

TOPIC3

LEGAL FRAMEWORK AGAINST TRANSNATIONAL ORGANIZED CRIME BY CRIMINAL JUSTICE SYSTEMS IN DIFFERENT COUNTRIES

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I. INTRODUCTION

Under the theme of the 108th International Seminar "Current Problems in the Combat of Organized Transnational Crime", our group was assigned to explore the legal framework against organized transnational crime in different countries' criminal justice systems. The scope of our exploration was identified and finalized with the following issues being focused on:

- (1) specific criminal provisions (substantive and procedural) for efficient countermeasures against crimes committed by organized transnational crime groups;
- (2) provisions for the confiscation of illicit proceeds derived from the specific organized transnational crimes;
- (3) provisions specifically directed at organized crime groups;
- (4) provisions for pro-active and/or non-traditional strategies, such as, undercover operations, wiretapping, immunity, controlled delivery etc., in investigating organized transnational crimes;
- (5) provisions for witness protection programmes;
- (6) special provisions with regard to sentencing policy; and
- (7) exploration of provisions for

international co-operation in criminal matters, such as extradition and mutual legal assistance.

In our examination, a total of 22 countries' criminal justice systems were studied, namely: Bangladesh, Colombia, Fiji, Hong Kong, India, Japan, Madagascar, Malaysia, Mexico, Mongolia, Nepal, Nicaragua, Pakistan, Papua New Guinea, Philippines, Korea, Saudi Arabia, Thailand, Tonga, Turkey, Venezuela, and, Viet Nam. Our study was conducted by ways of referring to the individual presentation reports of participants attending this Seminar, holding of interviews with participants, of general discussion in forum, and, examining of concerned law books.

II. CURRENT PROVISIONS IN COMBATING ORGANIZED TRANSNATIONAL CRIMES IN THE RESPECTIVE COUNTRIES

A. Efficient Countermeasures

Defining the term "efficient countermeasures" in legal justice systems is difficult, the group is nevertheless of the opinion that it should be a formalized system or arrangement facilitated either by provisions or executive action

(procedural) which is to speedily and timely deal with the suspect in the course of investigation and/or offender upon his/her arrest. Performance indicators are therefore placed upon: simplified procedures in investigating and detecting offences; timely process of request for assistance; and speedy trial.

Upon examining the legal justice systems of these 22 countries, it was revealed that only the Philippines has the set-up of ‘Special Dangerous Drug Court’ to speed up the criminal proceedings for drugs trafficking cases. In this court, trials can be concluded within two months, following the arrest of the offender. In Hong Kong, authorization in conducting raid at premises for firearms is delegated to police officers of the rank of superintendent (under the Firearms and Ammunition Ordinance) to speed processes. In addition, under the Police Force Ordinance of Laws of Hong Kong, banking institutes upon receipt of the request from the police have to supply information whether the subject has any accounts drawn on the bank and all account records, if any, within 28 days. It is noted that some countries, such as India and Malaysia, will make use of the internal security provisions to speed up proceedings against criminal, however the group is of opinion that these kinds of countermeasures should not be encouraged.

B. Confiscation of Illicit Proceeds

Provisions for confiscation of illicit proceeds, although confined to illicit trafficking in drugs, are in force in more than half of the 22 countries assessed; namely Bangladesh, Colombia, Hong Kong, India, Japan, Korea, Malaysia, Madagascar, Mexico, Nepal, Nicaragua, Pakistan, Saudi Arabia and Turkey. Amongst them, Bangladesh, Colombia, Hong Kong, Mexico, Nepal, Pakistan, Saudi Arabia and Turkey further have

provisions for confiscation of illicit proceeds derived other than from drug trafficking.

Of note, some countries have already had provisions in the final draft to regulate the confiscation of illicit proceeds derived from drug trafficking and/or organized crimes, although they are yet to be enacted, such as the Anti-Organized Crime Law of Japan, the Proceeds of Crime and Money Laundering (Prevention) Act of India, and the Money Laundering Control Act of Thailand.

C. Criminalization of Organized Crime Groups

Provisions for criminalizing members of organized crime groups can be divided into two categories: the first being provisions criminalizing the MEMBERSHIP of an organized crime group which making it an offence of being a member; the second category is described as provisions criminalizing SPECIFIC OFFENCES COMMITTED BY MEMBERS of an organized crime groups. By this criteria, the ‘‘Society Ordinance’’ of Hong Kong and the ‘‘Act for the Punishment of Violent Crimes’’ of Korea are under the first category; while the ‘‘Anti-Boryodukan Law’’ of Japan, and, the ‘‘Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act’’ which is only applicable in the State of Uttar Pradesh of India should be within the second’s.

D. Provisions for Pro-Active Strategies in Investigating Organized Crimes

For easy reference, pro-active strategies in investigating organized crimes are confined to those assessed to be the most reliable and effective evidence-gathering techniques, such as undercover operations, wiretapping, immunity, and controlled delivery.

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1. Undercover Operations

Under the laws of Colombia, Malaysia, Mexico, Pakistan (for drugs offences only), Madagascar, Saudi Arabia, Venezuela, and Viet Nam, in the course of investigation and detection of criminal activities, the mounting of undercover operations by the deployment of operatives is legally permitted and governed. Evidence so adduced is admissible in court. While in Bangladesh, Hong Kong, Japan, Philippines and Turkey, undercover operations are common practice and legal in the sense that there is no laws to rule it illegal. Undercover operations are basically illegal in the countries of India, Korea, Nepal, Nicaragua, Thailand, Tonga, and Fiji.

2. Wiretapping

The definition of wiretapping in our study is defined to the interception and/or the tapping of conversations over the telephone without the knowledge of both the calling and receiving parties.

Provisions permitting the wiretapping in the course of investigation exist in Colombia, India (mainly for information/intelligence gathering and evidence so obtained is not admissible in court), Madagascar, Malaysia (applicable only to drug trafficking and kidnapping offences), Mexico, Pakistan, Philippines, Turkey (subject to the prior approval of the court), Venezuela, and Viet Nam.

3. Immunity

In view of the difficulties encountered in prosecuting the master-minds of criminal syndicates (principal offenders), especially for victimless crimes, due to the secret operation of most of the organized crime groups, the granting of immunity to members of the criminal syndicate or operatives in undercover operations, so as to obtain their testimonial evidence in court, is assessed as one of the most

effective and reliable tactics. Immunity, in term of its types, can be divided into two categories in accordance with the approach of U. S. A.. The first type which is granted through legislation is called "formal" immunity, while the second type is granted by way of negotiation carried out between the defense counsel and prosecutor with the acknowledgment of the presiding judge. In respect of "formal" immunity, it can be further divided as "use" and "transaction" immunity.

- (i) *Use Immunity*: briefly protects a witness from prosecution in respect of their testimonial evidence in court from incriminating themselves for a particular offence.
- (ii) *Transaction Immunity*: is a blanket protection to a witness from prosecution regarding their testimonial evidence in court for a particular crime, or a series of crimes (transaction), in which s/he is incriminated.

"Informal" immunity is basically an agreement as a result of the bargain and/or negotiation between the defense counsel and prosecutor, with the cognisance of the presiding judge. By this agreement the witness is protected from prosecution.

Our study of these 22 countries' legal justice systems revealed that provisions to regulate immunity exist in Colombia, Hong Kong, India, Mexico, Pakistan, the Philippines, the Republic of Korea, Saudi Arabia, Venezuela and Viet Nam, although the circumstances under which it is granted may be deferent.

4. Controlled Delivery

"Controlled Delivery" is an effective tool in combating illicit drugs trafficking and is defined in the 1988 United Nations Conference for the Adoption of the Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic

Substances, as “the technique of allowing illicit or suspicious consignments, or substances substituted for them, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of the offence”.

Out of the 22 countries, adopting the tactics of controlled delivery in tackling illicit drugs trafficking, handling stolen goods, etc. is legalized in Hong Kong, India, Japan, Madagascar, Malaysia, Pakistan, Philippines, Saudi Arabia, Turkey and Vietnam. Nevertheless difficulties has been experienced in some countries affecting the success of these operations, due to the inadequate cooperation and coordination of involved countries, especially destination countries.

E. Witness Protection Programmes

The importance of witness protection is particularly pertinent in the success of combating organized crimes, not only because of preventing threat and/or violence to the witnesses but also as a guarantee in gaining the confidence of witnesses in support in of organized crime prevention and detection.

Most of the countries studied realize the essential need of protecting witnesses. Their witness protection programmes can basically be categorized in to three types:

- (1) Countries with witness protection programmes regulated by legislation are: Colombia, Mexico, Philippines, Saudi Arabia and Turkey (applicable to terrorist matters only). While in Hong Kong (Witness Protection Ordinance) and Nepal (Witness Protection Act) are in the draft stages.
- (2) Countries with the witness protection programme formalized by way of executive action are: Bangladesh, Hong

Kong, Korea and Nepal.

- (3) This group consists of those remaining countries in which the witness protection issue is not formalized nor legislated, but may be provided in case of need.

Of note is that despite witness protection programmes in force in law or otherwise in some countries, the extent and standards varied. Some countries only confine their protection to the trial period, although some countries provide a full range of protection including physical protection, relocation of residence, financial support, change of identity, and the extending of the scheme to cover the witness family and relatives. However it is unfortunate to note that some are hampered by the lack of financial and human resources to afford a comprehensive witness protection programme.

F. Special Criminal Punishment/ Sentencing Policy

Sentencing policy is basically a decision making process for the authority to determine the treatment of a convicted offender. It nevertheless implies the message of deterrence, punishment and rehabilitation, in accordance with the priority allocated and nature of the offence. Of course, the background of the offender should be taken into consideration as well.

Under this scope, a lot of factors such as the characteristics of the country, social, political economic, development stage, phenomenon of the country, may be brought up. For the sake of our study, focus is placed upon the issue of sentencing policy with regard to organized crime offenders. Amongst the countries studied, Hong Kong (Society Ordinance, and, Organized and Serious Crime Ordinance), Japan (Anti-Boryokudan Law) and Korea (Act for the Punishment of Violent Crimes) have special provisions to criminalize the members of an organized group by

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enhancing the sentence for the offence committed, although in Japan being a member of Boryokudan itself is not an offence under the Anti-Boryokudan Law. Whereas Bangladesh, India, Malaysia, Pakistan, the Philippines, Saudi Arabia and Turkey, has capital punishment in force for drug trafficking offences.

G. Provisions for International Cooperation

There is no dispute that international cooperation becomes a "must" if organized transnational crime is to be combated effectively and efficiently. The effective means are the surrender of fugitives and mutual assistance in criminal investigation by the facilitation of national provisions and/or bilateral/multilateral agreements; although difficulty is experienced by requesting countries due to lack of bilateral agreements with the requested countries, or, in view of the principle of speciality and of dual criminality.

Upon studying the 22 countries, those with national provisions to facilitate the international cooperation are Bangladesh, Colombia, Japan, Madagascar, Mexico, Malaysia, Nepal, Pakistan, the Philippines, the Republic of Korea, Saudi Arabia, Thailand, Turkey and Venezuela, while Hong Kong is in the stage of drafting the fugitive offenders bill.

III. QUESTIONS TO BE ANSWERED

Amongst the above seven issues, adoption of pro-active strategies such as undercover operations, wiretapping, immunities, and controlled delivery in investigating organized crimes attracted active discussions in the forum; not only in the scope of human rights, individual freedom, personal privacy but also bringing up the dilemmas being encountered by law enforcement agents, the issue of entrapment, and the issue of police ethics.

Despite in some countries undercover operations and/or wiretapping are yet to be legally permitted (of course in this sense it should not be assumed as illegal), law enforcement agencies adopt them as a common practice for information/intelligence gathering. This sort of practice apparently brings out a question of temptation and entrapment, should the law enforcement agent lack supervision and coaching. Meanwhile the belief that the law enforcement agency, as part of the social justice system, should reflect justice by maintaining the law and order with honesty and integrity, these practices are no doubt putting the law enforcement agent(s) in a dilemma. It is easy to imagine the next question of credibility of the officers concerned in their testimonial evidence under which the informational evidence is gathered. Should the officer intentionally deny or conceal the truth, or should s/he be holding to the ethic of honesty and tell the whole truth?

Immunity was another hot issue during the discussion session. By adopting the approach of the U.S.A., immunity (as described earlier), both formal or informal, basically puts a suspect under exemption from prosecution. This tool seems to be one of the most effective countermeasures in bringing the heads of organized criminal syndicates before justice. The question of abuse (such as what can be done if the witness whom the immunity has been granted turns hostile in court) should however become another concern of the legislators.

In the course of the forum, the meaning of immunity also attracted active discussion although it was eventually clarified that by adopting the U.S.A.'s approach and other countries' approaches, the application and circumstances under which it is granted might be different. In Hong Kong, the immunity (called Public

Interest Immunity) can be granted either before the commission of the offence, or after the commission of the offence. The former applies to police officers (operative) and/or witnesses (Informer) who have been tasked to take part in the undercover operation, while the latter can be granted to a suspect so as to testify against a principal offender.

Unless undercover operations, wiretapping, and immunity are formalized and founded with clear and specific legislation, the question of dilemmas and abuse remain to be answered.

The tactics of controlled delivery also causes concern upon the issue of lack of effective and efficient cooperation and coordination. In this aspect, the setting up of a joint action task force which not only involves law enforcement agencies of affected countries, but also includes legal counsel of concerned countries, appears to be a possible solution.

IV. CONCLUSION

Coming across the aforementioned scenario of organized crime, it is realized that perhaps there is no country in the world left free from organized crime one way or other. The problem of crime has been faced by all countries irrespective of economic and technological development or nation size. However, the crimes have flourished all over the world wherever there is a favorable atmosphere in respect of economic benefit and legal lacunas.

On the basis of general discussion of this group, it may be commented that there is no specific law in each country dealing with all transnational organized crime, that has substantive and procedural legal provisions for the efficient countermeasures against such crimes. In view of the rapid development of globalization, the

realization of provisions for confiscation of illicit proceeds derived from specific organized crimes becomes urgent.

Provisions providing undercover operations, wiretapping, immunity, controlled delivery and so on have been discussed in length. Most of the countries have these sort of practices in their countries, necessary to overcome criminal activities, but very few countries have according legal provisions (without which the law enforcement agencies are handicapped to combat the targeted crime and criminals). It is almost a consensus that such laws should be materialized and formalized so as to enable crime combatting agencies, but with full respect for recognized human rights, individual freedoms and personal privacy.

Protection of witnesses is needed for cases to be actioned effectively. By such, witnesses as can not only be protected from the danger of threat and violence, but can also be confident in their support of organized crime prevention and detection.

Many countries are found to have domestic laws providing extradition and mutual legal assistance in criminal matters. Some of the countries, although there is no such laws, have entered into mutual assistance agreement with many countries, especially neighbouring countries, for the arrangement of transborder as well as international crimes. Beside this, countries studied have links with interpol, by which capability in combatting organized transnational crimes are further enhanced. Moreover, United Nation's instruments relating to drugs and other transnational organized crimes are in effect in almost all participating countries, such as Vienna Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, 1988. The Seminar was in consensus to make an

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effort to adhere to such international arrangements and cooperation, either in bilateral or multilateral ways.

In sum, it is noted that the law enforcement authorities would require legal room to accommodate effective methods against organised crime, either through national or international means. Being transnational in nature, proper information, law and law enforcement agencies, as well as proper adjudication are always deemed necessary. Today, commitment has been shown by the world in such matters in many forums. However, proper arrangements for uniform and efficient countermeasures are still needed to be realized and explored as early as possible before new crimes come.