

CURRENT CHALLENGES AND BEST PRACTICES IN THE INVESTIGATION, PROSECUTION AND PREVENTION OF CORRUPTION CASES

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I. INTRODUCTION

Corruption is a chronic disease that damages the merits and aptitude of human beings and swallows resources from the earth. Although we all have been trying to eliminate the disease, it is still surrounding us. The more globalization the world has achieved, the more corruption increases. When criminals who commit corrupt acts use this technique for their crime, what can we do, what should we do? We have to cooperate and assist each other in eliminating the corruption on this earth, absolutely.

II. HISTORY OF ANTI-CORRUPTION LAWS IN MYANMAR

Before ratifying the United Nations Convention against Corruption, anti-corruption in Myanmar had a long, deep legal history dating back to 1885. After three Anglo-Burmese Wars with the British, the Kingdom of Myanmar was annexed to the British Empire in 1885. The Penal Code and the Criminal Procedure Code were introduced in Myanmar and they were widely used till 1948 when we received independence. Even after independence the Penal Code and the Criminal Procedure Code continued to be in legal effect. Regarding corruption, there was an old law, the Suppression of Corruption Act, 1948. Myanmar has adopted the English Common Law Legal System in a modified manner taken from India.

Myanmar ratified the ASEAN Mutual Legal Assistance Treaties (AMLAT) in 2004 and a domestic law, the Mutual Legal Assistance in Criminal Matters Law was enacted after that. After ratifying the United Nations Convention against Corruption, the Anti-Corruption Law was promulgated by the *Pyidaungsu Hluttaw* (Parliament) Law No. 23/2013 on 7th Aug 2013. In this paper I will present the challenges and the best practices in investigation, prosecution and prevention of corrupt acts.

III. GENERAL PRACTICE OF CRIMINAL CASES

As Myanmar practices the Indian Legal System, investigation is not done by the Union Attorney General's Office (UAGO). The Union Attorney General's Office is the main office with 14 Region and State Advocate General's Offices, District Law Offices and Township Law Offices under it. One of the functions of the UAGO is prosecution, and investigation is done by the prosecuting body which is under the Ministry of Home Affairs. The procedure for the prosecuting body is prescribed in the Criminal Procedure Code. The Bureau of Special Investigation is one of the prosecuting bodies. It was formed according to the Bureau of

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Special Investigation Act, 1951. The functions of the Bureau are: investigation, submitting legal opinions on cases, prosecution, collecting and submitting intelligence. The prosecution officer of the Bureau conducts criminal cases on behalf of the state before the Court under the Bureau of Special Investigation Act, 1951.

The function of the UAGO is controlled by the Attorney General of the Union Law. I will present the procedure of prosecution from a Law Officer's point of view. In respect of an investigation, when a report of the prosecuting body is received, a Law Officer examines whether the facts are complete or not in conformity with law. After that, the Law Officer gives an opinion on the case. Then the case is sent back to the prosecuting body, and the case is filed with the respective Court. The duty of a Law Officer is like a computer: the output will come out depending on the input or facts. If the facts are not complete, the opinion given by the Law Officer will not be accurate. Therefore, the first challenge in investigation is that some facts collected by the prosecuting body are insufficient.

Times change and general practice also changes. There were few issues in the investigation of corruption cases under the old law, the Suppression of Corruption Act, 1948. The police examined the accused and witnesses, took custody of remands, seized money and property and filed their case at the court. After ratifying the United Nations Convention against Corruption, the Anti-corruption Law was promulgated and there came challenges.

Under the new Law, the President of Myanmar formed the Anti-Corruption Commission comprising one Chairperson and one Secretary among the fifteen members with the approval of the *Pyidaungsu Hluttaw* (Parliament) to combat corrupt acts. The Commission conducts enquiries into bribery and illicit enrichment of suspects and investigates them. For enquiry and investigation, the Commission forms the Investigation Board which is led by any member of the Commission with appropriate citizens and the Preliminary Scrutiny Board with the appropriate persons on case-by-case basis. When the Commission receives information from the President of the Union and two Speakers of Parliament and complaints by aggrieved persons, it directs the Investigation Board to enquire from the suspect about his actions and illicit enrichment. But at first instance, investigation causes the suspect to get the right to explain the allegations. If he can explain with strong evidence, he will be free. In doing so, investigating the suspect, it is said that the provision of the new Law is good at practicing humanity and ensuring the rights of the suspect. But some accused are absconding while the case is under investigation. It is one of the challenges. We are considering issuing a separate law or directive to overcome this challenge. Moreover, the Anti-Corruption Law and rules related to it also need to be amended.

IV. PROSECUTION

When a case related to corruption is filed, the Anti-Corruption Commission requests the UAGO to take part in the corruption case. When the UAGO receives the request from the Commission, I, as the Deputy Director General, as well as the head of the Prosecution Department, direct the Advocate General's Office of the respective Region or State to attach a Law officer to the case. The case is constructed on the facts of the investigation. There are technical deficiencies in the court so the cooperation of the prosecuting body and the Law Officer is needed. Sometimes there are prosecution witnesses before the court, who deny the statements attributed to them in police papers. In these cases, the conducting law officer has to compare their statements before the court with the police paper. In some cases, important

witnesses do not appear before the court. In these cases, the appearance of witnesses is waived. This is a challenge during the prosecution of these cases.

When the accused is acquitted at trial, it is necessary to appeal to the respective High Court of Region or State or the Supreme Court of the Union against the acquittal. But there is a limitation of six months for an appeal against acquittal. If the limitation is exceeded, it is necessary to draft an affidavit. This is one of the challenges facing Law Officers. In the prosecution of some corruption cases, the prosecuting body cannot seize money and property related to the corruption as the accused refuses to produce the evidence. In these cases, we have to collect circumstantial evidence. Sometimes there are loopholes because of insufficient circumstantial evidence. The English Common Law Legal System says “A man is presumed to be innocent until he is proved to be guilty.” The burden of proof lies with prosecution and the Law Officer. Although the jury system was once initiated, there were weaknesses in using it because of the custom and culture of the Myanmar Society. All the judgements are made by the Court. It is a maxim of the English Common Law that “It is better for ten guilty persons to be acquitted than for one innocent man to be convicted.”

V. PREVENTION

The Ministry of Home Affairs is more responsible for the prevention of corruption than Law Officers. At this point, the rule of law is essential for the prevention of offences. This can be done with the cooperation of three pillars of justice mainly the Prosecuting Body, the Union Attorney General’s Office and its subordinate offices and the Courts. The Prosecuting Body has to collect the facts, the Union Attorney General’s Office has to conduct the case whether the accused is guilty or not and the court has to give an effective deterrent judgement. The rule of law is fundamental for the prevention of crimes and can produce Good Governance. Our old practice has been done with experience passed from senior lawyers to junior lawyers. During the time of the new Government, we conducted 56 workshops and seminars with the cooperation of the UN and International Organizations, International Law firms, the Attorney General’s Chambers and the Ministry of Law of ASEAN countries. The first seminar was with the European Union (EU) on the “Rule of Law” in February 2012. It was the largest international seminar in Myanmar with experts from 20 countries present, and it was attended by personnel from the Legislature, Executive and Judiciary. The attendees amounted to 250 people. Whenever we conduct international workshops and seminars, we invite the other two pillars of the State, namely, the Legislature and the Judiciary. Conducting seminars and workshops gives awareness to the participants and other attendees, who disseminate the knowledge gained to their colleagues.

We engaged the UNDP to have their country programme, an agreement with Japan International Cooperation Agency (JICA), and USAID, and created a Design Workshop to restructure the functions of the UAGO. The Ministry of Law of Singapore signed an MOU with us, and the Japan International Cooperation Agency (JICA) signed a Record of Discussion. We already have two MOUs with China and Lao PDR. We just signed an ROD with the Republic of Korea (KOICA) on 14th October 2015.

Internationally, the Attorney General of the Union gives keynote addresses around the world. He was the at APEC (the Asia–Pacific Economic Conference) Pathfinder Dialogue in Bangkok and the Rule of Law Seminar in Bangkok conducted by the American Bar Association, Department of State of USA and the Royal Family of Thailand. He also gave a

keynote address at the International Legal Aid Conference in Johannesburg, South Africa. He also gave a speech in Singapore organized by the AGC on the Changing Role of the Myanmar Legal System. These are landmarks in the prevention of corruption as well as Rule of Law.

VI. MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS LAW

Myanmar promulgated the Mutual Legal Assistance in Criminal Matters Law 2004 to be in line with international standards. This law was drafted with the help of the UNODC and was approved by the Financial Action Task Force (FATF). FATF comprises 36 member states and is headquartered in Paris, France. Myanmar ratified the ASEAN Mutual Legal Assistance Treaty (AMLAT) in 2004 and also checked whether our law was in conformity with the AMLAT. Every letter of the treaties and the spirit of the treaties are in conformity with the Law. The Ministry of Home Affairs issued the Mutual Assistance in Criminal Matters Rules in the same year. The Government shall form the Central Authority for rendering assistance among states in criminal matters in which the Union Minister of the Ministry of Home Affairs is a Chairman, the Deputy Attorney General is one of the members and the Director General from Myanmar Police Force is Secretary.

According to this law, any foreign state requesting assistance of Myanmar in criminal matters shall:

- (a) If it is a State Party to the international convention or regional agreement to which the Union of Myanmar is a State Party or a state which has a bilateral agreement with the Union of Myanmar, requests for assistance are to be submitted directly to the Central Authority;
- (b) If it is the State Party to the international convention or regional agreement to which the Union of Myanmar is not a State Party or the state that has not entered into a bilateral agreement with the Union of Myanmar, requests for assistance are to be submitted to the Central Authority through diplomatic channels.

Any foreign State may, in making a request under section 10, with respect to investigation, prosecution and judicial proceedings in criminal matters include and request the following matters:

- (a) Taking evidence or statements from any person;
- (b) Rendering service so that judicial documents shall have effect;
- (c) Examining objects and sites;
- (d) Identifying or tracing money or property that is relevant to the offence to be used for evidentiary purposes ;
- (e) Execution of searches, seizures, control, issuing restraining orders and confiscation of exhibits;

- (f) Obtaining information, documents to be used for evidentiary purposes, records and expert opinions;
- (g) Providing originals or certified copies of relevant documents and records to be used for evidentiary purposes;
- (h) Exposing the residential address of offenders, location of the exhibits and other necessary information;
- (i) Other matters in respect of which the Central Authority has agreed to give assistance.

The requesting state shall, in making a request mention the following facts in the Myanmar language or the English language:

- (a) Name and designation of the authority making the request;
- (b) Statement setting out a summary and nature of the case relevant to the request;
- (c) Necessary identity, address and nationality of the person concerned;
- (d) Procedures for rendering assistance in matters for obtaining evidence;
- (e) Period and limitation during which the request is to be complied with;
- (f) Information to be exposed and evidence to be obtained;
- (g) Statement to perform confidentially if the matter is required to be performed confidentially;
- (h) Extract of relevant laws, rules and procedures exercised in one's own state in respect of the requested assistance and the reasons thereof;
- (i) Name, function and responsibility of the person conducting the investigation or prosecution in judicial proceedings in one's own state;
- (j) Other necessary information.

The requesting state may, in urgent circumstances, make a request orally by telephone facsimile, electronic mail or other electronic means including computer networks. In making such requests the original letter of request shall be sent to the Central Authority without delay. The Mutual Legal Assistance in Criminal Matters Law is an existing law, but to date there is no case related to this law and no country in ASEAN has submitted requests on this matter.

VII. PUBLIC-PRIVATE PARTNERSHIP AND BEST PRACTICE

Corruption is a difficult issue to deal with. To tackle corruption cases, it is necessary to have the cooperation of the government and the public. Corruption cases can be constructed on the complaint of the public, and we have announced hotline numbers for use by the public

for such complaints. We also advertise in the newspapers for public awareness. There are some sample cases which resulted in the punishment of the accused based on complaints received from the public. One of these is where the Homalin Township Judge of Sagaing Region decided judgements which were not consistent with the law; thus, he was involved in corrupting criminal cases. He was sentenced by the High Court of the Sagaing Region with imprisonment for a term of 10 years with labour. Due to information from the representative of the Homalin constituency, the above case was discovered. When the Anti-Corruption Commission receives a complaint, it forms, if necessary, an investigation board and Preliminary Scrutiny Board to investigate these offences. Then, the Commission requests the UAGO to give legal advice on these offences. During investigation and prosecution, the prosecuting body and the UAGO need to cooperate. It is the best practice that the prosecuting body and the UAGO work cooperatively. Then the Commission requests the Union Attorney General's Office to give legal advice for these offences. It may therefore be said that the best practice for corruption cases is also public communication and engagement. Since this is the best practice, and there will then be the rule of law and hence we have "Good Governance and Clean Government". The government alone cannot apply best practices without the active participation of the public. Public-Private Partnership is necessary. To achieve this, the public must be "Good People, Clean People".

VIII. WHISTLE-BLOWER PROGRAMME OR WITNESS PROTECTION MEASURES

Myanmar provides whistle-blower and witness protection in section 17(i) of the Anti-Corruption Law. The Commission gives necessary protections and rewards to the informer in the matter of revealing and taking action for informing, provided there is credible evidence in respect of the bribery or enrichment by bribery allegation. The Commission can also issue rules about this, but the practice is not widely used yet.

IX. CONCLUSION

Myanmar has come a long way in its legal system since belonging to the English Common Law legal family. The judge is responsible for the judgement, the Law Officers for prosecution and the prosecuting body for investigation. Cooperation among these three institutions is necessary for combating crimes. As a step in both law and practice in introducing the fight against corruption, Myanmar has ratified the United Nations Conventions against Corruption (UNCAC) and the ASEAN Mutual Legal Assistance Treaty. Myanmar also promulgates domestic laws related to these treaties and applies these laws. In applying these laws, we face challenges. Challenges are everywhere but the most important is to overcome them. Myanmar is trying its best to overcome these challenges in both law and practice.