district court.

III. INDONESIAN LEGISLATION ON CORRUPTION

Initially, corruption committed by government officials was considered an ordinary crime, hence such an offence was ruled in general provision of crime law in which one of the article includes the threat of punishment for those government officials receiving gratification. Afterward, from time to time, exactly since 1960, the regulation of corruption crime began to be set up and advanced. The government regulation in Lieu of Law No. 24/1960 on investigation, charge and examination of corruption was the indication of this progress.

In accordance with the increasing of corruption crime, especially in internal of state officials, government realized that the current regulation is ineffective in implementation. Then in 1971, the amendment was converted to be the Act No.3/1971 on corruption eradication followed by the Act no. 11/1980 on bribery.

Furthermore, based on the destructive impacts of corruption crime causing huge state loss and lumbering the national development, the new set of corruption law, i.e. Act No. 31/1999 substituting the Act No. 3/1971 being issued, aimed to be the effort to cope with all crimes of embezzlement to state finance which has been more well organized and complicated, done either by individuals or cooperation. Some principals included in this act are:

1. The more comprehensive meaning of term of "acts against the law" described not only against the law in formal but also in material.
2. Corporation as the subject of corruption crime can be penalized with any penalties possible.
3. The regulation of minimal penalty and higher fine penalty system and also death penalty as a burdensome.
4. The new regulation for those corruptors who can not afford to return compensation to state must be imposed with extra penalty.
5. The term of "government official" committing corruption is made more comprehensive, including those, the official of corporation receiving funds or using state facilities.

Then in 2001, the regulation was completed and converted with the Act No. 20/2001 considering that corruption committed widespread will not only mess the state finance up but also abuse social rights and economy. Therefore, the way how to cope with the corruption crime must be well concerned, especially by uncommon strategies such as:

1. Implementing reversal burden of proof especially when probing gratification
2. Comprehending the meaning of evidence hints, not only based on the existence of witness, data of defendant, but also based on electronic evidence (unwell known so far in the system of proof in Indonesia).

Such corruption laws that is today officially legitimate in Indonesia and applicable in order to prevent and to bring such crime to an end. Beside the regulation mentioned above, the Act No. 28/1999 on the good governance, anti corruption, collusion, and nepotism, is still adopted today.

IV. PROCESS OF LAW ENFORCEMENT AGAINST CORRUPTION IN INDONESIA TODAY (ESPECIALLY IN THE JUDICIAL SECTOR)

Even though some breakthroughs over corruption eradication have been improved and adapted with the invasive action of corruption from time to time, such crime or power abuse in internal judiciary institution either in local or central level has never shown any indication to end, getting even worse, instead.

There has never been any research giving accurate data on the reason why corruption appears to be rampant over judiciary officials, but anyway, based on an observation, it is found that one of the factors is not unbalanced condition between what they earn and the social status they have, it is found completely not worth. On the one hand, it seems quite prestigious to be a judge, a clerk, or a staff, although the salary they get doesn't meet what they have to fulfil in their daily socialization with others.

Another factor says about the chance. When there is a chance there is a corruption. A very long process, complicated and twisting bureaucracy may always have given a chance to the officials to cut across procedures for any extra compensation. For instance, a lot of cases being handled by Supreme Court, there are some 10,000 cassation registered per year while many more cases of the previous years are still postponed unsolved. Consequently by only appointing 51 supreme judges, there are about 10,000 cases coming to halt and stagnant. The more cases registered the much longer time needed. Such condition motivates some opportunists to offer alternative way more preferable for many parties who want to have the case well finished without waiting for much longer time what is usually the case and which is absolutely dealt with certain compensation. Ineffective control and penalty system that gives no deterrent effect are more reasonable contribution for such wrongdoing to become endless problem.

Falsifying verdict document or case of extortion involving internal staff is of the case patterns appearing and being faced by Indonesian justice nowadays that forces Supreme Court to conduct more solid control to all elements of judicial apparatus such as judges, clerks or administration staffs.

Having been considering that some efforts of corruption eradication so far have not shown any better progress and ineffectiveness, government since 2002 has made some important further steps as extra ordinary measures to support the extra ordinary law enforcement on corruption by a special and independent commission given a broad power of authority in order to eradicate corruption in Indonesia that is called Corruption Eradication Commission (KPK). Since the time the body of KPK has been established, it is proved that the corruptive behaviour amid judiciaries has been slowly decreasing, such good outcome being clearly seen due to the broad authority of KPK for tapping, seizure, arresting, examining and prosecuting like a prosecutor.

For the aim of building good image and pride of law and good governance today, Supreme justice now is barely making renewal or reformation in law sector. The blueprint of reformation is addressed to:

1. Judicial independence
2. Court management system
3. Anti corruption amid judiciaries

A. Judicial Independence

To conduct an independent and neutral power of justice, Supreme Court has taken some giant steps of change by proposing an idea of one roof law enforcement based on the Act No. 35/1999 converting to Act no. 14/1970, where previously the position of judge was supervised by the minister of justice in administrative but now, with this regulation, Supreme Court takes over that authority. Such system is aimed to make judges work more freely without any tense, out of executive control. Moreover, the survey done by Transparency International's Corruption Perception Index 2006, the transformation has not yet completely changed the way of people to trust national judiciary.

B. Court Management System

Renewal on Court Management System consists of three points below:

1. Trial Procedure.
   Supreme Court makes the procedure of trial well simplified based on the major principals. The trial must be done quickly, simply, and with low cost. The court must be open for public to access justices.

2. Accountability and Transparency
   In order to perform accountability, all judicial apparatus must be working in professional way. All

verdicts made must be well concerned based on law, judicious, and sensible. To perform court transparency, it is necessary to conduct trial process in a transparent way in which all verdicts are accessible through the information system provided.

3. Case Management System.
   The Supreme Court lately launched "Information Technology System" namely the implementation of the computerized court administration system.

C. Prevention of Anti Corruption over Judiciaries

In order to make more serious steps addressing the corruptive behaviour over judiciaries, a very firm control and constant control is considered the most effective way to build a good and well integrated judiciary system in our country.

V. JUDICIARY CONTROLLING SYSTEM

The controlling systems on progress and legal are:

1. Internal controlling system
2. External controlling system

A. Internal Control

As is ruled in the Act no. 4/2004 on the main authority of judiciary saying that supreme authority for controlling all activities of judiciary process and components related is under control of Supreme Court.

Internal control is the control in the internal court itself divided into the regular and functional controlling system. Regular control is a direct control which is done repressively and constantly, and inspection by the leader to its subordinates to make all job descriptions of each staff run effectively and efficiently as regulated. The control gradually conducted is begun from District Court to the judiciary institutions of the lowest level. Ex officiously, a chief of district court has to do the controlling to all of his/her subordinates, practically such job is always delegated to the members of judge who runs routine control over each of his/her subdivisions. However, the sanction will be given to the chief who has done nothing when their subordinates are found guilty of doing mistakes. Due to the hierarchy, all chiefs of district court are under the control of chief of high court, and so are the high courts supervised and controlled by the Supreme Court.

The functional control is the control that is conducted by a special team appointed by the Supreme Court that is called the Controlling Board and led by a deputy of controlling division. The jobs carried out are: running internal control that will deal with accommodating public complaint about the behaviour of judges and judiciary apparatus; following up all claims by examining both parties, either the reporter of the reported; making a final conclusion of the examination and reporting to the Supreme Court. Such controlling board has been one of the effective mechanisms to conduct an internal control and to supervise the judiciary, not to mention all inputs the Supreme Court has always been well considered.

B. External Control

Substantially, the judiciary officials are also controlled by an external controlling board that is le-

galized not only by the regulation but also based on the public interest of those who are unsatisfied and disappointed with the national judiciary system.

The three External Controlling Bodies appointed are:

1. Judicial Commission.
   The newly established commission, in the state order as the implementation of article 24b Amendment of Constitutional Law 1945, is formed by the president. As an independent body, judicial commission has missions as follow;
   (i) Selecting and recommending candidates of Supreme Justice.
   (ii) Controlling over judiciaries, external or internal of the court as well.

Technically, in doing control, the Judicial Commission works on its own initiative or based on public information over misbehaviour of judges, and it will be then followed up for further investigation. When the judge is proved guilty, the Judicial Commission makes some recommendation to the Supreme Court to give sanction as ruled in the law. The sort of sanction given will be various such as administrative sanction, rank degradation, temporary promotion postponing, non activation and also termination. Crime penalty is a recommendation to bring the case to be proceeded by police.

The authority of judicial commission in selecting Supreme Justice is started by searching or tracking the background of the candidates, test of capability and integrity and also enforcing fit and proper test which is done together with House of Representative.

2. Corruption Eradication Commission (CEC/KPK).
   This body has mission as follows:
   (i) Collaborating with the other authorized institutions to enforce Corruption Eradication.
   (ii) Making control over state enforcement
   (iii) Examining, investigating and prosecuting the corruption crime committed by :
      - officials, state functional or any their individuals involved in the crime
      - Corruption crime attracting mass attention.
      - Corruption crime with loss over 1 billion rupiah.

Beside the authorities mentioned above, CEC also has authority for watching the judiciaries on gratification. The gratification over Rp.250.000- must be reported to CEC that will determine the status of belonging of the gratification, to the state or the receiver.

3. State Finance Controlling Agency (BPKP)
   This board has an authority to control the state finance which is managed by court institution.

VI. CONCLUSION

All descriptions above lead us to the final conclusion saying that basically the effort of prevention and eradication against corruption crime has been always tough and complicated to do. Even though all supporting components have been obviously provided to help the target well achieved, the most important thing that we need for a better change is a good will or morality, the factors which play a very important role to change an individual character or personality, simply become volatile, bad to be good, or good to be bad. This has been influenced by some factors such as surroundings controlling or income earned. Therefore, moral management must be always well concerned. Building the ethos of anti corruption to enforce good governance at the end.

CORRUPTION CONTROL IN THE JUDICIARY AND PROSECUTORIAL AUTHORITIES

Anthony Kevin Morais[*]

I. INTRODUCTION

It is a great honour for me to be asked to address at this event as a panellist on the topic entitled "*Corruption Control in the Judiciary and Prosecutorial Authorities*", which is co-hosted by the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, the Office of the Attorney-General of Thailand and the United Nations Office on Drugs and Crime with the assistance of the Japan International Cooperation Agency.

Before I begin, on the topic assigned to me this morning, I hope you will forgive me if I take this opportunity to reflect on the role of a Prosecutor, as a reminder of the importance of this function and then to offer a few thoughts on tackling corruption within the prosecution service.

Prosecution is an honour but it requires talent and experience; it is a skill and some even say an art. Indeed, to be a prosecutor brings different responsibilities in different jurisdictions, but whatever the legal system, all prosecutors should uphold the principles of fairness and justice whilst incorporating the rule of law. All this, coupled with the determination and tenacity to ensure that criminals are caught and brought to book quickly and fairly. These principles lie at the heart of every prosecutor's work whatever their nationality is.

Regardless, of the basis of the criminal law system, whether it is the Roman law, the Napoleonic Code or the Common Law, the prosecutor in almost all these systems is asked to represent the community. He/she is entrusted with powers and responsibilities. The prosecutor is asked to balance the exercise of these powers as a representative of the community and to use those powers to intervene in the lives of the individuals for the benefit of the community as a whole.

A prosecutor is the quintessential public interest lawyer. This, I believe is the most fulfilling career that one can have as a lawyer. He/she has no 'client' in the conventional sense, but acts impartially and objectively, yet in the public interest.

Prosecutors, quite simply, represent society, the public, in its effort to vindicate its rights and interest when those among us violate these rights by breaking the law. At the same time, prosecutors assert the interests of the victims of crime, the individuals, the communities and organizations who are harmed, either financially, physically, or in more intangible ways, by those who break the law. Prosecutors achieve these objectives by prosecuting and seeking to punish those who threaten the well-being of society and its citizens, by breaking the law.

The prosecutor has vast resources at his/her disposal, and the power this gives him/her must be exercised with a sense of proportion. He/she must not advance submissions he/she does not believe, nor must he/she conceal material that may assist the accused. It is no part of the prosecutor's function to seek a "conviction at all cost". No more can be expected of him/her than that he/she should present his/her case to the court fairly, intelligently and persuasively. Fairness by the prosecutor does not make him/her a "soft touch". He/she must be as vigorous and determined as he/she is courteous in the presentation of

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his/her case. While he/she is at liberty to strike hard blows, he/she is "*not at liberty to strike foul ones*". As Justice Sunderland explained in 1935 in the Supreme Court of the United States of America, the interest of the office of the prosecutor is "*not that it shall win a case, but that justice has been done*".

Against this backdrop, owing to the nature of job of a prosecutor, temptation rears its ugly head in various forms.

At the cost of seeming facetious, Prosecutorial misconduct should not surprise us. After all prosecutors are lawyers (intent on victory), depending on the jurisdiction, politicians (craving popularity) or human beings (needing to rationalize serious error).

II. REALITY OF THE CRIMINAL JUSTICE SYSTEM

A romantic view of criminal law and criminal trials is that only the guilty will be charged, prosecuted and eventually convicted. However, most of us are only too aware that this is not necessarily always the case. There can be a myriad of reasons for this. Foremost, the asymmetry of the criminal justice system arguably places unrealistic demands on prosecutors. Defence attorneys may pursue acquittals without regard to the truth and are subject to few ethical restraints. For example, defence attorneys generally are not bound to share evidence unfavourable to their client, but a prosecutor's failure to share exculpatory material is a serious failing, likely to result in a conviction being reversed. Prosecutors understandably are not fond of unequal combat. With trials structured as competitions, featuring a clear winner and loser, many prosecutors resist allowing their opponents overwhelming tactical advantage.

Personal ambition compounds competitive instincts. Many prosecutors often aspire for higher offices or re-election. In such instances, one rarely wins popular acclaim for the indictment not brought (because of doubts as to the guilt or because evidence was illegally obtained) or the case lost (because of appropriate restraint).

Professionalism in prosecution is hardly publicized by the media, whereas wins and losses are out there for everyone to see. Restraint is mistaken for strength, while rashness is sometimes regarded as strength.

The absence of private law enforcement in most countries has left the prosecutor as the sole figure to enforce the laws. With this singular power comes the heavy burden to keep the streets free and the innocent out of prison. To err in performing these functions has potentially disastrous results; the innocent may be cast in prison and stripped of their liberties, while the guilty remain free having the opportunity to commit other crimes.

Consequently, considerable powers are vested with the office of a prosecutor. Herein, lies the problem. The discretion to prosecute, plea bargaining, taking into consideration of offences, presenting of evidence, duty to disclose and recommending sentences are some of the areas of prosecution that may be malleable not only to corruption, but also to dishonesty, unethical conduct and abuse of power. Though most of us here may lack verifiable information of such practices for purposes of detection, one is all too aware that it does exist.

On the issue of discretion to prosecute, another cause of prosecutorial misconduct is the deep-seated human need to rationalize our errors. It would be difficult for prosecutors to sometimes admit that they have indicted the wrong person. Such an admission would tacitly amount to an admission of the lives he/she has shattered. Who among us is capable of acknowledging mistakes of such magnitude, is

questionable.

III. POSITION OF THE JUDICIARY

An area that is seldom touched upon when discussing the combating of corruption is the position of the judiciary. How does it factor in when discussing corruption?

The judiciary is an integral component in the fight against corruption. In this context, the judiciary has a role to pay in the appreciation of evidence and eventually in the kind of sentences meted out to those who are found liable for acts of corruption. The courts should regard corruption as a serious crime. Hitherto, the cancer metaphor seems a popular one with the courts in describing the social effects of corruption. The judiciary should recognize the importance of the Government's efforts to eradicate corruption and lend judicial support to achieving that end.

To achieve this, the judiciary must be seen to have independence, vis-à-vis, the executive power and the integrity, courage, legal intellect and impartiality trying a case. *Like Caesar's wife, the judges should be above suspicion!*

Having said this, judicial corruption appears to be a global problem. It is not restricted to a particular country or region, but is seen to be more pervasive in certain countries rather than others. Many regard corruption in the judiciary as the most pernicious form of corruption because it affects the rule of law, regarded as one of four critical variables for sustainable development and poverty alleviation.

International and regional human rights instruments are recognized as fundamental of the right of everyone to due process of law, including to a fair and public hearing by a competent independent and impartial tribunal established by law. The importance of this right in the protection of human rights is underscored by the fact that the implementation of all other rights depends upon proper administration of justice. An essential element of the right to a fair trial is an independent and impartial trial. Another inherent element of fair trial is the procedural equality of parties, the so-called "equality of arms". If the judiciary system is corrupt, no such elements will exist. Judicial corruption influences unduly access to the outcome of judicial decisions. The decisions will remain unfair and unpredictable and consequently the rule of law will not prevail.[1]

If one of the parties has bribed the judge or other court official and obtained access to documents to which the other party has no access, or caused documents to disappear, there can be no equality of arms. A judge who has taken a bribe cannot be impartial, independent or fair. A party who has successfully bribed a judge, immediately acquires a privileged status in relation to the other party who may not be in a position to do so. This preferential treatment obliterates objectivity and neutrality from the judicial process. Here, the fundamental precepts of human rights are violated rather than upheld.

Indicators of corruption in the judiciary include: delay in the execution of court orders; unjustifiable issuance of summons and granting of bails; lack of public access to court records; variations of sentences; delays in delivery of judgments; high acquittal rates against overwhelming evidence; conflict of interest; prejudices for or against a party, witness, or lawyer; high rate of decisions in favour of the executive; appointments perceived as resulting from political patronage; frequent socializing with members of the legal profession, executive or legislature and post retirement placements.

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1 Strengthening Judicial Integrity Against Corruption, UNODC, Vienna , March 2001

Reasons for corruption in the judiciary include low salaries paid to judicial officers and court staffs. Having said this, countless examples suggest that an adequate salary is necessary but not a sufficient consideration for judicial probity. Perquisites or extras granted to judges can sometimes have a negative effect, since the state suggests the adequacy of a living standard far beyond what the judge would be able to afford if he/she would be paid only his/her salary. Consequently, the judge gets used to a standard of living that he/she will not be able to maintain once he/she retires. Such a situation may contribute to the temptation to indulge in corrupt practices to accumulate resources in order to preserve his/her status after retirement. Further, issues like a heavy workload (which will cause him/her to loose interest in his/her work, and become more susceptible to corruption) and poor service conditions are areas that need to be addressed when we speak of controlling corruption in the judicial services.[2]

IV. HOW DOES ONE ERADICATE CORRUPTION IN THE JUDICIARY?

I have attempted to give you a glimpse of the forms of corruption in the judiciary, the causes and the reasons to it. How does one address these concerns?

It has been argued that in order to ensure unimpeachable conduct, members of the Judiciary should subscribe to *judicial Code of Conduct*. Judges and members of the public must be informed about the existence of such code, its contents and complaint-mechanism, in the event there is a violation of the code. Civil society participation is integral when devising this code, and judges should, on taking their oath of office, agree to the Code of conduct and agree, in the case of a breach of the Code, that they will resign or be removed from judicial office.

There should also be obligations on declaration of assets by judges and this should be done on a regular basis. Failure to comply with it or withholding information on newly acquired wealth should invite punitive measures, including removal from office.

A team of respectable judges should monitor delivery of judgments, decisions, and hearings, and the reasons for failing to comply with deadlines should be made known to the respective litigants. Recalcitrant judges who do not comply with deadlines should be reprimanded, once again with possible sanctions such as removal from office. Assignment of cases to judges should be conducted in a random manner, in order to prevent the common perception by members of public of “forum-shopping”.

Computerization of court records should be encouraged, as it would reduce the effect of “missing files” and “tampering of court documents”.

Encouraging *alternative dispute resolution* (ADR) would allow litigants the opportunity to engage in a process of settlement without the stress and anxiety of formal court proceedings, and would remove the fear and suspicion among litigants that “judges can be bought”. ADR would, in turn, give judges more time to concentrate on other pressing cases and complete pending judgments.

The media, Bar Associations and Law Societies should have a role to play and enough teeth in controlling corruption in the judiciary. Such entrusted bodies have to report instances of corruption, unsavoury practices or dereliction of duties by a judge. When such practices are raised, they should be investigated upon without fear or favour. However, when there should be a caveat, one should tread warily in investigations of allegations of judicial corruption. It should only take place after due consideration of

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2 Strengthening Judicial Integrity Against Corruption, UNODC, Vienna , March 2001

the viewpoint of other judicial officers, court staff, legal profession, and other users of the legal system. This is because members of the judiciary are extremely vulnerable to allegations of corruption by disgruntled litigants who may have an "axe to grind".

But, once it is established that there is a "prima facie" case for corruption, judges like any other members of the public should be subjected to the full brunt of the criminal law and its process. There should be no reprieve for such conduct on grounds of national interest or public policy.

Finally, the entire selection and appointment of judges should be conducted in a more transparent nature in order to combat allegations or perceptions of nepotism, favouritism, or politicization of the judiciary. The previous record of an aspiring candidate should be scrutinized with care and any whiff of corruption or misconduct in the past should be investigated and explained away, before the appointment is confirmed.

V. PREVENTING AND CURBING CORRUPTION WITHIN GOVERNMENT OFFICIALS

Corruption, dishonesty, and unethical behaviour amongst prosecutors and members of the judiciary excite in the minds of the people a general dissatisfaction with prosecution and adjudication process of the law. And, whenever people's allegiance to the laws is so fundamentally shaken, it would be one of the more fatal and dangerous obstructions of justice and will call for rapid and immediate redress.

The organizers of this seminar and the protagonists of this topic must be lauded for having the chutzpah to recognize the fact that corruption does occur within the judicial and prosecutorial system, rather than sweeping it under the carpet! We should not live in a Fool's Paradise! Participants here today, should also be lauded for being broad enough to participate in a dialogue of such magnitude and sensitivity. Sensitivities aside, having recognized the fact that this malady exists, our role here today is to articulate ways and means of curbing the spread of this pernicious disease within these systems. Corruption within the prosecution and judicial service could be likened to the case of a gatekeeper turned poacher!

On this note, I would like to give you a glimpse of Malaysia's approach towards preventing and curbing corruption within the government officials generally, prosecution and judicial service included. My focus would eventually be on two aspects, vis-à-vis, the Declaration of Assets. For good measure, I will give you a brief outlook of the relevant laws that impact on corruption in the Judicial and Prosecution service.

A. Malaysia's Measures against Corruption

The Anti-Corruption Agency of Malaysia has itself gone through phases and changes. This includes the review of the then anti-corruption laws, from the previous *Prevention of Corruption Act 1961*, to the present *Anti-Corruption Act 1997*. There have also been structural and strategy changes to enhance the capacity and capability of the Anti-Corruption Agency.

The laws under which offences of corruption are embodied are as follows:

(i) Penal Code
(ii) The Election Offences Act 1954
(iii) The Customs Act 1967
(iv) The Emergency (Essential Powers) Ordinance No22, 1970

(v) The Anti-Corruption Act 1997
(vi) The Anti-Money Laundering & Anti-Terrorist Financing Act 2001
(vi) The Mutual Assistance in Criminal Matters Act 2002

My focus today would be the *Anti-Corruption Act 1997* and the *Penal Code*.

1. Section 8 of the Anti-Corruption Act 1997

Section 8 of the Act describes the core functions of the Anti-Corruption Agency and it is imperative that I narrate the inter alia three of the functions, that has a resonance with today's topic. Apart, from the detection and investigation of the commission of a crime, the Agency is also responsible for promoting preventive measures in the following manners:

(i) examines the practices, systems and procedures of public bodies in order to facilitate the discovery of offences under this Act and to secure the revision of such practices, systems or procedures as in the opinion of the Director-General may be conducive to corruption;
(ii) instructs, advises and assists any person, on the latter's request, on ways in which corruption may be eliminated by such person;
(iii) advises heads of public bodies of any changes in practices, systems or procedures compatible with the effective discharge of the duties of the public bodies as the Director-General thinks necessary to reduce the likelihood of the occurrence of corruption.

These measures are important, as it equips the agency with the wherewithal to examine practices, systems and procedures of public bodies that may be conducive to corruption and then to advise heads of public bodies of any change there ought to be made in the practices, systems or procedures. This area as I mentioned, is a much-needed boost for the Agency's preventive measures against corruption.

Though there are in-built systems to prevent corruption or abuse of power within any public institution, prosecution included, no system can be considered water-tight. There may be glitches or blind spots that even the most incisive mind may overlook due to trust, inadvertence or work pressure. In this context, allowing non-partisan agencies like the Anti-Corruption body, the ability to objectively examine and advice on practices that need reform is commendable.

Prosecutors, be they Deputy Public Prosecutors, Police Prosecutors or Prosecutors from government agencies and Judges from the High Court, Court of Appeal and Federal Court are considered officers serving under a public body, within the Anti-Corruption Act 1997 and consequently, are susceptible to the provisions of the Anti-Corruption Act 1997.

The Anti-Corruption Act 1997 provides, within its scope, laws that criminalize the *giving, offering, soliciting or promise of gratification* by any party or the receipt or solicitation of gratification by any party. Any government official, including a prosecutor would fall within the ambit of this law, if found to be committing one for the aforementioned acts. The said acts need not be for the benefit of the individual concerned, for the Act is wide enough to cover benefits to be enjoyed by any other person.

The term "*gratification*" within the Act is given a relatively wide meaning and includes various permutations such as money, gifts loan, fee, reward, office dignity, employment or any valuable consideration of any kind. There is also provision within the Act that prohibits a public official from using his/her office or position for gratification. The presumption under the said section further states that an officer of a public body shall be presumed, until the contrary is proved, to use his/her office or position for gratification when he/she makes a decision or takes any action, in relation to any matter in which such an officer, or any relative, or associate of his/her, has an interest, whether directly or indirectly.

2. Section 32 (3) of the Anti-Corruption Act 1997

One other area of the Act that deserves special mention is section 32 (3) of the Act. Here, *in the course of investigation* of any public officer under the Act, it is discovered that the said individual has in his/her control or owns or possess or holds any property which is in excessive, having regard to his/her present or past emoluments and all relevant circumstances, the Prosecutor may by written direction require the said person to furnish statements on oath or affirmation explaining how he/she was able to acquire such property. Failure to respond satisfactorily will warrant imprisonment.

This said provision casts a wide net on relatives, associates and financial institutions of the individual to provide the investigators with information on the properties or funds held by them on behalf of the public official who is being investigated. Critics may argue that this is intrusive and impacts on fundamental human rights, but to this we say corruption and its proceeds threatens the well-being of society and tough measures must be taken. Legal scholars may however argue that this provision is triggered off only when an investigation is on-going. What about those who are not being investigated?

3. Public Officers (Conduct and Discipline) Regulation 1993

To this, we have within our government system, strict preventive measures laid down in the government instruction manual, entitled *Public Officers (Conduct and Discipline) Regulations 1993*, to supervise the conduct and discipline of government officials. It has within the said Regulations, *inter alia*, the following prohibitions:

(i) *a public officer cannot borrow from, or in any way put himself/herself under a financial obligation to any person.*
(ii) *a public officer is required to declare his/her assets at his/her first appointment and subsequently every 5 years.*
(iii) *a public officer cannot engage in trade or business or undertake any part-time work without approval.*
(iv) *a public officer cannot receive entertainment from members of the public.*
(v) *subordinate his/her public duty to his/her private interest.*
(vi) *conduct himself/herself in such a manner as is likely to bring his/her private interest into conflict with his/her public duty.*

A breach of any of the aforesaid instructions depending on the severity of the charge, may receive one or a combination of the following punishments:

(i) *dismissal from service;*
(ii) *reduction from rank;*
(iii) *stoppage or deferment of increment;*
(iv) *fine or reprimand;*
(v) *retirement in the public interest.*

We also have within the *Public Officers (Conduct and Discipline) Regulations 1993*, the periodic declaration of assets of public officials, prosecutors alike. This declaration acts as a deterrent for public officials from succumbing to the temptation of corruption or abuse of powers. By placing officials on guard that they would have to account for their newly acquired wealth, may cause them to pause, before overreaching themselves. This declaration of asset is done at the outset of one's career, and thereafter, as and when required by the Head of Department. Heads of Department are required to be observant of dramatic life-style changes in an official or his/her patterns of behaviour within and outside the office and require them if so, to declare their new found wealth.

This declaration of assets should also contain properties held under the names of the spouse or children of the public official and the source of income used to purchase the property. Where an officer or his/her spouse or child intends to acquire any property which is inconsistent with the Regulations, the acquisition shall not be made without the prior written permission of the Secretary General of the Minis-

try. This situation may arise, where there may be a possible conflict of interest between the official and the vendor in the acquisition of the said property.

Failure to include property and falsifying the source of income can be made subject of a criminal charge of false declaration that carries a term of imprisonment or disciplinary proceedings.

There are also provisions we have inherited from India in the Penal Code that proscribe public officers from putting himself/herself in a financial obligation or accepting any form of valuable consideration from persons under his/her official authority or has official dealings with him/her.

4. Judges Code of Ethics 1994

Judges in Malaysia are subject to the *Judges Code of Ethics 1994*, which apply to a judge throughout his/her period of service. There are various provisions in the said Code to regulate the conduct of a judge during his/her tenure, and a breach of it could constitute a ground for removal of the judge. Provisions include:

(i) a judge should not subordinate his/her judicial duties to his/her private interest

(ii) conduct himself/herself in such a manner as likely to bring his/her private interest into conflict with his/her judicial duties

(iii) conduct himself/herself in any manner likely to cause a reasonable suspicion that;

- *he/she has allowed his/her private interest to come into conflict with his/her judicial duties so as to impair his/her usefulness as a judge; or*
- *he/she has used his/her judicial position for his/her personal advantage*

(iv) conduct himself/herself dishonestly or in such a manner as to bring the Judiciary into disrepute or to bring discredit thereto;

(v) lack efficiency or industry.

It is also provided for in the said Code, that a Judge shall on his/her appointment or at any time thereafter as may be required by the Chief Justice, declare in writing all his/her assets to the Chief Justice.

B. Independence of the Attorney-General

In Malaysia, it is recognized that the Attorney-General, in exercising prosecutorial discretion, must act independently of partisan or political considerations.

Independence is an essential feature of the proper exercise of prosecutorial discretion. But, the notion of independence cannot exist alone: it must co-exist with the notion of accountability. Indeed, independence and accountability are not opposing concepts; they work in tandem. They provide a meaningful way to maintain and enhance public trust and confidence in the administration of justice.

Prosecutors in Malaysia do not act in their personal capacity. They represent the Attorney-General. Their discretion and independence are not personal attributes; they are delegated.

Because prosecutorial discretion and independence are delegated, prosecutors are accountable to the Attorney-General for their actions. As designates or agents of the Attorney-General, prosecutors must be able to explain to the Attorney-General the basis for the exercise of discretion.

The Attorney-General has issued broad policy guidelines to prosecutors when exercising this prosecutorial discretion, as the Attorney-General does not micromanage cases. These guidelines become not only a tool that regulates our internal thought process and guides our decisions, but also provides the standards against which our actions and explanations will be measured.

The Mission Statement of the Prosecution Division reinforces a prosecutor's commitment to

conduct prosecutions in a fair and just manner in accordance with the Federal Constitution and the laws of the country.

VI. MAKING IMPTOVEMENTS TO THE LEGAL AND INSTITUTIONAL FRAMEWORKS

Beyond legislation, political will, making improvements to the legal and institutional frameworks, to the governance and procedures in the public and private sectors, to the capabilities of anti-corruption specialists, perhaps the most challenging and fundamental aspect of combating corruption is changing the mind-sets of society at large, and prosecutors in particular.

Once a prosecutor or a member of the Judiciary, attempts to rationalize gifts or inducements given to them as being appropriate, in reality, this is only the start of being "on a slippery slope".

It is important to remember that behind these acts of corruption and abuse of power are people and the values they hold. Sadly, in today's fact-paced and demanding world, the temptation to seek easy money is very strong. Those who wield power and influence must remember that economies have been shattered and societies destroyed as a result of corruption.

There is undoubtedly a compelling need not only to improve governance of public and private institutions but equally an attempt must be made to address the underlying reason why there is an erosion of ethics and integrity in society.

However, building a society of individuals that have a high degree of ethics and integrity is no mean feat. This is because ethics and integrity are basically values that define who we are. Yet, ethics and integrity cannot be the subject of legislation nor can they be legislatively enforced. Ethics and integrity must evolve in our cultural setting, in our value system and the way we relate to others in society. This makes the promotion of ethics and integrity intangible and difficult to pursue, though they remain one of the most critical attributes that must be imbued in society. Certainly, the need for ethics and integrity in the public sector is most critical, because it is the public sector that safeguards public interest.

In recognition of this complexity, one of the preventive strategies advocated to by our Prime Minister is to inculcate in individuals and the Malaysian society as a whole, the noble values of honesty, ethics, equity, accountability and personal integrity-all injunctions of the great religions of this world. Inculcating such values and attitudes are arguably the most important elements in the fight against corruption and yet many of us seem to overlook this basic need.

1. The National Integrity Plan

The *National Integrity Plan* launched in 2004 provides the framework and guidance on the direction and strategies to address this issue of ethics and good governance amongst the public and private sector. The formulation of the National Integrity Plan is predicated upon the spirit and principles of the Federal Constitution, the philosophy and principles of the *Rukun Negara*, as well as the aspirations of Vision 2020. The overall objective of the NIP is to establish a fully moral and ethical society whose citizens are strong and spiritual values imbued with the highest ethical standards.

The Integrity Institute of Malaysia was created as a vehicle towards implementing the National Integrity Plan. This institute will coordinate and undertake research aimed at promoting good governance, accountability, transparency and efficiency in the public service. At the same time the institute will provide training courses and opportunities for inter-agency discussions on ways to improve

the quality of service and the efficiency in both the private and public sector.

The Institute has identified six government agencies to spearhead the implementation of the agenda and strategies under the National Integrity Plan. The Judicial & Legal Service would be one of the departments that will benefit from programmes to enhance integrity.

2. The Prime Minister's Circular No.1 of 1998

The Government has also implemented the *Prime Minister's Circular No. 1 of 1998*, which aims to enhance the management integrity of the government administration. This has been done through the setting up of integrity management committees in all ministries, departments and agencies of the Federal as well as State Governments.

One of the strategies devised as part of the National Integrity Plan, is that the fight against corruption must be a national effort and the public must be educated about the evils of corruption and co-opted into the fight against this scourge. Not only must the public be educated into not offering bribes, they must be proactive in reporting instances of corruption. Every citizen must be the eyes and ears of the government in detecting and exposing corruption. Those who partake in graft must feel unsafe and insecure knowing that they are being watched!

In order to achieve its objectives, the NIP has identified a set of priorities and targets. For the first five years (2004-2008), the NIP has identified the five priorities known as Target 2008, which is as follows:

(i) effectively reduce corruption, malpractices and abuse of power;
(ii) increase efficiency of the public delivery system and overcome bureaucratic red tape;
(iii) enhance corporate governance and business ethics;
(iv) strengthen the family institution;
(v) improve the quality of life and people's well-being.

Monitoring and benchmarking of the Plan will be undertaken. This assessment will be done based on the standards and practices compatible with the Malaysian society, as well as the standards set internationally.

VII. CONCLUSION

In conclusion, while we may deliberate and introduce highfalutin concepts and ideas at different levels on how to seek out culprits of corruption in the Judicial and Prosecution service and punish them, as lawyers we must realize that the law does not of itself provide an answer to corruption. It does not even provide the largest part of the answer. All that it can do is to provide a backdrop to the answers that must be based on institutional reform and ethical regeneration.

PRESENTATION SESSION II

Individual Presentation by Mrs. Lwin Lwin Aye Kyaw,
Judge, Director, Supreme Court,
Myanmar

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Individual Presentation by Ms. Deana P. Perez,
Senior State Prosecutor, National Prosecution Service, Department of Justice,
Philippines

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Individual Presentation by Mr. Nguyen Dang Thang,
Legal Expert and Prosecutor's Assistant, International Co-operation Department,
Supreme People's Prosecution Office,
Vietnam

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Individual Presentation by Mr. Nitithorn Wongyuen,
Judge, Office of the President of the Supreme Court, Office of the Judiciary,
Thailand

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Joint Presentation by Ms. Sirirat Vasuwat,
Senior Investigator, Level 9, Bureau of Corruption Suppression I,
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and
Ms. Supinya Berkfah,
Senior Officer, Bureau of Inspection of Assets 1, NCCC,
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Please note that the following papers have not been edited for publication.
The opinions expressed therein are those of the authors, and
do not necessarily reflect the position of the departments or agencies they represent.

CORRUPTION CONTROL IN THE JUDICIARY AND PROSECUTORIAL AUTHORITIES

Lwin Lwin Aye Kyaw[*]

I. INTRODUCTION

Corruption is a social cancer rampant in the whole world. Mostly, it is the government officials who are involved in corruption cases. However, there are also some cases in which citizens and companies are involved as well. True, many states in the world are making earnest efforts to crack down on corruption. Regrettably, there is as yet, not a single country completely free from corruption. In this globalized world of ours, states have become more and more interdependent and interactive in their relations with each other, for example, in economic, commercial and social matters. And in this globalization age, some well organized bribery and corruption cases cannot be prevented effectively and dealt with seriously by one country alone. So, I believe we need the international cooperation and coordination to tackle this social evil effectively and efficiently. At the same time, we should also bear in mind that as the causes of bribery and corruption vary from one state to another, so do the forms and methods of committing corruption.

Corruption is a disease that has afflicted us since time immemorial. Of all the corruption in many spheres of government institutions, corruption and bribery, rampant in judicial atmosphere is most deplorable and despicable. The Court-room must be clean-handed, dignified and solemnized. It is also found that some government servants including judicial officers and prosecutorial authorities are corrupted, not because of their financial difficulties but because of their weak moral and moral turpitude.

In the administration of justice, personnel of judicial bodies must decide the cases correctly in accordance with laws; otherwise, miscarriage of justice will occur due to the four elements of prejudice, namely prejudice of greed, prejudice of anger, prejudice of fear and prejudice of delusion. Of the four elements of prejudice accepting bribes with the prejudice of greed is loathsome and it is a moral turpitude.

II. PRESENT JUDICIAL SYSTEM IN MYANMAR

A. The Role of the Judiciary

On 4th January 1948, Myanmar broke away from the British Empire and become independent sovereign State. However, Indo-British Legal System, which has its roots in British concepts of justice, equity and good conscience, has been continued as a basic of our legal system. Some old laws, which are inconsistent and out of tune with our social, cultural and economic objectives are amended and repealed as and when necessary.

Today under the State Peace and Development Council, new laws have been enacted and the judicial system is reformed and modernized in the light of changing conditions of the country. The State Law and Order Restoration Council enacted the Judiciary Law, 1988, on September 26, 1988. In the year 2000, the State Peace and Development Council enacted the Judiciary Law 2000, whereby the Judiciary Law 1988 was repealed.

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B. Judicial Principles

According to the Judiciary Law 2000, judicial principles are:

(i) Administering justice independently according to law;
(ii) protecting and safeguarding the interests of the people and aiding in the restoration of law and order and regional peace and tranquility;
(iii) educating the people to understand and abide by the law and cultivating in the people the habit of abiding by the law;
(iv) Working within the framework of law for the settlement of cases;
(v) dispensing justice in open court unless otherwise prohibited by law;
(vi) guaranteeing in all cases the right of defence and the right of appeal under the law;
(vii) aiming at reforming moral character in meting out punishment to offenders.

C. Formation of Courts

As regards the formation of courts at different levels, under the Judiciary Law 2000, the following courts are established in the Union of Myanmar;

(i) the Supreme Court;
(ii) the State or Divisional Courts;
(iii) the District Courts;
(iv) the Township Courts;

Apart from these courts, there are Special Courts to deal with particular kinds of cases to achieve speedy and effective trial such as Juvenile Courts, Courts to try municipal offences and Courts to try traffic offences.

D. Power of Courts

The Supreme Court of the Union of Myanmar, established under section 3 of the Judiciary Law, 2000, is the highest Court of Appeal and exercises both appellate and revisional powers. It has original jurisdiction and it is one and only Court in Myanmar which can try the maritime cases in its original jurisdiction.

The State and Divisional Courts including District Courts established under section 12 of the Judiciary Law, 2000, have the power to adjudicate on original criminal cases and original civil cases. These Courts adjudicate on appeal cases and revision cases against the judgment, order and decision passed by the Township Courts. The Township Courts are established under section 12 of the Judiciary Law, 2000. The Supreme Court has conferred criminal jurisdictional powers on every Township Court. Bribery cases could be brought before the formal courts. Myanmar Courts, especially Township, District and State or Divisional Courts could play a very important role in adjudicating the bribery cases according to the relevant laws. They could try those cases, pass judgment and order, pass deterrent punishments against those offenders.

E. Judicial Education

Judicial service in the Union of Myanmar is career service. There is programme for the selection and appointment of Judicial Officers at different levels to carry out the judicial functions. According to the programme, a candidate for the post of a judicial officer must be a citizen of the Union of Myanmar having a good moral character and must have a degree of law or must have passed Advocateship examination. The candidates are selected and appointed by the Supreme Court.

Judicial Training Centre undertakes training for newly appointed judicial officers over a period of 3 months. After completion of a course, the trainee may become a Deputy Township Judge of the Court. Besides this programme the Training Centre offers a variety of Judicial Administration Courses for all judges at the different levels of Courts as continuing judicial education.

The judicial education programme is classified in five core areas:

(1) Bench Skills;
(2) Legal Knowledge; (studies on domestic and international laws)
(3) Social Context Educators;
(4) Judicial Administration;
(5) Ethics and Conduct.

III. SCOPE OF CORRUPTION

A. Definition of Corruption

Corruption has been based on many different perspectives and criteria, including; moral criteria; descriptions of the conduct or behavior involved; models involving conflicts of interest, breaches of trust or abuses of principal, agent , client relationship; economic, political and administrative models; distinctions based on whether the corruption involved public or private sector.

Corruption may involve cash or economic benefits, power or influence, or even less-tangible interests, in free-market and closed economies and in democratic and non-democratic governments and societies. Within the scope of these general definitions, there is also no general consensus about what specific sorts of conduct should be included or excluded, particularly in developing criminal laws or other politically sensitive concepts of corruption.

Definitions applied to corruption vary from country to country in accordance with cultural, legal or other factors and the nature of the problem as it appears in each country. Concepts may also vary from one time period to another. Definitions also vary depending on the background and perspective of the definer and purpose for which a definition was constructed. Economic or commercial models may focus on trade issues or harm to economic stability. Legal models tend to focus on criminal offences or areas such as breach of trust. Political models tend to focus on the allocation and abuses or power or influence.

B. The Characteristics of Corruption

The characteristic of corruption are as follows:

(i) Corruption always involves more than one person.
(ii) Corruption involves secrecy, except where it has become so rampant and so deeply rooted that some powerful individuals or those under their protection would not bother to hide their activity.
(iii) Corruption involves an element of mutual obligations and mutual benefits.
(iv) Those who practise corrupt methods usually attempt to camouflage their activities by resorting to some form of lawful justification. They avoid any open clash with the law.
(v) Those who are involved in corruption are those who want definite decisions and those who are able to influence those decisions.
(vi) Any act of corruption involves deception.
(vii) Any form of corruption is a betrayal of trust.
(viii) Any form of corruption involves a contradictory dual function of those who are committing the act.

IV. LEGAL FRAMEWORK FOR ERADICATION OF CORRUPTION

A. Respective Laws

Union of Myanmar Laws which prescribed the provision of eradication against corruption are as follows:

(1) The Penal Code
(2) The Suppression of Corruption Act
(3) Myanmar Official Secrets Act
(4) The Public Property Protection Act (1947)
(5) The Defence Services Act
(6) The Public Property Protection Law (1963)
(7) Election to the Pyithu Hluttaw Law (1989)
(8) The Central Bank of Myanmar Law
(9) The Financial Institutions of Myanmar Law
(10) The Saving Banks Law
(11) Fire services Law
(12) Myanmar Marine Fisheries Law
(13) Narcotic Drugs and Psychotropic Substances Law
(14) Forest Law
(15) People's Police Force Maintenance of Discipline Law
(16) Special Investigation Department Law
(17) The Control of Money laundering Law
(18) The Anti Trafficking in Persons Law.

B. Penal Code

Among these laws, in Penal Code, Sections 161 to 171 makes a list of offences committed by or relating to public servants. These offences or in other words, corruptions and punishments for abatement are mentioned in essence as follows:

(1) Public servant taking gratification in respect of an official act.
(2) Taking gratification in order, by corrupt or illegal means, to influence public servant.
(3) Taking gratification for exercise of personal influence with public servant.
(4) Section 164 prescribes punishment for abatement by public servant of offences defined in section 162 or 163.

C. The Suppression of Corruption Act

Among these laws on the eradication of corruption, "The Suppression of Corruption Act", which enacted in 1948 with a view to protect the citizens from corrupted service personnel, is a significant law. Section 4 of the Act, provides the definition of corruption. According to section 3 of the Act it can be presumed that if it is proved that the accused has had a large sum of money or properties out of all proportion to his official position or status and if the accused could not prove how he comes to have or how he has had such money or properties lawfully, the court may presume the accused guilty of corruption.

Different kinds of offences concerning misconduct of a public servant in discharging his duties are defined in section 4 (1), and punishable section of the offence is mentioned in section 4 (2) of that Act. Section 4 (1) and section 4 (2) of "The Suppression of Corruption Act" are prescribed as follows: "4 (1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duties-

(i) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person

for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward, within the contemplation of section 161 of the Penal Code; or

(ii) if he habitually accepts or obtains or agrees to accepts or attempts to obtain for himself or for any other person, any valuable thing without consideration or for an inadequate consideration from any person whom he knows to have been or to be, or to be likely to be, concerned in any proceeding before him or likely to be before him, or business transacted or about to be transacted by him, or from any person having any connection with the official functions either of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested or related to the person so concerned; or

(iii) if he by corrupt or illegal means or by abuse of his office as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iv) if he commits any fraud to the detriment of public interest or commits in respect of public property entrusted to him, either an act of misappropriation or of misconduct.
Explanation - It is not necessary that the acts mentioned in this clause should be an offence under the existing laws.

4 (2) Any public servant who commits criminal misconduct in the discharge of his duty shall be punished with imprisonment for a term which may extend to seven years and all the gains found to have been derived by the accused, by the commission of that offence shall be liable to be forfeited to the State.

D. The Control of Money Laundering Law

In section 25 of "The Control of Money Laundering Law" prescribes as follows:

"Any member of the Investigation Body who commits any of the following act or omissions in investigation money laundering offence shall, on conviction, be punished with imprisonment for a term which may extend from a minimum of 3 years to a maximum of 7 years and may also be liable to a fine:

(i) demanding or accepting money or property either for himself or for any other person as a gratification;

(ii) substitution of an offender with any other person so that action cannot be taken against him or misprision of an offender without taking action against him;

(iii) concealment, obliteration, conversion, transfer in any manner or disguishing of money and property obtained by illegal means so that action may not be taken against them."

E. The Anti Trafficking in Persons Law

Similarly, in section 30 of "The Anti Trafficking in Persons Law" provided that "any public official who demands or accepts money and property as gratification either for himself or for another person in carrying out investigation, prosecution and adjudication in respect of any offence under this law shall, on conviction be punished with imprisonment for a term which may extend from a minimum of 3 years to a maximum of 7 years and may also be liable to a fine."

That's why, in Myanmar there are many laws relating to the eradication of corruption and all levels of courts sentenced deterrent punishments on the accused.

V. MEASURES FOR THE ERADICATION OF CORRUPTION

A. Trial of Corruption Cases

In Myanmar bribery and corruption are cognizable offences. The Special Investigation Department and the Police Force, after investigation, send up corruption cases before the courts of law. Before send-

ing up these cases to the Courts, they have to be properly constructed in accordance with the law. In bringing these cases before the trial Courts, the law officer or the government advocate of the Special Investigation Department pleads for and on behalf of the government. During trial stage or after the completion of trial, the law officer, if necessary, will submit to the higher court for revision or appeal against the judgment of the original court. The purpose is to have a deterrent sentence passed and imposed on the accused. In some corruption cases, where there appear no grounds for taking criminal action, only departmental action is taken by the departments concerned.

When the prosecution authorities send up the corruption cases before the Courts, the judges hear and try the cases according to the law. When proved guilty, the accused is given a deterrent punishment. If the judgment of the trial Court is found to be not in accord with the law or if the sentence is not deterrent one, the higher Courts will alter the sentence and inflict a deterrent one in accordance with the law. And if the accused, charged with corruption, is acquitted by the trial court, the law office may submit an appeal against the acquittal to the Supreme Court. If so submitted, the Supreme Court decides whether the acquittal is well in accord with the law or not.

B. Measures Taken by Supreme Court of the Union of Myanmar

The Supreme Court of the Union of Myanmar, the highest authority of judiciary, also lays down anti-corruption schemes for judges of all levels of subordinate courts and is supervising the implementation of the proper administration of justice. In dealing with methods of prevention, the following measures are adopted:

(1) to put up sign boards at a conspicuous place proclaiming that both the giver and receiver of bribe are liable to be prosecuted under the Suppression of Corruption Act.

(2) to exhort the personnel, especially the judges, that refraining from accepting bribe, is not because he fears the consequences, but because he takes pride in his integrity, ethical conduct and abhors the practice is more commendable.

(3) to admonish the judges to so behave at all times as to promote public confidence in the integrity and impartiality of judges. To remind them time and again that their conduct, both in the performance of their official functions and in private life, must be characterized with propriety.

Regarding the investigations and disciplinary actions to be taken by the Supreme Court, it began with the gathering of information from among the public, from within the office personnel and from observations of their conducts in which subordinates are living ostensibly in a manner greatly in excess of their known means and ask privately for such information as may be necessary in cases in which the Supreme Court thinks officers are living beyond their means. Appropriate disciplinary actions are to be meted out and those actions range from admonitions, issuing of warnings, to dismissal from services and / or prosecutions, with deterrent punishments if convicted.

Important judgments passed by the Supreme Court are published as reported rulings every year without a break. These become the guidance of all levels of judges.

In 1965 criminal Appeal Case No. 37, Special Criminal Appellate Full Bench decided concerning with the judges involve in corruption cases are as follows:

"Judges have taken oath not to commit corruption when they make judgments. Only when the judges impartially and without corruption pass judgment, people will have trust and confidence upon the judicial system. When people come to trust and have confidence the judicial system, the offences can be peacefully settled if any criminal offences occur among the people. The courts shall extent their asistance in maintaining unity of the civil administration.

Judges are given their due salaries from the people's budget to render their service towards the people. There is no judicial system that permits to accept bribes form both side of the parties. At present,

judges are public servants who are taking salaries from the people's budget. Therefore, it is more important to give priority to the interest of the people by refraining from bribery and making honest and truthful judgment."

In these days, it is quite evident that in most countries, prices of basic commodities are rising and so, cost of living becomes very high. Salary earners are hard put to make both ends meet. To save that situation, our government is paying much attention to the welfare of the public servants catching the sight of this fact, the State Peace and Development Council arrange some measures as remedy for the eradication of corruption of government employees. These include increasing salaries, selling basic commodities by means of relief programmes, selling household goods through Government Department, providing housing plots for government servants and granting bank loans without interest and so on. By so doing, it is hoped that the number of corruption and bribery cases can be minimized to a certain extent.

VI. CONCLUSION

Corruption, a social cancer (evil) has been deeply rooted in a good number of States for years. The respective States have passed laws to eradicate corruption. But corruption is still there like a chronic disease attacking those states. Just because of corruption committed by a public servant, the public may have lost confidence in and may have also misunderstood the State and the government. So also, such corruption may obstruct and hinder State development. Thus, due to corruption, the State itself becomes the real loser. After all, there is no winner in corruption. Corruption is no win-win game. Therefore, only when those serving in the judicial sector, such as judges, prosecution authorities are free from corruption will there be a judicial system that enjoys public confidence and reliance.

The Bangalore Principles of Judicial Conduct 2002, have set out the following six values intended to establish standards for ethical conducts of judges.

(1) Independence
(2) Impartiality
(3) Integrity
(4) Propriety
(5) Equality
(6) Competence and Diligence

"The Bangalore Principles of Judicial Conduct 2002" are designed to provide guidance to judges and afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, lawyers and the public in general, to better understand and support the judiciary.

The Supreme Court of the Union of Myanmar is from time to time conducting orientation courses for the judges in the administration of justice. Therefore, judges are repeatedly remained to conduct the cases without any prejudice and by so doing, they are rendering service and protection to persons coming to the courts with clean hands.

For a nation to fight corruption in all spheres of work establishments, just a way of enacting appropriate laws alone is not sufficient to gain success. Co-operation and participation of the law-abiding citizens and service personnel are necessary in this task.

CORRUPTION CONTROL IN THE JUDICIARY AND THE PROSECUTORIAL AUTHORITIES IN THE PHILIPPINES

Deana P. Perez[*]

I. INTRODUCTION

A discussion on the organization of the judiciary and the prosecutorial authorities in the Philippines and their functions, will serve as the introduction to this presentation.

A. The Judiciary

The Supreme Court is at the top of the judicial pyramid. It is composed of a Chief Justice and fourteen (14) Associate Justices. It reviews the final decisions of the lower courts and exercises administrative authority over them.

The Court of Appeals is second the highest tribunal. It is composed of a Presiding Justice and fifty (50) Associate Justices. It has appellate jurisdiction over final judgments of the Regional Trial Court and quasi judicial agencies, except those falling within the exclusive jurisdiction of the Supreme Court.

The Regional Trial Courts have exclusive original jurisdiction over civil actions involving bigger claims and cases for crimes and offenses punishable by imprisonment over six (6) years, except those falling under the jurisdiction of the Sandiganbayan.

The Metropolitan Trial Courts, the Municipal Circuit Trial Courts and Municipal Trial Courts have jurisdiction over civil cases involving smaller claims as well as criminal offenses punishable by imprisonment of six (6) years and below.

The Sandiganbayan is a special anti- graft court. It has original jurisdiction in cases involving violations of anti-graft and corruption laws, where one or more of the principal accused are officials occupying positions classified as grade 27 and higher, of the Compensation and Position Classification Act of 1989 (Republic Act No.5758) otherwise, the regular courts shall have jurisdiction over the case.

B. The Prosecutorial Authorities

The independent Office of the Ombudsman is composed of the Ombudsman and six (6) Deputy Ombudsman. It has the mandate to investigate on its own or on complaint of another person, any act or omission of a public officer when it appears to be illegal, unjust, improper or inefficient. Such complaint may be the subject of criminal or administrative proceedings or both. After conducting the preliminary investigation, the Ombudsman files and prosecutes cases before the Sandiganbayan.

The National Prosecution Service under the Department of Justice has the authority to conduct preliminary investigation for violations of penal laws and to prosecute these cases. It is headed by the Chief State Prosecutor and under him/her are five (5) Assistant Chief State Prosecutors, State Prosecutors, Regional State Prosecutors, Provincial and City Prosecutors and their assistants.

The Ombudsman and the National Prosecution Service have concurrent powers to conduct a

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preliminary investigation of cases charging a public officer and to prosecute cases cognizable by the regular courts but the power to prosecute cases cognizable by the Sandiganbayan is under the exclusive control of the Ombudsman. The Ombudsman may deputize prosecutors from the National Prosecution Service or collaborate with them even in cases before the Sandiganbayan. A panel of prosecutors from the Office of the Special Prosecutor of the Ombudsman and the National Prosecution Service handled the prosecution of the plunder case against former President Estrada.

II. WHAT THE LAWS PUNISH

A. Republic Act No. 3019 or the Anti- Graft and Corrupt Practices Act

This law has the most comprehensive listing of what is corrupt behaviour on the part of public officials including requesting for or receiving of bribes or benefits such as a job for the official or a family member; causing undue injury or giving a party unwarranted advantage through bad faith or gross negligence and; neglecting or refusing to act on his/her task within reasonable time. The law defines unexplained wealth and requires every public officer to file a sworn Statement of Assets and Liabilities annually.

B. The Revised Penal Code

Under Chapter VII of the Revised Penal Code on Crimes by Public Officers, the following shall be punished: a public officer who accepts a bribe; a judge who renders an unjust judgment or order; a judge who maliciously delays the administration of justice and; any public officer who maliciously refrains from instituting the prosecution of violators of the law or tolerates the commission of offenses.

C. Republic Act No.6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees

It reiterates the prohibition from soliciting or accepting gifts or any thing of monetary value from any person in the course of official duties and the requirement of Statement of Assets and Liabilities.

D. Republic Act 7080 or the Anti- Plunder Law

It defines plunder as a series of criminal acts by a public officer including bribery, malversation of public funds, illegal disposition of the assets of the government, establishment of monopolies and taking advantage of the office to enrich himself/herself or others, resulting in at least fifty million pesos (P50,000,000.00) illegally acquired wealth. It is punishable with imprisonment for forty (40) years. Former President Joseph Estrada was convicted for plunder for receiving P545 million in illegal gambling payoffs, P131 million in tobacco excise taxes and P3.2 billion from gifts, percentage and shares that he deposited in fictitious bank accounts.

E. Republic Act No. 9160, as amended or The Anti- Money Laundering Law

It is treated as an anti-corruption law where the money transacted actually originated from some acts in violation of the Anti-Graft and Corrupt Practices Act.

III. ADMINISTRATIVE DISCIPLINE

A. In the Judiciary

The Constitution provides that the members of the Supreme Court and the Ombudsman may be removed by Congress from office by impeachment on grounds of, among others, culpable violation of the Constitution, bribery, graft and corruption.

The Supreme Court has the authority to discipline other justices and judges. Charges classified as serious include bribery, dishonesty and violations of the Anti-Corrupt Practices Act, violations of the Code of Judicial Conduct, knowingly rendering an unjust judgment or order, conviction of a crime involving moral turpitude, wilful failure to pay a debt, borrowing money from lawyers and litigants, gross ignorance of the law. The most severe sanction for a serious charge is dismissal from service, forfeiture of benefits and disqualification from public office.

B. For Prosecutors in the National Prosecution Service and the Ombudsman

The Secretary of Justice or the Ombudsman has jurisdiction to investigate and decide matters involving disciplinary actions against prosecutors under them. Their decisions may be appealed to the President who appointed the prosecutors. Violations of the Code of Conduct and Ethical Standards for Public Officials and Employees (R. A. 6713) prohibiting bribery or having material interest in a transaction requiring the approval of the office of public officer are grounds for disciplinary proceedings and sanctions. Grave administrative offenses under the Administrative Code of the Philippines, specifically the Civil Service Rules on Discipline, include graft and corruption, bribery, dishonesty, grave neglect of duty, contracting loans with parties, nepotism, etc. These are grounds for dismissal from service that carries cancellation of eligibility, forfeiture of benefits and disqualification from government service. The penalties are imposed without prejudice to criminal or civil liability.

A Code of Ethics for Prosecutors needs to be developed to guide them in their specific circumstances and to improve administrative discipline.

IV. SURVEYS AND CASES

A. In the Judiciary

In survey in 2005 and 2006, as many as thirty three percent (33%) or one-third of the general public agree that corruption in the judiciary is a fact they have to live with and that change is impossible. Forty-five percent (45%) of the general public disagree, and nineteen percent (19 %) are undecided. As to who is the main corruptor in the judiciary, one third or thirty nine percent (39%) say the judges and justices who ask for bribes, another third or thirty six percent (36%) say the clients who pay the bribes and one-fifth or twenty percent (20%) blame the lawyers who give/deliver the bribe.

In a full referendum, when judges themselves are asked about corruption in their midst, seventeen percent (17%) responded that there are many/very many corrupt judges in the Regional Trial Courts; fourteen percent (14%) say there are many/very many such judges in the metropolitan and municipal courts, twelve percent (12%) in the Court of Appeals and two percent (2%) in the Supreme Court.

The highest ranking magistrate dismissed from service was a justice of the Court of Appeals. The justice, his close friend who is a lawyer, and the lawyer's client who is the boyfriend of the accused in a drugs case, visited the state prosecutor handling the case and asked him to drop his motion to inhibit the

judge in the case. The justice also called up the Chief State Prosecutor to follow up the matter. When charged, the justice argued there was no money involved in his actions but the Supreme Court found him guilty of violating the Code of Judicial Conduct, stating that his act of lawyer for a suspected drug queen, seriously undermined the integrity of the judiciary.

B. In the Prosecutorial Authorities

There is no survey on corruption among prosecutors but it is generally accepted that they no longer command as much respect as they used to because of the increasing number prosecutors charged of corruption. In the last three (3) years, one (1) prosecutor a year was dismissed from service because of bribery and other related grounds. The prosecutors asked for money from parties who reported to the law enforcement agencies. Law enforcers conducted entrapment operations and made warrantless arrests of erring prosecutors. This year however, two (2) prosecutors were removed from service corruption related grounds. The last decision came few weeks ago.

V. SOME CAUSES OF CORRUPTION IN THE JUDUCIARY AND THE PROSECUTORIAL AUTHORITIES

A. Low Salaries

The most cited reason for corruption in the judiciary and the prosecution authorities is the low salaries of justices, judges and prosecutors. Recently however, a law was passed granting magistrates exemption from the Salary Standardization Law that covers government workers. The Supreme Court collect legal fees, a great portion of which is utilized to pay their regular allowances in the amount equal to their basic salary, as well as other special allowances thus, they no longer feel impoverished. On the other hand, prosecutors are not exempted from the Salary Standardization Law but the National Prosecution Service also collect legal fees though in very limited amount hence they get added benefits equal to only twenty percent (20%) of their basic salary. Little attention was given to the bill authorizing the collection of legal fees until prosecutors planned to go on mass leave of absence hence, it was immediately passed in the Congress and signed by the President into law. Prosecutors from the Ombudsman are said to be getting better compensation than their counterparts Service because of its fiscal autonomy. However, it remains uncertain that with the improvement in compensation, there would be less corruption in the judiciary and the prosecutorial authorities.

B. Culture of Paying a Debt of Gratitude

Corruption in the judiciary and the prosecutorial authorities is not limited to bribery or the outright exchange of gifts or money for a favourable decision. Oddly, the supposedly positive Filipino value of showing gratitude or retuning kindness has become a cause of corruption. Cases are decided not on the merits but in order to accede to requests from relatives, friends, former employers or anybody who has shown kindness or a granted favour to the judge or prosecutor in the past, otherwise he/she will be labelled an ingrate. A judge or prosecutor may inhibit himself/herself from handling a case to avoid suspicion but talk to a fellow judge in behalf of that someone he/she has to repay.

C. Political Pressure

In cities and municipalities, judges want to be in good terms with the chief executive or the mayor of the city or municipality that gives them monthly allowance on top of what they receive from the

Supreme Court and the national government. Some local government units also provide courts and prosecution offices in their area additional personnel, office equipment and supplies.

VI. PRACTICAL ISSUES IN THE INVESTIGATION AND PROSECUTION OF CORRUPTION CASES INVOLVING JUDGES AND PROSECUTORS

A. Difficulty in Detecting and Proving Corruption

Not a lot of those who give bribes are willing to file cases against corrupt judges and prosecutors but at times parties report anonymously. The Ombudsman, upon receipt of these reports, quietly checks the reputation of the subject. The Supreme Court, in hiring and promoting judges, discreetly do the same through agents of the National Bureau of Investigation. This is not fool proof but may trigger further inquiry, usually a lifestyle check to see if the subject is living within his/her income or a search for unexplained wealth. Sudden prosperity despite lack of means among his/her family members or close associates are also investigated because they may have been used as dummies to conceal bribes received or intermediaries to access the judge or prosecutor. Another strong indication of possible corruption is unusual patterns of decision making and rulings that are contrary to law or precedents.

B. Desistance or Retraction

Administrative discipline cases against judges and prosecutors usually do not prosper because they usually find a way to make complainants and witnesses sign affidavits of desistance or give a different testimony or simply not show up in the hearing. While the technical rules of evidence used in a court are nor strictly applied in administrative proceedings and despite jurisprudence that desistance or retractions are frowned upon and must not be given much consideration, it is inevitable that some cases cannot stand without the testimony of the complaining witness.

C. Entrapment Operations

Law enforcers plan entrapment operations against magistrates and prosecutors and execute carefully because the subjects know the law and police procedure. Law enforcers upon receipt a sworn written complaint from a party, prepare money bills to be used as payment in the extortion. Bills are marked, recorded and dusted with fluorescent powder. After the bribe or extortion money is received and the judge or prosecutor is arrested, he/she is tested for presence fluorescent powder. To strengthen their evidence, police officers also use hidden audio and visual recorders to document the entrapment and arrest. Thereafter, the recording is shown on television and played on the radio. He/she has no one to blame but there is much sympathy for his/her innocent family members who are also shamed and ridiculed. This practice also destroys the confidence of the public in the office.

D. Alteration of Findings and Modification of Penalties

Decisions of the Secretary of Justice and the Ombudsman in administrative proceedings finding prosecutors liable may be appealed to the President. It sometimes happen that the decisions are reversed thus the prosecutor goes unpunished. It is suspected that the reversals stem from requests from ranking government officials and politicians approached by the prosecutor to intercede for him. There are also cases when the findings are not reversed but the penalties are commuted or reduced to a degree so light it is not commensurate to the offense committed.

E. Lack of Criminal Convictions

Administrative sanctions imposed on magistrates and prosecutors do not bar criminal prosecution. Some of those dismissed from service as a result of administrative discipline cases are charged before the anti-graft court, the Sandiganbayan, but no magistrate or prosecutor charged in the past five (5) years has been convicted.

VII. ANTI - CORRUPTION MEASURES IN THE JUDICIARY AND THE PROSECUTORIAL SERVICE

A. Recruitment and Appointment

The authority to nominate candidates for positions to the judiciary and the Office of the Ombudsman and his/her Deputies is vested in the Judicial and Bar Council. The Council receives applications, verifies if the applicant meets the Constitutional requirements of the position and determines his/her educational preparation, experience, performance, independence and integrity by evaluating the supporting documents of the applicants and through interviews and background checks. It submits a list of qualified candidates to the President who makes the appointment.

As prescribed by the Civil Service Rules, the Selection and Promotion Board in the Office of the Ombudsman and the National Prosecution Service select applicants on the basis of the criteria mentioned above and recommend their choices for appointment. While the recommendation carries weight, the President however may appoint another applicant as long as he/she is qualified.

B. Uniform Laws and Standardized Procedure

In adjudicating cases, magistrates and prosecutors must apply the same substantive law, standardized procedures and well settled principles. There is a theory that when the decisions a judge or prosecutor are always reversed or when they suddenly stray their previous own previous ruling in similar cases, there is a chance their actions are not simple errors in judgment but were prompted by other factors. Serious deviations from the laws, prescribed procedures and principles constitute gross ignorance of the law for which some judges have been removed from office.

C. Independence

It is said that if justices, judges and prosecutors enjoy security of tenure and are well compensated, and the attractiveness of bribes or corruption is greatly reduced. Members of the judiciary and prosecutors of the Philippines enjoy security of tenure and can not be removed from service except for grounds discussed earlier. Because Constitution provides for financial autonomy of the judiciary and of the income it generates, its members are well compensated. The Office of the Ombudsman has also financial autonomy under the Constitution. Upon the other hand, there is a proposed bill to improve the salary and other benefits of the prosecutors of the Department of Justice.

D. Accountability and Transparency

Accountability and transparency in the judiciary and the prosecution authorities promote good decision making and acceptance of the decisions by the parties and the general public. Decisions are in writing and reasons for them are required and they may be reviewed when appealed. Members of the judiciary and prosecutors are subject to performance audit and reviews by their superiors.

Efficiency in disposing cases is negatively affected by the lack of prosecutors in the National

Prosecution Service. There are about two thousand two hundred (2,200) positions occupied only by one thousand five hundred (1,500) prosecutors. While judges handle an average of three hundred (300) cases a year, prosecutors conduct an average of two hundred thirty (230) preliminary investigations and prosecute in court four hundred fifty (450) cases a year. The heavy ratio of cases per prosecutor causes laxity in the observance of time limits and the quality of their work. On account of their heavy work load, their accountability is somehow lessened. Vacancies in the National Prosecution Service must be filled up soon. There must be proper representation and persistent follow-up with the President to appoint more prosecutors in order to improve the administration of justice by the organization.

On transparency, the Supreme Court, through its Public Information Office, informs the public of decisions, news regarding its projects and other activities through print and broadcast media and the internet. Upon the other hand, the Office of the Ombudsman disseminates its Annual Report to the public and has an informative website. The Department of Justice has to follow the lead of the two (2) mentioned institutions.

E. Case Management System

The Supreme Court has pilot-tested its computerized system of managing cases that will help minimize delay in the disposition of cases. It helps judges of trial courts in tracking cases, scheduling events, reminding deadlines and providing reliable information. The Office of the Special Prosecutor of the Ombudsman has also computerized its case flow management system. The National Prosecution Service has just begun planning the project. Funds for the computerization of case flow management systems in the three (3) institutions are provided by international donors and lending organizations such as the USAID, The Asia Foundation and the World Bank.

VIII. CONCLUSION

As the Ombudsman aptly stated, it is hard to imagine a genuine fight against corruption when the guardians and crusaders are themselves corrupt or susceptible to the lures of corruption. The recent years have seen a surge of anti-corruption initiatives in the judiciary and the prosecutorial authorities. To intensify the campaign against corruption, more lifestyle checks among those living beyond their means must be pursued. There must be vigorous entrapment and arrest of offenders so that cases will depend on the testimony of law enforcers rather than that of private citizens who are easily coerced or influenced to desist or retract from pursuing the cases. Those who are administratively liable should also be criminally punished and their properties forfeited. Top leaders should exercise the political will not to accede to requests to drop cases against erring magistrates or prosecutor. The appointment of more prosecutors in the National Prosecution Service and the increase in their salary must be expedited before more of them leave for other jobs.

The public must not be left resigned in the belief that corruption in the justice system is something they have to live with and there is nothing that can be done about it. The judiciary and the prosecutorial authorities do not hold the proverbial purse or sword in the society. Their power and authority rest mostly from strong public confidence in its legal and moral sanctions. It is imperative that everything be done to preserve that confidence or these institutions will lose their value.

CURRENT ISSUES IN PREVENTION AND ANTI-CORRUPTION IN VIETNAM

Nguyen Dang Thang[*]

I. INTRODUCTION

Corruption is a social phenomenon associates with the development and implementation of State power, and a serious crime because of its seriousness and consequences to society. Corruption destroys resources seriously, infringes the proper operation of State agencies, erodes sharply the confidence of people from State and reduces stable development of the Nations. That is why corruption is considered as "a national disaster" by several countries in the world and it should be prevented vigorously by powerful manners.

Anti-corruption at the present is not only an important mission of a Nation but also a global concern. The fact is that, even in developed and developing countries or undeveloped countries, corruption is still occurring in many different forms and causing very serious consequences. Anti-corruption activities including detection, investigation, prosecution and adjudication meet a lot of obstacles and difficulties and depend on economic conditions, political and social-culture situations as well as technology and management skills of the countries.

Although each country has different points of views on corruption, it is understandable that corruption is defined as an action of State officials who abuse his/her positions and/or State power for embezzling property, receiving or offering bribes or deliberately acting against law for self-interested motives.

II. SOME SERIOUS CONSEQUENCES OF CORRUPTION

Recognizing the serious consequences posed by corruption to societies, the United Nations Convention against Corruption, at the preface, has emphasized its consequences to people and societies, saying that the corruption is causing "*the seriousness and threats to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law*".[1] In fact, corruption is causing some following serious consequences to societies:

(i) Reducing socio-economic development and restraining stable development of the Nations.
(ii) Reducing people's confidence, eroding and collapsing traditional ethics, slowly vanishing national character.
(iii) Encroaching the proper operation of State agencies and organizations and gradually causing socio-political instability.
(iv) Goods and service are suffering high cost and investment is getting lower effect. This matter influences the strategy of hunger and poverty reduction of many countries.
(v) As to judicial system, justice and socio-fair foundation shall be broken by corruption. The rule of law or the principles of Legal-based State shall be disrespected and ruined.

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[*] International Cooperation Department, Supreme People's Prosecution Office of Vietnam.
[1] The United Nations Convention against corruption

(vi) The Civil rights and legitimate interests of citizens shall be violated seriously. The clearness and supreme legal equitableness of judicial system shall be destroyed by corruption. Especially when corruption attaches justice system then the supreme independence of judicial system will be affected; the law would become private instrument of corrupt officials and wrongdoers to control judicial agency operation and serve for the self-interests of corrupt officials.

Nowadays, recognizing serious consequences posed by corruption to nations, anti-corruption is concerned as a global issue. Fighting against corruption requires each country to have a long-term strategy and concrete policy which must be compatible with economic development conditions and national culture. Furthermore, strategy and policy for anti-corruption has to be implemented with drastic and uncompromising measures.

Corruption always comes close with the use of State power, therefore fighting against corruption must be a long-term process and it is only effective if we have comprehensive strategy and policy with proper implementation methods and suitability with the each development stage of each country.

In Singapore: anti-corruption has executed drastically since 1959. Singapore government has implemented anti-corruption with the motto of decisiveness and powerfulness. Various anti-corruption measures have been executed comprehensively such as: approving anti-corruption law, the law on confiscation property relating corruption; implementing public administration reform; executing high salary policy and priority policy to officials; establishing the independent anti-corruption agency namely Corrupt Practices Investigation Bureau (CPIB) and nominating officials who are full of capacity and firmstuff and to meet other standards for anti-corruption. At the same time, the CPIB has granted sufficient powers for anti-corruption.

In Korea: after 1992, Korea developed reform policy to create a good government, strong economy, social development, unity and peaceful country. The Korea Government implemented many anti-corruption measures such as: the State leaders must be spotless and model; implementing transparent principles as to State operation; punishing strictly corruptors and wrongdoers; establishing independent anti-corruption agency namely Korea Independent Commission Against Corruption (KICAC). The anti-corruption motto of Korea is “water to be purged from the riverhead”. Fighting against corruption has been implemented from the centre to local, especially in the National Assembly, Government and the Army.

In China: anti-corruption is considered a vital question of the Nation by the communist Party and the Republic of China considers anti-corruption an effective measure to ensure the success of reform achievements in China. Anti-corruption in China is implemented based on the motto: anti-corruption is served for political stability and economic development. The regulations and supervision institutions have been established and improved from the centre to local level. Anti-corruption policy of China focuses on detecting and dealing with large corruption cases which involve high ranking officials or personnel who have powerful influence to admonish. Besides, other small corruption cases are not defied at the same time on detection, prosecution and adjudication. Anti-corruption is paying attention to important and sensitive services including construction, bidding, financial management, State budget and procurement, banking and credits, taxation, securities, recruitment and position promotion. Fighting against corruption is the mission of the Party and peoples and hand over to the People’s Procuratorate, the court and supervision agencies from the centre to local.

III. PREVENTION AND ANTI-CORRUPTION IN VIETNAM

After 20 years of implementing "*doi moi*" reform policy, Vietnam has achieved many important successes in term of socio-economic development. The average GDP increases over *7%* per year. Investment and exports increased quickly.

However, Vietnam is facing many problems happening in the development process that is the lack of ability and management skill, articles are not high quality and corruption is more and more complicated. It is said that in the past corruption was very simple, separated, with less serious consequences but nowadays corruption happens in many sectors and services, and colludes with many persons and cause very serious consequences to society. Recognizing the serious consequence of corruption to the national economy and stable development, Vietnam has issued the firm and powerful anti-corruption strategy and policy. Anti-corruption is also concerned as a long-term, important and indispensable mission. Fighting against corruption must be implemented by appropriate steps, which are suitable with national development periods, and has to serve for socio-economic development mission of the Nation.

On November 29, 2005, the law on anti-corruption has approved by the National Assembly and come into force on June 1, 2006, replacing the ordinance on fighting against corruption 1998. This law is an important remark on fighting against corruption in my country, and is an important legal foundation to carry on anti-corruption activities, to prevent and to establish relevant institutions. Then Anti-corruption Central Steering Committee was established on July 28, 2006 lead by the Prime Minister.

Anti-corruption policy is implemented in all sectors and services from the centre to local level. The officials, especially the high-ranking officials, are pioneers and models on implementing the regulations and provisions on practicing thrift, anti-wastefulness and anti-corruption. On October 27, 2007, the government has issued decree 157 on the responsibility of the head of State agency to corruption happen under their duty and position and the decree 158 on regular change of officials in every 3 years.

Together with the execution of supervision mechanism frequently in all sectors and services, Vietnam also pays more attention to educate officials who are models, with integrity, high responsibility and self-awareness on anti-corruption. Anti-corruption is executed with the motto "*no restricted area*."

Along with education and training for a new human resource, prevention of corruption is considered as an important, long-term and uninterrupted mission. To perform this mission, prevention measures have been set up and improved step by step from making a policy to establish relevant institutions for receiving and controlling corruption cases. Legal system on anti-corruption gradually improves to become suitable with the facts and ensuring its comprehensiveness and compatibility. Controlling and supervising mechanisms for the operation of State agencies, especially judicial agencies and officials, are renewed toward completion frequently.

Current fighting against corruption has achieved first significant results. Many corruption cases are detected and prosecuted. However, there are still many difficulties. According the anti-corruption report in 9 months of 2007, there are 406 cases and 826 offenders are arrested and caused the consequences of 286 billion VND, but only 70 billion VND is recovered. This figure does not reflect the facts of corruption. The reasons for these matters are that:

(i) Corruption detection and denunciation still have many problems. Flinched psychology as denunciation, struggle, facing and afraid of revenge exists among the greatest part of people. Therefore, examining information at the first stage is a big challenge at receiving denunciation information. In many cases, there are not enough reasonable grounds to prove. While there is not any independent agency and proper mechanism in charge of collecting and gath-

ering corruption information, such an operation is not effective.

(ii) Anti-corruption agencies have just been established and still in lack of experiences and information. Furthermore, when dealing with corruption cases the agencies are not completely independent but also facing many barriers from other relevant agencies due to the flinched psychology of such agencies in cooperation with anti-corruption agencies.

(iii) Education and training officials who are in charge of fighting against corruption are still insufficiency from the salary system to bonus policy. Officials in charge of anti-corruption still face many pressures as implementing function and duty and flinch from such challenges. Policies to encourage and protect persons providing corruption information also have problem and insufficiency, so that it does not encourage people fighting against corruption.

A. Prevention and Anti-Corruption Measures

1. Prevention Measure

It could be confirmed that for anti-corruption process the prevention measure always plays a very important role. In this part, I will present some prevention measures that are applied in my country.

(i) Education measure

* *Education for community and citizens*: it is considered as the first important measure. Community should be educated to the consequences of corruption and anti-corruption sense. By this way, the detection of corruption could be more effective. The most important point is that the purpose of such measure is to establish a mechanism for providing information and set up a strongly supported foundation from community for anti-corruption and active participation of people around the country.

* *Education for officials*: it is an imperative measure in order to create a new official generation with the character of model and spotless - the first important element for preventing corruption. Officials should be recognized that they should not need corruption. Officials should be educated on giving prominence to increasing self-awareness, model-ness and high responsibility. In addition, the education for the officials should provide regulations and rule on evaluation ethics, behaviour, income, property, words and work... of the head officials and their spouse and children.

(ii) Enhancing legal system on prevention and anti-corruption

Legal system on prevention and anti-corruption is an effective instrument to fight against corruption, and a firm legal base to define the corruption concept and corrupt acts. Each country has different legal system on anti-corruption, so in order to fight against corruption effectively each country has to develop a suitable system based on the facts and corruption situation in respective country. It is notable that at least the criminal law must stipulate crimes relating to corruption and their penalty brackets set clearly and strictly.

Currently, together with the criminal law or the penal code, the law on anti-corruption is very important and indispensable. This law shall be legal foundation to stipulate clearly all matters relating to corruption from the definition, the list of corrupt acts to competent agency that have powers, function, responsibility and obligation and other relevant principles on implementation, property confiscation.

Issuing the law on anti-corruption is important and indispensable but the most important thing is how to implement the law in practice. It should have a clear and transparent mechanism so that the implementation could be more effective.

(iii) Implementation of transparent principle

Transparent principle is one of the essential prevention measures. This principle requires that the operation of State agencies and judicial agencies must be public and clear from making policy and issuing legal documents to implementing the policy and documents to community. Furthermore, the implementation of this principle shall facilitate State agencies to execute their accountability to people. To implement this principle, following matters at least should be done:

- All citizens must be ensured the rights to access information, documents issued by State agencies without any distinction of whether such information and documents involve citizen or not, except information in secret or related to national security.
- All information and documents of State agencies from the centre to local must be put in the websites of government agencies including the salary and income of the high-ranking officials in order to help people supervising the model and purity of high-ranking officials.
- The procedures of administration, procurement, recruitment, promotion, revenue and expenditure of agency budget should be made public and transparent.
- All denunciations and complains as well as their dealing progress should be informed to complainants publicly.

(iv) Prevention conflict interests

The conflict of interest is an unavoidable matter in the operation of State agencies. Therefore dealing this matter is compulsory to prevent corruption and corruption danger rising from officials. To do that we should have proper policy and appropriate measures for recruitment, employment, promotion, commendation and reward officials in the right way of transparency, democracy and public. Evaluation and comment for officials must be implemented in clear, democratic and transparent method in order to encourage officials improving their self-awareness on anti-corruption, and self-consciousness on inadvisable corruption. So that the heads of State agencies who are in charge of and responsible for corrupt acts happening in his/her agency. The heads also have to evaluate and control corruption dangers and its consequences which might happen in sensitive position in order to take proper prevention measures in time - for example, regular rotation of officials, and having policy and method to adjust power abuse for his/her interest of some officials.

In addition, the provisions of laws should provide clearly what officials should do and must not do. These provisions also have to perform clearly and publicly to people in order for people to implement their supervise responsibility.

(v) Implementation of the property declaration by officials

Property declaration by officials is concerned as an important measure and used by many countries in the world, especially officials holding management position. Property declaration is implemented in many different ways but it should be done frequently and annually before and after recruitment and promotion.

As to property declaration, an independent agency should be established in order to exercise and supervise the property declaration by officials - that is an important thing. And so on, it should provide regulations and punishment to persons who have deceitful declaration.

(vi) Implementation of high salary policy for officials

Obviously, salary and other allowance is the most important income resource of officials, especially for judicial officials. Therefore, implementation of high salary policy to officials is very popular in many countries and are successful on fighting against corruption, because it is very simple that salary and allowance being effective instrument to ensure the life of officials in order to help them not need to corrupt. This measure is a great means for creating motive power in order to assist officials maintaining their integrity when exercising their duty and function.

For judicial officials, together with high and stable salary policy, it must apply other priority policy

such as supporting accommodation, permanent tenure and so on in order to keep their mind on work. In my opinion, paying high salary for officials must be implemented as an essential measure for anti-corruption.

2. Measures Dealing with Corruption

(i) Detection corruption

In dealing with corruption, we have mechanism for detecting corruption. Because of corruption rising from State power abuses individual interests with corrupt persons or wrongdoers being officials who hold high position, deeply understanding legal regulations and rich in experiences, then to detect and prosecute the corrupt acts are quite difficult. The effective mechanisms for detecting corruption should often be performed by some following measures:

- Encouraging the participation and their playing roles of people, social organizations and the media for detecting and denunciating corrupt acts.
- Establishing policies and mechanisms to support people denouncing and providing corruption information via telephone, hotline and so on.
- Receiving and examining corruption information provided by anonymous persons.
- Protecting and keeping all personal information of denunciators in secret.
- It could be said that not only in Vietnam but also in many countries, the media channels and denunciation of people have detected most of corruption cases. These channels are the first important door for competent agencies dealing with corruption.
- Establishing measures and channels for collecting corruption information such as controlling email and/or supervising telephone, fax, wire taping or interception.
- Establishing special task force for collecting corrupt information.

(ii) Handling corruption

Criminal measures: investigation, prosecution and trial with severe punishment should be stipulated clearly in the Criminal Code and Criminal Procedure Code. However, fighting against corruption should be executed publicly, strictly and fairly in order to induce officials *dare not to corrupt*. Moreover, following that property confiscation must be well done.

Corruption now is a global issue. Therefore, anti-corruption mission must comprise of international cooperation between countries. Corruption crimes currently have close connection to other serious crimes including smuggling, money laundering, drugs and terrorism and that is why we should collaborate for sharing experiences, information and skills to fighting against corruption.

For judicial agencies, enhancing and protecting its independences are important missions. This is a quite important mission provided in the legal reform strategy by 2020 of Vietnam. In our practice, anti-corruption conducted by investigation body, the prosecution office and the court still have some difficulties and sometime take a lot of time due to several barriers such agencies are facing.

IV. CONCLUSION

It could be said that the way of corruption that will attach to judicial agencies shall destroy the supreme independence of judicial agencies. When the court was to become dependent on and/or be controlled by invisible groups then the independence of judicial agencies shall not exist in judicial system. The dark side of this thing is that these invisible groups shall use any of artifice from bribery, offering money, and to threatening judicial officials violating principles and ethics to serve for corruptors and wrongdoers. Therefore, enhancing the independence of judicial agencies and judicial officials is one of the imperative measures and it should be done at the same time with the measures mentioned above in order to ensure

the effectiveness toward anti-corruption. Judicial officials by themselves have to highly appreciate and respect the supreme independence of the constitution and laws as well as the supreme independence of justice when taking investigation, prosecution and adjudication.

CORRUPTION CONTROL IN THE JUDICIARY OF THAILAND

Nitithorn Wongyuen[*]

I. HISTORICAL OVERVIEW

In Thailand, the revolution of 1932 had an important effect on the Thai legal and judiciary system since it changed the form of government from an absolute monarchy to a constitutional monarchy. The Constitution vested the judiciary power with the Courts. Judges perform their duties in the name of the King and are assured of independence in adjudicating cases according to the law.

The Constitution is the supreme of the country that establishes the powers, functions and duties as well as the structure of the Executive, the Legislative and the Judiciary. The previous constitution of Thailand, namely, the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), as well as the present constitution, the Constitution of the Kingdom of Thailand, B.E. 2550 (2007) has substantial impact on the reorganization of the political system as well as the judicial system in Thailand. The types of courts recognized under the Constitution are: the Constitution Court, the Court of Justice, the Administrative Court and the Military Court. Although this change decreases the scope of the jurisdiction of the Courts of Justice, most cases still fall under the jurisdiction of the Courts of Justice.

Since there are four types of Courts under Thai law as mentioned above, this presentation shall be limited merely to the current situation of the judges in the Courts of Justice. In addition, its structure should be mentioned prior to the main topic as follows;

II. STRUCTURE

The structure of the Courts of Justice is divided into two parts: administration and adjudication. Prior to August 20, 2000, the Ministry of Justice was responsible for the administration works of all courts. The main role of the Ministry of Justice was to provide courts supports, including budget, personnel and office equipment, to enable them to operate their works efficiently. At present, the Office of the Judiciary, an independent organization and a juristic person, is the only organization responsible for the administration of the Courts of Justice. This change will guarantee independence of the Thai Judiciary from political interference.

With respect to adjudication, the Courts of Justice have power to try and adjudicate criminal, civil, bankruptcy, and all cases which are not within the jurisdiction of other types of courts. When there is a problem of whether a particular case will fall under the jurisdiction of which type of courts, the Commission on Jurisdiction of Courts chaired by the President of the Supreme Court is authorized by the Constitution to make a decision. Such decision is final.

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III. JUDICIAL SYSTEM

The Courts of Justice are classified into three levels consisting of the Courts of First Instance, the Courts of Appeal and the Supreme Court. The Courts of Justice have occasionally developed efficiency in handling cases. The developments fall into three ways, i.e., the increase of the number of courts, the emergence of the division and the branch of courts, and the establishment of the specialized courts.

A. The Courts of First Instance

The Courts of First Instance are categorized as general courts, juvenile and family courts and specialized courts. The general courts are ordinary courts which have authorities to try and adjudicate criminal and civil cases. Those courts are: Civil Courts, Criminal Courts, Provincial Courts and Kwang Courts or District Courts. The specialized courts are Intellectual Properties and International Trade Court, Labor Courts and Tax Court.

B. The Courts of Appeal

The Courts of Appeal consist of the Court of Appeal and nine Regional Courts of Appeal. The Court of Appeal handles an appeal against the judgment or order of the Civil Courts and the Criminal Courts. Meanwhile, the Regional Courts of Appeal handle an appeal against the judgment or order of the other Courts of First Instance. The jurisdictions of the Regional Courts of Appeal are consistent with the jurisdictions of the Courts of First Instance Regions 1-9. Each Courts of Appeal is headed by the President of the Court assisted by Vice Presidents of the Court. The Court is divided into divisions. Each division has one chief justice and two other justices. At least three justices form a quorum.

An appeal on point of law and, subject to certain specified restrictions, on point of fact is laid from the Courts of Appeal to the Supreme Court.

Each Courts of Appeal has a Research Division consisting of research judges. Primary functions of the Division are to assist justices of the Courts of Appeal by examining all relevant factual and legal issues of the cases, conducting legal researches and discussing with those justices to ensure uniformity and fair results.

C. The Supreme Court

The Supreme Court is the final court of appeal in all civil and criminal cases in the whole Kingdom. The Court consists of the President, Vice-Presidents, the Secretary and a number of justices. The President of the Supreme Court is also the head of the Courts of Justice. In the present system of the Courts of Justice, the President of the Supreme Court plays a great role in judicial and administrative works.

Like the Courts of Appeal, the Supreme Court also has the Research Division consisting of research justices.

At least three justices of the Supreme Court form a quorum. The court may, however, sit in plenary session to determine cases of exceptional importance and cases where there are reasons for reconsideration or overruling of its own precedents. The quorum for the full Court is not less than half of the total number of justices in the Supreme Court.

As a result of the 1997 Constitution, the Criminal Division for Holders of Political Positions was set up in the Supreme Court to act as a trial court in a case where the Prime Minister, a minister, member

of the House of Representatives, senator or other political official is accused of becoming unusually wealthy, committing malfeasance in office according to the Criminal Code, performing duties dishonestly, or being corrupted according to other laws.

In trial, a member of the House of Representatives or a senator is unable to claim the immunity provided in the constitution. The Criminal Division for Holders of Political Positions in the Supreme Court must rely on the record of the National Counter Corruption Commission and may investigate to receive additional facts and evidence as it thinks fit.

The quorum of this special division of the Court consists of nine justices of the Supreme Court who hold position of not lower than justice of the Supreme Court, and are elected by a plenary session of the Supreme Court justices on a case by case basis. A judgment will be made by a majority of votes; provided that each justice constituting the quorum will prepare the written opinion and make oral statements to the meeting before making decision. Orders and decisions of the Criminal Division for Holders of Political Positions in the Supreme Court will be disclosed and final.

IV. JUDGES

A. Types of Judge

There are four types of judge in the current system, namely, a career judge, senior judge, associate judge, and Datoh Yutithum or Kadis.

Lay judges are laymen recruited separately to perform duties in the Juvenile and Family Courts, the Labour Court or the Intellectual Property and International Trade Court. The aim of having lay judges is to have an experienced person or an expert in a relevant field who can work closely with a career judge in adjudicating cases. Unlike a career judge, becoming a lay judge is not a permanent position. Each lay judge holds the office for a term of certain years depending on which specialized court he or she is working for.

Kadis are persons who have experts in Islam. According to the Act on the Application of Islamic Law in the Territorial Jurisdictions of Pattani, Narathiwat, Yala and Satun Provinces, B.E. 2489, the Islamic Law on Family and Succession except the provisions on prescription in respect of succession shall apply instead of the Civil and Commercial Code in giving a judgment in civil cases concerning family and succession of Muslims. In such case, career judges and a Kadi will sit on the bench together to adjudicate the case to comply with the principle of Islam. A kadi must not be less than thirty years of age, know Thai language at the prescribed level, and have knowledge in Islam to enable him to apply the Islamic laws relating to family and succession.

Under Thai Law, a judge may be vacated from the office by the following reasons:

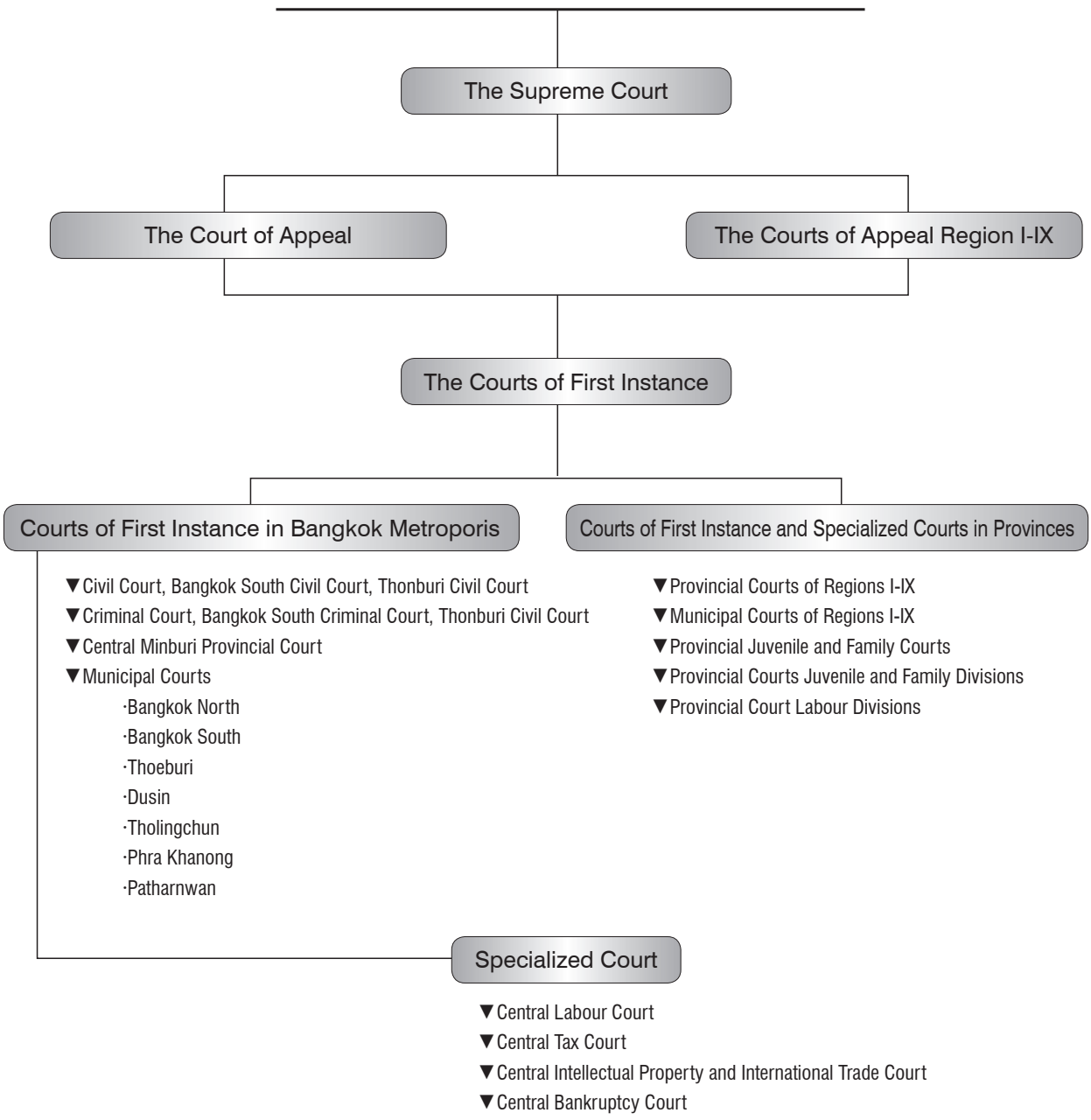
1. death;
2. resignation;
3. vacating from the office under the law on government pension fund;
4. being transferred to serve in a position of a government official which is not judicial position;
5. resignation for being in military service;
6. being ordered by law to resign;
7. being expelled, dismissed, or removed by law from the office;
8. being removed from office by a resolution of the Senate.

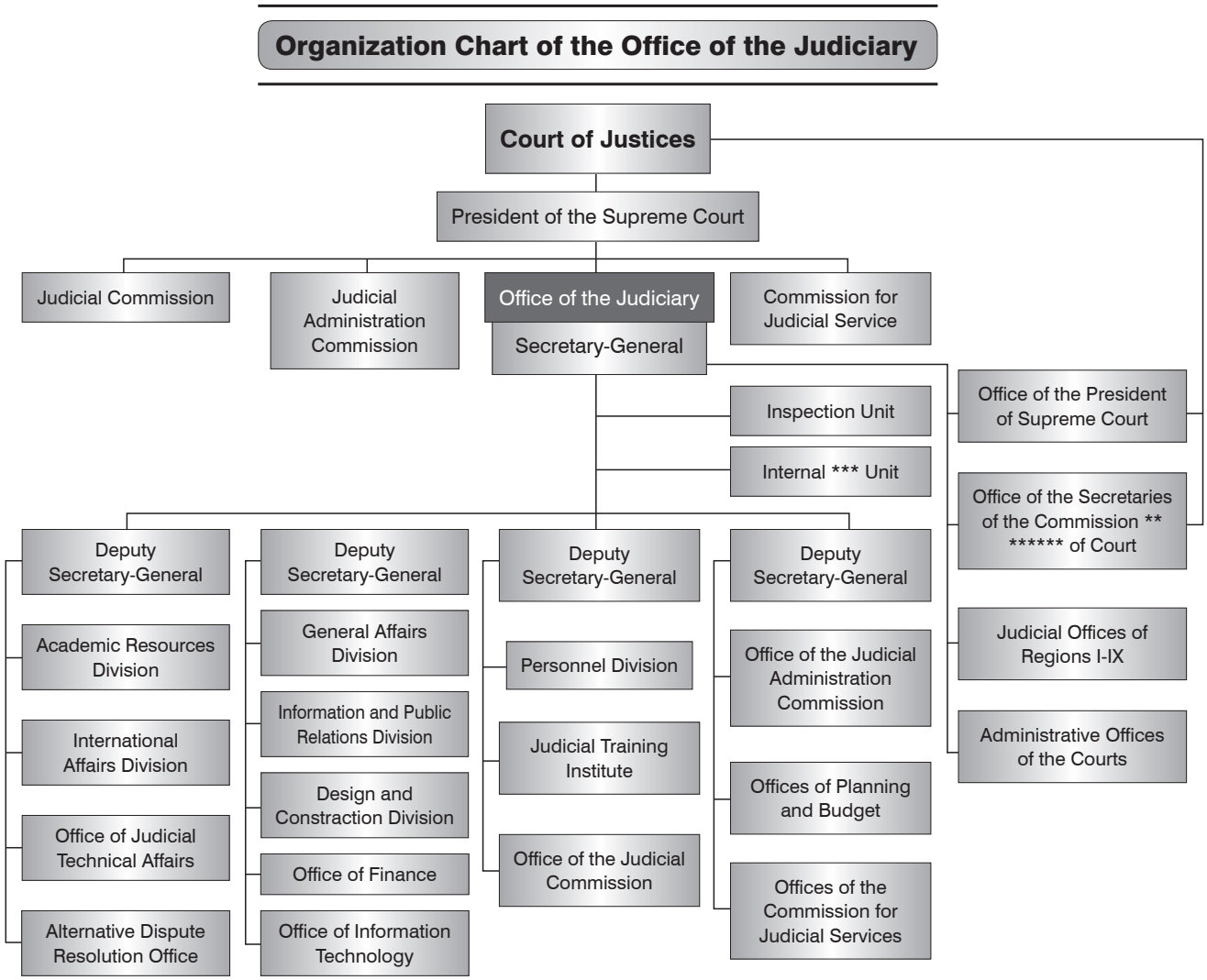
V. OFFICE OF THE JUDICIARY

Courts of Justice have an independent secretariat, namely, the Office of the Judiciary headed by the Secretary-General who will report directly to the President of the Supreme Court. The Office of the Judiciary has autonomy in personnel administration, budget, and other activities as provided by law. It has its own staffs and is divided into several offices and divisions. Office of Information Technology, Alternative Dispute Resolution Office, Office of Judicial Technical Affairs, and the Judicial Training Institute are also under the Office of the Judiciary. The work of the Office of the Judiciary concerning international judicial cooperation is under responsibility of the International Affairs Division.

In administering personnel and budget of the Courts of Justice, the Office of the Judiciary has done through three separate Commissions, i.e., the Judicial Commission, the Judicial Administration Commission, and the Commission for Judicial Service. The Judicial Commission chaired by the President of the Supreme Court composed of the Commissioners elected from judges in all levels of the Courts of Justice deals with appointment, transfer, promotion and disciplines of judges whereas the Commission for Judicial Service chaired by the most senior Vice-President of the Supreme Court consisting of both the Commissioners appointed by the Judicial Commission from judges in all levels and the Commissioners elected from senior judicial officers handles appointment, transfer, promotion and disciplines of judicial officers. The Judicial Administration Commission chaired by the President of the Supreme Court composed of the Commissioners elected from judges in all levels of the Courts of Justice is mainly responsible for approving budget plan and managing the budget, issuing regulations and notifications concerning administrative and secretarial works of the Office of the Judiciary. The work of the three Commissions is transparency since the law requires that each Commission must have at least certain number of Commissioners who are qualified persons and are not judges.

Organization Chart of the Courts of Justice





VI. CORRUPTION CONTROL

A. Independence of the Judiciary

Independence of judges is the first principle to warrant the anti corruption in the Court of Justice. Such principle is stated in the Constitution of the Kingdom of Thailand that the Judges are independent in the trial and adjudication of cases in accordance with the Constitution and the Law.

In addition, no judge shall abuse of his or her discretion by any command since the trial and adjudication by judges is not subject to hierarchical supervision.

In order to prevent corruption, the distribution of case files to judges shall be in accordance with the Court rules and the recall or transfer of case files shall not be permitted except in the case where justice in the trial and adjudication of the case shall otherwise be affect.

Moreover, the transfer of any judge without his or her prior consent shall not be permitted except in the case of terminally transfer as provided by law, promotion to a higher position, being under a disciplinary action or becoming a defendant in a criminal case, being the affect of justice in the trial and adjudication, having unavoidable situations as prescribed by law.

Finally, it is important that the judge should have sufficient salaries so that the corruption shall not easily be occurred. Therefore, salaries, emoluments and other benefits of judges are provided by law that the system of salary–scale or emoluments applicable to civil servants shall not be applied.

B. Declaration Before Taking Office

It shall be essential as stated in the Constitution of the Kingdom of Thailand that before taking office, a judge shall make a solemn declaration before the King in the following words:

"I (name of the declarer) do solemnly declare that I will be loyal to His Majesty the King and will faithfully perform my duty in the name of the King without any partiality in the interest of justice, of the people and of the public order of the Kingdom. I will also uphold and observe the democratic regime of government with the King as Head of the State, the Constitution of the Kingdom of Thailand and the law in every respect."

Such declaration is as a spirit of one who becomes a judge in accordance with the Thai culture, so that he or she shall truly believe in a justice and faithfully perform duty as promised before the King.

C. Recruitment and Training

Recruitment and training is one of the prevention measures against corruption. According to Thai Law, career judges are recruited by the Judicial Commission and are appointed by His Majesty the King. Besides having certain qualifications, an applicant must pass a high competitive examination given by the Judicial Commission. Once the applicants are recruited, they have to be trained as judge-trainees for at least one year. Those applicants who complete the training with satisfactory result will be approved by the Judicial Commission and tendered to His Majesty the King for royal appointment to be a judge.

Any applicant for an examination to be a judge–trainee must possess the following qualification and without any prohibitions:

1. being of Thai nationality by birth;
2. must not being less than twenty five years old of age when apply for examination or knowledge test;
3. having faith in constitutional democracy;
4. being an ordinary member of the Thai Bar Association;
5. not a being a person with inappropriate or immoral behaviour;
6. not being insolvent;
7. not being suspended from official service or ordered to be provisional discharged from judicial service under the law;
8. not being expelled, dismissed or discharged from the official service, a State enterprise or other State agency;
9. not being sentenced by a final judgment to imprisonment, except for an offence committed through negligence or a petty offence;
10. not being incompetent, quasi-incompetent, suffering unsound mind or of mental infirmity or having inappropriate physical or psychological conditions to become a judge or suffering from diseases as stipulate in the regulations of the Judicial Commission; and
11. having passed both physical and psychological examinations by the Medical Committee consisting of no fewer than three members as designated by the Judicial Commission, and the Judicial Commission has reviewed medical report and deems the applicant is sound to apply.

In addition, rules and procedures to verify qualifications of an applicant for examination shall be in accordance with regulations stated by the Judicial Commission.

The qualifications as mentioned above is as an effective tool to prevent corruption by a judge, especially where the applicant must not a being person with inappropriate or immoral behaviour, not being insolvent, not being suspended from official service or ordered to be provisional discharged from judicial service under the law, not being expelled, dismissed or discharged from the official service, a State enterprise or other State agency and not being sentenced by a final judgment to imprisonment. It helps to screen a person who may become a judge.

Number of applicants from 1993 -2007

Year	Applicants	Pass
1993	1,792	148
1994	1,691	129
1995	1,619	286
1996	1,544	71
1997	1,678	224
1998	1,744	306
1999	2,141	404
2000	-	-
2001	-	-
2002	3,227	257
2003	6,140	145
2004	4,074	42
2005	4,301	128
2006	5,025	278
2007	5,495	41

It should be noted that when the applicant conceals his or her background, there is no limitation of time to investigate. Even though the applicant has become a judge for many years, he or she still be discharged.

For example, in 2006 the applicant never would be accused or arrested under Thai law and he passes an examination then become a judge–trainee. During the period of judge-training program, it is reported by DEA that such applicant change name and he used to be arrested in 1983 by DEA – Los Angeles in charges of possession of heroin. He was found guilty in US Federal Court of importation and possession of heroin with the intent to distribute and sentenced 4 years federal prison. When received such report, the Judicial Commission ordered him to discharge.

1. Maintaining Discipline

In present, there are 3,817 judges. It is, therefore, very important for Judicial Commission to maintain the discipline of the judges to prevent opportunities for corruption and impose appropriate punishment. The table below indicates the increasing number of judges in each level.

Number of Judges

Year	Male	Female	Total
1998	2,007	451	2,458
1999	2,005	451	2,456
2000	2,383	541	2,924
2001	2,546	623	3,169
2002	2,612	653	3,265
2003	2,716	724	3,440
2004	2,788	751	3,539
2005	2,822	772	3,594
2006	2,953	864	3,817
2007	3,052	909	3,961

Number of Judges divided by each level

Year	Supreme Court	Courts of Appeal	Courts of first instance	Total
1997	86	238	1,963	2,287
1998	86	241	2,132	2,459
1999	86	255	2,287	2,628
2000	86	255	2,617	2,958
2001	85	292	2,792	3,169
2002	85	298	2,882	3,265
2003	85	307	3,042	3,440
2004	86	307	3,146	3,539
2005	87	322	3,185	3,594
2006	87	346	3,384	3,817
2007	87	346	3,372	3,805

According to the Act on Judicial Service of the Courts of Justice B.E. 2543, a judge shall strictly maintain discipline prescribed by such Act. And a judge shall perform his or her duty prudently to avoid damaging the judicial service, as well as with honesty and integrity. In addition, a judge shall maintain his or her reputation not to be notoriously known as one committing malfeasance.

When a judge is alleged, or where there is a suspicion, of his or her breaching discipline, the judge responsible for judicial service of the court shall arrange a preliminary investigation of facts without delay in accordance with the rules and procedures prescribed in the regulations of the Judicial Commission.

If it is found in a preliminary investigation that there is a ground of a judge who has breached of serious discipline subject to an expulsion, dismissal or discharge, the President of the Supreme Court shall appoint a committee which consists of at least three members who are judges having no conflict or interest with or connection in the matter to perform the investigation. However, in case a judge is prosecuted for criminal offense, the Judicial Commission may use a final judgment of the court as part of its consideration without appointing the investigation committee.

The investigation committee, after completing the investigation, shall report its opinion to the President of the Supreme Court and submit it to the Secretary of the Judicial Commission in order to forward to the Sub-Committee of the Sub-Judicial Commission for consideration and opinions.

When the Judicial Commission reviews the report made by the investigation committee and the Sub-Judicial Commission and resolves that the judge is indeed in breach of serious discipline, including but not limit to corruption, and should be expelled, dismissed or discharged from the judicial service or as otherwise, the President of the Supreme Court shall order accordingly.

In addition, when any judge is alleged of breaching of serious discipline so as to be subject to an investigation committee or is prosecuted with a criminal offense, unless the offense is committed by negligence or is a petty offense, if the Judicial Commission considers that allowing such person to continue performing judicial service during the investigation or the proceeding may disgrace the judicial service, the President of the Supreme Court may suspend the person from judicial service.

2. Punishments

There are five modes of disciplinary punishment as follows:

(i) expulsion;
(ii) dismissal;
(iii) discharge;
(iv) suspension from promotion or salary increase;
(v) reprimand.

The President of the Supreme Court shall order an expulsion when any judges breaches of serious discipline as follows:

(i) committing corruption of the judicial service;
(ii) committing a criminal offense and being subject to a final judgment of imprisonment unless it is an offense committed by negligence, or a petty offense;
(iii) failing to comply with rules, regulations and customary practice of judicial service and ethics where such failure seriously damages the judicial service;
(iv) being negligent in performing the judicial service and therefore seriously damaging the judicial service; or
(v) having committed a serious conduct.

Finally, when the President of the Supreme Court deems appropriate, upon an approval of the Judicial Commission, to vacate any judge even though the judge is alleged of seriously breaching discipline but after investigation there is no prevalent fact that he or she is guilty and thus must subject to expulsion, dismissal or discharge, yet it is deemed that the person is disgraceful and, if allow to remain in judicial service, it may adversely effect the judicial service.

The table below indicates a number of the punishment from 1992 - 2007

Year	Punishment				
	expulsion	Dismissal	discharge	Suspension from promotion/salary increase	reprimand
1992	0	0	0	0	0
1993	1	0	0	0	0
1994	0	0	0	1	0
1995	0	0	0	1	0
1996	0	1	0	0	0
1997	3	0	2	2	0
1998	1	0	2	2	0
1999	0	0	4	2	0
2000	1	0	1	0	0
2001	2	0	0	0	1
2002	2	1	0	0	1
2003	0	1	1	0	4
2004	0	0	0	0	5
2005	0	1	0	0	3
2006	1	0	2	0	4

3. Other Measures

In addition to the measures for anti corruption listed above, there are some kinds of the prevention in other processes such as the transference and appointment of the Judges by the Judicial Commission. The Judges shall not be allowed to perform his or her duty in any Court situated in the province where a judge or his or her family has domicile. In addition, a judge is not allowed to perform his or her duty in any Court or any province outside Bangkok Metropolitan for more than five years. Furthermore, there is Chief Judge of each Court to supervise the judges and report their performing to chief judges of courts of first instance.

VII. CONCLUSION

It can be stated that the Court of justice plays important role of integrity under the rule of law. It is, therefore, essential to monitor all the judges in order to prevent corruption. Further, the good governance should be applied especially the transparency. It seems that only internal inspection is not sufficient to promote integrity but other organizations should also have an opportunity to inspect or watch and impeach a judge by law when the corruption by judge occurs. Finally, it is truly believed that even all judge perform their duty with honesty but only one judge committing corruption of the judicial service, it shall decrease faithfulness and cause the lack of integrity, then ruin the judiciary.

ANTI-CORRUPTION IN THAILAND

"Corruption Control in the Judiciary and Prosecutorial Authorities"

Sirirat Vasuwat[*]
and
Supinya Berkfah[+]

I. INTRODUCTION

Corruption always happens because of the abuse of power by State Officials for their own benefits and parties as the words power corrupts, absolute power corrupts absolutely. In this connection, I would like to express my opinion that in order to control corruption and to solve the problems of corruption, we need to have three principle components which are transparency, accountability and check and balance. Now I would like to share the experience of corruption prevention in Thailand.

The establishment of anti–corruption organization in Thailand was concerned as the important political changes. In 1973 the mass crisis of October 14 led to the collapse of the Dictated-Military Government. Then the Democratic Government was established. During this transition period the Ad-hoc Government announced the law for anti-corruption and the Office of Counter Corruption Commission was appointed in order to prevent and suppress the mass corruption situation at that time. However, its performance had not much success. This was because of the interference from the political side.

The political situation in Thailand after the so-called Dictated–Military Government, however, can be called the Money-Oriented Democracy. The politicians used their money in general election for their political power. When they got power they use it for their private benefits, then the corruption was expanded. The parties making corruption were State Officials, Businessmen, and of course, the Politicians. The corruption in huge projects will also involve the technocrat and foreign business firms or the foreign financial firms. In this connection, the technocrat will be advantaged for making the project look reasonable while the foreign financial firms will take action as the contractor in the large construction project or the financial supporter of the project.

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II. THE NCCC

As a result, the people were very disappointed and finally led to the mass political crisis once again in May 1995. The general election was followed after the crisis and the new government was appointed. After that, there was the demand for the new constitution in order to solve the crisis. The new Constitution then was promulgated in October 1997 which expresses more transparency and accountability of administrative regime. According to the new Constitution, the National Counter Corruption Commission was appointed in 1999 in order to prevent the interference of politicians and on the other hands for the independent performance.

The National Counter Corruption Commission or NCCC has its main functions as provided by the Organic Act on Counter Corruption 1999 in 3 significant areas, which are;

- Inspection of Assets and liabilities
- Corruption Prevention
- Corruption Suppression

In other words, NCCC shall have the following powers and duties:

(1) To inquire into facts, summarise the case and prepare the opinion to be submitted to the Senate under Chapter 5, Removal from Office;

(2) To inquire into facts, summarise the case and prepare the opinion to be referred to the Prosecutor-General for the purpose of prosecution before the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions under Chapter 6, Criminal Proceedings Against Persons Holding Political Positions under section 308 of the Constitution;

(3) To inquire and decide whether a State official has become unusually wealthy or has committed an offence of corruption, malfeasance in office or malfeasance in judicial office;

(4) To inspect the accuracy and actual existence of assets and liabilities of State officials and inspect change of assets and liabilities of the persons holding political positions under Chapter 3, Inspection of Assets and Liabilities;

(5) To prescribe rules with respect to the determination of positions and classes or levels of State officials obliged to submit an account showing particulars of assets and liabilities;

(6) To prescribe rules and procedures for the submission of the account showing particulars of assets and liabilities of State officials and the disclosure of accounts showing particulars of assets and liabilities of persons holding the position of Prime Minister and Minister;

(7) To submit an inspection report and a report on the performance of duties together with remarks to the Council of Ministers, the House of Representatives and the Senate annually and publish these reports for dissemination;

(8) To propose measures, opinions or recommendations to the Council of Ministers, National Assembly, Courts or State Audit Commission for the purpose of improving the performance of government service or formulating action plans or projects of Government agencies, State enterprises or other State agencies in an endeavour to control corruption and the commission of an offence of malfeasance in office or malfeasance in judicial office;

(9) To refer matters to the agency concerned for the purpose of making a request to the Court for an order or judgment cancelling or revoking a right or document of title in respect of which the State official has given approval or granted permission conferring the rights or benefits or issued the document of title to a particular person in contravention of the law or official regulations to the detriment of the Government service;

(10) To take action with a view to preventing corruption and building up attitudes and taste concerning integrity and honesty, and to take such action as to facilitate members of the public or groups of persons to have participation in counter corruption;

(11) To give approval to the appointment of the Secretary-General;

(12) To appoint persons or a group of persons for performing duties as entrusted;
(13) To carry out other acts provided by this Organic Act or other laws to be the responsibility of the N.C.C. Commission.

Now, I would like to explain more about powers and duties of NCCC

A. Inspection of Assets and Liabilities

As for the inspection of assets and liabilities, it is quite successful for prevention. People can be involved and it is also the warning to the State Officials and the politicians. During the past four years the NCCC passed its resolution with prima facie for those who fail in showing the particular account of their assets and liabilities of more than 20 cases. The most famous cases were the cases of the former Deputy Prime Minister and Minister of Interior Major General Sanan Khajornprasart and recently the Deputy Minister of Transport, Mr. Pichate Satirachaval. However, for the case of the Prime Minister Police Lieutenant Colonel Thaksin Shinawatra, 8 per 1 of NCCC members passed the resolution with prima facie but 8 per 7 of Judges of the Constitutional Court made their adjudication of no guilty.

B. Corruption Prevention

NCCC's activities on Corruption Prevention are to determine the measures for the prevention of corruption which shall be practiced by State Officials. This shall be implemented by making study to the rules and regulations which are being used whether they provide any obstacles to those who doing business or even for public services. Once the obstacle were found, NCCC then will call for the meeting with then concerned authorities in order to send the measures against corruption. In addition, rules and regulations will also be proposed for the transparency and accountability of work performances.

NCCC also launches the campaign activities for integrity. It is believed the best corruption prevention is integrity. In fact, integrity is a merit of the Thai people for generations. Nowadays, social change has caused the ignorance of integrity among the people.

NCCC's Activities on Corruption Prevention

- Activation of common sense for integrity. There are varieties of target groups. However, the activity has focused on students at all level. This shall be done in the long period of time.
- Promotion of student activities for integrity. Such as speech contest, propose of articles, and songs which aim to fight against corruption.
- Laudation of the good people in the society. For example, the selection of government officials and people in local areas to receive the integrity award.
- Campaign against corruption. By having the cooperation with mass media in order to propagate the information for anti-corruption and also to promote the merit in the society.
- The people's participation project. This project aims for the realization among the people in fighting against corruption.

C. Suppression of Corruption

1. Government Policy on Corruption

In the past, successive governments always adopted and announced tough policies on the prevention and suppression of corruption. The current government has also adopted an anti-corruption policy as a part of its national agenda and one of its key policies, which can be summarized categorically as follows:

(i) Each and every agency in the public sector shall work in a collaborative manner to prevent and suppress corruption. In particular, they shall render all necessary cooperation with the National Counter Corruption Commission (NCCC).

(ii) Each and every state agency shall work towards necessary legislative amendments, shall revise and improve its rules and regulations as well as modernize its managerial methods and systems to become more efficient in carrying out the prevention and suppression of corruption. Emphasis shall be placed on granting more power and authority to the NCCC in order to strengthen its power and position.
(iii) Each and every state agency shall closely supervise, direct, control and monitor the performance of its personnel based on the principle of good governance.
(iv) Render due support to the roles played by the people's sector.
(v) Promote public participation in addressing the problems and issue of corruption.
(vi) Adopt strong and adequate measures for witness protection.
(vii) Set up a special unit specifically mandated to receive complaints and leads on cases of corruption in the public sector.
(viii) Set up a necessary unit within the executive branch, specifically mandated to assist the NCCC in combating the problem of corruption.
(ix) Give a necessary opportunity for bribe payers to stop such practice.
(x) Accelerate the investigation process on charges of corruption.
(xi) Improve all procurement procedures and methods to ensure transparency.

III. ASPECTS FOR ANTI-CORRUPTION REFORMS

Despite the fact that the NCCC is not a court of justice, the manner in which it has conducted the investigation and inquiry to get to the facts in the case, which is very careful, impartial, professional and thorough, has given the decision of the NCCC whether there is ground or no ground for accusation the weight of a court verdict. This is by intention, and not by accident. The new NCCC has planned its investigation and inquiry, and the preparation of evidence and supporting documents in such a way that they are equivalent to court documents, and as such, can be used directly by the court of justice without having to launch a new inquiry. In this way, the ideal role of the NCCC is fulfilled. However, there are still many issues that run counter to the efficient operations of the NCCC, and these issues have hindered effective services of this unique anti-corruption body. It is possible to categorize and summarize these issues briefly here such that future reforms regarding or related to these issues could bring about even greater success of the NCCC.

These issues can be listed as follows:

A. Scope of Power and Authority

While the focus of the NCCC is on suppression and prevention of corruption, it is true that the NCCC is also entrusted with the power to take care of malfeasance in offices or improper administrative behaviour in office. It is true that some malfeasance cases involve elements of corruption, but often these two issues are separated. For example, an improper conduct of a high-ranking official, say, a sexual harassment, may be looked upon as a malfeasance or a misconduct in office, but that behaviour does not involve any extraction of economic rent or transfer of public resources for personal gain. To have to consider these apparently administrative cases in addition to corruption cases put too much work load to the NCCC. Perhaps a future reform may call for the restriction of only corruption cases with the NCCC, whereas other malfeasance cases may be switched to Administrative Court or Special State Service Tribunal.

B. Inquiry Procedures

It is ironic that the selection process of the nine commissioners in the NCCC which is reputed to be

one of the toughest for any jobs in Thailand would end up having these commissioners presiding over numerous subcommittees inquiring away facts in tens of thousand cases, the job that can be done better by anyone younger and more energetic. The current inquiry procedure does not allow the commissioners to only consider the cases at the last stages of their investigation, but to slosh through all cases like young head prosecutors. The existing subcommittee system really slows down the process of NCCC deliberation. However, the Announcement No. 31 by the CDR where the commissioners can delegate power to permanent staff of the NCCC to carry out the main work, this is yet to be done in practice.

C. Collaboration with Other Government Agencies

As an independent organization outside the control of the executive branch, the NCCC could work very effectively along legal provisions contained in the Organic Act on Counter Corruption. There are, however, certain occasions that the NCCC may need help from other organizations or agencies. For example, in order to see the movement of funds on a certain transaction, the NCCC may need the expertise of the staff of the Office of Anti-Money Laundering Committee and the Bank of Thailand to trace the movement of money. However, the NCCC already has the power to ask for collaboration from all other government agencies (according to Section 25). Therefore, any deeper collaboration especially on institution to institution basis may not be necessary as this may lead to some implications on the association between independent organization and ordinary government agencies.

D. Conflict of Interests

This is probably the most important aspect of new directions in anti-corruption in Thailand. We have shown elsewhere in this paper that higher order corruption in Thailand often takes the form of the failure of policy makers to observe the impropriety of contract causing conflicts of interest. In fact, the practice may even be claimed legitimate because it does not directly violate or contravene any legal provisions. The interpretation of this offence is missing or misleading, and is seen as policy corruption rather than apparent corruption. Not that the existing legal provision is lacking on the corruption through conflict of interest. Section 100 of the Organic Act specifically addresses this aspect of corrupt practice (see Box 1), but the actual enforcement of this section is lacking or weak or both. In the near future, the importance of this aspect of corruption may be given stronger weight or emphasis so that attention may be paid to this type of corruption more than petty corruption or corruption through straightforward cheating, bribes, or kickback. If and when this state is reached, it is expected that corruption situations may improve significantly.

IV. CONCLUSION

In order to be more efficient and effective in dealing with the issue and problems, consideration should be given to enhance and strengthen the existing legal measure as follows:

(i) A national focal point should be established for the systematic storing and maintaining of intelligence and database system on corruption.
(ii) A new agency should be established with the specific mandate to render necessary assistance in the prevention and suppression of corruption.
(iii) The government should raise the public awareness of the fact that corruption is unacceptable and should launch a promotional campaign to invite public to cooperate with counter-corruption agencies.
(iv) Other independent organizations should be promoted to assume a greater role in tackling the problem of corruption.

(v) Declaration of assets and liabilities should be required of state officials entrusted with official duties involving possible vested interest.

(vi) Preventive measures against conflict of interest between public and private interest should be extended to cover those state officials serving in other positions.

(vii) Additional measures should also be in place to require top executives of public limited companies and financial institutions to submit declaration of assets and liabilities.

(viii) Legal measures should be further developed to take legal action against corruption in the private sector.

(ix) Legal provisions on the statue of limitations should also be amended specifically for cases involving corruption in both public and private sectors.

(x) There should be improvement of current measures requiring international cooperation for the prevention and suppression of corruption, while introducing additional measures to promote morale and ethnical values.

PRESENTATION SESSION III

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Presentation by
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***

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Please note that the following papers have not been edited for publication.
The opinions expressed therein are those of the authors, and
do not necessarily reflect the position of the departments or agencies they represent.

CORRUPTION CONTROL IN THE PROSECUTORIAL AUTHORITIES IN JAPAN

Takeshi Seto[*]

I. INTRODUCTION

I will base my presentation on five pillars.

(i) The first pillar is the legal and other institutional frameworks for preventing the involvement of Japanese public prosecutors in corruption;
(ii) Secondly, I would like to outline concrete cases in which Japanese public prosecutors were involved in corruption;
(iii) Thirdly, I would like to give you my assessment of the situation of corruption among Japanese public prosecutors;
(iv) Fourthly, I would like to refer to investigation techniques regarding corruption in the judiciary and prosecution service;
(v) The final pillar will be the conclusion.

II. LEGAL AND OTHER INSTITUTIONAL FRAMEWORKS

It is often said that institutional safeguards are important to maintain the integrity of public prosecutors and to prevent them from being involved in corruption. I also believe that such safeguards are in fact effective and necessary.

In this part of the paper, I would like to introduce what kinds of safeguards exist in Japan for regulating Japanese public prosecutors.

A. Independence

The separation of power is stipulated in the Constitution of Japan. Power is divided into three distinct classifications, namely legislative power, executive power and judicial power. The prosecutorial functions themselves are part of the executive power vested in the Cabinet. Since all executive powers should be engaged under the responsibility of the Cabinet, the Minister of Justice has the responsibility of supervising public prosecutors. However, prosecutorial functions are crucial for the administration of criminal justice, which falls under judicial power, and if those functions are controlled by political influence, the whole criminal justice system would be jeopardized. In addition, the qualification of a public prosecutor is equal to that of a judge and a private attorney, meaning that the judicial system is administrated by highly professional, skilful and responsible personnel. Therefore, it is recognized that prosecutorial functions have a quasi-judicial nature and should be engaged independently and neutrally as far as possible. This recognition is clearly reflected in the Public Prosecutors Office Law, Article 14. The article provides that "[the] Minister of Justice may control and supervise public prosecutors generally[1] in

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[1] "Generally" means, for example, to set up general guidance for crime prevention, the administrative interpretation of laws and how to dispose of affairs related to prosecution to maintain their uniformity.

regard to their functions. However, in regard to the investigation and disposition of individual cases, the Minister may control only the Prosecutor-General"[2]. The Minister of Justice cannot directly control an individual public prosecutor's investigation or disposition of cases.

In this circumstance, the next question relates to the relationship between the Prosecutor-General and individual public prosecutors. In Japan, prosecutorial authority belongs to the Public Prosecutors Office, or "PPO", which consists of one Supreme Public Prosecutors Office, eight High Public Prosecutors Offices, fifty District Public Prosecutors Offices and 438 Local Public Prosecutors Offices. The current number of public prosecutors is about 1,500. As to the structure of the PPO, each office has a head or a chief and he/she controls and supervises other public prosecutors in the office. The Prosecutor-General has the authority to control and supervise the officials of all the Public Prosecutors Offices. This means that the Japanese prosecutorial system adopts a hierarchy and each public prosecutor must, as a public servant, follow orders or instructions rendered by the Prosecutor-General and the chief of the office to which he/she belongs.

However, under the Code of Criminal Procedure of Japan, prosecutorial functions for an individual case belong to each public prosecutor. In other words, each public prosecutor can independently engage his/her power bestowed by law. For example, I can conduct an investigation on a certain case in a District Public Prosecutors Office and reach the conclusion that the case should be indicted. However the chief public prosecutor of my office has a different opinion and orders me to discharge the case. In this case, if I do not follow the order, but instead indict the case, the indictment itself is valid because I have the power to do so independently. Of course I may be under disciplinary action at a later stage for disobeying the order. However, I still have a chance to dispute the legality of the disciplinary action, if the order of the chief seems inappropriate. As a result of this, if my supervisor is corrupt and tries to unduly influence me, I have the capacity to engage my duty independently.

Accordingly, Japanese public prosecutors, as holders of prosecutorial authority, are independent from political influence through the Justice Minister and are also independent, as individuals, from any other powers despite these belonging to their supervisors.

B. Guarantee of Status

In Japan, the National Public Service Act stipulates the basic principles and standards of public servants in executive power. It includes provisions on the requirements for recruitment, salary and responsibilities; forfeiture of position, demotion and dismissal against an official's will; administrative leave against an official's will; and the requirements and procedures for disciplinary actions. Since public prosecutors belong to the executive branch, this Act applies to them in general. This is different from the members of the National Diet and judges, who are excluded from the application of this Act.

However, considering the quasi-judicial nature of public prosecutors, their status should be, and in fact is, more secured than other public servants in executive power and the Public Prosecutors Office Law stipulates some exceptions to the application of the Act.

Article 25 of the Law stipulates that "no public prosecutor shall, against his/her will, lose his/her office, be suspended from the performance of his/her duties or suffer reduction of salary unless by disciplinary action" except in the following cases; (i) age of retirement; (ii) decision by the Committee for the Examination of Qualifications of Public Prosecutors; and (iii) supernumerary officials. The

[2] This control was exerted only once, in 1954, when public prosecutors investigated a big bribery case involving several high-ranking politicians and tried to arrest the Secretary-General of the majority party. The Minister of Justice, who belonged to the same party, ordered the Prosecutor-General to halt the arrest, which should consequently have lead to the termination of the investigation. However, since it produced severe criticism from the public through the mass media, the Minister of Justice had to resign shortly thereafterwards.

Committee is formed of highly responsible citizens such as members of the National Diet, judges, private attorneys and members of the Japan Academy. The grounds upon which the dismissal of a prosecutor may be based are fewer than those applicable to other public servants. Hence, it is more difficult to remove a prosecutor from his/her position. Therefore, the guarantee of public prosecutors' status is very high, although the level of it is not equal to that of judges. A public prosecutor will never endure unfavourable treatment if he/she performs his/her duty in an honest and faithful manner.

However, there is a difference between prosecutors and judges with respect to the stability of their position. Judges are guaranteed not to be transferred to another position against their will, but prosecutors do not enjoy the same privilege. In general, a prosecutor's place of work is rotated every two or three years. This is burdensome to some extent, but the practice prevents prosecutors from forming deep relationships with persons in the work environment, lessening the possibility of forming collusive relationships. Therefore, most prosecutors think this practice necessary.

C. Salary

As mentioned-above, the National Public Service Act stipulates the salary of public servants and there is a law which provides a specific salary for public servants in general. However, public prosecutors also enjoy a special status regarding salary and a separate law exists relating to prosecutorial salaries. Currently, the special nature of public prosecutors' duty is duly reflected in their salaries and, according to the special law, it can be said that public prosecutors receive, on average, a higher salary than other public servants. The amount and interval of increase of salary is almost the same as judges. Therefore, from this point of view, public prosecutors are recognized as having a quasi-judicial status.

In addition, the rank or degree of a public prosecutor as a public servant is also relatively higher than others.

Therefore, public prosecutors are, in general, satisfied with their treatment as public servants.

D. National Public Service Ethics Law

In the 1990s, a series of scandals and corruption involving bureaucrats, including top-level executives of government ministries and agencies, came to light. Many of the incidents were of a structural nature, because bribes were given by companies and organizations which were closely linked to each bureaucrat's duties. At the same time, it was also revealed that central government public officials were wined and dined by local government public officials.

Following these incidents, the National Public Service Ethics Law was enacted in 1999 and entered into force in 2000.

The Law is characterized by the Rules of Conduct and the Rules of Report requiring national public servants to maintain the code of ethics.

The Rules of Conduct stipulate that national public servants and their professionally related parties are prohibited from (i) accepting cash, goods, or real estate, (ii) accepting wining and dining, (iii) the acquisition of unlisted shares (whether with or without consideration) or (iv) travelling or playing golf together. In addition, the Rules of Report require all national public servants except junior officials to report quarterly to the heads of ministries when receiving extra income or other donations from business entities although the activities of such entities are not related to the public servant's duty. Furthermore, all senior officials are also required to file annual reports of their total income, property acquired by gift, and security transactions. If public servants fail to report the necessary information under these obligations, they will undergo disciplinary action by the National Public Service Ethics Board.

As a result, these rules clarify illegal donations by delineating rules of conduct, assuring transparency of conduct and maintaining the ethics of public servants in the course of their duty.

Additionally, there is another reporting system for all public prosecutors. This system was introduced in 2002 following a bribery case involving a senior public prosecutor, which I will explain later in this presentation. This system is based on the concept that public prosecutors should refrain from frequent transactions of real estate or security for the purpose of accumulation of profit because such behaviour inspires the allegation that they do not devote themselves to their job and raises doubts of their integrity, impartiality and commitment to equality.

Accordingly, all public prosecutors are required to report transactions of real estate and security every year in addition to the report obligation provided in the Law.

E. Internal Supervision

This is a method of internal control of the appropriate exercise of prosecutorial power, including the prevention of the corrupt exercise of power.

As I said above, the Japanese prosecution system is hierarchical. Each public prosecutor who deals with cases individually has to consult with and seek approval from his/her supervisor while disposing his/her case. Since the supervisor has a great fund of experience in the prosecution service, a public prosecutor has to give a reasonable explanation to get his/her supervisor's approval for disposition. If the case is serious or important, a public prosecutor has to be under multiple supervisions to dispose it.

Accordingly, although a public prosecutor may be personally corrupt, he/she cannot commit corrupt acts unless the supervisors are also corrupt.

F. Prosecution Review Commission

This is a method of external control of the appropriate exercise of prosecutorial power.

In Japan, public prosecutors monopolize the power of prosecution with little exception[3]. We do not have a private prosecution system. If a public prosecutor indicts a case with malice, such indictment can be challenged at the trial stage. However, if a public prosecutor decides not to prosecute the case with malice and his/her supervisor gives approval for the decision, no one can prosecute the case and the case can never be tried at court. This means that, if the prosecution organization as a whole is corrupt and supervision is not appropriate and effective, a public prosecutor has the ability to cover up a case. For this reason Japan established the Prosecution Review Commission.

The purpose of this Commission is to maintain the proper exercise of public prosecutors' power by subjecting it to popular review. There is a Prosecution Review Commission in each District Court and its major branch, and the Commission consists of 11 members selected from citizens who have a suffrage right in the House of Representatives of the Diet. It is empowered to examine the propriety of decisions by public prosecutors not to institute prosecutions. The Commission must conduct an investigation whenever it receives an investigation request from a person who suffered from the offence or made a complaint or accusation. In some instances, the Commission can carry out investigations on its own initiative, and is competent to examine witnesses in the course of the investigation.

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[3] As the exception of monopolization of prosecution, the Code of Criminal Procedure stipulates a "Quasi-Prosecution" system in Articles 262 to 269. In this system, a person who has made an accusation of offences involving a criminal justice official who has abused his/her power, and is not satisfied with the public prosecutor's decision not to prosecute, may apply to the court to order the case to be tried. The court, after conducting hearings, dismisses the application, or orders the case to be tried if the application is well founded. If the application is granted, then a private attorney is appointed by the court to exercise the functions of the public prosecutor.

The Commission then notifies the Chief Prosecutor of the District Public Prosecutors Office of its conclusion. The Prosecution Review Commission's verdicts may be (i) prosecution is appropriate, (ii) non-prosecution is improper, or (iii) non-prosecution is proper. If the Commission concludes prosecution is appropriate or the non-prosecution is improper, the Chief Prosecutor orders another public prosecutor of the office to further investigate the case and to re-examine the original disposition. After the re-investigation and re-examination, the public prosecutor-in-charge must obtain approval from the Superintending Prosecutor, who is the chief of the High Prosecutors Office, before making the final disposition. Although the Commission's verdict is not binding upon the prosecutor under the current legislation[4], it is highly respected in the re-investigation process. Since Japan does not have a jury system or a private prosecution system, only The Prosecution Review Commission allows the public to participate in criminal justice administration at present.[5]

Under this system, public prosecutors provide clear and reasonable explanations when deciding not to prosecute cases, including facts they found based on evidence and application of the law to the facts; accordingly, they cannot cover up cases with the intention of corruption.

III. CASES

These are current legal and other frameworks to prevent corruption in the prosecution service. They are very effective but still, corruption cases involving public prosecutors have arisen.

A. Leak of Investigative Information

In 2000, the Deputy Chief Public Prosecutor of Fukuoka District Public Prosecutors' Office, Mr. Y, received a report from his subordinate that the police were investigating a case in which Mrs F, the wife of Fukuoka High Court Judge Mr. F, was stalking or threatening a person. Mr. Y considered that Mrs. F should cease this behaviour as soon as possible and apologise to the victim so that the case would be solved to the satisfaction of all parties concerned. Accordingly, Mr. Y invited Mr. F to his office and gave him a rough outline of the investigation. However, he did not inform the police of his intention in advance and also, did not confirm that the victim was willing to settle the case without indictment. Mr. F tried to persuade his wife but she denied the allegation and seemed to destroy relevant evidence.

After police arrested Mrs. F, Mr. Y's action was unveiled by the media. Harsh criticism was forthcoming, to the effect that the prosecution service and the judiciary were in a collusive relationship, that Mr. Y tried to cover up the case because the suspect was the wife of a judge and that his behaviour distorted prosecutorial neutrality etc.

Accordingly, the Supreme Public Prosecutors Office started a criminal investigation of this matter and came to the conclusion that Mr. Y did not intend to cover up the case. He was not indicted for the offence of breach of confidence as a public servant because his leak of information might be recognized within the exercise of a public prosecutor's authority to settle the case in the most appropriate way for all parties. However, he was subjected to disciplinary action based upon his above-mentioned behaviour and his response to the media, both of which were inappropriate and damaged people's trust and confidence in the prosecutorial authority. In the end, he quit his job.

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4 An amendment enacted in May 2005 will be in force by May 2009. According thereto, if after reviewing the case twice, the Commission determines that on both occasions that prosecution is appropriate, an attorney appointed by the Government must take over the prosecution from the public prosecutor and prosecute the case.

5 Law for the Prosecution Review Commission (Inquest into Prosecution)

Mrs. F was indicted for threatening a person and sentenced to imprisonment.

B. Bribery Case

In 2002, a senior public prosecutor of the Osaka High Prosecutors Office, Mr. M, was arrested by the Special Investigation Department of the Osaka District Public Prosecutors Office. He had a real estate transaction with a member of the "Yakuza", a Japanese criminal organization, and in the course of developing a relationship with the gang member, he abused his position to pass on investigative information and received about ¥200,000 as a bribe.

Although he denied this allegation, he was dismissed in disgrace when he was indicted. In 2005, he was sentenced to imprisonment of one year and eight months at the first instance and his appeal to the High Court was rejected in 2007. The case is now under consideration by the Supreme Court.

C. Counterfeiting of Victim's Withdrawal of Complaint

In Japan, when a case is assigned to a public prosecutor for investigation, he/she has to complete investigation within six months, in general. If more time is required, he/she has to explain the reason for it to his/her supervisor. This is the practice for seeking an expedited investigation.

This year, a case of counterfeiting by a public prosecutor became known. Last year, a public prosecutor of the Tokyo Public Prosecutors Office, Mr. S, took charge of a case in which a victim made a complaint of indecent assault. He dealt with the case for more than six months but he seemed not to be able to complete the investigation until this April when he had to move to another District Public Prosecutors Office. Since he did not want to abandon the case without disposition and therefore hand it over to his successor, he counterfeited a written withdrawal of complaint by the victim. Based upon this, he dismissed the case. His supervisor did not recognize that the withdrawal of complaint was false.

This counterfeiting case was revealed when the victim asked the Public Prosecutors Office about the result of the investigation. The prosecutor responsible was dismissed in disgrace when he was indicted for the forgery of a private document with a seal etc. He was sentenced to two years' imprisonment with suspension of the execution of the sentence.

IV. ASSESSMENT OF THE SITUATION OF CORRUPTION IN THE JAPANESE PROSECUTORIAL AUTHORITIES

Regarding statistics with respect to corruption among criminal justice personnel, we have only those of the last two years from public information. The numbers are of those persons who were disposed at the District Public Prosecutors' Offices.

Organization	2005		2006	
	all	prosecution	all	prosecution
Judiciary	3	0	0	0
Ministry of Justice	5	0	5	2
Police organization	8	6	3	0

You can see that the level of corruption in criminal justice personnel is very low. The number in

the column of the Ministry of Justice of the chart denotes persons other than public prosecutors. The situation is the same for judges. The number in the column of the Judiciary is cases committed by court staff other than judges and assistant judges.

Of course, I cannot deny the possibility that there might be uncovered cases where public prosecutors or judges are involved in corruption. But I can say that legal professionals working in the judiciary and prosecution service are, with a very small number of exceptions, rarely interested in corruption.

I will explain to you the reasons for this (other than legal and other institutional frameworks which were already referred to at the beginning of this presentation.).

A. Strong Sense of Ethics and Professionalism

In Japan, all legal professionals, including private attorneys, have to pass the National Bar Examination and become legal trainees for a certain period. Since the National Bar Examination is said to be the most difficult examination in Japan and long and hard preparation is indispensable to pass it, those who succeed in passing the Examination tend to have a high sense of responsibility for their work and are proud to be legal professionals.

At the same time, the general public respects public prosecutors and expect and support their successful work, based on a long history in which public prosecutors of former days built up the public trust in the profession by undertaking tremendous work such as bribery cases of a former prime minister and other top ranking politicians, bureaucrats and businessmen. Most of the current public prosecutors are filled with a sense of mission to cope with the expectations held by the public and communicated through the media.

B. Guarantee of Status and Salary

As I said in the introduction, the status of public prosecutors is secured and their salary is favourable in comparison to other public servants. Accordingly, most public prosecutors feel satisfied with their current working conditions.

If a public prosecutor becomes a private attorney, he/she may earn twice or even ten times the income earned as a public prosecutor. However, if a person is attracted to a high income, he/she would never have become a public prosecutor to begin with. He/she could choose to be a private attorney instead of becoming a public prosecutor. I believe, or I want to believe, that a legal trainee who chose to become a public prosecutor rather than a private attorney does find working for the public interest or social missions more attractive than money.

If a public prosecutor is involved in corruption and the case is uncovered, he/she has to undergo disciplinary action and, if the case is serious, will be dismissed in disgrace. Although in some instances he/she will not be officially dismissed, in practice, once he/she has damaged the confidence of the public in public prosecutors and had discredited the office of the public prosecutor he/she might not be treated as before by colleagues, and resigns his/her position.

Therefore, for public prosecutors it is difficult to imagine gambling their satisfactory status by becoming involved in corruption.

C. Organizational Support and Control

The Japanese prosecutorial system is hierarchical, and all personnel in the respective public

prosecutors' offices, namely from the Junior Assistant Officer to the Chief of the office, have strong ties to the unit. For example, every public prosecutor has an assistant officer and they work together as a team from time to time in a mutually interdependent way for the success of their work. A supervisor carefully watches respective teams to see whether they can work together well or not. They also tend to keep frequent contact with other colleagues and teams not only in the office but also out of the office.

Under these circumstances, if a public prosecutor has concerns about engaging his/her duty, someone around him/her can and will give support. At the same time, a public prosecutor cannot establish secretly and unduly a connection with others due to the close relationship among all of those present in the office. Of course, a supervisor carefully checks the work of respective public prosecutors on a daily basis, when he/she seeks the approval of a supervisor on his/her disposition.

Furthermore, there are periodical training courses for public prosecutors as well as assistant officers. The importance of integrity in a public prosecutor is repeatedly emphasized during these courses especially after the incidents I mentioned above.

D. Independence of Mass Media and Public Awareness

If most corruption cases are not discovered, there may be a tendency among public prosecutors to become involved in corruption. However, it is also difficult in Japan to perpetrate corruption in secret. One of the major reasons for this is the independence of mass media. If the political and other strong powers can suppress the media reports of corruption, such cases will never come to public attention and perpetrators can keep their positions without sanction. However, in Japan, since the mass media is totally independent and they believe that uncovering corruption is their responsibility, it openly and sometimes sensationally reports corruption cases. Once the case becomes a target of public attention, there is strong demand to make clear the whole story. At the same time, reporting of corruption is a good opportunity for the mass media to gain public trust and support; therefore it is absolutely proactive in reporting corruption cases.

According to this tendency of the media, it is also true that if an ordinary person uncovers information of corruption and he/she wishes, the case can easily be brought to public attention. This means that if corruption cannot be kept secret by the guilty parties, they face the risk of being investigated and prosecuted. We can say that this possibility seems to be very high and no-one expects that he/she can keep their misdeeds secret. The Whistleblower Protection Act, enacted in 2004, facilitates the passing on of information by any employees regarding corruption within their organization.

In fact, the first corruption case mentioned in my presentation, which was the case of the Deputy Chief of the District Public Prosecutors Office, Mr. Y, was said to be leaked to media from the police who had strong doubts about his methodology.

The reasons which I have listed here are not exclusive, but based upon these reasons, public prosecutors in Japan rarely think about becoming involved in corruption because it requires gambling with their job and reputation. This helps to keep the system free from corruption.

V. INVESTIGATIVE MEASURES

Lastly I would like to refer to investigative techniques for corruption cases involving a public prosecutor or a judge.

In general, investigation of corruption is very challenging because corruption is usually committed behind closed doors and it is difficult to find witnesses and gather objective evidence or evidential articles. Since public prosecutors and judges are legal experts, they are very cautious and well prepared before committing a corruption crime. In other words, they are careful not to leave evidence of their actions. Therefore, the investigation is more difficult than those of usual cases. The offenders in this case know the investigative techniques very well. Therefore, we cannot use cheap tricks in the investigation as the results will be useless. We should instead follow the established investigative techniques to the letter.

Firstly, we must gather background information on the case in order to establish the whole story and avoid prejudice or misunderstanding.

Secondly, we have to gather objective evidence and evidential articles as far as possible. In this regard, the search and seizure of relevant places at an early stage is indispensable. At the same time, investigation of relevant financial institutes should be also encouraged in order to gather financial information. As you are all aware, transactions through financial institutes are frequently employed in corruption cases and such information becomes not only objective evidence of the case but also the trigger to expand the case to that of a much broader incident.

Thirdly, all documents and materials should be carefully analysed. Since there is little material evidence in a corruption case, interrogation of a suspect is indispensable to establish as complete an understanding of the case as is possible. But of course, a suspect will deny the allegation because he/she is aware of how difficult the investigation of corruption is. Therefore, in order to persuade and take a true statement from a suspect, an investigator has to have overwhelming information on *the case* as well as the suspect.

Regarding interrogation, since a public prosecutor and a judge are highly qualified persons and understand how evidence is evaluated, if an investigator succeeds in showing them that he/she has evidence enough for prosecution or guilty verdict, an offender may change his/her attitude to the allegation and make a confession in the case.

While conducting corruption cases in the prosecution service and judiciary, we have to pay special attention to how our investigation and prosecution is seen by the public. Since a suspect in such a case is also a legal professional, the public tend to harbour doubts of a collusive relationship between suspects and the public prosecutor and judge who are dealing with the case. Therefore, we have to bear in mind that it is important to make the criminal procedure fair and impartial and seen to be fair and impartial. In this connection, I would like to take up as an example the first case mentioned in this presentation in which, since the suspect was the Deputy Chief of the District Public Prosecutors Office, was dealt with by public prosecutors of the Supreme Prosecutors Office. Other example can be seen concerning the activities of the Prosecution Review Commission. If the public prosecutor of the District Public Prosecutors Office starts a re-investigation and comes to disposing the case after the Commission's verdict, he/she has to seek approval by the Superintending Public Prosecutor of the High Public Prosecutors Office. This is because the former decision within the District Public Prosecutors Office should be re-examined by an official holding a higher rank and a neutral point of view.

In addition, if a judge is involved in corruption, the investigative authority should think about to which court it will apply for a warrant for investigation. This is because if the investigative authority seeks a warrant at a court where the judge suspected of corruption works, the investigative information may be leaked to that person. Therefore, an investigator should seek a warrant from a court other than the court where a suspect judge works, if the former court has jurisdiction to issue the warrant.

VI. CONCLUSION

I have explained the Japanese system to control corruption in the prosecutorial authorities and its effect in practice.

Each country has different types of problems. However, regarding corruption in which a prosecutor or a judge is involved, I believe that measures and techniques to combat corruption do not greatly differ among countries.

Since I have to say that Japan is also a country which has a problem with corruption, I hope that my presentation has given you some suggestions on how to combat similar problems in your own countries.

CORRUPTION CONTROL IN THE JUDICIARY IN JAPAN

Jun Oshino[*]

I. INTRODUCTION

"Japanese judges are among the most honest, politically independent and professionally competent in the world today ... Judicial corruption is virtually unknown. Judges do not take bribes" - *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust, (2005)* John O. Haley, Wiley B. Rutledge Professor of Law

" ... The media have rarely reported scandals or malfeasance involving judges. During the past 60 years since the end of World War II, only a handful of judges have been removed through impeachment, including three corruption-related dismissals. This figure shows that judges in Japan have relatively high integrity" - *National Integrity System: Transparency International Country Study Report: Japan 2006* Transparency International

"The extent of political and bureaucratic corruption that is prevailing in Japan has been well documented. However, there are still no indications that the prevailing Japanese judicial system is corrupt, or is suffering from the influence of bribery" - *Corruption in Japan – Institutionalizing the Right to Information, Transparency and the Right to Corruption-Free Governance (2004)* C. Raj Kumar, Lecturer, School of Law, City University of Hong Kong

In Japan, it is generally believed that almost no Japanese judges abuse their status or authority for private interest. For example, the Final Report of the Justice System Reform Council (2002), which reflected various public opinions in proposing comprehensive reform of the justice system in Japan, did not mention a corruption problem in the judiciary. As mentioned above, some foreign researchers have said that there seems to be no corruption in the Japanese judiciary.

I do not say that Japanese judges are perfect. I have to tell you that there have been a small number of corruption cases in the judiciary in the past. However, as far as I know, as a former assistant judge, I am sure that these are extraordinarily rare cases, and that most Japanese judges maintain their independence and integrity in order to ensure fair and impartial trials and public confidence in the judiciary.

Then naturally two questions may arise; are these observations really true, and if so, why and how does the Japanese system prevent corruption? It is not so easy to answer these questions, because it cannot be explained solely by introducing our legal framework. As I will explain later, the independence and status of judges are firmly secured in Japan. However, on the other hand, in general, too much independence may sometimes induce judges to abuse their power. To explain the long tradition and mindset of judicial integrity and how we harmonize it with judicial independence, it is necessary to explore the background and actual working style of Japanese judges.

Firstly, therefore, in this paper, I would like to explain briefly the historical development of the Japanese judiciary, citing cases, incidents and episodes related to judicial independence and integrity. It will help you to understand the historical background to their tradition and mindset. Then, I would like to

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explain the general legal framework and actual working conditions of Japanese judges, including appointment, training, salary, tenure and sanctions, which are related to their independence and integrity. Thirdly, I would like to explain my observations in answering these questions.

II. THE HISTORY AND DEVELOPMENT OF THE JUDICIARY IN JAPAN

A. The Meiji Constitution

1. Basic Court Structure

Japan has had two modern constitutions, one is the Constitution of 1889 and the other is the Constitution of 1946. The Constitution of 1889 is often called the Meiji Constitution, since it established the regime of Japan following the Meiji Restoration in 1868, which lasted until the end of the Second World War.[1] This regime was characterized as a constitutional monarchy with the Emperor as sovereign.

The Supreme Court in the Meiji Regime, which was called *Taishin-in*, was established in 1875, ahead of the promulgation of the Meiji Constitution.[2] *Taishin-in* was the highest appellant Court, and at the same time had original jurisdiction in some important cases. The lower courts were the High Courts, Circuit Courts and Prefectural Courts.

The Meiji Constitution was interpreted to guarantee judicial independence from the executive authority, while the administration of the judiciary was under the supervision of the Minister of Justice, as is common in countries of Continental Europe. Regarding the independence of Meiji era courts, there is a well-known case called the *Otsu* case.

2. Otsu Case

In May 1891, a policeman named Sanzo Tsuda on guard duty for the Crown Prince of Russia who was at that time travelling in Japan, tried to slash the Prince with a sword in *Otsu* City. The government, fearing grave consequences, asked the President of the Taishin-in, Iken Kojima, to have Tsuda sentenced to death, by an analogous application of provisions concerning offences against the Japanese Imperial household. However, the Penal Code then in force did not specifically regulate offences against members of a foreign royal household; no penalty heavier than imprisonment for life – the maximum punishment for an ordinary attempt at murder – was available under the code. Kojima rejected the government's interference, and encouraged the judges in charge of Tsuda's case not to allow themselves to become subject to such undue interference. Tsuda was given a sentence of imprisonment for life, not the death penalty.

Thus the judges dramatically guarded their independence, rejecting all governmental pressure. However, on the other hand, there were remarks that Kojima himself infringed judicial independence, because he was not presiding at the trial or hearing the case of Tsuda. There has been a lot of discussion regarding whether what Kojima did was justifiable. Nevertheless, the Otsu case has been quite often cited as the key incident in the maintenance of judicial independence in Japan.

B. The Present Constitution

1. Basic Court Structure

The present Constitution of Japan was promulgated on 3 November 1946, and entered into force on 3 May 1947. After the Second World War, Japan changed its legal framework as suggested by the General

1 The drafters of this Constitution referred to the German Constitution as a model of a constitutional monarchy.
2 The influence of *Cour de cassation* in France is often pointed out.

Headquarters of the occupying Allied Forces.[3] The constitutional monarchy with the sovereign Emperor was replaced by a constitutional democracy with sovereignty residing in the people.

The present Constitution provides for a fundamental separation of state powers. The legislative power is vested in the Diet, executive power is vested in the Cabinet, and all judicial power is vested in the Supreme Court and in other lower courts. The Constitution provides for checks and balances among these three powers, so that none of them may exercise their powers excessively.

The Constitution also strengthened the independence and autonomy of the judiciary. As well as the authority of judicial administration, the Constitution vested the Supreme Court with rule-making powers, whereas before the Second World War, this had been the responsibility of the Minister of Justice (Constitution Art 77 (I)). Since the end of the War, the Supreme Court has appointed and removed all officials other than judges, and manages the financial and other administrative affairs of the courts. In order to manage affairs concerning judicial administration, the General Secretariat and other agencies are attached to the Supreme Court.

2. Incidents Related to Judicial Independence

The independence of the judiciary includes independence from both internal and external influences. Article 81 of the Court Organization Law stipulates that the power of supervision of judicial administration shall not influence or restrict the judicial power of each judge.

The promulgation of the present Constitution was followed by cases or incidents in which the main issue was judicial independence. Among them was the 1948 *Urawa* incident the *Hiraga Letter* of 1969.

(i) The Urawa Incident

In 1948, a defendant was sentenced to three years' imprisonment with three years' suspension of execution of the sentence. The court found that she had become so depressed by her husband's gambling habits that she killed her children and attempted to kill herself. The Committee on Judicial Affairs of the House of Councillors researched this case, exercising the Diet's investigative power in relation to the government,[4] and concluded that the facts found by the courts were wrong and the sentence imposed was too lenient. The Supreme Court protested to the House of Councillors, while the Committee of the House of Councillors rebutted the Supreme Court.

(ii) The Hiraga Letter Incident

In 1969, the Chief Judge of Sapporo District Court, Mr. Hiraga, wrote a letter to a judge of the Court, Mr. Fukushima, who was a presiding judge of an on-going administrative case which involved serious and controversial constitutional issues. In this letter, Chief Judge Hiraga tried to advise Mr. Fukushima to avoid mentioning highly political and constitutional issues when rendering judgment. Judge Fukushima thought that the letter infringed his judicial independence and showed the letter to others. The Judicial Conference of Sapporo District Court gave strong warning to Mr. Hiraga, telling him that his letter may have unduly influenced Mr. Fukushima's exercise of judicial authority. The Supreme Court also warned him that the letter raised public doubts of judicial independence and fairness. Mr. Hiraga was relocated to the Tokyo High Court.

These cases or incidents are well known to Japanese jurists and legal students as important examples in discussing the meaning of judicial independence in Japan. Judges shall exercise their authority independently in accordance with their conscience and shall be bound only by the Constitution and the laws (Constitution Art 76 (III)). The purpose of institutional independence of the judiciary is to secure from undue external or internal influence, including from the court itself, the independence of each judge in the exercise of his/her authority. Japanese judges bear in mind the importance and responsibility

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3 Consequently, we see remarkable influences of the United States system on the Constitution and other legislation drafted in the late 1940s and early 1950s.

4 Article 62 of the present Constitution.

of their positions.

C. Episode Related to Judicial Integrity (Episode of Judge Yamaguchi)

With regard to judicial integrity, the so called "Episode of Judge Yamaguchi" is well known. In the 1950's, Japanese markets were under Government control because of the economic confusion which followed World War II. The Government issued tickets to the public with which they could buy goods. However, not enough tickets were issued to allow people to live and so food and other goods were traded on the black market. It was a violation of the economic control laws but it was necessary for survival. However, as a criminal judge who had to punish violations of the economic control law, Judge Yamaguchi decided not to violate the laws and he only ate food which he obtained legally, knowing that it would endanger his life. He died from malnutrition.

His actions were criticized as extreme, but for jurists, this episode is regarded as an example of the heavy responsibility that judges bear, even in their private lives. Among Japanese judges, in general, there is a tendency to be upstanding and to have the appearance of being upstanding not only in public but also in their private lives.

III. INTEGRITY IN THE CURRENT JAPANESE JUDICIAL SYSTEM

A. The Courts

To explain the status of Japanese judges, it is necessary to touch upon the basic structure of the Japanese courts. There are five types of courts in Japan: the Supreme Court, High Court, District Court, Family Court and Summary Court. Numbers after each title show the number of each court.

(i) Supreme Court (1)

The Supreme Court is the highest court in Japan and consists of 15 Justices. The Supreme Court exercises appellate jurisdiction of Jokoku appeals and Kokoku appeals as provided by law. It ordinarily hears a Jokoku appeal from a High Court if the case involves a constitutional issue or a result contrary to precedents of the Supreme Court or High Court. The Supreme Court may also hear at its discretion Jokoku appeals of any case which involves an important point of statutory interpretation.

(ii) High Courts (8 with 6 branch offices)

The High Courts have jurisdiction over Koso appeals filed against judgments rendered by the District Courts and Family Courts, as well as the Summary Courts in criminal cases. High Court cases are heard by a collegiate body of judges.

(iii) District Courts (50 with 233 branch offices)

District Courts have general jurisdiction over all civil and criminal cases in the first instance, except for those cases exclusively reserved for Summary Courts, Family Courts and High Courts. The majority of District Court cases are tried by a single judge. However, with regard to criminal cases; cases involving a possible sentence of death; life imprisonment; or "imprisonment for a minimum period of not less than one year" are handled by a collegiate court of three judges. This also applies to any other cases deemed appropriate. The former are called "statutory collegiate cases" and the latter "discretionary collegiate cases." With regard to civil cases, major cases are also heard by a collegiate court of three judges as discretionary collegiate cases.

(iv) Family Courts (50 with 233 branch offices and 77 local offices)

The Family Courts have jurisdiction primarily over family disputes and juvenile delinquency

cases (involving persons under 20 years of age). Additionally, these courts handle adult criminal cases involving offences harmful to the welfare of juveniles.

(v) Summary Courts (438)

The Summary Courts have jurisdiction over minor civil and criminal cases. All cases are presided over by a single Summary Court judge.

B. Judges

1. Status of Justices of the Supreme Court

The Justices of the Supreme Court are appointed by the Cabinet, with the exception of the Chief Justice, who is appointed by the Emperor as designated by the Cabinet.[5] At least ten of the fifteen, including the Chief Justice, must be appointed from among those with distinguished careers as lower court judges, public prosecutors, private attorneys or law professors. However, the remaining five Justices need not be qualified as jurists, as long as they are learned, have an extensive knowledge of the law, and are at least 40 years of age.[6] Having non-jurists in the Supreme Court may imply that the original idea of the Supreme Court was rather closer to that of a Constitutional court, since it is uncommon to have such people in the appellate courts of other countries.

The appointment of the Justices is reviewed by the people at the first general election of members of the House of Representatives following their appointment, and in addition, they are subject to review at the first general election of members of the House of Representatives after a lapse of ten years, and in the same manner thereafter. If the majority of the voters favour the dismissal of a justice, he/she shall be dismissed. To date no Justices have been removed by this recall system. There have been criticisms that this recall system exists in name only.

The justices of the Supreme Court retire at the age of 70.

2. Status of Judges of Lower Courts

(i) Qualification, Appointment and Training Process - Career Judge System

All lower court judges are appointed by the Cabinet, from a list of persons nominated by the Supreme Court. Since 2003, as a rule, in nominating inferior court judges the Supreme Court must consult with the Advisory Committee for the Nomination of Inferior Court Judges. Once appointed, most judges serve until retirement, which is 65 years of age for lower court judges, and 70 years of age for Supreme Court judges. In general, judges are continuously reappointed every ten years, unless judicially declared mentally or physically incompetent to perform their official duties or unless publicly impeached. However, there is an opportunity to review the vocation of judges every ten years.

Inferior court judges are categorized as fully-fledged judges, assistant judges or summary court judges.

The assistant judge system aims to provide professional experience through on-the-job training as an assistant judge before qualifying as a fully-fledged judge. Assistant judges are appointed from among those who have passed the National Law Examination, have completed 12 or 16 months of training as a legal trainee in the Legal Training and Research Institute of the Supreme Court, and passed the final qualifying examination. This qualification process is same as that for prosecutors and private attorneys.

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5 This means the Chief Justice is of the same rank as the Prime Minister. Other Justices' ranks are as high as those of Ministers of the cabinet.

6 According to recent practice, the backgrounds of Justices include six judges, four practicing lawyers, two public prosecutors, two administrative officials and one university professor.

Until the introduction of the law school system in 2004, only 2 or 3 % of examinees passed the National Bar Exam. Since 2006, it became mandatory to study for two or three years in a law school before taking the new National Bar Exam. The passing rate increased dramatically, but is still less than 50 %.

The majority of newly appointed assistant judges are graduates of the Legal Training and Research Institute of the Supreme Court. According to recent statistics, less than 10 % of legal trainees can be appointed as assistant judges. The result is that assistant judges are those who survive a tough selection process.

During the legal training period, he/she will spend at least four months in a judge's chamber to get practical training. Judges are often observed by the legal trainees, even in their chamber. This working style helps to keep the judges focussed on high standards and good examples.

For the first five years, he/she can be an associate judge of a three-judge court. However, when acting alone, he/she does not have the authority to preside at any trial. His/her authority as a single judge is restricted to matters outside the trial stage.

Therefore, generally, at least for the first two years, they are assigned to a division of the District Court. Usually each division consists of three or four judges (including the Chief Judge of the division who presides over a three-judge court) who work in one chamber. Therefore, a young assistant judge can learn a lot from senior judges of the same division, including judicial tradition and mindset. The Chief Judge of the division usually has more than fifteen years' experience, while the senior associate judge usually has at least five years' experience. This process also helps new judges to inherit the tradition of integrity.

After that, the assistant judge is transferred to another court. This time, he/she will work not only as an associate judge of the three-judge court, but also a single judge in different kinds of procedures, such as juvenile hearings. After three years' experience, he/she can be appointed a summary court judge.

After five years' experience, an assistant judge is qualified as a senior assistant judge to preside over a trial in a single-judge court.

To be a fully-fledged judge, it is necessary to have practical experience of not less than ten years as an assistant judge, a public prosecutor, a practicing lawyer, a professor of law at a designated university, or equivalent related experience as prescribed by statute. However, most are appointed from among the ranks of assistant judges.

During these periods, there are some opportunities to train at the Legal Training and Research Institute of the Supreme Court for a few weeks.

I believe that this career judge mechanism, including the qualification process, appointment, promotion and training system play an important role in maintaining our tradition of integrity.

In contrast, Summary Court judges can be appointed from among individuals unqualified as jurists. In practice, they are appointed primarily from among learned and experienced court clerks who are selected by a special Supreme Court committee.

(ii) Security of Status and Job Rotation System

Judges are protected from being unwillingly removed, transferred, relocated, suspended or deducted remuneration（Constitution Art. 78, 79 (VI), 80 (I), Court Organization Law Art. 48）.

However, in practice, a job rotation system exists. The Supreme Court has the authority not only to nominate candidates to be lower court judges, including the President of the High Courts, but also to assign judges to a specific court. If this assignment includes relocation or transfer, it requires the consent

of the judge. Judges are asked whether they can agree on relocation or transfer from one court to another court every three or four years. The main purpose of this job rotation system is to give as many opportunities as possible to each judge, avoiding disparity between them. Many judges want to work in the major cities, but most understand the necessity of job rotation and usually agree to it. This rotation system also helps to prevent judges from establishing collusive relationships with particular persons in one area.

(iii) Sufficient Salary

The judges shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office (Constitution Art 80 (II)). In practice, there is a remuneration promotion chart which is applicable to both judges and prosecutors. To some levels of fully-fledged judges, remuneration is mechanically raised according to this chart. As of April 2007, the basic monthly salary for a newly appointed assistant judge is JPY320,100 (approximately US$2,900) and for newly appointed fully-fledged judge is JPY533,000 (approximately US$4,800). This amount appears less than that of prosperous private attorneys, but it is enough to live on without the temptation to accept bribes.

(iv) Judicial Administrative Supervision by the Supreme Court or Delegated Lower Courts

As I mentioned before, the Supreme Court or delegated Lower Courts have the power to exercise judicial administration including the rule-making power related to the internal discipline of the courts (Constitution Art 77).[7] As a kind of judicial administrative supervision, the court can give cautions to judges for misbehaviour or misconduct, as long as it does not infringe their independence (Court Organization Law, Art. 80, 81). Courts will exercise this power upon the resolutions of the Judicial Conference, which consists of Justices or fully-fledged judges of the court.

If such misbehaviour or misconduct is more serious, more formal sanctions under the Law of Impeachment of Judges or the Law Concerning Status of Judges are considered.

This supervision also maintains judicial integrity.

(v) National Public Service Ethics Law and the Judiciary

In Japan, there is no unified judicial code of conduct. Ethical Principles which are stipulated in the National Public Service Law (enacted in 1947), the National Public Service Ethics Law (enacted in 1999) and the Rules of Conduct for National Public Service (enacted in 2000) are applied to prosecutors, but are not directly applied to judges.

The Supreme Court enacted the Ethical Rule for Court Officials, which is applied to court officials other than judges. However, in 2000, Chief Judges of High Courts agreed on following statement; “The integrity of judges has been highly maintained by long historical efforts, however, considering the enactment of the National Public Service Ethics Law, judges shall respect this Law, the related Cabinet Order and the Ethical Rules enacted by Supreme Court, in relation to persons concerned with cases”. They also stated that the extra income reporting system and the ethical supervisory system, which are stipulated in the National Public Service Ethics Law, may not be applied to judges. However, general principles stipulated in the National Public Service Ethics Law, such as equal treatment, fair exercise of authority, prohibition of the abuse of power for private interest, prohibition of behaviour dubious to public good and those in the National Public Servant Law, such as obligation to give undivided attention to duty, obligation to preserve secrecy, prohibition of acts causing discredit, had already been recommended as ethical guidelines for judges. In addition, the Court Organization Law stipulates prohibition of concurrent posts to gain extra income, prohibition of being a member of the National Diet or Local Assembly and prohibition of aggressive participation in political activity, all of which are

[7] Rule-making power originates in common law countries, not in civil law countries. Japan modeled this system on the system of the United States.

directly applied to judges.

In this sense, it is possible to say that ethical guidelines of conduct for judges have been developed and observed to some extent.

3. Sanctions against Corrupt Judges to Restore Judicial Integrity

(i) Criminal Sanctions

In Japan, like many other countries, there is no immunity for judges in criminal cases. Judges can be prosecuted and tried in an ordinary criminal procedure. Like other public officials, if a judge is sentenced to imprisonment, even with suspension of execution, he/she will be disqualified as a jurist.

Since WWII, only four judges have been indicted and sentenced to imprisonment with or without suspension of execution in a criminal trial. Among them, there has been only one bribery case, in 1954. In this case, after the judge retired, it was revealed that he had been entertained by a party in the case. Two of the cases concern abuse of authority for private interest. These cases date from 1982 and 1983. In the 1982 case, a summary judge had a sexual relationship with a female defendant. In the 1983 case, an assistant judge visited a prison and examined the secret record of a former prisoner which is unnecessary for a judge to exercise his/her duty. In these cases, the judges had been removed from their positions before sentencing.

Apart from these cases, no judge has been indicted for corruption. These were extraordinarily rare cases. However, they have served as sufficient warnings to judges to maintain high standards of behaviour.

(ii) Administrative Sanctions

No disciplinary action against judges shall be administered by any executive organ or agency (Constitution Art. 78). Instead, there are some measures which can be taken by a legislative or judicial body to impose sanctions on judges whose behaviour has compromised their integrity: (a) Sanction by the Law for Impeachment of Judges, (b) Sanction by the Law Concerning Status of Judges.

These measures are rarely taken, but exist as a safeguard to ensure judicial integrity:

(a) Sanction by the Law for Impeachment of Judges (Dismissal)

Only the Judicial Impeachment Court, which is a legislative body composed of Representatives and Councillors drawn from the Diet, may dismiss a judge as a disciplinary sanction (Constitution Art. 78). It can dismiss the judge only if he/she (1) neglects his/her duties to a remarkable degree, or (2) committed misconduct which will cause extreme harm to the integrity of the judiciary, whether or not it relates to official duties (the Law for Impeachment of Judges, Art. 2). This is one of the checks and balances systems between the three branches of government.

With regard to the procedure for impeachment of judges, the Judges Indictment Committee, also a legislative body composed of Representatives and Councillors drawn from the Diet, has the sole authority to indict a suspected judge in the Judicial Impeachment Court. Anyone can file a complaint to the Committee. The Supreme Court also has the authority to file a complaint. Every year, hundreds of complaints from losing parties etc. are received by the Committee. However, owing to strict screening by the Committee to review whether or not there is sufficient reason and evidence, only seven cases have been indicted and only five judges have been dismissed by the Judicial Impeachment Court since World War II.

Of those five judges who were dismissed, only three of them were removed for corrupt behaviour. One summary court judge was removed in 1957 because he was entertained by an applicant for mediation. One assistant judge of the bankruptcy division of the District Court was removed in 1981 because he received two golf clubs, a golf bag and two business suits from a bankrupt trustee whose case he handled. He was also arrested, but the value of the bribery was not enough to merit prosecution and he was released after being detained. He was dealt with by suspension of prosecution.

If a judge is dismissed by the Judicial Impeachment Court, he/she will also be disqualified as a jurist and cannot work as a private lawyer. This is sufficient sanction for them.

This system of sanctions plays a key role in restraining judges from engaging in corruption.

(b) Sanction by the Law Concerning Status of Judges (Disciplinary Sanction)

In Japan each High Court can impose disciplinary sanctions against judges under its jurisdiction. The disciplinary sanctions are only minor fines (less than JPY 10,000) and reprimands.

These sanctions seem light but the effect of a warning is enough. This system is also thought to contribute to the prevention of corruption by judges.

4. Other Measures also Useful in Ensuring Judicial Integrity

In Japan, some measures are taken to ensure fair, impartial, transparent and accountable court proceedings. From a different angle, I can say that these are also useful for preventing opportunities for judicial corruption.

(i) Mechanical Case Assignment

In every court and for every type of case, whether civil, criminal, juvenile or domestic, the case is assigned to judges mechanically according to a pre-designated order. This avoids the possibility that cases will be assigned at the request of a particular prosecutor, court or judge. In addition, there is an exclusion, avoidance or refusal system so that particular judges and court clerks who have close relationships with parties of the case can avoid conflicts of interest.

(ii) Collegiate Court System

In Japan, major cases are usually judged by a collegiate court of three judges. Of course, the parties have the right to appeal. These systems may act as a check. As I mentioned before, our typical working style, sharing one chamber with other judges and a legal trainee, also helps to avoid falling into self-satisfaction in our working habits.

(iii) Transparent Proceedings

The Constitution stipulates that, “trials must be conducted and judgments must be declared publicly”, and “in all criminal cases, the accused shall enjoy the right to a speedy and public trial”. Exceptions to public trials are permitted under extremely strict conditions. In civil cases, the procedure of adjustment of the issue is often held in a room other than an open court. In practice, during this process, judges often seek the possibility of settlement. However, judges are encouraged to distinguish the procedure for adjustment of the issues from settlement conferences. For the former purpose, it is necessary for judges to speak in front of both parties. For the latter purpose, judges often prefer to exchange opinions with each party separately. But knowing that some people may feel suspicious of the possibility of collusive conversation, judges usually ask each party whether this manner is acceptable for them before doing so.

(iv) Transparent and Accountable Judgment

Judgments are announced in open court and are printed after announcement. Judges must provide sufficient reasons in the judgment, and usually cite the necessary evidence and factors considered in reaching a decision. In serious cases, judges often give summaries of judgments and reasons to the mass-media for prompt reporting. Also, information technology enables prosecutors’ offices and courts to develop databases of sentencing precedents with necessary factors, so that judges can avoid disparity among their judgments. Furthermore, the documents are open to the public after the case is completely finalized. Therefore, the judgment is exposed to the criticism of

the parties to the case, the media and the public. Hence, it is difficult for judges to render unreasonable judgment for private interest, because it can be quickly and easily identified by the system of making judgments public.

(v) Participation of Lay Persons in the Judiciary

Particularly in Summary Courts and Family Courts, lay persons take part in civil or family affairs proceedings. They assist judges in various ways, by acting as conciliation commissioners or judicial commissioners etc. One main purpose of these systems is to utilize lay persons' experience, skill or opinion for appropriate disposition, but it also helps to secure transparency and accountability in the judicial proceedings.

IV. CONCLUSION

Japanese judges, in general, have an excellent reputation for balancing their independence and integrity. In my opinion, the following points support Japanese judges' incentives in maintaining their integrity.

- The balance of sufficient security of judges' status and its appropriate limitation, such as reasonable remuneration, reappointment every ten years, the placement rotation system and exceptional disciplinary processes.
- A highly competitive and fair selection process and well-considered training in the career judge system, from which the majority of judges are appointed.
- Historically developed tradition, pride and mindset of judges.
- Transparent and accountable court proceedings

However, maintaining integrity is a great challenge. Also, integrity is just one virtue that judges should have. For example, Japanese judges have recently been recommended to gain more experience outside the judiciary in order to broaden their perspectives. Japanese judges are also required to strengthen their competence.

In addition, the judicial system varies from country to country. Of course, the Japanese model is not directly applicable to other countries. To strengthen corruption control in the judiciary, we should keep in mind the balance between independence and necessary checks in respective countries. A comprehensive approach should be considered.

I hope the Japanese experience provides some useful information to respective countries.

STRENGTHENING JUDICIAL INTEGRITY AND CAPACITY – SUCCESSES AND LESSONS LEARNED[1]

Oliver Stolpe[2]

I. INTRODUCTION

The implementation of all other rights ultimately depends upon the proper administration of justice. Yet, it is only recently that the implications of the integrity of the justice system for the rule of law have been fully acknowledged. A lack of judicial integrity threatens its independence and fairness and undermines the rule of law – a key prerequisite for economic growth and the eradication of poverty.[3] Effective protection of human rights and human security require well-functioning judiciary with integrity, which is capable of interpreting and enforcing the law in an equitable, efficient and predictable manner. A fair trial, one of the most fundamental human rights, can only be achieved through an impartial tribunal and the procedural equality of parties.

Judicial corruption appears to be a global problem. It is not restricted to a specific country or region. Yet manifestations of corruption or other related forms of the abuse of power seem to be at their worst in developing countries and countries in transition. According to the Geneva-based Centre for the Independence of Judges and Lawyers, of the 48 countries covered in its annual report for 1999, judicial corruption was "pervasive" in 30 countries.[4]

Since 2000 the UN Office on Drugs and Crime (UNODC) has been supporting the development and implementation of good practices in judicial reform through its Global Programme against Corruption. UNODC's initial rationale for addressing judicial reform stemmed from the increasing accounts of widespread corruption in the judiciary in many parts of the world.[5] It soon became evident, however, that judicial corruption could only be addressed effectively as part of a broader, systematic and sustainable approach aimed at enhancing both the integrity and the capacity of the judiciary and the courts.

More specifically, UNODC initiated in 2000 under the guidance of an international group of chief

1 An earlier version of this article has been published under the title "Assisting judicial reform: lessons from UNODCs experience" in the Transparency International Global Corruption Report 2007, Corruption in Judicial Systems, p. 159-164 (co-authored with Fabrizio Sarrica)

2 Oliver Stolpe works for the Global Programme against Corruption of the United Nations Office on Drugs and Crime. The views expressed in the present publication are those of the author, and do not necessarily reflect the views of the United Nations.

3 Petter Langseth and Oliver Stolpe, Strengthening Judicial Integrity against Corruption in Yearbook of the Centre for the Independence of Judges and Lawyers, 2000, pp. 53-71; Petter Langseth and Oliver Stolpe, The United Nations' Approach to Helping Countries Helping Themselves by Strengthening Judicial Integrity: a Case Study from Nigeria, in Corruption, Integrity and Law Enforcement, Kluwer Law International 2002, pp. 309-333

4 Centre for the Independence of Judges and Lawyers, Ninth annual Report on Attacks on Justice, March 1997 - February 1999.

5 In a survey conducted in Mauritius, between 15 and 22 per cent of the interviewees stated that "all" or "most" of the magistrates were "corrupt." According to a similar survey conducted in Tanzania in 1996, 32 per cent of the respondents who were in contact with the judiciary had actually paid "extra" to receive the service. In Uganda in 1998, over 50 per cent of those who came into contact with the courts reported to have paid bribes to officials. The number, however, decreased significantly with only 29% of the respondents claiming to have bribed the judiciary in 2002. In a survey carried out for the World Bank in Cambodia, 64 per cent of the interviewees agreed with the statement "the Judicial system is very corrupt", and 40 per cent of those who had been in contact with the judiciary had actually paid bribes. A recent national household survey on corruption in Bangladesh revealed that 63 per cent of those involved in litigation had paid bribes either to court officials or to the opponent's lawyer and 89 per cent of those surveyed were convinced that judges were corrupt. In the Philippines, 62 per cent of the respondents believed that there were significant levels of corruption within the judiciary. In a similar study conducted by the World Bank in Latvia, 40 per cent of the respondents who had dealings with the court system reported that bribes to judges and prosecutors were frequent. In Nicaragua, 46 per cent of those surveyed who had dealings with the court system stated that there was corruption in the judiciary; 15 per cent had actually received indication that the payment of a bribe was expected. In Bolivia, 30 per cent of the respondents to a service-delivery survey were asked for a bribe upon contact with the judiciary, and 18 per cent actually paid a bribe. Petter Langseth, Oliver Stolpe, Strengthening Judicial Integrity against Corruption, CICP-Global Programme against Corruption. http://www.unodc.org/pdf/crime/gpacpublications/cicp10.pdf, published first in the CIJL Yearbook, 2000

justices and senior judges a programme aimed to support countries in strengthening judicial integrity and capacity. Technical assistance focuses on improving access to justice, enhancing the quality and timeliness of justice delivery, strengthening public trust in the judiciary, establishing safeguards for professional ethics, and facilitating coordination across justice sector institutions.[6]

At the international level, UNODC promotes the development and dissemination of international standards as well as tools for their effective implementation at the domestic level. In 2000 UNODC in collaboration with Transparency International convened a first meeting for chief justices and senior judges from eight Asian and African States with the purpose of considering ways of strengthening judicial institutions and procedures in the participating states and beyond. Through a series of meetings since then the group devised a list of priority actions to strengthen judicial capacity,[7] an outline for assessing justice sector integrity and capacity,[8] the Bangalore Principles of Judicial Conduct[9], a code of conduct for court employees[10], a Commentary on the Bangalore Principles of Judicial Conduct, as well as a training manual on judicial ethics. Other forthcoming tools include an e-learning tool on judicial ethics and a technical guide for the strengthening of judicial ethics and capacities.[11]

UNODC has provided support in strengthening judicial integrity and capacity to Nigeria, South Africa, Indonesia, Mozambique and Iran, cooperating with a variety of partners including UNDP, GTZ, DFID, and USAID. Further projects are planned for Montenegro and Kenya. This paper draws in particular on experiences in Indonesia, Nigeria and South Africa, which show that low-cost reforms can have a significant positive impact on access to justice, timeliness and quality of justice delivery, independence, impartiality and fairness of the justice system, integrity, accountability and oversight of justice sector professionals, and coordination among various justice sector institutions.

II. ASSESSING JUSTICE SECTOR INTEGRITY AND CAPACITY

As a first step UNODC supports the conduct of a comprehensive assessment of justice-sector integrity and capacity in the country concerned. Assessments aim to produce a comprehensive and detailed picture of the status quo of the country's justice sector, adopting a variety of methodologies including desk research, surveys and focus groups.[12] A second purpose of the assessment is to provide a baseline against which the impact of reforms can be measured.

The survey instruments are administered to a large set of stakeholders both inside and outside the justice sector, including judges, prosecutors, police court staff, lawyers, business people, court users (e.g. litigants, accused, witnesses and experts) and prisoners awaiting trial. All are asked questions about:

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6 For further information on technical assistance provided by UNODC in the area of judicial integrity and capacity, see http://www.unodc.org/unodc/en/corruption.html

7 First Meeting of the Judicial Group on Strengthening Judicial Integrity, Vienna, April 2000. Available at www.unodc.org/pdf/crime/gpacpublications/cicp6.pdf

8 Second Meeting of the Judicial Group on Strengthening Judicial Integrity, Bangalore, February 2001. Available at www.unodc.org/pdf/crime/gpacpublications/cicp5.pdf

9 Third Meeting of the Judicial Group on Strengthening Judicial Integrity, Colombo, January 2003. Available at www.unodc.org/pdf/crime/corruption/judicial_group/Third_Judicial_Group_report.pdf

10 Fourth Meeting of the Judicial Group on Strengthening Judicial Integrity, Vienna, 27-28 October 2005. Available at www.unodc.org/pdf/corruption/publication_jig4.pdf

11 For further information on the work of the judicial group on strengthening judicial integrity and capacity, http://www.unodc.org/unodc/en/corruption_judiciary.html

12 See UNODC, 'Assessment of Justice Sector Integrity and Capacity in Two Indonesian Provinces', technical assessment report, Vienna-Jakarta, March 2006; UNODC, 'Assessment if the Integrity and Capacity of the Justice System in Three Nigerian States', technical assessment report, Vienna, January 2000; UNODC, 'Assessment of the Integrity and Capacity of the Justice System in South African Courts', technical assessment report, Pretoria-Vienna (unpublished).

- Access to justice
- Timeliness of justice delivery
- Quality of justice delivery
- Independence, impartiality and fairness of the courts
- Levels, locations, types and costs of corruption within the justice sector
- Functioning of accountability and integrity safeguards in the justice sector.
- Coordination and cooperation across the justice sector institutions
- Public trust in the justice system

A key element of the assessment methodology is the strong reliance on local ownership, fostered through the participatory review and adaptation of the survey instruments as well as through participatory data analysis conducted by focus groups.

In Nigeria, in 2002, 5,766 stakeholders were interviewed across three states, Lagos, Delta and Borno. When the assessment was repeated in 2007 a total o 10,000 stakeholders were interview across 10 States. In Indonesia 2,485 stakeholders were interviewed in two provinces, South Sumatra and South East Sulawesi; and 1,268 stakeholders were interviewed across three South African provinces.

As far as access to justice is concerned, assessments explored the coverage of the territory by courts, the affordability of court and lawyer fees, the ease of access to information on basic rights, the functioning of the justice process and the statutes affecting one's own case as well as the access of prisoners awaiting trial to legal services, their knowledge about the possibility to apply for bail, and the average number of months they spend in remand.

Access to justice was a major problem in all three countries but it was found that access to information was far more problematic than physical or economic access to courts. In Indonesia, more than 60 per cent of people in prison awaiting trial were not aware of the possibility of bail and more than 70 per cent had not retained a lawyer. In several jurisdictions affordability turned out to be more closely related to the number of times a court adjourned a case, than to lawyers' fees. In Nigeria, in 2002, court users had to face on average 7-8 adjournments before resolving a case, and only 15 per cent of users found courts affordable. Access to justice has proven to be closely related with corruption. Analysis of the results of the assessments showed that the respondents who had greater difficulties in accessing the courts were also more likely to be confronted with demands for bribes; people who had to return to court several times for the same case were the ones that were asked to pay bribes more frequently.

While the timeliness of proceedings differed significantly across countries, users consistently perceived the courts as too slow. Nigerian courts in 2002 were by far the slowest with users waiting on average 16–35 months to resolve their cases. In Indonesia (2004) users waited 6–12 months for adjudication. South African (2005) court users waited on average 3–6 months for cases to be solved, nevertheless 51 per cent felt that courts were still too slow.

Causes for delays also differed between countries, ranging from high average caseloads per judge, the complexity of procedural law, the lack of well trained staff, to the lack of sufficient resources and working tools. A significant cause of delay is also linked to the difficult cooperation and coordination between various criminal justice institutions. E.g. in Nigeria, focus group discussions revealed that many of the delays are caused by the uncoordinated transfer of investigating police officers and police prosecutors, by the prison authorities not producing the accused in court as scheduled, and by the Attorney General's Office not providing its legal opinion on case files in time. While many of these delays are linked to a lack of capacity, equipment and professional preparation within the institutions involved, it became evident that some times these delays are used strategically by the justice sector professionals to extort bribes from the accused or their families.

The quality of service provided by courts was difficult to assess as stakeholders' opinions tended to reflect their general state of confidence in the justice system. The assessments sought therefore to identify more objective indicators to provide an indirect measure of the quality of justice delivery. These included: the use of non-adversarial dispute resolution techniques; the availability of written guidelines concerning court management; the quality of court-record keeping, the level of computerisation of the courts; the frequency and comprehensive nature of performance evaluation; and the predictability and consistency of laws and jurisprudence.

When examining these indicators, it turned out that in all three countries various techniques are used to resolve cases without adversarial proceedings. About 80 per cent of surveyed judges in Indonesia reported using mediation techniques, while 30–40 per cent in Nigeria insisted on receiving from lawyers a certificate that settlement attempts had been tried without success. In South Africa one third of judges interviewed reported using settlement conferences.

Levels of computerisation varied significantly. In Nigeria, in 2002, only 5–15 per cent of judicial officers had been equipped with computers and in less than 4 per cent of the cases, these computers were used for case management, while in Indonesia more than 70 per cent of courts are computerised. One of the main problems which hamper the computerisation of courts is the lack of pre-established standard requirements of hard and software to be purchased. This has lead in some cases to the purchasing of the wrong or incompatible equipment. Moreover, the lack a thorough needs assessments and maintenance plan leads often to a situation where equipment is not being utilized effectively or small malfunctioning cannot be addressed as no budgetary provisions have been made for that purpose.

Another focus of the assessments was the frequency, nature, cost and causes of corruption in courts. The intention was to explore where and how corruption occurs with a view to identifying counter-measures. For that reason experience and perception of corruption were both explored. In Nigeria (2002) and Indonesia (2004) a large portion of respondents had experienced bribery, whereas South African court users (2005) had low experiences of corruption in the courts, yet more than half of them perceived the justice system as corrupt.

The causes of corruption differed. In Nigerian courts the main reason for paying bribes was to expedite the court process or be granted bail; while in Indonesia bribes were mainly paid to obtain a more favourable judgement or sentence. Other court-related procedures identified as related to corruption included: delays in the execution of court orders; unjustifiable issuance of summons; prisoners not being brought to court; lack of public access to copies of court orders and decisions; disappearance of files; unusual variations in sentencing; delays in the delivery of judgments; high rates of decisions in favour of the executive; and appointments resulting from political patronage.

On the issue of corruption within the judiciary there were variations in response according to profession and gender. In Nigeria lawyers and business people were more likely to experience corruption and to perceive the courts as corrupt.[13] Also in Nigeria, female judges perceived the justice system in general as less fair and impartial than their male colleagues.

In South Sumatra lawyers had the worst opinion of the judicial system, while in South East Sulawesi it was businesses and court users who evaluated the integrity of the judiciary most negatively. At the same time only 3.6 per cent of the judges in Sumatra and only 10.3 per cent of those in South East Sulawesi admitted to have any knowledge of bribery in the courts. This compares with 61.5 percent of

[13] There could be various reasons for these differences, for example lawyers and business people may be more likely to bribe judicial officers and court staff on their own initiative or to respond to requests for bribes because they know that this is the only way to get things done. It is also possible that court users, owing to a lack of knowledge, are often defrauded by court staff requesting payments for services that should be free of charge, rather than asking for a bribe.

lawyers and 45.1 per cent of court users in Sumatra who knew of a concrete case in which a court user paid a bribe; and 47.5 per cent of lawyers and 31.2 percent of court users in South East Sulawesi.

With regard to the independence, impartiality and fairness of the courts, users and operators in all three countries were sceptical. In Nigeria, in 2002, half of judges agreed that the government controlled the judiciary and more than half of lawyers regarded courts' decisions as influenced by politics. More specifically, 18% of the judges felt that judicial appointments were politically influenced and not based on merit, while 50% of the lawyers claimed to know of judicial decisions that had been inspired by politics. In Indonesia, half of judges and more than 60 per cent of prosecutors had experienced political interference in judicial decision-making. In South Africa, on average 15% of the magistrates believed that politics, social status and race commonly affected the outcome of judicial decisions.

Public trust was assessed by exploring the inclination of users and business people to use the courts. In 2002, in Nigeria, more than 40% of the court users indicated that they would not use the courts again based on their prior experiences, and approximately the same percentage claimed that they had not used the courts in the past despite the need to do so. In Indonesia, around half of users and up to 70 per cent of business people had not used the courts in the previous two years, though they felt the need to do so, because they perceived them as too corrupt or expensive.

Convincing counterparts of the benefits of an assessment is not always easy. Justice-sector operators believe they know well the shortcomings of the justice system and can propose appropriate remedies. In addition, they may fear negative results and that revealing them in the media will further undermine trust in the justice system. Special care must therefore be taken to foster ownership of the assessment among members of justice institutions.

UNODC seeks to achieve this in two ways: first, stakeholders are involved in the review of the assessment methodology and its adaptation to the specific legal and institutional conditions of their country; and, secondly, stakeholders are later involved in a process of participatory data analysis. Furthermore, perceptions of the justice system are mostly worse than experiences. Thus in some cases justice-sector operators may be convinced to accept the need for an assessment because its results could help rectifying overly negative perceptions among the general public. Finally, evidence-based planning is only possible where the data has a high level of credibility with regard to sample size, methodology, specificity of information obtained, and the independence and professionalism of the entity responsible for data collection, as the results would otherwise be challenged. Further dialogue focuses then on the validity of the findings, rather than designing measures to address the problems identified.

While all stakeholders were interviewed about their perceptions and experiences with regard to the police, UNODC did not include questionnaires for the police in its assessment methodology. Involving the police was considered unpractical and discarded for a variety of reasons. Stakeholders in different countries considered this a mistake; in some environments it was easier for police to refute the data on the grounds that they had not been involved in designing the assessment methodology or data collection, and that the perceptions of stakeholders were therefore biased.

Overall the results of the surveys were revealing, often contradicting the perceptions of justice-sector operators with regard to the shortcomings of the justice system, as well as their root causes. In some cases, they demonstrated that commonly held views about the justice system are not always justified. In all cases the assessments revealed interlinks suggesting unexpected root causes, as well as potential solutions, which are keys for guiding the subsequent process of policy development and strategic planning.

However, the most important lesson emerged after the repetition of the assessment in Nigeria in 2007 when it became evident how much progress had been made against the initial baseline of 2002. The

fact that for the first time it was possible to demonstrate measurable improvements in terms of integrity and capacity of the justice sector became the single most important factor to reinforce support for the reform effort within the judiciary as well as to promote increased cooperation and contribution by the executive and the legislator.

III. ACTION PLAN DEVELOPMENT AND IMPLEMENTATION

The action planning draws from the findings of the assessment, aiming to formulate policies and measures that address the weaknesses identified. Besides coherent and realistic identification of objectives, activities, responsibilities, timeframes and costs, the main aim is to ensure ownership of the action plan by stakeholders. This has proven more difficult than expected for a variety of reasons. Where institutions are weak, their capacity to manage and monitor implementation of action plans is underdeveloped. This is particularly true for judiciaries since they are typically small, limited in managerial capacity and unable to absorb additional time-consuming tasks such as the coordination and management of an action plan. Moreover, most judiciaries are dependent on the executive and legislature for the provision of funding. Budgetary allocation have minimal flexibility and often do not even allow for relatively small ad-hoc investments, e.g. to cover the costs of regular coordination meetings. Finally, while action plans target mainly the judiciary, substantial inputs are required from other criminal-justice institutions. Since the latter do not directly profit from the project, they were sometimes reluctant to contribute.

UNODC sought to foster local ownership through the formation of implementation committees, typically composed of stakeholder groups such as the Ministry of Justice, the judiciary, prosecution service, the police, prisons, the bar, NGOs, academia and the private sector. In some cases, implementation committees also included a member of the local anti-corruption body. Committees were given responsibility for coordinating and managing implementation of the action plans. UNODC's role was to provide technical expertise, policy advice, management support and funding, as well as, in some cases, to play an advocacy role towards the executive and legislator.

One of the challenges judicial reform efforts are likely to face is that judiciaries often do neither have the capacity nor the skill sets to carry out and ensure the sustainability of reforms. All too often skill sets that any modern organisation cannot do without, such as IT, business administration, communications and similar are not available. The management departments are often small and staffed exclusively with lawyers, typically already overburdened with the daily administrative tasks. Thus identifying and strengthening an institution within the judiciary which can ensure the implementation and sustainability of the reform is the key. In some countries, the judicial commissions or judicial training institution may be able to carry out some of these functions.

A lot of effort is spent monitoring action plan implementation, particularly the identification, documentation and dissemination of good practices and failures. The latter was achieved through the organisation of national meetings at the end of the projects that provided opportunities to share the findings of the assessment, evaluate action plans developed in the pilot jurisdictions, and review progress made and experience gathered from the implementation.

In line with the problems identified in the assessments, the projects focused heavily on improving access to justice by improving legal education and making information about one's case more accessible; on reducing delays; and on improving complaints mechanisms. Projects focus on enhancing the information provided to court users through posters, flyers, stickers, TV and radio programmes that educate the public about their rights under the constitution; procedural codes; and codes of conduct for

judges, prosecutors and police (e.g. the right to bail, the right to see a judge within a certain timeframe following arrest, the right to remain silent, the right to legal aid and the right to engage a lawyer, etc.). In Nigeria, the number of court non-appearances due to false expectations that bail requires cash or some other form of payment was greatly reduced. In Nigeria and Indonesia UNODC organised town-hall meetings that provided thousands of citizens with an opportunity to interact with local, justice-sector representatives. In Indonesia public declarations of intent to tackle judicial corruption by the chief justice and senior judicial figures within the framework of the project, along with integrity meetings and subsequent publicity were credited with having catalysed the creation of an anti-corruption activist group in south Sumatra.

Measures to enhance the timeliness and quality of justice delivery included: procedural reforms; the provision of basic court IT equipment; training of judges, prosecutors and court staff in case-flow management, alternative dispute-resolution and diversion techniques and the handling of complex economic crimes. An independent evaluation of the Nigerian project found significant evidence of the success of alternative dispute initiatives, case-flow management and changes to civil procedures resulting in reductions in case backlogs, case lengths, the number of cases going to trial and, most significantly, the number of defendants in prison awaiting for trial. UNODC also provided equipment essential to enhancing transparency and efficiency in court, such as photocopiers, computers and electronic court-recording machines. While this was welcomed by stakeholders, particularly in Nigeria, sustainable maintenance was a real challenge. No provisions were made for supplies or repairs, although UNODC had emphasised the need. As a result UNODC insisted on receiving signed declarations from heads of pilot courts in Indonesia stating their willingness to make provisions to maintain equipment and provide required supplies at their own expense.

In Nigeria the most often cited impact was the establishment of a complaints system, consisting of complaints boxes and complaints committees to ensure their credible review. In all jurisdictions, as well as at the federal level, this led to a reduction of the number of complaints being seen and therefore requiring a response from the national and state chief justices. It also provided an opportunity to clarify responsibility for the grievance by informing court users when a complaint actually fell within the domain of the police or prisons, which helped to increase confidence in the courts. Pilot courts in Nigeria have started to report on complaints received and action taken through websites, annual reports and newsletters. In Indonesia, however, the same system did not achieve a similar impact. By the end of the project, not one complaint has been received via these mechanisms. It appeared that the complaints boxes were so conspicuously situated that it would have been impossible for a person to deposit a complaint without being seen. The fact that the boxes were situated in the court compounds and were locked and guarded overnight made it impossible to deposit a complaint after the courts closed. The evaluation proposed relocating the boxes outside the court premises and to consider the establishment of a P.O. box to receive complaints in future.

One of the overriding challenges UNODC faced throughout the projects was ensuring that the criminal-justice institutions all worked together toward a common objective. Despite efforts to include all stakeholders in implementing the action plans, the police and sometimes the prosecutor's office were uninterested and in some cases even obstructive (e.g. vandalising posters educating citizens about rights). Other conflicts stemmed from the parallel existence of several systems of justice delivery that were not well integrated and did not necessarily recognise each other's legitimacy and jurisdiction (e.g. sharia or traditional rulers vs. secular courts). Moreover, strict interpretation of the separation of powers between the judiciary and the legislature/executive prevented the former in some countries from effectively influencing funding and budgetary decisions by the latter, with negative consequences for the long-term sustainability of the projects' achievements.

IV. EVALUATION AND IMPACT

It is possible to draw important conclusions from the projects carried out so far. They have delivered positive results, in particular in raising awareness, and have illustrated the value of pilot testing and produced sound data upon which decisions concerning extension and expansion of the programmes could be based.

In particular, in Nigeria, where the data of the second phase programme became available in 2007, it became evident that the support provided by UNODC has delivered some highly encouraging results. Significant improvements could be registered in all areas of reform. E.g. access to justice for prisoners awaiting trial had improved significantly with prisoners being in remand on average 11 months by them time of the interview, compared to 30 months in 2002. Adjournments have been reduced from an average of 7-8 per case to 6-5. Also, in 2007 only 7% of the judges felt that judicial appointments had been influenced by politics, compared to 18% in 2002. The quality of recordkeeping had been enhanced, with only 5% of the judges considering the recordkeeping inefficient or very inefficient, compared to 37% in 2002. Certainly most impressive was the reduced vulnerability of the system to corruption. While in 2002 42% of the court users interviewed claimed that they had been approached for the payment of a bribe to expedite the court procedure, in 2007 on average it were only 8%. Not surprisingly, these improvements have resulted in improved public trust in the judicial system, with only about 25% claiming that they would not use the courts again in the future based on their current experience, while in 2002 44% had shared that view.

V. CONCLUSIONS

Seven years of supporting judicial reform efforts with a particular focus on strengthening judicial integrity have allowed UNODC to gather some important lessons. First and foremost, addressing corruption in isolation is unlikely to yield good results. Corruption is the result of overall weaknesses in the governance system and as such needs to be tackled through a holistic approach.

It is common knowledge that any reform effort will require leadership at the top. This is even more true so for the fight against corruption. However, it has become quite evident that leadership at the top is not enough. In particular, when the leadership moves on to address new challenges, sustainability becomes problematic when the leadership at the top did not allow by time for leadership at all hierarchical levels to emerge and take ownership of the reform process.

As mentioned earlier, judiciaries are typically small institutions with very little capacities to manage and monitor the implementation of reforms. It is therefore necessary that technical assistance pays particular attention to the identification and strengthening of an organisational unit within the judiciary to carry forward the reform efforts.

Moreover, judiciaries are typically under funded and, unlike institutions of the executive arm, have little or no influence over their resource allocations. Projects and programmes aimed to assist judicial reform need to take this into account, and ensure the active involvement in and support of the legislature and the executive.

In order to ensure that judges of all levels fully embrace measures to enhance accountability, oversight and integrity in the judiciary there is a need to review remuneration and working conditions. If these are not conducive some judicial officers may consider the adherence to standards of professional

ethics and conduct impossible and therefore improper.

Another important lesson is that, contrary to the concerns voiced by some judges, it was possible to enhance accountability without jeopardizing judicial independence. As matter of fact it turned out that, if carefully designed, measures aimed to increase accountability of judges, at the same time can strengthen judicial independence.

Overall it can be concluded that low-cost reforms can have a significant impact on the overall performance of and trust in the judiciary, if measures to enhance integrity of the judiciary are carefully balanced with measures aimed to increase the capacity of the judiciary.

PRESENTATION SESSION IV

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Please note that the following papers have not been edited for publication.
The opinions expressed therein are those of the authors, and
do not necessarily reflect the position of the departments or agencies they represent.

DEONTOLOGY AND THE DISCIPLINARY LAW OF MAGISTRATES IN FRANCE

Patrice Davost[*]

I. INTRODUCTION

The concept of deontology, the science related to duty or moral obligation, was formulated in years 1793-1795 by the English philosopher Jeremy Bentham and only appeared in his posthumous work "Deontology or the Science of Ethics" in 1834.

Associating two Greek words: "deontos" (that which is proper) and "logos" (consciousness) (consciousness of what is proper), the term deontology first turned up in philosophical language before being progressively incorporated into the legal vocabulary.

Deontology and disciplinary law are closely related to the extent that the classical punishment for a breach of deontology consists of pronouncing a disciplinary sanction.[1]

That is why one could say that deontology is one of the foundations of professional discipline.

The deontology of the judge is inextricably associated with the independence and the responsibility of the judge.[2]

The formulation of deontological rules, the information on them, the punishment for breaches of them, the responsibility of the judge, the independence of the judiciary are at the heart of current concerns over the rule of law.

Does this deontology for judges need to be translated into a code, into a compendium of principles, or should it consist of simple recommendations?

In Europe, the Advisory Panel of European Judges in their opinion No. 3, in 2002, on the principles and rules governing professional imperatives applicable to judges recommends a simple "declaration of principles of professional conduct" issued by the judges themselves.

As for the United Nations, the group of experts instituted by the Committee on Human Rights of the U.N. defined the principles on judicial deontology in Bangalore.

- in 2001, it involved the "deontology" code combining 7 major principles:
  (i) independence
  (ii) integrity
  (iii) impartiality

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[1] - "The deontology of magistrates" by Guy CANIVET and Julie JOLY-HURARD – DALLOZ-2003.

[2] - "Recruitment, professional evaluation and career of judges and prosecutors in Europe: Austria-France-Italy-The Netherlands and Spain." Research Center for Judicial Studies – University of Bologna – Italy) – by Roger ERRERA. 2005
- "The judge in the city" by George BOLARD and Serge GUINCHARD, University Professors – *La Semaine Juridique* [The Legal Week] – May 2002 – p. 977 et seq.
and
- Appendix 1: The responsibility of magistrates in France
- Appendix 2: Independence and responsibility of magistrates – The international texts.

(iv) equality
(v) competence
(vi) diligence
(vii) responsibility

- *in 2002,* "Principles" (and moreover the code) were defined emphasizing the independence and the impartiality of the judge, the importance of recruitment and training as well as transparency and publicity of the proceedings and of disciplinary jurisprudence.

The International Union of Magistrates, at the time of its congress in Mexico in 2004 adopted a resolution, in this respect, affirming that "deontology, deriving from the reflection and the experience of each magistrate, must contribute to the improvement of justice and to public's understanding of the work of judges and to helping to develop a judicial culture that, itself, will contribute to social cohesion."

Finally, it must be remembered that *Resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985 adopted by the General Assembly of the United Nations* on fundamental principles relative to the independence of the judiciary enunciate a certain number of guarantees applicable to any proceedings brought against a judge, so as not to does not imperil his independence, particularly those to be heard quickly and fairly.

The European Charter on the Status of Judges, adopted by the Council of Europe on July 8 and 10, 1998, also mentions the need for appropriate guarantees necessary for any proceedings brought against a judge.

The purpose of this present study is to present the current state of this question with respect to France, a country where the judiciary corps at times includes magistrates of the seat and magistrates of the prosecution service (Article 1 of Ordinance No. 58-1270 of December 22, 1958) amended, concerning the organic law relative to the status of the magistracy.

"*Judges must exhibit in their person itself, the requisite qualities of integrity and loyalty, which alone translate the meaning of their responsibilities and the consciousness of their duties, making them deserving of their assignment and legitimizing their action*" (C.S.M. [State Council for the Judiciary] session 03/24/1994).

"*… It is incumbent on any judge to observe strict scrupulousness and to avoid any behaviour of nature to entail the risk of his/her impartiality being questioned and that can, as a result, undermine the authority of the judicial institution.*" (C.S.M. seat 07/20/1994).

If the *jurisprudence* of the Superior Council of the Magistracy, illustrated by two significant extracts, illustrates the ethical and deontological obligations of magistrates of the judicial order, the rules thereof are defined and contained in Ordinance No. 58-1270 of December 1958, amended, covering the organic law relative to the status of the magistracy.

This particular statute provides supplementary guarantees to magistrates in relation to the statute of the public function, but conversely entails reinforced obligations; the rules protecting the independent exercise of the jurisdictional activity stems from the non-removability of magistrates of the seat, with guarantees for career development, on the basis of responsibility and statutory protection.

The specific obligations are essence of an ethical and deontological nature. They are contained:

(i) in the text of the oath: "*I swear to properly and faithfully fulfil my functions, to religiously keep deliberations secret and to conduct myself at all times with as a worthy and honest*

magistrate." (Article 6 of the statute on the magistracy).

(ii) in the obligation of, individual and collective, decorum (Article 10 of the Statutory Ordinance).

(iii) in the scheme of incompatibility with other activities (elective political mandates, prior professional activity).

Added thereto are an obligation of residence and, for the prosecution service, hierarchical subordination. The requirement of evident impartiality as defined by the European Court of the Rights of Man entails statutory requirements, which are sanctioned through a code of discipline.

Article 43 of the magistracy statute defines the disciplinary misdeed as" any breach by a magistrate of the duties of his state, of honour, of scrupulousness or of dignity."

The obligations resulting from this text are common to the magistrates of the seat and of the prosecution service, owing to the principle of unity of the magistracy stated in Article 1 of the Statutory Ordinance according to which: "*the judicial body includes the magistrates of the seat and of the prosecution service (…).*"

Nonetheless, the second indent of Article 43 of the Statute stipulates that the breach of discipline "*must be assessed for a member of the prosecution service or a magistrate of the category of the central administration of the Ministry of Justice, taking into account the obligations deriving from his hierarchical subordination.*"

We should briefly mention the current sanctioning mechanism and the practical conditions for its implementation, before examining the means for preventing attacks on the deontological and ethical rules.

II. THE CURRENT SANCTIONING MECHANISM

A. The Disciplinary Procedure

Under the Constitution, the State Council for the Judiciary [C.S.M.] assists the President of the Republic, guaranteeing judicial independence and authority.

It is at the heart of the disciplinary system for magistrates described in Articles 43 and following of the Statutory Ordinance.

The Keeper of the Seals exposes the facts giving rise to legal actions at the State Council for the Judiciary (Article 50-1 of the Statute) either to the chief prosecutor at the Court of Cassation, president of the group of the C.S.M. competent for the discipline of the prosecution service (Article 63), depending on whether the magistrate is a member of the seat or of the prosecution service.

Since Organic Law No. 2001-539 of June 25, 2001, the heads of the court of appeal likewise have this option, though it is still very little used (Article 50-2 of the Statute).

Prior to the referral to the C.S.M., a "preliminary inquest" will have been undertaken, either by the upper hierarchies of the prosecuted magistrate, or by the inspector general of the judicial services, assisted by inspectors, all magistrates, who are subject directly to the authority of the Keeper of the Seals. The general inspection of the judicial services possesses a general power of investigation, verification and control (Article 5 of Decree No. 65.2 of 01/05/65, amended).

The disciplinary proceeding guarantees the adversary proceedings, respect for the right of defence and, since the end of the 90s, the principle of the public announcement of a public hearing, with respect to Article 6-1 of the European Convention on Human Rights. The Organic Law of June 25, 2001 amending the statute on magistracy instituted public announcement as a rule, except in camera (in private chamber) decided by the disciplinary board, if the protection of public order or of private life so requires or if there are special circumstances of a nature to undermine the interests of the judiciary (Articles 57 and 65 of the Statutory Ordinance). As stressed by the first president Canivet[3], the disciplinary instance is thus indisputably "proceduralist" under the most demanding constant control of the Council of State.

A statistical analysis shows a strong increase in the number of disciplinary decisions against magistrates. *The number of sanctions pronounced was multiplied by four in these last ten years from the preceding decade*.

(i) 1983-1992: 20 decisions
(ii) 1992-2003: 92 decisions (including 35 since 2000)
- In 46% of the cases, the sanction consists of a transfer
- In 16% of the cases: withdrawal from the function
- In 12% of the cases: retirement from office
- In 10% of the cases: removal from office
- In 10% of the cases: reprimand
- In 5% of the cases: loss of grade
- In 1% of the cases: demotion.

From 2000 to 2005, the State Council for the Judiciary rendered 54 decisions or opinions and pronounced 25 sanctions including:

(i) 3 removals from office
(ii) 7 retirements
(iii) 7 transfers

The incriminated behaviour falls within the proportions more or less equivalent to *the time of and apart from the exercise of their functions*. Their enumeration is not exhaustive and case law provides numerous examples.

(i) Prohibition on maintaining relationships incompatible with the task of the magistrate: prostitutes, drug addicts, facts of private life that undermine the image…
(ii) Behaviour in keeping with the office: conduct under the influence of alcohol, payment of debts and taxes, abusive language.
(iii) Professional deficiencies: lateness, *sine die* deliberations, absenteeism, attitude in the hearing, obligation of residence.
(iv) Personal conception of the functions: refusal of the function of organizing the service of the presidents of courts.
(v) Hierarchical insubordination: obligation of honesty.
(vi) Obligation of decorum: behaviour, scrupulousness, arguments.
(vii) Duty of actual and evident impartiality: classifications without favouritism, free performance of work.

An examination of all the opinions and decisions of the State Council for the Judiciary reveals a progression of disciplinary law leading in the direction of an approach increasingly marked by guiding

3 - "The deontology of magistrates" Dalloz 2003

rules and principles of a deontological nature.[4]

Prior to the decade of the 70s, decisions tended to stress the seriousness of the facts exposed to justify the application of a penalty, chosen considering this sole criterion in the scale disciplinary punishments, without genuinely qualifying the facts.

Today, the facts exposed to disciplinary bodies are not only assessed with respect to their seriousness, but are genuinely qualified in terms of discipline in relation to the professional duties of the magistrate being prosecuted, the honour, the scrupulousness or the honesty the Statute requires him to observe. *Improper behaviour is not only assessed in intrinsically, but also rendered in the more general perspective of the location and of the judicial institution, of its credibility and of respect for its authority*. The State Council for the Judiciary often requires judges to prove an acute sense of responsibility."[5]

Prior to the referral to the substantive issues of the disciplinary proceeding, it is possible, in an emergency, and in the interest of the service, to issue a *temporary ban*. This measure lapses at the end of two months, if no case is substantiated. It cannot be issued without having first followed the formalities stipulated with respect to disciplinary matters. This is a conservative measure, which of itself does not constitute a disciplinary sanction. It cannot be made pubic and does not entail deprivation of due process.

The urgency may result from the mediatisation of the rebuked behaviour; this measure tends to be more frequently pronounced if the facts are sufficiently serious.

B. Admonition

Admonition does not fall under the disciplinary power according to Article 44 of the Statute, but from authorities specially invested with this power itself: the inspector general of judicial services, the first presidents, the attorneys general and the department directors or departmental heads of the central administration of the Ministry of Justice.

Even though the admonition is not included among the number of sanctions provided under Article 45, its legal genre nonetheless exhibits a disciplinary "colour."

As it concerns a contested decision, it involves a written and nominal record, assigned to the individual file of the magistrate likely to be referred to the Council of State for abuse of power within two months of its notification. It must be preceded, under pain of nullity due to a procedural defect, by communication of the file to the magistrate in question.

It does not prevent the later exercise of disciplinary prosecutions.

The admonition disappears from the file at the end of three years, except in the event of a new admonition or a disciplinary sanction. It can be expunged through amnesty. *Admonition is, moreover, not decreed apart from a disciplinary misdeed* ("of minor seriousness" according to the conclusions of the Government commissioner – CE 01/16/76. The control of the administrative jurisdiction also entails (apart from the error of law or fact) the existence of a misdeed of a nature to justify the sanction.

The admonition is thus analyzed, in reality, as a dismemberment of disciplinary power in favour of chief judges, department directors or heads in the central administration of the Ministry of Justice.

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4 State Council for the Judiciary – "Compendium of disciplinary decisions 1959-2005" (C.S.M. – 2006)

5 - C.S.M. seat, February 17, 2000 ("persistent lack of strictness and a sense of responsibility that undermines the credibility of his function…").

- C.S.M. Prosecution Service – March 16, 2001 ("serious breach of the sense of responsibility that one is entitled to expect from an experienced magistrate.

It concerns the power conferred by the Statute itself. In the absence of provisions providing for admonition of the chief judge he evades the control of the hierarchy of the Keeper of the Seals, the Ministry of Justice.

An examination of the admonitions delivered in recent years in France highlights that the sanctioned facts exhibit an isolated, circumstantial character, and are devoid of the seriousness justifying the institution of a legal action before the C.S.M. (particularly, because they are imputable to a magistrate who is never indicated unfavourably until he or they call into question fundamental principles of probity, of impartiality…) or they concern sometimes persistent professional deficiencies, however, which the chief judge deems capable of being overcome by this sober measure.

An analysis of 40 admonitions issued over the course of the years 2000-2005 leads to an assessment that 90% of the breaches were committed during the exercise of functions, that is:

- 65% consisted of professional deficiencies: breaches in the manner of serving, tardiness in the treatment of files, refusal of service, unjustified absences, etc.
- 35% consisted of behavioural problems or deviations of language, lack of fairness, conflicting relationships, abuse of official capacities, [and] breaches of obligations of scrupulousness, decorum and dignity.

This growth of "disciplinary" statistics does not appear to be indicative of a laxity on the part of the judicial corps. Rather it reveals a greater strictness, tending to expand the disciplinary field and the quality of the behaviour expected from magistrates.

It also tends to reinforce the mechanisms of prevention, the instruments of which can still be developed and improved.

III. THE MECHANISMS FOR PREVENTION

Even if the State Council for the Judiciary specifically intended to state that the institution of disciplinary prosecutions had in itself a preventive role:

"*Whereas, (…) that the disciplinary proceeding instituted [against the magistrate] constitutes the strongest encouragement available to prevent the facts for which he/she is rebuked in the future and thus any risk of recurrence by him/her can reasonably be dismissed.*" (CSM SEAT 01/26/90), the prevention of attacks on the rules of ethics and of deontology lie rather in the proper operation of the mechanisms for evaluation and for control and in making magistrates aware of this dimension of their function.

A. Honesty of the Professional Evaluation

Following extensive reform in 1992, magistrates are now evaluated biannually (Article 12.1 of the Statutory Ordinance). As a result, the magistrate is more closely associates with his/her work: the evaluated magistrate describes his/her activity and discusses it with the president of his/her court. He/she can make observations and challenge his/her evaluation before the advancement commission. The new evaluation reinforces the principle of due hearing of the parties and must not only be associated with the past performance assessment, but also be invested with a prospective character, while reconciling the needs for the formation of prospects for a change of function.

The essential reform, however, dates from the beginning of the decade of the 1980s, with the comprehensive communication of the evaluation of the concerned magistrate. A reading of old files under-

scores a greater circumspection, from this date, in the expression of decorum, and could cause concern over a weakening of the warning function.

The unequivocal character of the judgments in the savoury extracts provided by Jean-Pierre Boyer in his work "Judges and notable persons of the XIXth century"[6] is no longer found in our current notations, the expression of which is infinitely more nuanced, to the point of no longer being able to measure the reality of the quantities described, nor to verify the adequacy of the candidates for the functions for which they apply.

The assessor is indeed enclosed within tight bounds:

- Any rebuke, any grievance, must take the form of an admonition, with the guarantees associated with it. The Council of State opposes the depositing of an administrative note or of a report containing "*a call to order*" or a "*severe admonishing*" taken against him/her following an incident, without the competent chief judge having opted for one of the two options provided in this regard under the statutes (disciplinary action or admonition).

In a judgment of March 10, 1999, the Council of State granted the petition of a magistrate intended to annul the paragraph of a letter by which the presiding judge of a departmental court had sent him observations and had notified him to add such observations to his file. The Council of State actually deemed that this paragraph constituted an admonition and that the president of a court was not qualified to so decree:

Moreover, the commission for promotions thoroughly investigated "*the clear error of assessment*" by the chief judge who had expressed poorly justified or inadequately detailed rebuke.

The simultaneous results of this is prudent expression and, sometimes, inflated praise (exceptional and excellent), which can lead to concern over a loss of effectiveness of the warning function or interference with the points of reference of the evaluation.

In reality, the old formula of literal assessment protected by the absence of due hearing of the parties presented more disadvantages than advantages. In exposing a grievance of unfairness, it betrayed the values that it has been entrusted to respect and deprived itself of a dialog of the sort that would foster their respect.

The "speaking the truth" must be adapted to this restrictive framework that requires shared benchmarks from the evaluator, from the evaluated and from the user of the evaluation.

A cumulative training effort towards one another is thus indispensable to the proper operation of the system.

B. Creating an Awareness of Ethics and of Deontology

1. The Publicity and the Dissemination of the Jurisprudence of the State Council for the Judiciary

"Thanks to the jurisprudence of the State Council for the Judiciary, the quality, the abundance and the dissemination of which have continuously improved in recent years, the content of deontology has been clarified and formalized.

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[6] - Judges and notable persons of the XIXth century" by Jean-Pierre BOYER, Renee MARTINAGE and Pierre LECOCQ: PUF 1982 p. 175 et seq: Notation from d'ARBOU by its Chief Prosecutor in 1849, "I cannot speak of his instruction, he does not have any; as to his intelligence, he has none." Notation from FAUGERIOUX: "He lacks neither intelligence, nor capability, nor instruction, but only the hunt." Notation from ASSLIN: "He is one of the weakest magistrates of the jurisdiction. He has never had and will never have an understanding of the law and can only render justice by extreme luck, by the indications of his conscience: moreover, his head is poorly organized."

Today the jurisprudence of the State Council for the Judiciary constitutes a true deontological corpus, a pertinent and clear referent for guiding the judge"[7].

Since the Organic Law of February 5, 1994, this jurisprudence has been published in the annual report on compulsory activity of each of the training sessions of the State Council for the Judiciary, and incorporated into a compendium of disciplinary decisions rendered between 1959 and 2005[8], works sent to each of the 8,100 magistrates.

2. The Initial and Continuous Training of the National School of the Magistracy

Deontology has been taught by the National School of the Magistracy both as initial training and continuous training for more than a dozen years.

This teaching is first dispensed during the initial training, in the form of theoretical discussion and the study practical cases, in order to permit each legal auditor, before leaving for training period in the courts of law, to acquire a clear consciousness of the deontological implications of the acts of magistrates. This approach is continued more concretely through the training periods with the magistrates of the courts of law and for each of the functions that the future magistrates will be called upon to perform upon leaving the school. These questions are covered during a consolidation organized at the end of the training period in the courts of law. The legal auditors all invited to bring up a number of specific situations with that they could have encountered in relation to their first experience in courts of law.

The said educational program of the initial training session neither defines a strict "code of conduct," nor prepares a catalogue of good or bad answers; the proposed approach lies in the comparing of crossed points of view, and of work on these practices undertaken in association with a team of inspectors of the judicial services.

The continuous training in this area (compulsory each year for all magistrates since 2007), devotes various sessions to the problems of ethics and deontology.

A file available on the Internet is dedicated to the question of "Responsibility and the ethics of legal proceedings" and to the deontological responsibilities of magistrates in the light of the jurisprudence of the State Council for the Judiciary.

The decentralized continuous training also deals with various types of these questions.

The content of this teaching is examined every year by the board of directors of the National School of the Magistracy, when the management submits to it the initial training program for legal auditors, which may be amended or reinforced at that time.

As stressed by Mrs. Dominique Commaret, honorary prosecuting attorney at the Court of Cassation and the former assistant inspector general of the judicial services to the Ministry of Justice: "Independence does not derive only from recruitment or from professional guarantees. It is a constant effort that the magistrates must exercise on themselves. Independence supposes a distance, not only with respect to political power, but all forms of power."

"Specifically, for a magistrate, to be responsible, means keeping up his/her knowledge, respecting the law, and being free and just, rational and independent."[9]

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7 - Aforesaid OP "The deontology of magistrates" (Dalloz – 2003)
8 - Compendium of deontological decisions (C.S.M. – 2006)
9 - Aforesaid OP "The deontology of magistrates" by Guy CANIVET and Julie JOLY-HURARD – Dalloz 2003

DEONTOLOGY AND DISCIPLINARY LAW OF MAGISTRATES IN FRANCE (APPENDIX 1)

THE RESPONSIBILITY OF THE MAGISTRATES OF THE JUDICIARY IN FRANCE

The magistrates are subject to four systems of liability that follow different rules": criminal liability, civil liability, professional liability and disciplinary liability.

At the criminal level, the magistrate is subject to common law for criminal violations that he/she, as any citizen, could commit. He/she does not benefit from any jurisdictional privilege.

At the civil level, the concern for protecting the magistrate from abusive lawsuits intended to destabilize his/her jurisdictional action, has led legislatures to adopt a system of derogatory civil liability. This system is founded on a mechanism substituting the liability of the State for that of magistrates.

Article 781-1 of the Code of the Judicial Organization likewise provides that "the State is obligated to repair the damage caused by defective operation of the judiciary service. This liability is only incurred by a grievous misdeed or by a denial of justice. The liabilities of the judges, due to their personal misconduct, are governed by the statutes on the magistracy concerning magistrates of the judiciary."

It should be noted that this system of liability of the State is not limited only to the acts of magistrates, but also extends to all acts relating to the performance of the public service of judiciary, in particular, the activities of the clerk of the court.

Nonetheless, there are schemes that depart from that Article L 781-1 that do not require proof of grievous misconduct, for example, in relation to trusteeship or temporary confinement.

Magistrates are directly liable for their personal misconduct. Article 11-1 of the Ordinance of December 22, 1958 relative to the statutes on the magistracy likewise provides that the liability of the magistrates who have engaged in personal misconduct related to the public service of the judiciary can only be incurred based on a cross claim by the State exercised before a civil chamber of the Court of Cassation. This action, which is intended to engage the civil liability of a magistrate as never been instituted.

On the professional level, Article 12-1 of the Ordinance of 1958 posits that the professional activity of each magistrate be subject to evaluation every two years or earlier in the event of presentation for advancement. Article 20 of Decree No. 93-12 of January 7, 1993 adopted for enforcement of the Ordinance of 1958 posits that this evaluation consist of a written memorandum through which the authority responsible for carrying it out describes the activities of the magistrate, conducts a general type assessment, posits the functions for which he is suited and defines, if applicable, his training related needs.

On the disciplinary level, Article 43 of the Ordinance of 1958 provides that "any breach by the magistrate of the duties of his station, of honour, of scrupulousness or of dignity shall constitute disciplinary misconduct." The disciplinary action is exercised before the State Council for the Judiciary.

An examination of all the opinions of the State Council for the Judiciary reveals a progress of disciplinary law in the direction of an increasingly pronounced contribution and of guiding principles of a deontological nature.

DEONTOLOGY AND DISCIPLINARY LAW OF MAGISTRATES IN FRANCE (APPENDIX 2)

INDEPENDENCE AND RESPONSIBILITY OF MAGISTRATES

The main international legislation

I . UN LEGISLATION

The main principles relative to the independence of the magistracy were adopted by the General Assembly of the United Nations under Resolutions 40/32 of November 29, 1985 and 40/146 of December 1985.

These principles constitute the normative reference framework for statutes governing magistrates at the worldwide. Adopted and prepared within the context of the Seventh Congress of the United Nations for the Prevention of Crime and the Treatment of Offenders held from August 26 to September 6, 1985, they were confirmed by the General Assembly of the United Nations in its resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985.

They constitute the normative reference framework for any discussion on the status of judges. They have thus been reaffirmed on numerous occasions by the works of the Human Rights Commission of the United Nations through successive reports of the special reporter on the independence of judges and attorneys[10] and the resolutions adopted on the judiciary[11].

Point 16 of these principles sets out that "*Without prejudice to any disciplinary proceeding or any right to appeal or right to indemnification by the State, under national law, judges cannot personally be subject to a civil action owing to abuse or omissions in the performances of their judicial functions*." Consequently, judges are given personal immunity before civil courts for acts committed in the performance of their functions[12].

Point 17 of these principles posits a certain number of guarantees applicable to any proceeding brought against a judge in the performance of his/her functions, particularly the law to be heard expediently and equitably according to the appropriate proceeding. *The explanatory notes[13] stress the guarantees that must be put in place in any disciplinary proceedings brought against a magistrate, so as not to imperil their independence*. Thus, the rules of equitable proceedings must be respected.

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10 For example, Report of the special reporter on the independence of judges and attorneys, E/CN.4/2004/60: §41.

11 For example, Resolution of the Human Rights Commission 2002/43.

12 This concerns the wording that was initially retained following the work undertaken by the United Nations Committee for the Prevention of Crime and the Fight Against Delinquency by the draft resolution relative to the independence of the magistracy accepted at the end of the regional preparatory meeting of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan (I al e), August 26 – September 6, 1985, A/CON.121/9

13 Explanatory notes intended to facilitate the work of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which drafted and adopted the fundamental principles regarding the independence of the magistracy prior to being adopted by the General Assembly of the United Nations under Resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985.

II. LEGISLATION OF THE COUNCIL OF EUROPE

A. Recommendation R (94) of the Committee of Ministers in the member States on the independence, the effectiveness and the role of judges dated October 13, 1994

This recommendation is the reference text on the independence and effectiveness of the judged in the judiciary of the Council of Europe. As such, it serves as the basis for work at the Consultative Council of European Judges (CCJE)[14], which constantly refers to its provisions in the opinions issued to the attention of the Committee of the Ministers of the Council of Europe[15]. Its principles served as a reference for the drafting of the European Charter on the Status of Judges.

Adherence to its provisions was the object of a questionnaire sent by the CCJE to the States and on the basis of which it drafted its Opinion No. 1 on the norms regarding the independence and non-removability of judges.

Consequently, in the absence of a restrictive legal value, this recommendation has been accorded a high degree of moral authority.

The recommendation seeks to reconcile the requirements for independence and liability of judges. It considers that "in the same aim of preserving their independence, it is indispensable to subject them to a system of control that assures respect for their duty"[16].

It sets out in its paragraph 2 d) of its first principle relative to the general principles concerning the independence of judges that: "*Judges should make their decisions with complete independence and power to act without restrictions and without being subject to influences, inducements, pressure, threats or undue interference, direct or indirect, by anyone or for any reason. The law should provide sanctions against persons seeking to so influence judges. Judges should be absolutely free to rule impartially on the cases referred to them, according to their personal conviction and their own interpretation of the facts, and according to the rules of law in force. Judges should not be obliged to report to any person foreign to the judiciary on the substance of their cases.*" The explanatory report specifies that in some States, judges are required to report on the volume of cases treated, which can in itself be compatible with the independence of judges and the need for efficient management of justice and the requirements for planning are not in dispute. Nevertheless, it underlines the risk of pressures entailed in this practice and suggests that judges should not be obligated to report on the substance of the case. Hence, this recommendation appears to preclude the possibility of pursuing the personal liability of the judge on the basis of jurisdictional decisions. Conversely, the CCJE itself[17]8 does not oppose the possibility of questioning the judge in case of a judicial decision rendered with such incompetence that it is tantamount to professional misconduct.

Recommendation R(94) sets out in paragraph 1 of its sixth principle relative to the defective performance of responsibilities and disciplinary misdeeds that "*when judges do not effectively and adequately discharge their responsibilities or in case of disciplinary misdeeds, any measures necessary should be taken, with the reservation that they do not undermine the independence of the judiciary.*" Nonetheless, it is stipulated in paragraph 3 that such measures cannot be taken unless the procedure culminating in their pronouncement is enveloped *in a minimum of procedural guarantees*. It is thus suggested that *such*

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14 The CCJE is the consultative body of the Committee of Ministers, for the purpose of preparing opinions on the intent of the latter with respect to generic type questions concerning the independence, impartiality and competence of judges.

15 For example, Opinion No. 1 (2001) on the norms relative to the independence and the irremovability of judges; Opinion No. 3 (2002) on the principles and rules governing the professional imperatives applicable to judges and in particular deontology, incompatible behavior and impartiality.

16 §7 of the exposition of the grounds for recommendation R (94) 112.

17 Opinion No. 1 (2001) on the norms relative to the independence and irremovability of judges: § 67.

measures be taken or controlled by a higher judicial body. The recommendation encourages respect for the rules of equitable proceedings in the procedure for implicating the liability of the judge. The explanatory report insists on there being a link between the disciplinary proceedings respecting the rules of fair hearing and the independence of the judges. It considers the existence of the disciplinary proceedings carried out before an independent and impartial body to be essential to safeguarding the independence of the judge. In its Opinion No. 1, the CCJE revisits the importance of "respect for the requirements associated with the rights of defence of the European Convention on Human Rights" and "on the need for a precise definition of violations for which a judge can be removed from office" (principle of legality applicable in disciplinary matters).

B. The European Charter on the Status of Judges

The European Charter on the Status of Judges was adopted in July 8-10, 1998 by the participants to the multilateral meeting on the status of judges in Europe, organized by the Council of Europe.

Though this charter is devoid of binding impact, its value lies in the terms of the foreword itself: "of the pertinence and the force that its authors intended to give to its content."

It is the fruit of deliberations conducted within the Council of Europe over many years on the organization of the judiciary in a State of democratic law. It seeks above all else to provide greater visibility to these works.[18]

This charter expresses the desire to more effectively foster the independence of judges, which is necessary to reinforce the preeminence of the law and to protect individual freedoms.

It is the reference document on the status of judges in the legal order of the Council of Europe. As such, it serves as the reference text in the CCJE, which time and again refers to, reiterates, completes and interprets its principles.

It devotes its fifth principle to the fifth principle to the liability of magistrates. This liability can only be implicated under *strict conditions and at the end of proceedings surrounded by guarantees*. Thus, serious guarantees surround the pronouncement of a disciplinary sanction: principle of legality and proportionality of the disciplinary sanctions; a disciplinary sanction can only be adopted based on the decision, the proposal, the recommendation, or with the consent of a body including at least half the elected judges and at the end of an adversary proceeding. Furthermore, *it stipulates that the liability of the judge cannot be directly investigated by the party subject to court action*, the repair of damages borne as a result of a decision or the behaviour of a judge is incumbent on the State. Nevertheless, to a limited extent, the State can potentially demand reimbursement from the judge through a *jurisdictional action* and in the case of *gross and inexcusable ignorance* by the judge of the rules under which it conducts its activity. These terms oppose the implication of a magistrate for the sole reason of the inopportuneness of his/her decision. Moreover, the cross claim of the State can only be instituted after having obtained the prior consent of an independent body including at least half the judges elected by their peers. For the CCJE, the intervention of such an authority in accordance with a procedure that fully guarantees the rights of defence is critically important in questions of discipline[19]. It insists in particular on guarantees of independence that must be exhibited by such authority, which leads to requiring that its members be democratically appointed by the judiciary.[20]

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18 Foreword of the European Charter on the Status of Judges.
19 Aforementioned Opinion No. 1 (2001): § 60
20 Aforementioned Opinion No. 1 (2001): § 37, 45, 60

C. The Position of the Consultative Council of European Judges

The responsibility of magistrates was focal point of the CCJE in its Opinion No. 3 (2002) on the principles and rules governing the professional imperatives applicable to judges and in particular deontology, incompatible behaviour and impartiality.

If the CCJE recognizes that the liability of the magistrates appears as a corollary of "the powers and of the trust granted by society to judges," it calls for great prudence in recognizing such a liability, so as to preserve the independence of judges from undue pressure.[21]

1. On the criminal liability of magistrates

The CCJE is hostile to the institution of criminal liability for magistrates in certain cases of grave negligence as noted in Sweden or in Austria, where judges can be sanctioned, for example, with a fine in certain cases of grave negligence, such as excessively long incarceration or detention. To the CCJE, "*the judge should not have to work under the threat of a financial sanction, even less pain of prison, the threats of which could, even unconsciously, influence their judgment.*"[22]

It draws attention to the risk entailed in the potential in certain countries for private persons to bring criminal suits against judges. It notes that little known harassing lawsuits by the litigant against a judge have become common in some countries[23].

2. As to the civil liability of magistrates

Due to the risks of abusive proceedings instigated by disgruntled litigants, the CCJE has come out forcefully against any direct personal civil liability for the magistracy when it involves good faith[24]. It considers that judicial breaches that cannot be redressed by appeal should not be able to lead to a lawsuit being brought against the State by the disgruntled party to the court action. The CCJE acknowledges the validity of cross claims by the State brought against a magistrate, insofar as such a suit meets the requirements established under the European Charter on the Status of Judges. Thus, it should only be possible to bring such a suit with the prior consent of an independent authority encompassing substantial representation. *But the CCJE goes even further than the Charter in recommending that such a suit can only be brought in the case of a wilful misdeed by the magistrate*[25].

The CCJE is thus hostile to any personal liability by the magistrate in the case of an unintentional misdeed.

3. As to the disciplinary liability of magistrates

The CCJE deems that any professional misdeed should not be likely to lead to a disciplinary proceeding and that only grave and obvious misdeeds should justify a disciplinary sanction. It notes the importance that the principle of legality invests in this regard, requiring that those misdeeds that could give rise to disciplinary sanctions be clearly defined, which should lead to the banning of recourse to general and ambiguous formulas.

The CCJE has declared itself in favour of a proceedings conducted before an independent body that should be a court or, if not, the members of which have been appointed by an independent authority and according to a procedure guaranteeing the rights of defence.

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21 Aforementioned Opinion No. 3 (2002): § 51
22 Aforementioned Opinion No. 3 (2002): § 53
23 Aforementioned Opinion No. 3 (2002): § 54
24 Aforementioned Opinion No. 3 (2002): § 55 "A general principle has it that judges should be absolutely exempt from any personal civil liability with respect to any claim targeting them directly and associated with the performance of their functions when they are acting in good faith."
25 Aforementioned Opinion No. 3 (2002): § 57

D. The Jurisprudence of the European Court of Human Rights

1. Independence of Magistrates

The demands of a fair hearing as provided in Article 6 of the European Convention on Human Rights specifically impose access to an independent and impartial court. On this basis, the European Court of Human Rights has developed an exacting jurisprudence when it comes to the status of magistrates.

In a great number of rulings, it affirms that the right to have one's case heard before an independent court is an essential component of the right to a fair hearing. Whether a body is independent is determined with respect to the method of appointment, the term of the mandate of its members and the presence of guarantees against external pressures and in knowing whether or not there is an appearance of independence (European Court of Human Rights, KADUBEC vs. Slovakia, September 2, 1998, req. No. 27061/95: § 56)

The assessment of the independence of judges is not limited to the examination of their organic independence, but likewise takes into consideration their functional independence, that is to say, the freedom to accomplish their jurisdictional functions in complete independence. To safeguard this latter, the judiciary organization should not require the judge to justify the grounds of these decisions[26].

2. Guarantees with Respect to Disciplinary Proceedings Brought against Magistrates

The European Court of Human Rights refuses, with constant case law, to declare itself competent in matters of disciplinary litigation of magistrates with respect to Article 6, in taking the position that magistrates are invested with a prerogative of public authority, even if it otherwise accepts to bring the disciplinary litigation for numerous professions in civil matters (for example the disciplinary litigation of physicians and attorneys). However, all the guarantees for a "fair hearing" are applicable to this litigation under the European Charter on the Status of Judges and under the Recommendation R(94) 12 of the Committee of Ministers of the member States on the Independence, the Effectiveness and the Role of Judges dated October 13, 1994.

The guarantees of fair hearing can be briefly summarized as follows:
(i) public announcement of the proceedings;
(ii) equality of arms;
(iii) independent and impartial court, established by law;
(iv) right to be judged in a reasonable period of time.

With respect to criminal matters it likewise includes:
(i) the right to be informed of the charges retained in a short period of time;
(ii) the right assistance by counsel.

The jurisprudence of the Court has extended these rights to civil matters. This right, which has a double degree of jurisdiction protected by Protocol 7 ratified by France, is provided only for criminal matters.

III. THE LIABILITY OF INTERNATIONAL JUDGES

The laws of the various international jurisdictions establish very elaborate systems of privileges

[26] In this sense the opinion issued by F. MATSCHER in his analysis of European jurisprudence in "The new developments of fair hearing in accordance with the European Convention on Human Rights," Acts of the symposium of March 22, 1996 in the Grand Chamber of the Court of Cassation, Bruylant, Brussels, 1996, p. 38-39.

and immunities in favour of international judges.

The Statute on the International Criminal Court breaks new ground by providing a system of disciplinary liability for the judges of the Court specified in the Regulation on Proceedings and Proof.

Article 46 of the Rome Statute relates to the loss of the functions of judges. It provides on the one hand for the possibility to relieve a judge of his/her functions with the absolute majority of the other judges and, on the other hand, for the Assembly of the Party States to remove a judge from office in the case of a serious misdeed or grave breach of duties imposed on the judge under the statute.

A grave misdeed is defined by the Regulation on Proceedings and Proof (rule 24). It covers two types of behaviour: behaviour falling within the scope of their functions and a behaviour not falling within the scope of their functions. Article 47 of the Rome Statute provides for the possibility of disciplinary sanctions in the case of misdeed less serious than that justifying the loss of functions of the judge, that is to say, a serious misdeed or grave breach of the duties imposed on him/her under the Statute. This less serious misdeed is defined under rule 25.

Disciplinary sanctions can only be adopted at the end of a proceeding respecting the rights of defence (rule 27: the right to present and to receive elements of proof, to assert ones arguments and to answer questions posed to him/her, and the right to be represented by counsel).

IV. CONCLUSION

International law calls for the establishment of serious and substantial procedural guarantees, so as to preserve the independence of magistrates in any proceedings brought against them within the scope of their functions.

INVESTIGATION AND PROSECUTION OF JUDICIAL AND PROSECUTORIAL CORRUPTION

Peter J. Ainsworth[*]

I. BACKGROUND

In the aftermath of the Watergate Scandal key reforms were instituted in the United States that had a lasting impact on the way in which public corruption cases are handled. This paper focuses on one of the organizational reforms, the creation of a nationwide authority that coordinates major investigations in this area. It also addresses the evolution of the legal structure and body of investigative techniques most often employed in the battle against corruption in the United States. Finally, the last portion of this work looks at a real example of a judicial corruption investigation which resulted in the conviction of a United States District Court Judge in New Orleans Louisiana.

II. THE PUBLIC INTEGRITY SECTION

The Public Integrity Section (PIN) is unique within the Department of Justice. The Department overall has field offices in major cities around the United States known as United States Attorney's Offices. These offices prosecute all federal crimes in their respective jurisdictions, with some oversight from the Justice Department in Washington, D.C. By contrast, PIN is based in the headquarters of the Justice Department in Washington, D.C. What makes this office unique is its mission. PIN handles investigations and prosecutions where the local U.S. Attorney's Office is unqualified for some specific reason. These reasons can include the following: (a) a potential conflict of interest between a member of the office, particularly where it involves the U.S. Attorney himself or herself (the U.S. Attorney is the head of the office and is a political appointee of the President) ; (b) an investigation involving a federal officer, such as a local judge or prosecutor, who works in or closely with the U.S. Attorney's Office; or (c) a highly specialized or controversial case where the involvement of independent prosecutors from the Justice Department will aid the prosecution. PIN's special expertise in public corruption investigations and prosecutions is also a valuable asset in cases the office works jointly with the local U.S. Attorney.

The Public Integrity Section has been highly successful in handling these and other types of cases. Most importantly, the creation of a special unit, in certain cases, removes potential conflicts of interest and increase public trust in the system of justice as it is applied to public officials. Because the office is made up of career prosecutors who are hired to make decisions based on an objective set of standards, it can make critical decisions without regard to political considerations. It also brings uniformity to the investigation of federal, state, and local officials throughout the country.

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III. PUBLIC CORRUPTION PROSECUTION IN THE UNITED STATES

A. Initiating a Public Corruption Prosecution Generally

In the United States, we use the term "predication" to describe the evidence or information we have that forms the basis of the initiation of a public corruption prosecution. Predication, however, is really about two issues: (1) starting the case now; and (2) defending the case later.

On the latter point, it is important to focus on the unique nature of our typical defendants in public corruption cases. As we all know, superficially they tend to appear much more "defensible" than your average drug-dealer or other criminal. Indeed, most have been elected to something at some point in their career. They often can afford to hire the most aggressive defence attorneys, they tend to have supportive family, friends, and constituents, and it is not unusual for the prosecutor to find himself on the losing end of the defendant's public relations assault. Finally, it is common for the defendant to scream "POLITICS!" as the explanation for why your office would choose to pick on such an upstanding citizen. For all of these reasons it is important to have documented "predication" to open an investigation.

1. United States Law On Predication

In the United States, there is no requirement that a prosecutor's office have specific evidence to justify the initiation of an investigation of an individual. As one of our federal appellate courts explained: "We also . . . reject[] the suggestion raised by [the defendants] that the government should have a reasonable suspicion that an individual is involved in some illegality before targeting him in a sting operation... Thus, the mere fact the undercover investigation is started without reasonable suspicion does not bar the conviction of those who rise to its bait. We note that as a practical matter, investigative agencies rarely expend their limited manpower and resources on a mere whim or in fabricating criminal activity." United States v. Allibhai, 939 F.2d 244, 249 (5th Cir. 1991). As explained below, however, this legal conclusion does not necessarily resolve the practical problems faced by prosecutors in deciding when and how to initiate a public corruption prosecution.

2. Predication: Practical Issues

As a practical matter, predication is typically necessary for two reasons: (a) to avoid wasting precious investigative resources and (b) to avoid later attacks. These attacks may come immediately after an investigation becomes public and are often consumed by an eager media audience. In the United States, they are often initiated or encouraged by defence counsel or politicians. Such attacks typically accuse the prosecutor of opening an investigation of a public figure for political reasons or for some other nefarious purpose. Such cries including the inevitable cry of "politics!" are virtually always wrong. In fact, in my eight years with the Public Integrity Section I have yet to see a case where such an attack would have merit. For the aggressive defence lawyer, however, the point of the attack is not its merits but rather its impact on the media, the public, and ultimately the jury pool.

How do we safeguard against this problem? The key components of responding to such claims are carefully corroborated investigations: institutional checks and balances that insulate the investigation and the prosecutor from any perception of political or personal motivation. Any major investigation and prosecution should have the full weight of the institution behind it — not just the lone efforts of an individual or even a small group of investigators.

3. Sources of Predication

Below are typical sources of predication that have been used in prosecutions in the United States. Each presents its own problems, and must be handled carefully. The key is corroboration. In other words, concern about the source of the information — for example, someone who has been arrested for drug use and now wants to help himself or herself by giving information about a corrupt politician —is

inversely related to the amount of corroboration an investigation can produce. The better the corroboration, the less the corruption prosecutor will have to worry about a "bad source." Especially in the world of corruption, it is important not to reject immediately source information simply because it comes from someone with "issues". Typical sources:

(a) The victim. A "victim" is typically an individual who is hit up for a bribe or kickback by a corrupt politician, refuses to pay, and turns the politician in to your office. Thank goodness for such people, but they seem very rare in our work.

(b) Newspapers. In the United States, reporters often receive corruption allegations long before they are reported to the law enforcement community, and there is never a reason not to follow up what appear to be prima facie allegations of corruption in the paper. The biggest downside is that the publicity prevents the use of undercover techniques (which I will discuss below).

(c) Current or former employees or colleagues. These have proven to be excellent sources of "inside" information, but the prosecutor must assess grudges and ulterior motives to make effective use of such information.

(d) Ex-spouse or other disaffected family members or friends can be excellent sources of information from people in the know." Again, the witness' agenda must be assessed and the gathering of evidence carefully controlled.

(e) Co-conspirators who get caught. As will be discussed in the New Orleans judge case, this source of information often provides the best opportunity for covert investigative activity. Again, the person who is obviously trying to help himself or herself get out from under some other problem will need to be approached with a healthy dose of scepticism. As with many of the categories above, steps are taken to carefully corroborate the witness' allegations.

(f) Political enemies: although this can be very dangerous, it is sometimes true that a political enemy may make allegations that at least need to be checked out. The key is that the prosecutor must not discard the initial allegation because of its source but instead work very hard to corroborate the information.

All of these sources of information (except the innocent victim) are fraught with peril for the reasons stated above. But, if we discarded such allegations merely because the source is admittedly troublesome, our ability to combat public corruption would be severely compromised. Unfortunately, these types of sources often provide the initial basis of your predication. How to neutralize the problems?

4. Corroboration and Undercover Operations

In the United States, the use of undercover operations — especially the tape-recording of telephone conversations and meetings — is absolutely essential to the fight against corruption. Simply put, it is the rare case indeed where the act of bribery is recorded in documents that you can later use as evidence; it is also rare to find witnesses willing to testify about such payoffs. This is especially true because the two best witnesses — the bribe payer and the politician — are extremely unlikely to be willing to talk about their act.

This is where the undercover operation comes in. The best evidence that can be obtained is the defendant's own words on tape. Although concerns about entrapment are legitimate, they can be readily overcome by making sure that the undercover actors allow the target of the investigation to make clear on tape his or her intent to be bribed. This is best accomplished by letting the target speak, in his or her own words, about what he or she wants or needs and how it is to be delivered. If the person is corrupt and trusts the undercover witness or officer, such conversations can be obtained and make very powerful

evidence. There is nothing better than being able to tell the judge or jury that the defendant's words speak for themselves. This can be achieved through the use of a good undercover plan and a simple tape recorder. Equally importantly, it allows the prosecutor to remove the focus from the predication/source issue.

Four steps are commonly used in an undercover operation to corroborate the predicate information with which you began. The focus is always on accumulating sufficient corroborative evidence so that the defence attorney's attacks on the initial source of your information will be neutralized.

5. The Four Steps for an Undercover Investigation

(a) First Step: The Index. This is a vital tool in any office that is investigating or prosecuting public corruption. The index is simply a compilation of all corruption allegations from any source made against a particular public official. The sources include all of those listed above, including the newspaper, as well as any other that might cross your desk. The index can be kept by computer or on index cards in a file cabinet. The key is that every time such an allegation arises — even it doesn't lead anywhere — it is listed in the index for later reference. Then, when a later allegation comes in, it can be checked in the index and see if similar allegations were made in the past. If the answer is yes, this fact should be recorded in the investigative file as further proof that the investigation's legitimate and the initial allegation is now partially corroborated.

(b) Second Step: Documentation & Approval. In sensitive cases like these, the prosecutor should never be "out there" on his or her own. A public corruption investigation is uniquely sensitive and must be handled scrupulously lest motives be questioned and work compromised. This requires that the opening of the case be noted with thorough documentation. Although sources must be protected where necessary, the initial allegation should be recorded and explained in documentation that is approved by a supervisor. The prosecution of public corruption cases requires institutional credibility; such prosecutions will fail if they are seen as the work of an individual or a small group of investigators. Again, one key is to never let the prosecutor's own credibility or motives be questioned. The solution to this problem — since the defence will surely try to attack — is to ensure that the prosecutorial and investigative institutions are behind the prosecution. This can only be accomplished through documentation (even though all prosecutors sometimes find this tedious) and consultation with superiors. It is especially important that the predication for an investigation be recorded in this manner.

I also want to note that in the United States these steps are taken very seriously. In fact, before any sensitive undercover operation is undertaken, it must be reviewed in detail and approved in writing by a review committee that is made up of senior Department of Justice and FBI officials with many years of experience in this field. These officials meet at the FBI on a regular schedule and review written "undercover proposals" from all over the country. Because of these meetings, the proposals are often reworked and improved before they are approved. This kind of centralized system is vital to making sure that the operations are conducted professionally and effectively; it also ensures that investigations are not undertaken for political or other improper purposes. Again, it is this kind of review that gives an investigation institutional credibility, thereby further pushing into the background any attacks on the investigation's origins (including problems with your initial informant)

(c) Third Step: Confirmation. Once an investigation is predicated and approved, the prosecutor or investigator is ready to move forward and gather some evidence. In the undercover context, this requires careful study and thought. How can we get an undercover officer close to the subject in a way that encourages trust? How do we give the undercover officer "back-

stop," the credentials he needs to appear real to the subject? How do we approach the subject in a way that gives him the opportunity to say "yes" if he's corrupt or "no" if he's not? On the latter question, it is best to leave details of a payoff to the subject. If the politician is readily able to describe how and where he likes to be paid, his or her statement constitutes great evidence. I also may indicate that this is someone who has probably been doing this for a long time. One important tip: instruct the undercover witness or officer not to talk too much; let the subject talk (my experience has shown that sometimes the undercover officer is so nervous he talks too much and even interrupts the target).

These issues require planning and should not be approached lightly. They are unique to each case and I would encourage you, if you have time, to do a careful study of your target before you send in an undercover officer. Find out as much as you can about the subject: where he's from; how long he's been in office; what type of district he represents, etc. This will help the undercover officer build a solid relationship with the target that will hopefully produce recorded conversations that accurately reveal the target's venality.

(d) Fourth Step: Expansion. The prosecutor is always prepared for the initial target to begin naming corrupt colleagues who also need to be paid. This is especially possible where an initial target is in a legislative body that requires a certain number of votes to accomplish something. This is an exciting opportunity because it gives one the opportunity to uncover truly systemic corruption inside a particular office or institution. When this happens, one should repeat the steps listed above and proceed from there. It is especially important that an undercover witness or officer be allowed to meet face-to-face with the new subjects; requests by the initial subject for the witness or officer to give him or her money so that he (the initial subject) can pass it on to his "friends" should be resisted. The undercover officer should insist on being there.

B. Example of Judicial Corruption Investigation: United States v. Collins

After reviewing several cases we at the Public Integrity Section have brought against judges, I decided to concentrate on an investigation that involved Robert F. Collins, a federal District Judge from New Orleans, Louisiana, who, with an associate, was eventually convicted of taking a bribe. As you will learn, the individual paying the bribe, who had a criminal case pending before Judge Collins, was working closely with the government throughout this investigation.

1. Background

I have chosen the Collins case for two major reasons. First, the evidence eventually presented during the trial of Judge Collins was derived from a variety of investigative techniques. In particular, a body wire--a microphone taped to the body of an individual cooperating with government investigators--was used extensively after the initial allegation was received. Also used were trap-and-trace and pen register devices that identify telephone numbers called from a designated telephone and numbers from which calls were received on a designated telephone. During the final phase of the investigation, electronic surveillance or "wiretapping" of telephone conversations was also conducted to record actual conversations between the two subjects in this case.

Less technical and more traditional investigative techniques were also employed. On numerous occasions, government investigators conducted surveillance of the two subjects who met in public places to exchange money and discuss their criminal scheme. As you may expect, government investigators also pre-recorded money when preparing the "bribe packages" that were eventually found in the possession of Judge Collins and his associate. In order to recover the pre-recorded funds and other evidence of the

bribe taking, government investigators, during the final phase of the investigation, conducted searches of offices and vehicles after receiving approval from the court. Immediately after the searches, investigators conducted interviews of the two subjects, which, among other things, provided contradictory explanations for their conduct.

The second major reason why I have chosen the Collins investigation is because the context within which the bribe taking occurred itself involved a real case with a real crime and real defendants. As we shall see, Gary Young, the individual who initially approached government investigators with information that Judge Collins may be willing to accept a bribe was, at the time of this approach, himself about to be indicted in a major drug smuggling case. From the outset, then, we were forced to take certain steps and implement certain safeguards to minimize the actual effect our investigation or Judge Collins had on the justice system.

The first step taken was to ensure that the entire investigation was conducted under judicial supervision. This was accomplished by asking the Chief Judge of the Fifth Circuit--the next highest level in our federal judicial system--to appoint another judge to supervise the investigation. Once appointed, Judge Duhe reviewed and signed all necessary applications and orders in the course of the investigation, including pen register, trap-and-trace, wiretap, and search warrant requests. We also received Judge Duhe's concurrence before taking any formal actions in Gary Young's drug case. This was necessary because each such action such as the filing of discovery motions, entry of guilty pleas, etc., was taken at our direction for our investigative reasons, and so might be viewed as a "manipulation" of the justice system. In each instance, then, Judge Duhe made a determination that the action was necessary to the investigation and was justified by the facts developed to that point and by the need to determine the scope of any bribery scheme affecting the administration of justice.

The second safeguard was designed to ensure that none of Judge Collins's judicial decisions concerning Gary Young and his case would be affected by the existence of the investigation. To accomplish this, Gary Young and the government entered into an agreement which called for the withdrawal of any plea or sentence, however lenient or strict, imposed by Collins on Gary Young and the transfer of his case to another judge at the conclusion of the covert investigation.

Finally, because the initial allegation, as delivered by Young, involved statements by a third party--Judge Collins's associate, John Ross--to the effect that he, Ross, could obtain favourable treatment from the judge in Young's case in return for money that the two would split, our first task was to determine that Ross was not simply using the name of Judge Collins, without the judge's agreement or even knowledge, to get money from Young. This uncertainty led us to decide that should it become apparent at any point that Ross was simply "scamming" Young, we would cease any investigation of Judge Collins. As we shall see, the investigation was planned in stages allowing us, at each juncture, to determine whether it was appropriate to take the matter into the next stage.

2. The Parties and Their Relationships

Before moving into the history of the investigation, let me introduce the parties involved. One of the two subjects was Robert F. Collins who, at the time of the investigation, was a 59-year-old native of New Orleans having served as a United States District Judge since 1978. During his confirmation hearing before the Senate, it was alleged that Collins had received the services of prostitutes and other gifts in return for favourable rulings while serving as a Magistrate-Judge in state court. But, after a lengthy investigation by the Senate Judiciary Committee, Collins's appointment was confirmed.

The second subject of the investigation was John Ross, a New Orleans businessman involved in real estate and insurance. Ross, who characterized his relationship with Judge Collins as a long-standing friendship, had known Collins for 23 years.

Finally, the individual who brought the initial information to authorities, Gary Young, was, at the beginning of the investigation, a convicted drug dealer who was facing the prospect of new drug charges, the result of his involvement in another smuggling scheme. Young had become acquainted with Ross during the late 1980s in connection with a restaurant run by Young. As we shall see, Young remained a stranger to Judge Collins throughout the investigation. The only communication between Young and the judge, throughout the investigation, was conducted through Ross.

3. The Allegation

In spite of having served a four-year sentence for drug offenses in the early 1980s, Young was again involved in a drug scheme toward the end of the decade. Upon learning that two co-conspirators had been arrested and charged in connection with their scheme, Young, who began to fear that he too would eventually be implicated, met with his lawyer and began discussing the possibility of cooperating with the government in the drug investigation. Meanwhile, a friend of Young explained that John Ross may be able to help Young in the event that Young's case ended up before Judge Collins, a very real possibility since Young's co-defendants had already had their cases assigned to the judge's docket.

On September 27, 1989, Young accompanied his friend to see John Ross. In this initial conversation, Ross explained that, because he was a good friend of Judge Collins, he could help Young in the event that Judge Collins was assigned his case. Ross explained that this "help" would take money and required an initial payment of $5,000 for the process to get started. Young agreed to this payment and then recounted the substance of this initial conversation to government investigators who, in turn, arranged to have Young wear a body wire for later meetings with Ross.

4. The Investigation

Beginning in early October, Young met Ross several times to discuss how Collins, working through Ross, could help Young get a lenient sentence. In one of these conversations, Ross set the total price for this "help" at $100,000. In another, Young provided Ross with the initial payment, a carefully packaged bundle consisting of pre-recorded funds. It was at this point, once funds had changed hands, that we implemented our investigative plan.

As described earlier, we planned the first phase of the investigation around evidence gathered through consensually monitored conversations recorded on a body wire worn by Young. In the event that investigators, using this and other techniques, began to collect evidence that Ross was indeed working with Judge Collins, we planned to apply for a trap-and-trace and pen register for Ross's telephone. Again, if our evidence implicating the two in a scheme continued to expand, we planned to apply, with Judge Duhe, for wiretaps, first on Ross's telephone and then on Judge Collins's private line. As a final phase, we planned to conduct searches and interviews, but only in the event that the body of evidence implicating Ross and Collins continued to expand.

(i) Body wire evidence: In addition to the taped conversations during the fall of 1989, Young's body wire continued to record incriminating conversations with Ross as the two met and talked while awaiting Young's indictment. For example, on December 20, Ross was recorded as saying he was ready to "help." He also provided an example of someone who was recently sentenced by Judge Collins for whom he, Ross, could have gotten a lighter sentence had he only been approached. Again in an early January conversation, Ross gave Young the name of an individual who had received lenient treatment by Judge Collins in return for a bribe to Ross and Collins. Finally, on February 1, 1990, Ross was recorded telling Young that he had met with Judge Collins to tell him about Young's "situation." Ross explained that things were now on track.

Because we knew that Young was about to be charged for his drug offense, we surmised that if

Ross was being honest about his relationship with Judge Collins there would likely be telephone calls between Ross and the judge soon after Young's indictment, since, at the very least, the judge would need to be informed of case events by Ross. This possibility of telephone traffic between the two immediately following Young's indictment led us to apply, on March 15, 1990, for trap-and-trace and pen registers to be installed on Ross's telephone line.

(ii) Trap-and-Trace and Pen Registers: Young was indicted on April 5, 1990, but his case was assigned not to Judge Collins but another District Judge in New Orleans. Learning of this development, Ross met with Young and, in another recorded conversation he explained how Young should go about getting his case transferred to Judge Collins. Ross also set up a code for referring by telephone to the money being paid to "fix" his case. In closing, Ross noted that as soon as the case is transferred, Young should "get on your knees and thank God because it'll be all over."

Soon thereafter, Ross and Young again meet to talk about the transfer of the case and money. During this recorded conversation, Ross called the judge's chambers to confirm the date Young had given for a hearing on the transfer of the case, a call which was recorded by the pen register. Ross also accepted a payment of $2500 during this meeting, and noted that he was going to have lunch with the judge to work out the details of the case.

One week later, the pen register recorded two more calls from Ross's office to the judge's chambers. Following these calls, surveillance teams witnessed Ross and Judge Collins having lunch at a local restaurant. After lunch, Ross called Young back to report that the judge knew about the transfer motion and, as a result, "everything looks good." That same day, after a hearing with the prosecutor and the defence attorney, Judge Collins orally agreed to accept Young's case. One day later, Ross, in a recorded conversation with Young, reported that the judge wanted half the money now and half later. He went on to set up a payment schedule, advising Young to start getting the money together. Following this conversation, the pen register recorded that a call was made from Ross's office to the judge's chambers. At this point in the investigation, we were granted permission to intercept conversations on Ross's telephone.

(iii) Wiretap on Ross's telephone: On May 23, Young provided Ross with a folder containing $20,000 in pre-recorded money. In a recorded conversation made at the time of the payment, Ross also set up a code for Young: after the judge accepted the bribe, Ross was to call Young and utter the phrase, "your daughter has hit a home run."

Following this conversation between Young and Ross, the wiretap installed on Ross's line recorded Ross telling the judge that he had to "talk about a property" and "I have an estimate" on the property. Ross then arranged to give the judge this "estimate" within 5 minutes at a local tavern. Surveillance teams then followed Ross to the designated meeting place where he was seen handing the folder with pre-recorded funds to Judge Collins. Collins was seen leaving with the folder. Meanwhile, Ross was recorded telling Young that his "daughter hit a home run".

Finally, within the next week, Young paid Ross another $30,000 in pre-recorded money on the same day that the Judge Collins accepted Young's guilty plea and set his sentencing date. A day later, the judge and Ross again met. Upon being informed of this recent evidence implicating Judge Collins in the bribery scheme, Judge Duhe, on June 1, approved the government's request to record conversations on Judge Collins's private telephone line.

(iv) Wiretap on Judge Collins's telephone line: After a period of waiting, the wiretap on Judge Collins's line paid off when, on August 6, Ross and the judge were recorded discussing what is owed by Young on his $100,000 bribe.

On August 8, Young's sentencing date, Ross was picked up on Young's body wire accepting $11,000 in pre-recorded money carefully packaged in a folder. The wiretap on the judge's line then recorded Collins asking the prosecutor to recommend a reduced sentence for Gary Young. Following this call, surveillance teams saw Ross giving the judge the same package he had earlier received from Young. Toward the end of the day, Judge Collins sentenced Young to a term of imprisonment far more lenient than that recommended by the prosecutor or the probation department.

(v) The searches: Within two days of the sentencing date, Young and Ross were recorded discussing how Young should go about getting his sentence reduced even further. Meanwhile, on August 10, surveillance teams witnessed Judge Collins pass two $20 bills--one at the drug store and one at a local restaurant. When these bills were recovered, government investigators identified them as being part of the May payment made by Young to Ross.

At this point in the investigation, Judge Duhe granted our request to conduct searches of the person and office of both Ross and Collins as well as the judge's car, which he had been used during the August 10 purchases. Evidence recovered from the judge included $180 in marked funds from the May 23 payment found in his wallet. In his office, investigators found the folder used in the August payment from Young to Ross and in the judge's car, agents found the drug store receipt from the purchase made with marked funds a few hours before.

Finally, when the subjects were interviewed, they each gave explanations for their recent interactions but, in doing so, they contradicted each other in key areas. The remainder of the investigation, then, was devoted to proving these explanations false. In the end, both Collins and Ross were convicted and sentenced to healthy terms of imprisonment.

5. Overview

The Collins case provides an excellent example of the careful and meticulous investigative approach that should be used, in our system, in any matter involving allegations of judicial corruption. The case began with a series of consensually monitored conversations picked up on a body wire. Thereafter, each more intrusive investigative technique--pen registers, trap-and-traces, wiretaps, and searches--was introduced only after investigators, prosecutors, and eventually Judge Duhe, concluded that the case against Judge Collins was getting stronger. The evidence gained by using each investigative technique was laid out and relied upon in our requests to move to the next most intrusive--and more potent--technique. In this way, investigators were able to build, step by step, a strong case against Judge Collins without damaging the integrity of the court system within which he operated.

IV. CONCLUSION

Although corruption cases are extremely difficult, such prosecutions are essential to the effective functioning of a healthy government that treats all of her citizens equally.

CLOSING CEREMONY

Address by
Mr. Keiichi Aizawa,
Director, UNAFEI

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Address by
Mr. Keisuke Senta,
Senior Legal Expert,
UNODC Regional Centre for East Asia and the Pacific

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Closing Remarks by
The Honourable Mr. Chaikasem Nitisiri,
Attorney General of Thailand

ADDRESS

Mr. Keiichi Aizawa
Director, UNAFEI

His Excellency Mr. Chaikasem Nitisiri, Attorney General of Thailand, honourable guests, distinguished participants, ladies and gentlemen.

First and foremost, on the occasion of the closing session, I would like to express my sincere appreciation, on behalf of UNAFEI, to the co-organizers of this Regional Seminar, the Office of the Attorney General of Thailand and the UNODC Regional Centre for East Asia and the Pacific, for their tremendous contribution in convening this significant meeting. Without their expertise, professionalism and tireless efforts, this Seminar could not have been such a success. I would also like to take this opportunity to extend my heartfelt gratitude to the staff of the Office of the Attorney General of Thailand for the warmest hospitality shown to us during the entire period of this Seminar.

To all of the participants gathered here, I would like to commend you for your dedication and enthusiasm during the course of this Seminar. Without your individual contributions we could not have produced such satisfactory results. I appreciate that you spent valuable time away from your offices to contribute to the success of this Seminar.

Ladies and gentlemen,

This Seminar was indeed an exceptional opportunity for all of us, criminal justice practitioners and policy makers who are very actively fighting corruption, to get together and discuss a common pressing issue: control of corruption within the judiciary and the prosecution services. Owing to the very well prepared and analytical presentations given by the participants, we now have a broader perspective from which to evaluate and analyse the current situation of judicial and prosecutorial corruption in the context of Southeast Asian countries. We also gained an understanding of the major causes of this phenomenon, as well as information about some beneficial practices employed by our international colleagues. Furthermore, with the great contributions given by the many speakers we have been apprised of useful international methods of addressing this issue, including various efforts made by the United Nations in the field of corruption control in the judiciary and the prosecutorial services. Our discussions were most lively and constructive in reconsidering and enhancing the effectiveness of existing measures in order to curb instances of wrongdoing by judges and prosecutors.

On the basis of the all above, we could agree upon the most practice-oriented recommendations as the final document of this Seminar. As an organizer of this Seminar, I genuinely hope that these recommendations will prove to be a practical and realistic basis for our common endeavour.

Ladies and gentlemen,

As a further step towards strengthening good governance, and on the basis of the great success of this Seminar, UNAFEI is planning to hold a second Regional Seminar on Good Governance for Southeast Asian Countries in Thailand in 2008. The next Seminar would probably be on a slightly smaller scale than this event; however it will maintain the substance of the work of this Seminar.

For the time being, it is likely that we will address the issue of corruption control in relation to public procurement, as that is one of the most vulnerable areas in terms of corrupt practices in many parts of the world. I look forward to seeing again as many of you as possible at the second Seminar.

In closing, I hope to see the participants using the knowledge they have gained here in tackling corruption in their respective countries. It is my sincere wish to see the ideas and advice shared at this Seminar disseminated and utilized across the attending countries, via those here present. I trust that with your efforts, the work we have done here will contribute to the further promotion of good governance in this region.

Thank you very much for your attention.

ADDRESS

Mr. Keisuke Senta
UNODC Regional Centre for East Asia and the Pacific

Mr. Chaikasem Nitisiri, Attorney General of Thailand, Mr. Keiichi Aizawa, Director of UNAFEI, Distinguished Participants and Visiting Experts, Ladies and Gentlemen.

It is for me a great honour and privilege to address the closing session of the Regional Seminar on Good Governance for Southeast Asian Countries, on behalf of Mr. Akira Fujino, Representative of the United Nations Office on Drugs and Crime, Regional Centre for East Asia and the Pacific.

First, please allow me to say something personal. I am now working in the UNODC Regional Centre as Senior Legal Expert in Terrorism Prevention. Before joining UN, I was a Deputy Director of UNAFEI, the predecessor of Mr. Seto who has been present in this Seminar throughout this week. I also enjoyed working under the leadership of Mr. Aizawa during my tenure at UNAFEI. Therefore, it is actually my personal pleasure to be here to see many familiar faces, not only from Thailand and Japan but also from other countries, with whom I had the honour to work in my previous jobs or under my present responsibility.

Distinguished Participants,

Fighting corruption is one of the top priorities to be pursued by all Member States of the United Nations. The former Secretary-General of the UN said, "this evil phenomenon is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development".

Therefore, it is essential to ensure that corruption is under strict control, if not totally eliminated, with a view to realizing a society with good governance. In doing so, the judiciary plays a very important part as one of the basic institutions to deliver justice, equity and freedom. Corrupt judiciary will gravely undermine the public trust in the just and proper functioning of their society, and damages their image in the outside world, leading to destabilization of the community and lack of sufficient investment or development aid. However, it is sad to observe that in many parts of the world, we are yet to see corruption-free judiciary and prosecution.

Distinguished Participants,

For the past five days, you discussed how to address this important issue, and agreed upon a set of recommendations which contain many effective measures to be considered by the relevant agencies and authorities in your countries. I would like to emphasize that this is not the end of this exercise. All of us should proceed, on the basis of what we achieved today, to further our goals toward the realization of corruption-free society in this region. Let me assure you that the UNODC Regional Centre is always ready to be involved in this process, and looks forward to continuing working with you and your colleagues.

I would also like to welcome the intention of UNAFEI to organize another seminar next year, focusing on public procurement issues, which are also crucial in the proper management of public policy and fair conduct of business.

Before closing, let me express, on behalf of the UNODC Regional Centre, my deep appreciation to UNAFEI, the Office of the Attorney General of Thailand, visiting experts and JICA for their contribution to this important Seminar.

Finally, I wish you all a safe journey home.

Thank you.

CLOSING REMARKS

The Honourable Mr. Chaikasem Nitisiri
Attorney General of Thailand

Mr. Keiichi Aizawa, Director of UNAFEI, UNODC and international experts, Distinguished Participants, Ladies and Gentlemen.

First of all, please accept my apology for not being able to join you in the opening ceremony and throughout this very important Regional Seminar. However, I have learned that the Seminar during the past four days went very well. I have also been informed that this significant event was successful not only in producing substantive results, but also in developing and enhancing networks and relationships among criminal justice and anti-corruption authorities.

I think many of you may agree with me that fighting corruption is a truly challenging endeavour and it takes a long time before anti-corruption strategies can tackle the root causes of corruption. Among all the key elements against corruption, we, the criminal justice authorities, have always been the core element on which the public places high expectations. Since corruption always involves abuse of power, we therefore must be very mindful in exercising our powers. The problem is: who should be the one to check if the judiciary and prosecutorial authorities use their powers properly? I think the discussions and recommendations that have been concluded in this Regional Seminar should provide us with a very practical guideline to answer this question.

Distinguished Participants, Ladies and Gentlemen,

Among successful and admirable things achieved during this Regional Seminar, there might nevertheless have been something that our honourable guests from UNAFEI, UNODC and from ASEAN member countries found unsatisfactory. If there was such a thing, please allow me - on behalf of the Office of the Attorney General of Thailand - to apologize for each and every mistake that we might have made.

Before closing this Regional Seminar, I wish you all the best of success in the efforts to eradicate corruption within the criminal justice system and in our societies, in either the public or private sectors.

Lastly, I would like to thank UNAFEI and UNODC for co-hosting this Seminar. I also would like to thank all the organizing staff for their hard work contributing to the success of this event. For international participants and experts, I wish you a safe and pleasant trip back home. For some of you who may have spare time before taking off, please enjoy yourself in Bangkok. I hope to see you again either in our respective countries or at other ASEAN forums.

Thank you and goodbye.