CURRENT ISSUES IN THE INVESTIGATION, PROSECUTION AND ADJUDICATION OF CORRUPTION CASES

Khin Myo Kyi[*]

I. INTRODUCTION

Corruption is a menace facing every country in the world. The strengthening of exchanges and cooperation in the international community in the field of anti-corruption has become an inevitable choice in the international community. Legal systems may be different but the political will to combat corruption keeps standing out. One should have the spirit of mutual benefit, or win-win cooperation, which deepens our cooperation, and mutual support to jointly fight and prevent corruption. Firstly, dialogue throughout the investigation, prosecution and judicial stages should be strengthened. Secondly, technical assistance to promote balanced development of anti-corruption work should be made. Thirdly, it is important to strengthen international cooperation and enhance the level of fighting and preventing corruption.

II. MYANMAR'S LEGAL SYSTEM

In the regimes of the Kings of Myanmar, they adjudicated the criminal and civil cases by *damathat* and *phat hthn*. They believed that there are four kinds of corruption: firstly corruption of greed, second corruption of anger, thirdly corruption of fear, and fourthly corruption of delusion. They had directed their ministries to adjudicate the cases of the people without such four kinds of corruption. There have been *manu damathat, kinwunmingyi phathtat* and so on. During the colonial period, Myanmar was introduced to the English Common Law Legal System but Myanmar Customary Law was not touched. Having regained independence, Myanmar enacted the 1947 Constitution of the Republic of the Union of Myanmar. The Myanmar Legal system is therefore a unique system and belongs to English Common Law tradition but is not a replica.

A. Judiciary

The Constitution of the Republic of the Union of Myanmar (2008) adopted by Myanmar came into force on 31 January 2011. Concerning the judiciary, the Union Supreme Court, State and Region High Courts, District Courts, and township Courts have been formed under the Constitution. These Courts adjudicate criminal and civil cases including corruption cases. The Union Judiciary Law and the Criminal Procedure Code provide the powers of the courts. Under such laws, the township court has jurisdiction that tries and passes judgement on any offence punishable with up to seven years' imprisonment. The District Court and High Court of the Region and the State may impose any sentence authorized by law, but the sentence of death shall be subject to confirmation by the Supreme Court of the Union. The Supreme Court of the Union is the highest court that supervises all other courts.

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[*] Deputy Director, Prosecution Department, Union Attorney General's Office.

B. History of Anti-Corruption in Myanmar

In Myanmar we had domestic laws addressing corruption as early as 1948 called, the Suppression of Bribery Act, 1948. The special laws in other sectors of Myanmar have been enacted to combat and prevent corruption and bribery. Therefore Myanmar signed the United Nations Convention against Corruption (UNCAC) in 2005. In 2011, Myanmar introduced a genuine, disciplined multiparty democratic system under the New Constitution of the Republic of the Union of Myanmar. President U Thein Sein has taken office, and he has always emphasized the importance of clean government, good governance and anti-corruption efforts in his inaugural speech and on several other occasions. As a step in both law and practice in introducing reform, Myanmar ratified the United Nations Convention against Corruption (UNCAC) on 20 December 2012. Ratification of the convention was followed with announcement of the "third phase of reform" aimed at tackling corruption in Myanmar. Soon after, an anti-corruption committee was set up on 9 January 2013. The anti-corruption committee against Bribery headed by the Vice President, Dr. Sai Mauk Khan, was formed on 8 January 2013 by notification No 9/2013 to protect public properties, to strive for the interest of the society and people, to combat corruption and bribery effectively, to make the law enforcement and administration sectors transparent and to promote domestic and international investment. The Union Attorney General is also a member of this committee. And then, Myanmar drafted the Anti-corruption Law with the help of the UNODC and other organizations. Due to the efforts of the committee, *Pyihtuangsuhluwtaw* (Parliament) has enacted the Anti-corruption Law and the President signed and published it on 7 August 2013. The law came into force on 17 September 2013.

There is the doctrine of *pacta sunt servanda* in the international law of treaties. The doctrine of international law of treaties specifies that treaties are made to be respected by states that have ratified them. Having enacted the Anti-corruption Law, Myanmar followed this doctrine. The Anti-corruption Law of Myanmar is consistent with UNCAC, and the new law keeps Myanmar abreast of other member states that ratified UNCAC. Such doctrines have come into effect.

In Chapter III of UNCAC on criminalization and law enforcement, the definitions of bribery, national public officials and international public officials, officials of public international organizations and prosecution, adjudication and sanction, jurisdiction and so on are prescribed. These subjects are also described in sections of the Anti-corruption Law of Myanmar.

III. THE ATTORNEY GENERAL OF THE UNION LAW

Regarding "the Primary Roles of Public Prosecutor (law officer) in combating the corruption", I would like to mention the Attorney General of the Union Law and the Union Attorney General's Office. For prosecution matters on behalf of the Union, who is to be responsible to appear? The Attorney General of the Union Law was promulgated in accordance with section 443 of the said Constitution of the Republic of the Union of Myanmar. Under this law, responsibility to appear for prosecution matters on behalf the Union falls upon the Union Attorney General. The Attorney General of the Union Law has seven chapters, namely, Title, Enforcement and Definition, Formation of the Union Attorney General's Office and various levels of Law Offices, appointment of the Attorney General of the Union and the Deputy Attorney General, Advocate General of Region or State, Functions and Duties of Law Officers

and Miscellaneous. Under this law, the Attorney General of the Union and a Deputy Attorney are appointed. The Attorney General of the Union is also a member of the Union Government and is responsible to the President of the Union.

A. Duties and Powers of the Attorney General of the Union

Among of the Duties and Powers of the Attorney General of the Union under section 12 and 13 of the law, one should know them for prosecution matters on behalf of the Union. They are:

(1) Tendering legal advice when requested by the President, the Speakers of the Parliament, any organizations of the Union Level and any ministry of the Union and *Nay Pyi Taw* Council;

(2) Prosecuting criminal cases at the Court in accordance with law;

(3) Appearing on behalf of the Union;

(4) Filing an appeal or revision to the Supreme Court of the Union on judgement, order or decision passed by any High Court of the Region or State, in cases relating to the Union;

(5) Carrying out in accordance with law, if it is necessary to withdraw the entire case, any charge or any accused in a criminal case filed at the Court;

(6) Deciding to close a criminal case that cannot be prosecuted at court;

(7) Filing appeals against acquittal orders in accordance with the law with the Supreme Court of the Union if it is considered appropriate to file such an appeal by the High Court of the Region or State;

(8) Guiding and supervising the relevant Advocate General of the Region or State, relating to the performance of the various levels of Law Offices in the Region or State as may be necessary.

To fulfill the enormous responsibilities of this law, the Attorney General of the Union also has the power to form the Union Attorney General's Office, 14 offices of the Advocate General of the Region or State, a self-Administered Division Law Office, self-Administered Zone Law Offices, District Law Offices and Township Law Offices.

The Attorney General of the Union, in accordance with the stipulations, delegates his or her duties and powers to Law Officers. The Functions and Duties of the Law Officers from different levels of Law Offices are mentioned in sections 34 to 36 of the Attorney General of the Union Law. The tasks performed by the Law Officers are categorized into 16 duties. Among them, some are scrutinizing and tendering legal advice on criminal cases to be in conformity with the law before prosecution; prosecuting criminal cases at the courts in accordance with the law; appearing in criminal and civil cases on behalf of the Union; carrying out other duties assigned by the Attorney General of the Union and relevant Advocate General of the Region or State.

B. Union Attorney General's Office

The Union Attorney General's Office acts as the Head Office. This Office has four departments. They are the Legislative Vetting and Advising Department, the Legal Advice Department, the Prosecution Department and the Administration Department. Among them, the Prosecution Department is the oldest department in the Union Attorney General's Office. Since the formation of the Office, this Department is responsible for prosecution on behalf of the Union and the different level law offices are also responsible for this. And law officers (Public Prosecutors) of different levels of law offices are also responsible for prosecution of anti-corruption offences.

IV. THE ANTI-CORRUPTION LAW OF MYANMAR

This law has eleven chapters, namely, title, enforcement, extent and definition, aims, formation of the Commission, its duties and powers, formation of the Preliminary Scrutiny Board and its functions and duties in respect of currencies and properties enriched by bribery, formation of the investigation body and its functions and duties, formation of Commission office, information about bribery, duties of the President, the Speaker of the *Pyithu Hluttaw* (Lower House), the Speaker of *Amyotha Hluttaw* (Upper house), representatives of the *Hluttaw* (Parliament), declaration of currencies, properties, liabilities and assets owned by the competent authority, confiscation of the currencies and properties obtained from bribery, offences and penalties and miscellaneous.

A. Investigation of Anti-Corruption Cases

Investigation is the first step to identify corrupt acts and suspects. Under this law, the President shall form the commission which includes a chairman and 14 members after getting approval from the *Pyihtaungsu Hluttaw* (Parliament) to perform the aims of the law. The Commission shall form the Investigation Board and the Preliminary Scrutiny Board to enquire about bribery and illicit enrichment. The Commission shall investigate or call for investigation in order to take action in accordance with the law regarding the following cases.

(1) Matters assigned by the President for investigation and submission, about bribery and illicit enrichment,

(2) Matters assigned by the Speakers of Parliament concerned as regard a proposal of representatives in accordance with law to take action against a political post holder about bribery and illicit enrichment,

(3) Complaints by aggrieved persons to the Commission about bribery and illicit enrichment and to take action against any person,

(4) Complaints by aggrieved persons to any working committee, working group, the Preliminary Scrutiny Board, or the Investigation Board formed by this law, about bribery and illicit enrichment and to take action against any person,

(5) Complaints by aggrieved persons to any relevant government department and organization, and then they transfer such cases to the Commission, about bribery and illicit enrichment and to take action against any person.

In investigating, the investigation body shall determine a period and inform the accused to explain and submit evidence or proof relating to the charge in carrying out the investigation. And the accused may explain and defend himself or may be defended by his agent in respect of the charge in the investigation made by the investigation body. The person under investigation has the burden of proof—by clear and credible evidence—to establish how he legally obtained his assets of money and property or what kind of income he obtained.

The investigation body shall submit the findings to the chairman of the Commission within (30) days after investigating, and then the chairman of the Commission shall hold the Commission session to discuss and resolve upon such findings. In deciding—

(1) If the Commission assumes that the accused has committed any offence under the law according to the findings of the report, after issuing the prior sanction for prosecution, it may assign the duty to prosecute him to the Investigation Board, and if no credible evidence to the charge is found, it may dismiss the complaint. The Commission shall inform and submit such, issuing the prior sanction and prosecution promptly as soon as possible to the President and the Speakers of both houses of the Parliament.

(2) If the Commission finds (in the finding report) that any person has been enriched by bribery, it shall form the Preliminary Scrutiny Board and assign it to vet the currencies and properties owned by the competent authority. The Preliminary Scrutiny Board shall submit the scrutiny report to the Commission. The Commission reviews the scrutiny report, and if it is proved clearly that the currencies and properties owned by the competent authority were obtained by bribery, then the Preliminary Scrutiny Board shall order the confiscation of the said the currencies and properties.

(3) If the Commission assumes that the further evidence should be investigated, it may reassign the case to the investigation board that submitted such report or another investigation board.

Under section 18, the investigation board shall therefore prosecute the "competent authority", which means certain politicians, high-level officials, senior officials, political post holders, international representatives, and public officials, who commit any offence under the Anti-corruption Law in the relevant High Court of the Region or State and any person except the competent authority who commits any offence under the law in the relevant court that has competent jurisdiction.

B. Prosecution of Anti-Corruption Cases

Prosecution is the second step to prosecute the accused and to sentence him to effective and deterrent punishment. Under section 30 of the Anti-corruption Law, the Commission shall send a

report that includes the decision to take action against the accused to the Union Government Office so that the Union Attorney General's Office can prosecute the case.

In criminal proceedings in Myanmar, there are three phases: investigation, prosecution and trial, and post-trial. These parts are related to each other and must follow the Union Judicial Law, the Attorney General of the Union Law, the Criminal Procedure Code, the Criminal Law (Penal Code), Special Laws (for special subjects) and their rules. The Anti-corruption Law is a special law to combat bribery and corruption, but no rules have been established yet. For investigation, prosecution and adjudication, the existing laws are in practice. Section 69 of the Anti-corruption Law provides that the offences taken action under the law are defined as cognizable offences.

The second schedule of the Criminal Procedure Code shows offences against other laws, except the Penal Code, and addresses whether police may arrest without a warrant or not, whether warrants or summons shall ordinarily issue in the first instance, whether an office is bailable or not, whether compoundable[1] or not, punishment, and by what Court is the case triable. If anyone commits an offence punishable by death, imprisonment which may exceed seven years, his offence is called a cognizable, non-bailable, not compoundable offence, and it must be tried by the Court of Session. But offences are separated into two kinds under the Anti-corruption Law, section 18. Firstly, if the accused is a competent authority, he is prosecuted in the High Court of the Region or the State. Secondly, the rest are prosecuted in courts that have competent jurisdiction under the Criminal Procedure Code.

As provided above, generally law officers scrutinize and tender legal advice on cognizable cases in conformity with law before prosecution. They determine whether there is valid evidence for prosecution and a relevant law that has been infringed by the accused; who should be prosecuted and who should be used as witnesses; how to select the appropriate evidence and witnesses to prove the offence; which matters which should be handled by the prosecuting body (investigating body) for the sound construction of the case; whether there is a need for further evidence; if there is evidence that has been illegally collected, how to manage it in the case; and tendering legal advice to the prosecuting body (investigating body) on whether to prosecute the case in the relevant court or not. If there is no sufficient evidence to prosecute the accused, the law officer tenders a request to the prosecuting body to detect further evidence and to interview the necessary witnesses. If the prosecuting body does that, and new evidence and new witnesses are not found, the prosecuting body submits a request to the relevant law office to close the case. The interaction between the prosecuting body or investigation board, the concerned persons and the law officers should be in the spirit of mutual benefit, or win-win cooperation, to prevent and fight corruption.

The Evidence Act, section 101, provides that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. The law officer (public prosecutor) must prove, therefore, the fact that the accused has committed corruption. The law officer first examines the prosecution's witnesses, then (if the accused so desired) cross–examines him, and then (the law officer if so desired) re–

[1] Compoundable offences are those offences where the complainant (the one who has filed the case, i.e., the victim) enters into a compromise, and agrees to have the charges dropped against the accused. However, such a compromise should be bona fide, and may not include any consideration which the complainant is not entitled to.

examines. The examination of a witness by the adverse party shall be called his cross-examination. The examination of a witness, subsequent to cross–examination by the party who called him, shall be called his re-examination. The examination and cross–examination must relate to the facts, but the cross-examination needs to be confined to the facts to which the witness testified on his examination-in-chief. The re-examination shall be limited to the explanation of matters referred to in cross-examination; and if new matter is introduced during re-examination with the permission of the court, the adverse party may further cross–examine upon that matter.

All facts, except the contents of documents, may be proved by oral evidence. Oral evidence must, in all cases whatever, be direct, with the exception of expert opinion. The contents of documents may be proved either by primary or by secondary evidence. Primary evidence means the documents are produced for inspection in the court. Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterparts, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing them.

Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original. The Electronic Transaction Law (2004), s.48, provides that "Information, electronic records, electronic data messages, electronic signatures or other documents communicated between the originator and the addressee shall not be denied legal effect, validity or enforceability solely on the ground of being made through electronic technology".

After examining the prosecution's witnesses, the accused is charged with the relevant sections of the Anti-corruption Law. If the accused pleads guilty to the charge, the Court will sentence him with just and proper punishment. If he denies the charge the Court carries on to examine the defence witnesses.

C. Adjudication of Anti-Corruption Cases

Administering the case, the courts give the accused fair trials, and sentence them to severe punishment on balance. The courts must abide by the principles of the administration of justice. These principles are:

(1) To administer justice independently according to law;

(2) To dispense justice in open court unless otherwise prohibited by law;

(3) To support the right of defence and the right of appeal in cases according to law;

(4) To support in building of rule of law and regional peace and tranquility by protecting and safeguarding the interests of the people;

(5) To educate the people to understand and abide by the law and nurture the habit of abiding by the law by the people;

(6) To cause to "compound", or compromise, and complete the cases within the framework of law for the settlement of cases among the public;

(7) To aim at reforming moral character in meting out punishment to offenders.

Former rulings have shown practitioners how to decide, handle and how to think about corruption cases. One example is that "U Ganaysin (Appellant) v. the Union (Respondent), 1967, M.L.R, p-11. It was held that there are takers and givers in the occurrence of bribery. If both satisfy each other, corruption cannot be discovered. If the giver is not satisfied, he complains to the police and the corruption case arises. Investigation needs preparation for arresting the taker and seizing the bribery money. In this situation the court must find the truth. If it appears that the giver has deceived by using the trap method, then the accused is released and the informer—who is the giver—might be prosecuted properly. If bribery occurred, the taker should be prosecuted and should not be acquitted merely due to unclean hands of the giver.

Another one is "U Ba Si (Appellant) v. the Union (Respondent), 1968, M.L.R, p-66". It was held that one complained that the public official asks for the bribe money in exchange for some official act. Here the complainant is not defined as an accomplice. Those who are included in the trap method are not also called accomplices. They are eyewitnesses. Special care should paid to the trap method. Although the trap method is used in a corruption case, the responsible persons are to act according to laws and regulations, and they must testify correctly before the court.

Another case is U Soe Haling v. the Union of Myanmar, 1968, M.L.R, p 39. In this ruling the accused was prosecuted, and the court needed to suppress and deter bribery by punishing the accused severely. But punishment cannot be the same for each offence. The court might consider the background of the offence and sentence the accused accordingly. The aim of punishment is to have the accused express regret and reform his moral character. The accused is a public official and he himself commits bribery. But his surroundings push to him crime. The general situation of Myanmar's political system causes the occurrence of the corruption. Ordinarily corruption cannot be defeated easily. By building the social and economic systems firmly, every national combats the occurrence of corruption.

V. CONCLUSION

Corruption offences are difficult to investigate. Law officers (public prosecutors), the investigation board and law enforcement agencies should cooperate and coordinate to prosecute the accused and seek just punishment. Corruption cases occur in all countries, and such cases relate to other crimes such as transnational organized crime, terrorism in other countries and so on. Prosecutors and investigators need techniques, skills, knowledge, cooperation and coordination to combat corruption. Nowadays Myanmar is in the process of political and economic reform, and the important phase of reform aimed at eradicating corruption is arriving. Myanmar has been receiving technical assistance from the international community, thus strengthening exchanges and cooperation in the field of anti-corruption.