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PART TWO

WORK PRODUCT OF THE 16TH UNAFEI UNCAC TRAINING PROGRAMME

EFFECTIVE MEASURES TO PREVENT AND COMBAT CORRUPTION AND TO ENCOURAGE COOPERATION BETWEEN THE PUBLIC AND PRIVATE SECTORS

INTRODUCTORY NOTE

It is with pride that the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) offers to the international community the Resource Material Series No. 92.

Part One of this volume contains the work product of the 155th International Training Course, conducted from 18 August to 2 October 2013. The main theme of the 155th Course was *Effective Collection and Utilization of Evidence* in Criminal Cases. Part Two contains the work product of the 16th UNAFEI UNCAC Training Programme, conducted from 6 October to 13 November 2013. The main theme of the 16th UNCAC Programme was *Effective Measures to Prevent and Combat Corruption and to Encourage Cooperation between the Public and Private Sectors*.

With regard to the 155th Course, achieving prompt and proper punishment of offenders requires that criminal investigators discover the facts of the crime during their investigations, and it is equally important to utilize evidence effectively to prove guilt at trial. Historically, acquiring statements from suspects, victims and key witnesses has been the primary means of gathering evidence. However, over the past 50 years, it has become difficult to acquire such statements because of changes in society and greater commitments to human rights, especially the rights of the accused.

When interviewing or interrogating witnesses or suspects, investigators must carefully obtain accurate statements. Some countries have introduced special interview or interrogation techniques based on cognitive psychology, such as the PEACE Model (interview) in England and the REID Technique (interrogation) in the United States of America. Additionally, several countries have systems that facilitate witness testimony, such as offers of immunity and plea bargaining, or that compel witnesses to testify through the use of subpoenas. In addition to interrogation, some countries use special investigation techniques to acquire important statements, such as undercover operations controlled delivery and electronic surveillance, including wiretapping.

On the other hand, progress in science and technology has brought forensics to the field of criminal investigation. Recently, new investigation techniques to acquire objective evidence, such as genetic (DNA) testing, computer forensics and video analysis, are being introduced in many countries and are becoming essential investigation methods.

With regard to the 16th UNCAC Programme, corruption poses a serious threat to the stability and security of societies. The threat is even greater when corrupt practices prevail in the public sphere. The enormous negative impact of corruption and its increasing transnational aspects led to universal recognition that this phenomenon had to be addressed collectively at the international level. Consequently, several multilateral instruments against corruption have been adopted since the mid-1990s. The most important of these instruments, the United Nations Convention against Corruption (hereinafter referred to as "UNCAC") was adopted by the UN General Assembly on 31 October 2003.[1]

Articles 15 through 25 of UNCAC establish a framework for the criminalization of corrupt acts, including public- and private-sector bribery, embezzlement, trading in influence, and money laundering. As for any crime, investigators must use a combination of effective interview and interrogation techniques in addition to the best available electronic and forensic technologies. Moreover, as UNCAC stipulates in Articles 12, 13 and 39, cooperation between the public sector and the private sector is very important to prevent and combat corruption effectively. Finally, international cooperation is vital to combating corruption, and countries must share information on the status of corruption within their respective borders. Such relevant information includes experiences, current problems, and sophisticated techniques in the investigative, judicial and asset recovery processes.

UNAFEI, as one of the institutes of the United Nations Crime Prevention and Criminal Justice Programme Network, held these training programmes to offer participants opportunities to share experiences, gain knowledge, and examine crime prevention measures in their related fields, as well as to build a human network of counterparts to further international cooperation, which is vital to addressing these issues.

[1] G.A. Res. 4, U.N. GAOR, 58th Sess., Supp. No. 49, at 5, U.N. Doc. A/Res/58/4 (2003).

In this issue, in regard to both the 155th International Training Course and the 16th UNAFEI UNCAC Training Programme, papers contributed by visiting experts, selected individual presentation papers from among the participants, and the reports of the 155th Course and the 16th UNCAC Training Programme are published. I regret that not all the papers submitted by the participants of each programme could be published.

I would like to pay tribute to the contributions of the Government of Japan, particularly the Ministry of Justice, the Japan International Cooperation Agency, and the Asia Crime Prevention Foundation for providing indispensable and unwavering support to UNAFEI's international training programmes. Finally I would like to express my heartfelt gratitude to all who so unselfishly assisted in the publication of this series.

March 2014

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Director of UNAFEI

PART ONE

RESOURCE MATERIAL SERIES
No. 92

Work Product of the 155th International Training Course

"Effective Collection and Utilization of Evidence in Criminal Cases"

UNAFEI

VISITING EXPERTS' PAPERS

INVESTIGATIVE INTERVIEWING IN ENGLAND PART I: MODELS FOR INTERVIEWING WITNESSES AND SUSPECTS

*Timothy E. Curtis**

This essay will, as its title suggests, outline the models of investigative interviewing that have evolved into current practice, not just in England, but in many parts of the world. It can be read alone or in conjunction with Part II of this project which will look at some tactical and legal considerations applicable to investigative interviewing.

I. INTRODUCTION

There is possibly no such thing as a *perfect* police interview and the author of this paper has heard many experienced detectives make that observation. That is not to say that they do not constantly strive for the best product available; it is more a recognition that, under close scrutiny, somebody somewhere will be able to pass critical comment on some aspect of their performance as the interviewer. The reality is of course that in an adversarial judicial system such as that which operates in many countries which derive their legal system from the English there will always be 'the other side' who will be strongly motivated to highlight flaws in the interview process. If an interview was conducted to such a poor degree that it could be argued the outcome was not reliable then the interview could ruled as being inadmissible and its content not considered by the decision makers. In these circumstances it will almost always be the victim of the crime who suffers. If the product of a witness interview is deemed to be unreliable then it is possible that they will have to give their evidence 'live' in Court; if a suspect's admission is ruled to have been secured unfairly it may never get to the ears of the Judge or jury.

Criticisms of police interviews have long been the topic of debate in arenas wider than just the Courts though: many politicians, academics and other interested parties have evaluated and commented on some of the tactics and interview-skills employed during formal and informal reviews of cases. Much of this critical analysis has informed changes in practice through the years and it is true to say that these developments continue to this day. But for many, the basic premise of an interview remains the same: to find out what happened. Or "the quest for truth" as it is sometimes defined as. Even this simple foundation on which an interview is built has, in the past, been said to be the source of the problem: if the interviewer has already decided what happened (or what 'the truth' is) then they might conduct the interview in such a way as to achieve confirmation of their preconceived ideas — rather than adopt a more open-minded approach to explore of what might have happened.

II. CURRENT POSITION

There are a number of different interview frameworks that are currently trained to police officers and other criminal justice system practitioners in the United Kingdom and this paper will, in the main, deal with two of them: the four-phased interview advocated in the publication "*Achieving Best Evidence in Criminal Proceedings*" (Ministry of Justice 2011) and the PEACE model. The four-phased model is a framework exclusively for witnesses whilst the PEACE model has an application across both witness and suspect interviews.

These models developed in parallel to each other and although both started to gather a momentum within the criminal justice system from the late 1980s they have remained as separate entities through-

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out. That said there are obvious similarities between the two which will not be ignored as this essay gives a generic overview of both models. It will also focus on some more specific techniques that can be employed through the various phases.

III. THE SEVEN PRINCIPLES OF INVESTIGATIVE INTERVIEWING

As early as 1992 the British Government recognised the need to set out ideology that would underpin all investigative interviews. In doing so it published its seven principles (which can be seen in their original form at appendix A) which remained unaltered until 2009 when they were bought up to date to reflect changes in some legislation, publications and working practices. These principles — still in use today — are:

i. The aim of investigative interviewing is to obtain accurate and reliable accounts from victims, witnesses or suspects about matters under investigation

ii. Investigators must act fairly when questioning victims, witnesses and suspects. Vulnerable people must be treated with particular consideration at all times

iii. Interviewing should be approached with an investigative mindset. Accounts obtained from the person who is being interviewed should always be tested against what the investigator already knows or what can reasonably be established.

iv. When conducting an interview, investigators are free to ask a wide range of questions in order to obtain material which may assist an investigation

v. Investigators should recognise the positive impact of an early admission in the context of the criminal justice system

vi. Investigators are not bound to accept the first answer given. Questioning is not unfair merely because it is persistent

vii. Even when the right to silence is exercised by a suspect, investigators have a responsibility to put questions to them.

It can be seen that whilst many of the principles apply to both witness and suspect interviews some apply exclusively to one discipline or the other. Acknowledging these differences we need to look at how the models of interviewing vary, how they evolved and the key drivers behind those developments. Firstly we will look at specific guidance on interviewing vulnerable and intimidated victims and witnesses.

A. Victim and Witness Interviewing

In 1988 Judge Elizabeth Butler-Sloss published her report of the inquiry into a significant number of child abuse investigations in the English County of Cleveland. In it she commented that the interviews conducted with the witnesses: "*. . . . mostly failed the standards agreed by professionals working in the area of child sexual abuse*" (Shaw 2011). As a result of this inquiry the Right Honourable Douglas Hurd, the UK Parliament's Home Secretary of the day, established an advisory group to consider the using of visually recorded interviews of child victims and witnesses as a means of taking their evidence to Court. In his letter setting out the group's terms of reference he was clear from the outset that:

> *. . . . although it is the context of child abuse that this idea has gained ground it has wider implications, and an argument — although probably a less compelling one — could be mounted for the evidence-in-chief of other vulnerable groups to be given in this way*
> (Pigot 1989).

The group published their recommendations 18 months later in what has become known as the "Pigot Report" (after its chair, His Honour Judge Thomas Pigot) but is more properly titled: *"The Report of the Advisory Group on Video Evidence"* (Home Office 1989). In it they endorsed Professor

John Yuille's "Step Wise" approach to interviewing.[1] This is one which recognised the need for rapport to exist between interviewer and interviewee at the start of the interview; the need for the interviewee to recognise the seriousness of the context of the interview — and thus the need to be truthful; the need for the interviewee to be encouraged to speak freely about what they want to say before questioning begins; and when questioning actually commences it progresses from an open style before, if necessary, moving to more specific probing. Metaphorically speaking, this model's DNA exists in many of today's interview frameworks used around the world.

In 1992, adopting (and making reference to) many of the Pigot inquiry's recommendations, the British Government Home Office in conjunction with the Department of Health published "*The Memorandum of Good Practice*" (Home Office 1992) and what became known as "The Four Phased Interview" was born. This formalised the approach to be adopted in interviews with child witness in criminal proceedings and, in doing so, also acknowledged Judge Elizabeth Butler-Sloss's report referred to earlier. The four phases of the interview were:

- Rapport
- Free narrative account
- Questioning
- Closing the Interview

Instantly the influence of Yuille's 'step-wise' approach can be seen and his philosophy of minimising any trauma the child may experience during the interview whilst maximising the amount and quality of the information forthcoming and, at the same time, maintaining the integrity of the process (Yuille 1998 pg 1) was reflected. To achieve these objectives each phase contained significant guidance and whilst it is not intended to duplicate it all here some of the key points are worthy of reminder.

1. Phase One: Rapport

Everything needed to done overtly and whilst the main aim of this phase was to establish a rapport with the child and make them feel as relaxed and as comfortable as possible, the fact that the interview was being visually and audibly recorded needed to be made clear — as did the rationale for doing so. The child also needed to understand the reason for the interview. Given that the Pigot inquiry recommendations were aimed at securing Court-grade evidence the necessary rules of evidence needed to be considered during this phase and whilst there was no requirement for the child to swear an oath during the interview it was acknowledged that it would be helpful for the court to be aware of the child's *need* to tell the truth. This was also the phase that the interviewers were encouraged to supplement their existing knowledge about the child's cognitive and social development and, in particular, their communication skills so that the rest of the interview could be conducted using age-appropriate language.

2. Phase Two: Free Narrative Account

This phase, as its name suggests, was where the child was encouraged to speak spontaneously and freely — ideally about the matter under investigation. The key point here is that the account was to be given in a manner that was free of interviewer influence. Interviewers were encouraged to employ 'active listening' skills and use open questions as much as possible ensuring all the time that they were communicating at a level suitable for the interviewee sat opposite them.

3. Phase Three: Questioning

The purpose of this phase of the interview was to probe further information volunteered in the free narrative account phase. Whether the interviewer sought greater detail or just clarification of something already said the guidance was the same — use four specific question types (open-ended, specific but non-leading, closed, and finally leading) and recognise the hierarchy that exists between them.

[1] Professor John Yuille is an Experimental Psychologist at the University of British Columbia, Canada and had spent over thirty years researching memory in adults and children.

(1) Open-ended.

The interviewer should, as much as possible, use open-ended questions in the first instance (and, indeed, return to this style at the earliest opportunity when they were departed from). Although it was obvious that the question phase had been entered it was still possible to secure information with the least amount of interviewer-influence if 'open' questions were employed.

(2) Specific but non-leading.

Specific but non-leading questions allowed the interviewer to secure clarification on particular points already made earlier in the process.

(3) Closed

The Memorandum of Good Practice (MoGP) was clear (Pg: 20): "*If specific but non-leading questions are unproductive, questions might be attempted that give the child a limited number of alternative responses*". This endorsement of the use of closed questions was given with additional guidance. It gives the example: "*Was the man's scarf you mentioned blue or yellow, or another colour or can't you remember?*" (MoGP: Pg 20). Here you can see that the closed question is constructed in such a way as to allow the child to select an option other than blue or yellow (without such an opportunity the question could be construed as leading). It also allowed a response from a child who genuinely did not know what colour the scarf was.

(4) Leading

The final question type in this hierarchy is 'leading'. Leading questions were advocated only if they were applied with the utmost care and only then if they were likely to lead on a point which was unlikely to be a fact in dispute at any subsequent trial. The Memorandum of Good Practice made the differentiation clear to new-to-role interviewers insomuch as, when it is generally accepted that a person X has been killed at a particular time, it would not be not be considered as leading to ask the child 'what were you doing when X was killed?'. What is far less likely to be admissible would be a question:

> *which either suggests the required answer, or which is based on an assumption of facts which had yet to be proved. Thus 'Daddy hurt you, didn't he?' is an example of the first type of leading question, and "When did you first tell anyone about what Daddy did?' put to child who has not yet alleged that Daddy did anything is an example of the second type*
> (MoGP Page 26).

At all times the interviewer was encouraged to revert back to 'open questions' if any new information came to light.

4. Phase Four: Closing the Interview

This phase was essential as it was designed to ensure that the child witness did not leave the process in a distressed state. The child should not feel that they had failed or let the interviewers down and it was important to ensure that the child left the interview room in a positive frame of mind. It was also an opportunity to answer any questions that the child might have of the interviewers and for a discussion to take place about what might happen next. In many respects it can be viewed as a return to the rapport phase where neutral topics were discussed before ending the process.

The guidance published in the Memorandum of Good Practice proved to be so helpful in achieving its main objective of securing court-grade interviews of child victims that, following a further Home Office report ('*Speaking Up For Justice*') in 1998 and the Youth Justice and Criminal Evidence Act of 1999, the same model of interviewing was extended for use with certain categories of vulnerable and intimidated adult victims and witnesses. The Memorandum of Good Practice was replaced by "*Achieving Best Evidence in Criminal Proceedings*" (Ministry of Justice 2001) and four new categories of vulnerable witness were added to the existing one of 'children'— and thus became eligible for interview under the four-phased model. They were:

i. Witnesses with learning disabilities,

ii. Physically disabled witnesses,

iii. Witnesses with a mental disorder or illness

iv. Witnesses who were suffering from fear and distress (intimidated witnesses).

The four phases of the interview remained more or less the same as they were under the Memorandum of Good Practice and this continued to be the case for nearly six years. In 2007 however, to reflect the changes in relevant legislation and the adoption of a "Victim's Charter", a second edition of "Achieving Best Evidence in Criminal Proceedings" was published. This edition not only recognised the definitions of 'significant', 'reluctant' and 'hostile' witnesses (and gave interview guidance accordingly) but it also slightly adjusted the question hierarchy of the third — or question — phase of the interview. It now re-labelled the 'closed' questions of earlier publications as 'forced-choice' questions and gave additional guidance as to their use.

2011 saw the third edition of "Achieving Best Evidence in Criminal Proceedings" published — again to cater for changes in practice and legislation — but the model and its phases remained fundamentally unchanged. A significant addition to this edition however was the inclusion of extended guidance on the use of the "Enhanced Cognitive Interview". Although the cognitive-interview (in 2001) and the *enhanced* cognitive-interview (in 2007) were referred to in earlier editions the 2011 version was a much richer source of information on the various techniques available to interviewers.

Whilst the model to interview victims and witnesses was evolving and enjoying a variety of re-births the world of suspect interviewing was no less active and just as 1992 saw the publication of the Memorandum of Good Practice for the interviewing of witnesses it proved to be a landmark year in the development of suspect interviewing too.

B. Suspect Interviewing

Police in England and Wales had been audible-tape recording their interviews with suspects since its trials in 1984 and so by the late 80s a wealth of material (much of which had completed its route through the full criminal justice system) existed for evaluation and comparison. Some police interviews with suspects were also visually recorded and in 1992 Professor John Baldwin[2] published a report for the Home Office following his evaluation of 600 such interviews (400 visually recorded and 200 audibly recorded). His report: "*Videotaping police interviews with suspects — An evaluation*' is described by Clarke and Milne (2001) as probably being the "watershed" moment in the well-documented criticism of police interview skills (page 1).

Baldwin was able to criticise over a third of the interviews he evaluated, grouping their failings under four main headings:

I. The ineptitude of the police officers conducting the interviews resulted in Baldwin identifying them as being "*nervous, ill at ease and lacking in confidence*" with some of them being "*unfamiliar with the available evidence and had clearly not read the written statements*" (McGurk et al. 1993)

II. The interviewers assumed guilt and therefore expected a confession. This, in turn, influenced the type of questions posed as well as the manner and tone in which those questions were asked — to the extent that any confession subsequently offered by the suspect was not pursued sufficiently to sustain the case.

III. A poor interview technique was manifestly demonstrated by, amongst other things, interrupting the suspect and becoming "*unnecessarily flustered by the intervention of a third party, such as a legal representative*". (McGurk et al. 1993).

[2] Professor Baldwin was the Director of the Institute of Judicial Administration for over twenty years and is now the Emeritus Professor of Judicial Administration at the Birmingham Law School in England.

IV. Unfair questioning or unprofessional conduct. Baldwin expressed concern "in a small number of cases" where the interviewers employed an "*unduly harrying or aggressive approach*" (McGurk et al. 1993).

Whilst Baldwin acknowledged that the interviews he used in his research were not necessarily a representative sample both he, and subsequently the Home Office, were sufficiently concerned to make recommendations for change. The Police were not averse to change and it needs to be recognised that in parallel to Baldwin's research the Association of Chief Police Officers (ACPO) had (in October 1991) already established a working party on Investigative Interviewing and were actively reviewing their working practices. An outcome of all of this work was the adoption, in 1993, of a model of interviewing that would be applicable to all suspect and witness interviews. It was based on a series of phases and would become known by the mnemonic P.E.A.C.E., an acronym designed to assist the police in recognising the different stages.

P.E.A.C.E.

The stages of a PEACE interview are: **P**lan and prepare; **E**ngage and explain; **A**ccount, clarify and challenge; **C**losure; and finally **E**valuate. PEACE therefore is, in essence, Yuille's step-wise approach under different headings. Its application to a suspect interview obviously meant that different considerations would exist at each stage — but officers familiar with the four phased interview (advocated in the Memorandum of Good Practice) would recognise the parallels.

PEACE	Four phased
Plan and prepare	The Memorandum of Good Practice reflected this thinking when it was also very clear that: "*No Interview should be conducted without adequate planning*" (MoGP pg 9).
Engage and explain	Rapport
Account	Free Narrative Account
.... clarify, challenge	Question phase
Closure	Closure
Evaluation	

Although, as has already been stated, PEACE can apply to witness as well as suspect interviews we will focus, in this essay, on its application in a suspect context. We will consider the statutory obligations on the interviewer later but first we will take a generic look at the various stages of a PEACE interview.

***P*eace: Plan and Prepare**

It is easy to argue that this is the most important part of the interview — particularly in a suspect context. As somebody once said: "Failing to plan is planning to fail"! Good planning would start to address at least three of Professor John Baldwin's four categories of failings in the interviews that he assessed (referred to earlier in this essay) and even the fourth, 'the unfair or unprofessional approach', might be further minimised by better preparation.

There are a number of generic points that need to be considered before the interview takes place. Amongst these are:

i. What can this interviewee contribute to this investigation?

ii. What are my legal considerations / constraints?

iii. What offence (or offences) am I investigating — and thus what are their 'points-to-prove'?

iv. What do I already know about this interviewee and what do I need to find out?

v. Does this interviewee have a third party present — a legal advisor or an 'appropriate adult'?

This is by no means an exhaustive list and each investigation will bring with it different 'planning and preparation' considerations but for this overview of PEACE we will briefly look at the five points above.

(a) What can this interviewee contribute to this investigation?
From the outset you always have to plan for one of three responses from your interviewee:

i. prepare for a denial,

ii. prepare for an admission and

iii. prepare for your suspect to not answer any of your questions.

All three of these responses (even 'a suspect who does not answer your questions) can take on various guises but the need to plan for them is the same. Does, for example, the denial take the form of alibi that needs to be confirmed / rebutted or does the suspect claim 'mistaken identity' — in which case what are my identification options?

In the case of an admission the interview still needs to proceed to a depth that will, as Baldwin put it, sustain the case. Does the confession identify additional lines-of-enquiry such as those that might assist in the recovery of outstanding property — or identify additional victims? Does the admission go further than the original victim reported? A confession still needs to be probed.

A suspect who wishes to not answer the questions put to him can do so in a variety of ways. He can just choose to respond "no comment" at the end of each question — thus provoking the interviewer to ask the next question — or he can choose to say nothing whatsoever. The important thing in the planning phase is that the interviewers have planned to deal with the eventuality.

(b) What are my legal considerations / constraints?
The Police and Criminal Evidence Act 1984 is the primary piece of legislation that impacts suspect interviews. Amongst other things it governs the detention of a suspect when he or she has not been charged with any offence and stipulates the amount of time that a person can be so detained — and who to apply to if the investigation wants the period of detention to be extended. It also reinforces the fact that a detainee is entitled to free and independent legal advice.

Other things that an interviewer needs to consider at this early stage in the process include things like:

- Is English the first, or most appropriate, language for the interviewee?
- The fact that special considerations exist if the detainee is a juvenile or a mentally disordered or vulnerable adult
- Has the detainee made any significant statements in the past?
- Is there any 'Special Warnings' material in existence that require additional cautions under sections 36 or 37 of the Criminal Justice and Public Order Act of 1994? (This is discussed in greater detail in Part II of this essay.)

(c) What offence is being investigated and what are the points-to-prove?
Whilst it seems obvious that the interviewer should know what they are investigating Milne and Clarke (2001) in their comprehensive review of police interviews revealed that less than 30% of interviewers covered the points-to-prove in a "*comprehensive manner*" and, more worryingly, just over

14% of the interviewers did not cover them at all (Pg 38). Just as important as points-to-prove is knowledge of any statutory defences that might exist for the offence under investigation so that they too can be covered in the interview.

(d) What do I already know about this interviewee and what do I need to find out?

Given that the next stage of the PEACE model is "*Engage and explain*" there is an expectation that the interviewer will, at least try to, 'engage' with the interviewee. To this end it is useful to find out, so far as is relevant to the investigative process, some background information on the individual. This becomes particularly relevant if the employment of various interview tactics is being considered. The planning and preparation stage can be viewed as an opportunity to carry out a form of 'gap analysis. Once the interviewee identifies what they do not know about their interviewee when they 'engage' with their interviewee in the next phase of the process.

Another consideration could be whether this person has been interviewed in the past. If so, is there anything to learn from that contact with the police?

Does this interviewee have a third party present — a legal advisor or an 'appropriate adult'? When it is remembered that McGurk et al. (1993) reported that officers became "*unnecessarily flustered by the intervention of a third party, such as a legal representative*" the need to prepare for this eventuality is obvious. Equally the solicitor and appropriate adult have clearly defined roles and responsibilities in an interview and the interviewer needs to be prepared to ensure that they are carried out.

p*E*ace: Engage and explain

There are two distinct components to this phase: 'engagement' and 'explanation'. Firstly let's look at the 'engage' element. Depending upon what particular event is under investigation the interviewer(s) may have to spend a considerable amount of time in the next day or so with the person sat on the other side of the interview table. It is therefore right to recognise that:

> *Interviewers and interviewees can be influenced by appearance, manner and speech, regardless of what is said* [....] *therefore you must give thought to how you are going to manage the opening of the interview*
> (Centrex 2004).

This extract comes from the Central Police Training and Development Authority's publication "*The Practical Guide to Investigative Interviewing*" and explains perfectly why first impressions count. It is logical therefore to attempt to manufacture an environment aimed at meeting the needs of the process. There is no great mystique in human engagement and people do it every day. When you meet somebody you have never met before one of the first things you do is introduce yourself — and find out their name. And yet this seems to be anathema to some investigative interviewers, particularly in a suspect interview context. "*I don't want* [the suspect] *to know my first name*", and "*I don't want to be his friend*" were just two surprising responses from some police officers of an English Shire police force when this point was addressed with them. The latter comment clearly misses the rationale for the guidance. It is not about trying to create a friendship but about 'engaging' with the interviewee. Whilst this all seems very logical almost all models of interviewing have had to include this instruction as part of their framework, perhaps demonstrating the ease with which this aspect would be ignored by some interviewers if not so included.

Other 'engagement' considerations include the identification of any particular concerns that the interviewee may have. This can range from a desire for a drink of water through to an impassioned enquiry surrounding his anticipated release-from-custody time. Either way, the important thing is that the interviewee is talking to you. Importantly it gives you the ability to actually manage any concerns that he might voice but also, a potentially beneficial spin-off might be that this interaction may make it psychologically harder for him to remain silent when the interview moves into its true investigative phase.

The second element of this phase of the interview is to *explain*. This should not be seen as a mutually exclusive 'chunk' of the interview and can easily be woven in with the engagement process but, either

way, there are two main points that will warrant explanation: the reason that the interview is being conducted and secondly, the manner in which it is going to unfold. It is illogical, just because the interviewee is under arrest, to assume that they are familiar with the legal system. It is therefore appropriate to spend time checking their understanding and, if in any doubt, reinforcing the value that the interview will add to the investigation as a whole — and thus the significance that their contribution in the exchange will make. This is also the opportunity to explain what might happen during the interview.

These might include things such as:

i. The formalities and procedures of a tape (or video) recorded interview — including:

   a. The right to free and independent legal advice,

   b. What will happen to the recording media at the conclusion of the interview.

   c. If the interview is being remotely monitored, the additional procedures that relate to such a practice.

ii. Although the interview may be being audibly (or visually) recorded notes might still be taken during the process.

iii. Exhibits might be produced, revealed and discussed.

iv. The interviewee should not make any thing up and fabricate a response just to 'please' the interviewer.

v. The interviewee should give as much detail as possible

vi. The interviewee will be given time to answer questions put to them — so if there are times of silence it may be because the interviewer is giving the suspect thinking-time.

This is by no means an exhaustive list but it illustrates the need, when engaging with the interviewee in the first instance, to assess his or her linguistic abilities and level of understanding so that when the above features are explained it is delivered at a level that the interviewee will understand. This becomes particularly relevant when 'cautioning' the suspect and ensuring that they have an understanding of its content.

The "Caution"

The PACE "*Code of Practice for the detention, treatment and questioning of persons by police officers*" defines an interview as: "*.... the questioning of a person regarding their involvement or suspected involvement in a criminal offence or offences*". Every police officer is very aware that such interviews need to be conducted only once the interviewee has been told that:

> *You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence.*

This 'Caution' has sometimes been referred to as a '*right to silence*' and, to some degree, comparisons can be made with the "Miranda Rights" enshrined in the laws of the United States of America (which start: "You have the right to remain silent....") but the English caution makes the clear distinction between what the suspect says (or does not say) '....*when questioned*' and what he later intends to '*rely on in court*'.

Research (Jacobson 2008: Pg 9) has shown that even well educated people can have difficulty in explaining the caution in 'plain English' and so when one considers the added stresses that possibly exist when under arrest it is even more critical to ensure that the suspect understands it. To this end

many interviewers now ask three questions of the suspect who they have just cautioned. These are:

i. Do you have to say anything?

ii. If this matter goes to Court and you tell them something that you could have told me during this interview what might the Court think?

iii. What will happen to the tapes?

It is argued that coherent responses (by the suspect) to these three questions demonstrate an understanding of the caution. Whilst the author of this essay acknowledges it to be a step in the right direction he does not necessarily see it as the final solution.

pe*A*ce: Account, clarify, challenge

The opening question (in this phase) should give the interviewee the opportunity to admit or deny the offence, provide a reasonable explanation for what happened (and their involvement) or provide an alibi. Here we will look at examples of four different question constructs and their potential outcomes.

An open question:
"You have been arrested for [offence]. *What can you tell me about it?"* This gives the suspect an opportunity to respond in any of the four directions mentioned on the previous paragraph.

A closed question
"You have been arrested for [offence]. *Did you do it?"* This is merely a variation on the above and might, at best, secure only a "yes" or "no" reply — which obviously then demands a second question which will need to have been planned accordingly.

Time constrained question
Restricting the time frame inside which you want the suspect to comment can be done in two ways: *"Where were you between* [time] *and* [time] *?"* or, *"Where were you at* [exact time]*?"*. Both address slightly different investigative objectives and should be employed tactically where appropriate. A third variation: *"What were you doing at* [location] *at* [either a specific time or between-times]*?"* could be used with a suspect arrested at or near the crime scene.

Micro-summary questions.
If the suspect has already made a relevant comment it is possible to include that fact to act as a prefix to many of the above types of question. An example might be: *"The police and ambulance service were called to your house and found your partner had been stabbed in the chest. When they asked you what had happened, you said that you stabbed him/her. Tell me how you came to stab him/her?"* Similarly: *"When you were arrested this morning you said you'd been defending yourself when you hit Brian. Tell me what happened?"*

Whilst all of the questions focus immediately on the matter under investigation they approach the subject in subtly different ways and a good interviewer will have used the *engage* and *explain* phase to assess which wording is most likely to provoke the most desirable response from the interviewee. Again psychology makes a significant contribution here. Look at the difference between these two questions, which both ask the same thing:

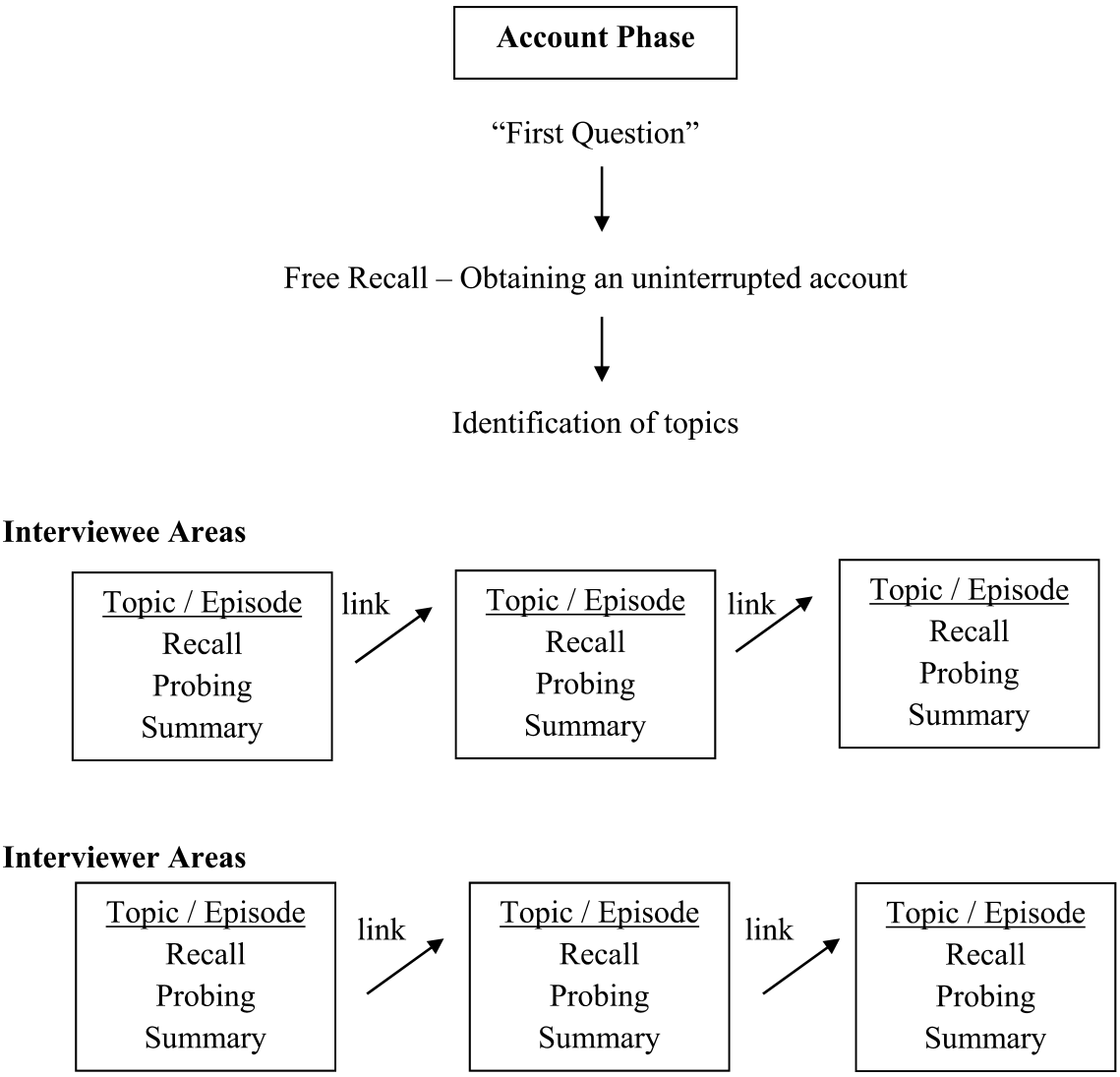
"You have been arrested for sexually abusing your daughter. Tell me what happened?"
and ....
"You have been arrested because we are enquiring into an allegation by your daughter that you had sex with her. We want to understand what has happened, so tell us what you know about this?"

Knowing your interviewee and therefore being able to assess which wording (and which question type) is likely to achieve your objective is the key. Securing the fullest, most detailed account that the interviewee can (or is willing to) give is the primary aim of this phase of a PEACE interview and it is therefore hoped that the planning, preparation, engagement and explanation will all pay dividends at

this point.

Once an account is forthcoming the interviewers task is to identify specific topics within that account that they want to clarify further. Once these topics have been identified they should probe each one separately before moving to the next. Once the suspect's topics have been exhausted the interviewers can start to introduce their own topics. These could be, for example, apparent points of conflict —where a witness's account and the suspect's account appear at odds. Similarly it could be that the interviewers want to introduce new material to the suspect — such as scientific findings.

The Centrex publication of 2004, the "Practical Guide to Investigative Interviewing" (pages 95 and 101) has a diagrammatic representation of a PEACE interview and the below is a development of that illustration showing just the Account phase:



In some law-enforcement settings the "Interviewer Areas" are occasionally referred to as "First-stage challenge" (although such terminology does not exist in the purist PEACE model) in recognition of the fact that this is where the relationship between the interviewer and the suspect can start to change and even deteriorate if not properly managed. A PEACE traditionalist would refer to this stage of the interview as 'moving from account to clarification'. Either way the continued use of open, non-confrontational questions at this point is advocated. The difference in style between the following two questions is obvious — even though both use open questions — but it is important, at this stage, that something akin to the latter is adopted.

In your account you said you left home at 10.00pm whereas I have a witness who says they saw you in town at 9.30pm. Tell me again what time you left home

and ....

In your account you said that you left home at 10.00pm. I need to tell you now that a witness has come forward who says they saw you in town at 9.30pm. Can you see the problem we have here? This is why I'm interviewing you [about this offence] — *so that we can resolve this discrepancy. So, take your time to ensure we both fully understand what you are saying here and when you are ready, tell me when you left home?*

In the second example the "we" in the 'problem that ***we*** have' and '.... ***we*** can resolve this discrepancy' refers to the interviewer and the interviewee. This point can be reinforced by appropriate body language to ensure that the interviewee does not think that it is a problem that 'we' — the law enforcement agency — have. Was he to think that there is obviously nothing that he can do to address the issue. This is why it is important that he sees himself as part of the solution — not just the problem. Empirical evidence shows that this approach is more likely to maintain the engagement with the interviewee, which is the objective of the tactic.

This is the phase that all the new evidence (that the investigators intend to use in the interview) is revealed to the interviewee. Some interviewers want to hold back what they consider to be their strongest, most damming piece of evidence, their coup de gras, for a final challenge point — but this approach is flawed. How do they know it is their strongest point if they have not given the suspect the opportunity to comment on it? He might have a perfectly logical explanation for his fingerprints being on the knife. Until he is asked the interviewers can only guess his response. It is not only unprofessional for them to assume that they know the answer but it also reinforces Baldwin's point (as reported in McGurk et al 1993) referred to earlier in this essay that the interviewers assumptions unhelpfully influenced the manner in which they delivered their questions. Only once all the material that the investigators intend to use in the interview has been discussed — and the suspect's responses considered — can a decision be made as to what points are the 'strongest'. Without doubt the assessment of a particular evidential aspect's strength and weakness is very subjective and additional planning is essential. There are a number of different tactics available to interviewers when delivering their 'challenge' and whilst there is no single universal solution to the approach that should be adopted we will look at one approach in detail this paper: the principle of prioritisation.

The premise is simple: take a number of evidential points that remain in conflict with the suspect's account and assess the value they add to the investigation. Now prioritise them —weakest to strongest — and prepare a closed question around each point-of-evidence to be put to the suspect. The actual delivery tactics of the questions will depend upon many factors unique to each investigation but the following is a guide. Start the interview with a brief but formal re-assessment of the suspect's understanding of the 'Caution'. Deliver the questions (as planned in advance) and acknowledge the suspect's responses. Because the question type has moved from 'open' to a more closed construction the interviewer is not expecting lengthy replies. The interviewer needs to be ready for potential frustration from the suspect as he (the suspect) will almost certainly be repeating responses he has given earlier. Whilst the interview concludes on what the interviewers consider to be the strongest point-of-challenge they should not overtly label it as such. It should be delivered, in question form, in the same measured and professional manner as the others have been.

The rationale for the use of this tactic is two-fold. Overtly the interviewers are ensuring that all they have put all of the key points of evidence (that they intend to use in interview) to the suspect and are giving him chance to reiterate his previously delivered explanations. Perhaps more psychologically there is an acknowledgement that by prioritising the points-of-challenge there is an opportunity for the suspect to see the true weight of evidence being considered against him. Delivering these points in a closed manner also allows the suspect to see this evidence with absolute clarity.

The tactic is not designed to elicit a false confession and it should not be employed in such a way as to exert an unfair pressure on the interviewee but a suspect who has lied during the earlier interviews — because they have not recognised the evidence that exist against them — might choose to reconsider their earlier responses in the light of this clarity. Equally an offender who has chosen to

remain silent until this point may decide to respond during this phase. Much as is the case at the very beginning of an interview, the interviewer should be ready at this stage to receive an admission — either full or partial — or a continued denial.

A third effect of this tactic is that should this matter go before a court, the jury have, in this interview, a summary of some of the key prosecution points alongside the defendant's responses, all in a ten to twelve minute interview tape (or six page interview-transcript). Somewhat theatrically it has been said in the past that if the interview tapes are played (in court) in chronological order then the last thing the jury will hear before entering their retiring room to 'decide the fate of the accused' is this resume.

'Reliable' and 'Fair': Sections 76 and 78 of the Police and Criminal Evidence Act 1984

There is a similarity between seeking clarification and challenging something insofar as they both seek an explanation. What makes them different is often just the style with which they are employed. In an investigative interview both need to be conducted in an appropriate and professional manner. Sections 76 and 78 of the Police and Criminal Evidence Act 1984, whilst important throughout the entire investigative process, are particularly relevant here as they deal with the admissibility of evidence in general and confessions in particular.

Section 78 states:

> *In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*

Simplistically this gives the court the option to exclude evidence (which would normally be admissible) if it considers that it was unfairly obtained. This has in the past included evidence obtained in such that breaches the European Convention on Human Rights and/or the Police and Criminal Evidence Act Codes of Practice. In the context of a suspect interview is easy to see that if the Court considered tactics employed during that interview to have been unfair then it has the right to exclude it.

Section 76 is even more relevant to interviewers as it relates directly to any admission that a suspect may make. It allows a court to exclude that confession if it agrees that it:

> *.... was or may have been obtained —*
> *(a) by oppression of the person who made it; or*
> *(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,*

Much like section 78 above the European Convention on Human Rights is the agreed point of reference here thus "Oppression", in this context, would include "torture, inhuman or degrading treatment, and the use or threat of violence". Oppression (as a term) was also specifically considered by the Court of Appeal in the case of Regina versus Fulling (1987) where it was held to be given its ordinary dictionary meaning and: "*.... was likely to involve some impropriety on the part of the interrogator*" (CPS 2013). In the case of Miller, Paris & Abullahi (1993) the interview was held to have been oppressive even though the solicitor was present throughout.

Although there is a lot for the interviewers to consider during the planning and execution of the clarification and challenge phases of any interview the Central Police Training and Development Authority was very clear in its 2004 guidance (which still holds today):

> *The account needs to be challenged when you have good reason to suspect that an interviewee is deliberately withholding relevant information or knowingly giving a false account*
> (Centrex 2004).

If, during a challenge, the suspect was to suddenly make an admission the interviewer should be ready to return to an open-style of questioning — and seek this new 'account'; PEACE should therefore not be seen as a restrictively linear, one-way approach, much more a flexible framework in which to interview.

pea*C*e: Closure

In a suspect interview there are some obligations placed on the interviewer, not least by Code E of the Police and Criminal Evidence Act Codes of Practice. Amongst these requirements is the need to give the suspect the opportunity to clarify or add anything he has already said, the time the interview is being concluded and the suspect should be handed a notice which explains what happens to the interview tapes. It remains obvious that these matters should still be carried out in a professional manner, not least because there there may be a requirement for further interviews. It is also right to let the suspect know what will happen next.

Interviewers can sometime treat this stage of the interview as merely a procedural formality when, in fact, it should be considered tactically. As just one example, it could be used as an opportunity to reveal what will be covered in the next interview. In doing so the legal advisor could be briefed accordingly and any other 'disclosure' material handed over to the suspect. The Police and Criminal Evidence Act demands that the police deal with a detainee "expeditiously": by revealing at the end of one interview what will be covered in the next — in order to give the suspect thinking time can surely be argued to meet that obligation.

peac*E*: Evaluation

Although this phase is conducted after the interview is concluded it is still a fundamental part of the process. Logic demands that there was an aim, an intended objective for conducting the recently concluded interview. That same logic demands that the interviewer assess whether that aim and objective was achieved. If it wasn't then the investigation could be severly let down unless this evaluation is conducted and a new approach to address the investigative objective is considered.

There are three things that should always be evaluated at the end of the interview: what new information (if any) was forthcoming, the suspect and finally the interviewer.

i. The new information that came out of the interview

   a. What new information do you now have?

   b. Does it corroborate existing information?

   c. Does it generate new lines-of-enquiry?

   d. Does it elevate existing lines-of-enquiry to a higher priority?

ii. The interviewee

   a. What was his demeanour?

   b. Has his health or well-being deteriorated/improved?

   c. Has he changed his approach (from 'no-comment' to now answering questions — or vice-versa)?

iii. The interviewer's performance

   a. Was there still a professional rapport existing?

   b. Should we change interviewer for the next interview?

c. Has that interview identified any professional development / training issues for the interviewer?

d. What does the interviewer need to do differently next time to achieve the investigative objectives?

It is clear that a well conducted evaluation will inform the 'planning and preparation' phase of any subsequent interview with the suspect and therefore is an essential ingredient in the process.

In conclusion the PEACE framework can be applied to victim and witness interviews just as it can be to suspects. Whilst some of the considerations discussed above might not be relevant with witnesses, many will. Equally additional factors may exist with victims of crime that are not relevant to suspected offenders. It is hoped that by comparing the opening section of this report, which focussed on witness interviewing, with the latter section, dedicated to PEACE (in a suspect context) a broad understanding has been secured of the current system of investigative interviewing in England.

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APPENDIX A

The Original Seven Principles of Investigative Interviewing

1. The role of investigative interviewing is to obtain accurate and reliable information from suspects, witnesses or victims in order to discover the truth about matters under investigation.

2. Investigative interviewing should be approached with an open mind. Information obtained from the person who is being interviewed should always be tested against what the interviewing officer already knows or what can reasonably be established.

3. When questioning anyone a police officer must act fairly in the circumstances of each individual case.

4. The police interviewer is not bound to accept the first answer given. Questioning is not unfair merely because it is persistent.

5. Even when the right of silence is exercised the police still have a right to put questions.

INVESTIGATIVE INTERVIEWING IN ENGLAND
PART II: SOME TACTICAL AND LEGAL CONSIDERATIONS

*Timothy E. Curtis**

This paper has been written so that it can be read as a stand-alone document in its own right but its primary purpose is to complement "*Part I "Models for Interviewing Witnesses and Suspects*" and it is recommended that it is read in conjunction with that essay.

I. INTRODUCTION

The Greek philosopher Aristotle spoke of Ethos, Pathos and Logos as "*ingredients of persuasion*" or tools to encourage another to take a particular point of view. Whilst investigations should never be conducted in such a way as to distort the truth (so as to fit an investigator's preconceived ideas) it is possible to draw parallels between Aristotle's teachings and modern-day models of investigative interviewing. In the sister-paper to this essay ("*Part I: Models for Interviewing Witnesses and Suspects*") we saw how the four-phased interview for vulnerable and intimidated victims and witnesses (as advocated in the Ministry of Justice publication "Achieving Best Evidence in Criminal Proceedings") was comparable with the PEACE model of interviewing (employable in both suspect and victim/ witness contexts). In this paper we will look at various strategies and tactics that can be employed during interviews as well as some additional factors that influence practice and procedures. In doing so we may see at least two of Aristotle's 'ingredients' at work — if not all three.

Without looking too hard it is possible to see aspects of 'Ethos' — the attempt to establish the interviewer's authority — present in the "Engage" phase of a PEACE model interview and quite possibly again in the "Challenge" element; 'Pathos' — the art of appealing to the interviewee's emotions — without doubt features in the "Clarification / first-phase-challenge" steps; and 'Logos' — the presentation of an argument in logical terms — in the "Final-challenge" delivery, across a PEACE interview. This sort of psychology has long been recognised as playing a role in police interviews and many eminent professionals in that science have informed the research into techniques that the police now use. But where psychology (and/or acts of persuasion) meets the Criminal Justice system a boundary exists which cannot be crossed: everything that is done must fall the right side of the law. Article 3 of the European Convention on Human Rights (protection from torture, inhuman and degrading treatment or punishment) and Article 6 (the right to a fair trial) are both significant indicators of where that boundary is drawn (and both of those clauses are also reflected in the more global Universal Declaration of Human Rights in its Articles 5 and 10 respectively). Interviewers need to recognise this when considering their tactics.

The Association of Chief Police Officers recognised these challenges when, in 2005, it published its guidance on this matter. It stated that for an official body such as the police to stay within the standards set by Humans Rights legislation it needed to be able to show that its activities met that benchmark. To that end they created a mnemonic that became the mantra for investigative decision making. The acronym they used was (coincidentally given that this paper is being delivered in Tokyo) "JAPAN"!

J *ustification* (legality) — that there were reasonable grounds to suspect some knowledge or involvement relevant to the criminal offending or disturbance of the peace;

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A *uthorisation* — that the proper procedures have been followed, recorded and all actions were authorised;

P *roportionality* — that the nature of the interference is proportional to the matter being investigated in its seriousness;

A *ccountability* — all the options considered and all the relevant factors must be recorded;

N *ecessity* — that the methods used are necessary for the purpose of the enquiry.
(ACPO 2005 pg 34)

An interview, be it with a suspect or a witness, has to be '*investigative*' otherwise it is unlikely to achieve its objective — indeed interviewers are actively encouraged to employ an "*investigative mindset*" in the Seven Principles of Investigative Interviewing. So there is little dispute that an interviewer is not merely somebody who asks questions, they are an investigator. Thus, if they apply the five-point 'JAPAN' guidance to their decision making they will be in a stronger position to defend their strategy in court.

The National Police Improvement Agency makes an additional point on the topic of decision making:

In order to be effective the investigator must develop the ability to make reliable and accountable decisions. This may often be under pressure or difficult circumstances
(NPIA 2013)

In an investigative-interviewer context that pressure can be because they are making tactical decisions dynamically, in the heat of the interview. They may have planned and prepared for the exchange diligently but something happens in front of them that causes them to change direction and use a different strategy altogether. If, as they should have done, their original plan was recorded ("*Writing an interview plan in all cases will ensure that the most appropriate elements of PEACE are being used*" — Clarke and Milne 2001) the interviewers will need to justify their departure from that plan. That justification will itself need to be recorded — albeit, in these circumstances almost certainly retrospectively. This point is reflected in the performance criteria of an interviewer (as set out in the agreed National Occupational Standards) "*Ensure all decisions, actions, options and rationale are fully documented in accordance with current policy and legislation*" (Skills for Justice 2008). Applying the "Justified, Authorised, Proportionate, Accountable, Necessary" rationale to the recording process has been found to be a useful template.

II. ADVERSE INFERENCES

Before we look at specific tactics that can be considered in investigative interviews it is right to look at another legislative issue that must be considered during interviews with some suspects. This is sections 35 to 37 of the Criminal Justice and Public order Act 1994 which allows potentially adverse (on the part of the suspect) inferences to be drawn by the court. Section 35 deals specifically with an inference being made if the accused remains silent during the trial. There are caveats that apply but, given that section 35 can only apply after the interview has taken place it has less relevance to this essay than sections 36 and 37; so we will concentrate on them. As we do so we will also remind ourselves of the wording of the 'caution' that applies to all interviews of people for whom there are grounds to suspect them of having committed an offence:

"You do not have to say anything. But it may harm your defence if you do not mention now something which you later rely on in court. Anything you do say may be given in evidence."

Here, it is clear that there is no obligation on the suspect to answer any questions — so long as he or she understands the implications of such a refusal at a later date. Section 36 though shifts the onus of commenting back to the suspect. It states:

Where—
(a) a person is arrested by a constable, and there is—
(i) on his person; or
(ii) in or on his clothing or footwear; or
(iii) otherwise in his possession; or
(iv) in any place in which he is at the time of his arrest,
any object, substance or mark, or there is any mark on any such object; and
(b) that or another constable investigating the case reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offence specified by the constable; and
(c) the constable informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark; and
(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence so specified, evidence of those matters is given [....] the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure or refusal as appear proper.

Section 37 has a similar impact:

Where—
(a) a person arrested by a constable was found by him at a place at or about the time the offence for which he was arrested is alleged to have been committed; and
(b) that or another constable investigating the offence reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence; and
(c) the constable informs the person that he so believes, and requests him to account for that presence; and
(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of those matters is given, [....] the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure or refusal as appear proper.

In both Sections there are areas that have been, and will continue to be, areas for debate: in section 36, what constitutes "*otherwise than in his possession*"?; and in section 37, how flexible can "*.... at or about the time ....*" be? These have been ultimately matters for the Court to decide but the responsibility lies firmly with an interviewer to ensure that, at the time of questioning, the suspect understands what is being asked of them. In circumstances where Sections 36 or 37 apply the original caution advising them that they '*.... do not have to say anything....*' is no longer relevant and the suspect needs to understand that the obligation on them has changed. To achieve this understanding they are given, what is referred to in relevant guidance as, a "Special Warning". Significantly, whilst the original caution is published and agreed (Police and Criminal Evidence Act 1984 Codes of Practice: Code C Paragraph 10.5) a 'Special Warning' isn't: "*Legislation does not provide a specific form of wording ....*" (Centrex 2006 Pg 11) for it. The reference point then has to be the Police and Criminal Evidence Act Codes of Practice (Code C, Paragraph 10.11) which states:

For an inference to be drawn when a suspect refuses to answer a question about one of these matters, or to answer it satisfactorily, the suspect must first be told in ordinary language:

a) what offence is being investigated;
b) what fact they are being asked to account for;
c) this fact may be due to them taking part in the commission of the offence;
d) a court may draw proper inference if the fail or refuse to account for this fact;
e) a record is being made of the interview and it may be given in evidence if they are brought to trial.

It is therefore the interviewer's responsibility to construct a 'warning' that embraces the five factors listed above in a form that they can justify was appropriate for their interviewee's level of understanding. Clearly the application of this "Special Warning" has the potential to confuse the interviewee if not explained well by the interviewee. Occasionally interviewers find themselves saying things like: "*I'm now taking the Special Warning off*" when no longer asking questions to which Sections 36 or 37 apply. It is perhaps not surprising when some practitioners prefer to introduce 'Special Warning material' only towards the end of the interview (approaching the challenge phase) in case they render the rest of it as inadmissible due to the interviewee being confused.

III. THE FIVE TIERS OF INVESTIGATIVE INTERVIEWING

There is, without doubt, a need to exercise vigilance when interviewing around evidence to which sections 36 and 37 of the Criminal Justice and Public order Act 1994 applies but professional interviewers should not be apprehensive and probably should not let it influence their interview plan to that degree. The more serious the case, the more scrutiny on things like the use of "Special Warnings" is likely to be and in recognition of that probability, the Police in England and Wales have adopted a tiered system of interview skills so that, for more serious investigations a higher level of skilled interviewer can be called upon.

For many years there were five tiers of investigative interviewer:

Tier 1 — an entry-level introduction for basic recruits;

Tier 2 — for more experienced officers dealing with more serious offences;

Tier 3 — identified 'Specialist interviewers' utilising additional techniques in the most serious crimes;

Tier 4 — for managers and supervisors of interviewers; and

Tier 5 — Interview Mangers/Coordinators.

This structure not only gave Senior Investigating Officers in serious crime investigations clarity over what sort of resources they should be deploying across their interviews but it also gave Workforce Development departments a focus for any future Training Needs Analysis.

A commonly adopted application of the Tiers was that all uniformed patrol officers would be trained to Tier One, all detectives to Tier Two, all supervisors to Tier Four and then a core nucleus of staff, from specific policing disciplines, would be trained to Tiers Three and Five as necessary. It is important to recognise that the Tier Three specialism existed in both the witness and the suspect arenas and so departments such as Major Crime Investigation Teams would have some Tier Three (suspect) specialist interviewers as well as some Tier Three (victim/witness) specialist interviewers.

This Tiered structure existed until the publication of the National Investigative Interviewing Strategy (National Police Improvement Agency 2009) when it was incorporated within the Professionalising the Investigation Programme (PIP) and aligned with the National Occupational Standards of the Police. In essence nothing changed: Tier 1 became PIP level 1 'Volume and Priority Crime' interviewers and Tier 2 became PIP level 2 'Serious and Complex crime' interviewers. Tier 3, whilst still PIP level 2 investigators would be formally identified as having the additional competencies of a 'Specialist suspect' or a'Specialist victim and witness' interviewer. Tier 4 was absorbed into the general supervisory responsibilities and the Tier 5 Interview Mangers/Coordinators continued to exist in their own right.

Many Police Forces employ a progression strategy demanding that to become an Interview Manager/Coordinator you have to have been a 'Specialist' interviewer (in either the suspect or witness field). The logic of this straight forward: they can advise on a technique or tactic that they are themselves familiar with and have practiced.

IV. TACTICS

Having a range of tactics available to an interviewer is important as every interviewee will be different and so a one-size-fits-all approach will almost certainly fail. Add to this fact that many repeat-offenders are interviewed time and time again by police officers and the need to be flexible in the execution of the interview takes on a heightened relevance. Something as common as receiving no satisfactory response to an interview question can be an area where different approaches can, and in many case should, be considered.

A. "No comment"

When a suspect exercises his right not to say anything meaningful in reply to the questions put to them he should, in the first instance be reminded of the implications of the 'caution' that he is being interviewed under. He should be reminded that that if he intends to rely on an account at Court, that Court might be less inclined to believe him than had he offered that explanation during the interview. Whilst that is something for the suspect to consider the interviewers also have a responsibility here: if they do not ask the question during the interview then no proper inference (following the suspect's refusal to answer) can be expected to be drawn by the Judge or jury. Basically, if the question is not asked — it cannot be a failure to answer it. Empirical evidence disappointingly exists of officers who have failed to plan for such a potential and they end up saying to the suspect (who has responded "No comment" to their opening fifteen questions): "Are you going to keep saying 'no comment' to all of our questions?" When the suspect replied that he was never going to answer any of their questions so they might as well charge him if they had the evidence — the interviewers terminated the interview at that point. This episode concluded with a supervisor intervening and, following appropriate planning, the interview was resumed later in the day. But this demonstrates that "no comment" is a difficult response to constantly put questions to unless you are ready to do so. Poorly prepared interviewers can sometimes find them falling into a metronomic response where the interview goes something like this:

Question: "Where were you last night?"

Reply: "No comment"

Question: "Did you go to the nightclub?"

Reply: "No comment"

Question: "Did you go into the nightclub?"

Reply: "No comment"

Question: "Did you see the barman in the nightclub?"

Reply: "No comment"

Question: "Did you threaten the barman?"

Reply: "No comment"

Question: "Did you punch the barman?"

Reply: "No comment"

Etc, etc etc.

The 'metronome effect' is where as soon as the interviewer has finished the question the suspect responds "no comment" .... and as soon as the suspect has finished the word "comment" the interviewer is straight back in there with the next question. No pause. Nothing. Just the start of the next question. To which the suspect replies "no comment" and the interviewer, in anticipation that that

would be the response, comes straight in with the next question. It becomes metronomic when question is followed by answer is followed by question is followed by answer is followed by question is followed by .... The reality is neither party is thinking about what is going on. Almost certainly the suspect is not listening to the questions — he is just waiting for the interviewer to stop talking to give his 'reply'. In these circumstances however it is crucial that the interviewer gives the suspect time to digest what the question was and to show that he was given time to consider his response.

Another tactic in a similar vein employed by suspects is where they respond with the words "no comment" but do not give the interviewer time to deliver the question. They actually speak over the top of the question. The problem for the interviewer here is that the Court may hold that the suspect didn't in fact hear the question — or, indeed, that the question was not successfully asked. In either case the ability to ask the court to draw a proper inference might prove difficult.

Responding with "no comment" is one method suspects can adopt when refusing to give adequate responses in interview. Another is just remaining silent. Much like saying "no comment" there is more than one way of remaining silent in an interview. The suspect can stare directly at the interviewers in an attempt to intimidate them or he can ignore them completely and adopt a body-language reinforcing this stance. This could be as extreme as standing and facing the wall or, less dramatically, they might just lay their head on their arms on the table feigning sleep. The interviewers need to have a response for these tactics — not least ensuring that the interviewee is not suffering some sort of mental break-down making his health and well-being an issue. In short, the interviewers need to ensure that there is nothing existing at the time that will impact on the reasonable expectation of the suspect answering.

B. Written Questions

If there is likely to be any doubt that the question has been put to the suspect an option exists for the interviewers to write them out, much like a questionnaire, and give them to the interviewee. As is always the case there are additional points that need to be considered with such a tactic but it is an option. It is also something that is worth considering as giving advanced notice of what will be included in the next interview.

C. Pre-Interview 'Disclosure'

'Disclosure' is terminology often used when speaking about pre-interview briefings with the suspect's legal advisor. This briefing reveals — or 'discloses' what material it is intended to discuss in the next interview. The rationale for such a practice is to give the opportunity for the legal advisor to, in private, advice the suspect and take instructions from him. Whilst this sounds perhaps like the police being overly helpful there are, in fact a range of investigative benefits in existence here.

If the police ask a question the suspect could make 'no comment'. He could claim that he did so, on the guidance of his legal advisor. His legal advisor could in turn claim that they had insufficient information from the police on which to base coherent advice to their client — thus 'no comment' was the only advice they could give. If the Court considered this as being circumstances existing at the time of the interview that would have removed the reasonable expectation for the suspect to answer the questions put to him in interview it is possible for no proper inference to be drawn from the suspect's refusal to answer it. To be clear: there is no legal obligation to disclose anything in advance of the interview but it is something that is occasionally done to progress the interview process. There is obviously the pitfall here of revealing so much of your case that the suspect has an opportunity to construct a false explanation to fit the facts of the case — and this could be argued if 'pre-interview disclosure' was not dealt with professionally and with an investigative mindset. To illustrate this point let us look at the introduction of scientific evidence, such as a finger-print of the accused at the scene, into the interview.

Let us consider an investigation where a school has been broken into during the long summer holiday and a lot of wanton damage and destruction has been caused. This includes heating pipes that had been suspended from the ceiling in the reception hall having been pulled down, flooding the area. The fingerprints of three people are discovered on the upper part of one of the pipes — consistent with people swinging on it and it eventually giving way under their weight. These fingerprints are identified

as belonging to three students of the school. The three youths were all interviewed simultaneously. The legal advisor of one youth was given the full circumstances of the scientific evidence: the fact that it was fingerprints, where they were — both where in the building and where on the pipe — and they were also given photographic evidence. In interview this youth's account was that he and his friends, during term time (ie when they had legitimate access to the school), had held a competition to see who could jump the highest — and make a mark highest on the wall. The youth went on to explain that he was so good at this game that he climbed onto the banister rail of the stairs in the reception and jumped from there .... and was even able to just about touch the heating pipe. That was why his fingerprints would have been found on something that was normally twenty feet off of the ground — certainly not because he had swung on the pipe breaking pulling it from the ceiling. Poor 'disclosure' tactics had given him the ability to construct a whole story around the potentially damning piece of evidence. A more thought-through disclosure strategy was used on the second youth.

The second youth was told only that the police had "intelligence" that suggested he (the youth) might have been responsible for the damage. It was left for the youth and his legal advisor to ponder what this 'intelligence' might have been. Was it an independent informant or one of the other detainees in an admission to the police, was it closed-circuit television footage or something else. The legal advisor argued that he did not enough information on which to advise his client — hence the youth made no comment to the questions put to him. In the next 'disclosure' package it was then revealed to him that the 'intelligence' was in fact 'scientific, forensic intelligence'. Still the legal advisor did not know whether this 'intelligence was likely to be a footwear mark, fingerprint, DNA or fibre evidence — or something else. The interviewing officers pointed out that all they were trying to do was secure an uncontaminated account from the youth that might explain his probable presence at the scene of the crime but the youth maintained his position of making no comment. The officers revealed next that there was fingerprint evidence available to them. The youth obviously pointed out that he was a student at the school and so his fingerprints were likely to be present. It was only when the location of the fingerprints was revealed to him did the youth make a reply — this being that he had heard the damage going on and entered the building in an effort to see what was happening. In doing so, he must have inadvertently grabbed the pipe (which was now at waist level) — thus leaving his fingerprints behind. Any subsequent Judge and jury would be able to see that ample opportunity had been given to the youth to explain his involvement, and that he only chose to do so when given the whole amount of information linking him to the scene. Pre-interview disclosure therefore does not need to tie the hands of the interviewer. Indeed it is sometimes helpful to consider it alongside one of the National Police Improvement Agency's Principles of Investigative Interviewing.

D. Facilitating the Cooperation of Suspects: Early Admission of Guilt

The fifth Principle states: "*Investigators should recognise the positive impact of an early admission in the context of the criminal justice system*" (NPIA 2009). The question that this raises for an interviewer is: are they obliged to reveal more information in advance of the interview than they would otherwise have intended — in order to provoke an early admission (if, indeed the interviewee is guilty) or is it right to hold back the information in order not to contaminate any early confession — thus allowing the offender to demonstrate their true regret? The answer is almost certainly unique to each investigation and goes back to the '*Justified, Authorised, Proportionate, Accountable, Necessary*' approach to defensible decision making discussed earlier. If there is any doubt about the contribution that an admission in interview can make to the sentence that an accused can receive in Court some time later it should be removed by the Sentencing Guidelines Council. When considering mitigating factors relevant to the offender they state: *The issue of remorse should be taken into account at this point* [once the seriousness of the offence has been considered] *along with other mitigating features such as admissions to the police in interview*. (Sentencing Guidelines Council 2006). The interviewer needs to be careful how this guidance is introduced into the interview so as to ensure it does not become interpreted as an unfair inducement. It is almost certainly for this reason that very few interviews contain the discussion in such stark terms.

E. The Custody-Time Clock

The incremental approach to 'disclosure' used in the example above with the youths' fingerprints on the school heating pipe identifies another consideration for the interviewer: "*How much time have I got left before this suspect needs to be released?*" The Police and Criminal Evidence Act 1984, Code C,

paragraph 1.1 lays the foundation: "*All persons in custody must be dealt with expeditiously, and released as soon as the need for detention no longer applies*". Section 37 of the same Act states that where a person has been arrested for an offence:

> *If the custody officer determines that he does not have such evidence before him* [to charge the detainee], *the person arrested shall be released either on bail or without bail, unless the custody officer has reasonable grounds for believing that his detention without being charged is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him.*

Here it is clear that a person can be held in custody solely for the purpose of interviewing them. But does incremental 'disclosure' conflict with an 'expeditiously' dealt with investigation and unfairly extend the time a person spends in custody — particularly if to be interviewed is the sole reason he is so detained? We are back, yet again, to defensible decision making — and decisions of this nature will have to be defended on a regular basis to an ever escalating-in-authority independent reviewer.

Section 40 of the Police and Criminal Evidence Act 1984 states that a detainee who has not been charged must have his continued detention reviewed and further authorised not later than six hours after the initial detention was first authorised. The detention must be reviewed again not more than nine hours after the previous one was conducted and subsequent reviews will be at intervals of not more than nine hours — up to a maximum period of detention not exceeding 24 hours. These reviews will be conducted by an officer of at least the rank of inspector who has not been directly involved in the investigation.

Section 42 of the same Act authorises an officer of the rank of Superintendent or above to extend this maximum by another 12 hours in certain circumstances, namely:

- it is an indictable offence;
- the detention continues to be necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him; and
- the investigation is being conducted "*diligently and expeditiously*".

This has the potential to extend the detention up to 36 hours without charge, by which point, if a further extension is desired it will be a matter for Magistrate to rule on.

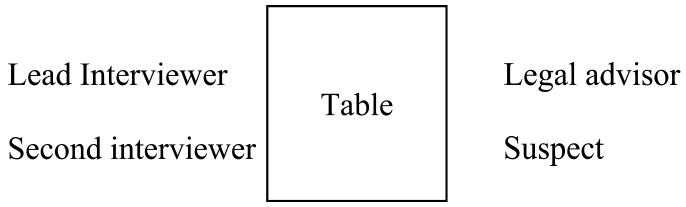
Initially a Magistrate can issue a Warrant of Further Detention to extend the custody period for up to a maximum of 36 hours (making 72 hours in total). Application can later be made for this warrant to be itself extended to a maximum of 96 hours detention — after which the suspect must be charged or released.

It is right to recognise that a significant amount of legislation, requirements and provisos have been summarised in these few sentences but, for the purpose of investigative interviewing and the tactic of incremental disclosure — the point is made: the investigation (and therefore the interview) must be dealt with diligently and expeditiously and an independent Inspector, then Superintendent, then Magistrate must be regularly convinced the need to detain the suspect remains. These review thresholds give the suspect's legal advisor the opportunity to put forward their views regarding, not least, the interviewer's diligence and expedience. Whilst these views are put to the Review Officer (the Inspector, the Superintendent or the magistrate) a tenacious legal advisor will have already made their mark in the interviews — and interviewers need to be ready for these interventions.

F. Dealing with Legal Advisors in Interviews

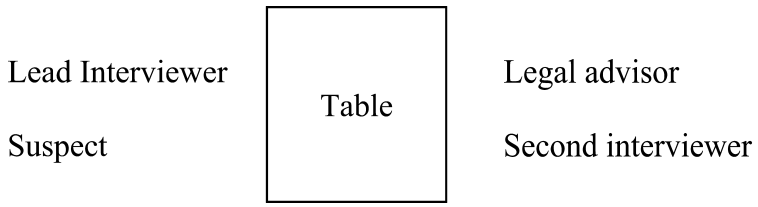
Ideally police interviews with suspects will be conducted by two interviewers — one to lead the process and ask the questions and the second to take notes, summarise as appropriate and otherwise assist his or her colleague as necessary. A rule of thumb tactic for police officers when dealing with legal advisors is that the lead-interviewer should remain engaged with the interviewee and the

second-interviewer, the note-taker, should be the one who responds to any intervention during the interview by the legal advisor. A simple rationale for this is if the legal advisor 'wins' the argument then the lead-interviewer has not 'lost face' in the eyes of the suspect — thus whatever 'engagement' existed between the lead and the suspect, none of it has been lost. If any professional credibility has been lost in the room (in the eyes of the suspect) it has been lost by somebody not directly interviewing them. A second, more reasoned, basis for the second interviewer engaging with the legal advisor is that it does not mean that the lead-interviewer has to be distracted from their train of thought. Often, when an interview is going well (in the eyes of the police) a legal advisor will make an intervention merely to break the momentum. Allowing the lead interviewer to maintain their line of thinking whilst their colleague deals with the distraction is extremely helpful to the lead. This tactic can even be enhanced by manufacturing a specific seating arrangement in the interview room. Look at the setting below:



Even if the second interviewer deals with the legal advisor's intervention they are talking across the diagonal of the table — across the line-of-sight that exists between the lead interviewer and the suspect. This can potentially disrupt the engagement that you want to continue to exist between these two individuals. Just swapping the interviewers seating positions means that this is less likely to happen.

A variation on this theme — and one that provokes discussion amongst trainees — is that shown below:



Here the rapport between the lead and the suspect is much easier to maintain and any discussion between the legal advisor and second interviewer can seem almost ancillary to the interview going on over the other side of the table. Another benefit of this seating plan is that there is no barrier between the interviewer and the suspect. This may be advantageous or it may not be — and there may be other factors to consider too — but the point is, even something that we often do without thinking (such as walking into an interview room and sitting down) should be planned for in an investigative interview.

G. Tactical Interview Advice: The Interview Manager

Interview Manager/Coordinators have already been referred to earlier in this essay. Their role is, amongst other things, to advise on a range of planning and tactical considerations (some of which have been discussed above). This coordination is crucial to the investigation as a whole as so many things can upset the interview strategy unless it is coordinated. A well meaning press-release to the news-hungry media following the discovery of a dead body can — and will — influence a pre-interview disclosure strategy. The press release will, by definition, release information to potential witnesses and the offender thus contaminating future interviews. A commonly practiced investigative technique is the house-to-house enquiry. Unless this is coordinated by or with the Interview Manager an injudicious release of information into the public domain can occur. Investigative Interviews stretch far beyond the confines of the interview room; equally factors previously not considered as relevant can have a massive impact on what happens during that maximum of 96 hour detention.

H. Tactical Interview Advice: The Psychological Interview Consultant

Sometimes even more assistance is required and this can come in the form of a Behavioural Investigative Advisor (BIA) or, more recently, a Psychological Interview Consultant (PIC). In the past

these specialists have been referred to as psychological profilers, forensic psychologists and criminal profilers amongst other titles. They will almost certainly not be police officers but are an external service who can be called upon as and when considered necessary. For many years they have been considered as having a contribution to make to investigations as a whole it has only been in relatively recent years that their contribution to investigative interviewing has become finely honed.

They can offer interview guidance against specific character disorders: a psychopath, for example can be superficially charming and intelligent, and yet under the surface they might be unreliable, dishonest, insincere, manipulative and egocentric. When interviewing such a person they will say that there is little point in spending too much time on trying to build a rapport with the suspect. Interviewers should avoid criticism of him or his actions and also avoid conveying or expressing emotions. A PIC will also say that there is limited value in appealing to a psychopath's better nature as he may well not have one. If he does it is quite possible that this is a hard-to-reach area of his psyche.

A second example would be a suspect with a histrionic personality disorder will quite possibly see life as mundane and boring and will crave attention and excitement. In interview it might be helpful to flatter their intelligence and independence and to emphasise the need to resolve the situation.

Equally a paranoid person might well be suspicious, mistrustful and hyper-sensitive. Here, if the interviewers emphasised the importance of the suspect giving their version of events then this might be appropriate motivation to encourage an account from them.

These are just three examples of the sort of generic advice that a BIA and/or a PIC might be able to give, but more specific assistance might also be possible, depending on how much information about the suspect exists on which they can build their guidance. It is quite possible for them to advise on things like:

- Nature and timing of arrest
- Who is to make the arrest
- Characteristics of interviewers
- Duration of interviews
- Timings of interviews
- Order of questions asked
- When and how to make challenges
- Topics to include / avoid
- What would be the most effective first question
- How might questions be most effectively worded
- How can rapport be most effectively established and maintained

Just as importantly BIAs and PICs recognise also what they cannot do. They are academics with a background in behavioural sciences; they are not investigators, interviewers or interrogators. They do not pretend to keep up with relevant legislation surrounding investigation and/or interviewing nor do they profess to be able to 'get inside the mind of a killer' or to 'push the right buttons in order to get them to confess'. The stereotypical portrayal of a criminal psychologist in Hollywood movies and television dramas is often an image they need to dismantle for some more naive investigators!

V. CONCLUSION

This paper has aimed to give an overview of some of the strategies, tactics and techniques that can be considered during an investigative interview. Whilst its focus may appear to have been on suspects much of what has been discussed is equally applicable to some witnesses. Each tactic needs to be adapted to suit the circumstances that exist at the time, the presentation of the interviewee and the skill set (and confidence) of the interviewer. It is hoped that this paper has also shown that ongoing advice is available to interview teams and Senior Investigators — both from within their own ranks and beyond. In conclusion, consider the words of filmmaker Errol Morris:

> *I think an interview, properly considered, should be an investigation. You shouldn't know what the interview will yield. Otherwise, why do it at all?*

Follow that mindset, in both witness and suspect interviews and you will not go far wrong.

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PLEA BARGAINING, COOPERATION AGREEMENTS, AND IMMUNITY ORDERS

*Robert R. Strang**

The term "plea bargaining" has become a label often used to describe a series of disparate mechanisms to investigate, prosecute, and adjudicate criminal liability. For some, plea bargaining is the indispensable tool to address criminal conduct, while for others it has become a symbol of coercion and injustice. The purpose of this Article will be to distinguish the very different mechanisms that are often grouped under the plea bargaining concept, to examine their key characteristics, and to analyze some of the benefits and costs that come with each approach.

I. PLEA BARGAINING

From the payment of *wergeld* to the victim's family by the accused among Germanic tribes in Roman times, the consensual resolution of criminal liability is an ancient practice. Today, different forms of plea bargaining practices are growing around the world. Jurisdictions from both the adversarial and the inquisitorial traditions provide alternatives to the full criminal trial.

At its essence, the plea bargain is an admission of guilt in return for, or in hope of, a shorter sentence or alternative disposition. It does not necessarily require cooperation, just acceptance of personal responsibility in return for mercy. While plea bargaining is sometimes thought of as an innovation of the United States and contrary to the search for the truth obtained during a full trial and the principle of legality (mandatory, rather than discretionary, prosecution decisions) observed by civil traditions, consensual resolution and abbreviated trial procedures in criminal cases follow a long tradition existing in both common law and civil law jurisdictions.

Plea bargaining can serve multiple purposes. The expedited procedures allow for more efficient resolution of cases, which promotes judicial and prosecutorial efficiency. As full blown trial with the full panoply of rights takes substantial judicial resources, many countries have adopted plea bargaining to reduce court congestion. The consensual resolution of simpler or minor offenses is seen as needed to ensure that the right to a speedy trial in more serious cases can be protected.

There are additional motivations for adopting plea bargaining. Trials are inherently uncertain; in some countries, prosecutors see plea bargaining as a way to ensure that defendants who they believe have engaged in criminal activity receive some punishment, even if the length of sentence is reduced. In addition, in cases where witnesses have been traumatized by the underlying criminal activity, a plea bargain allows the victims to avoid having to face the very same individuals who harmed them. In cases where investigative or other confidential information (or possibly illegal investigative action) is involved, a plea bargain may avoid the need to disclose such information during a public trial.

Finally, a plea bargain can be seen as serving a valuable penological purpose. Defendants in most plea bargains must acknowledge their own guilt in open court. Such public acceptance of responsibility can be an important first step on the defendant's road to rehabilitation. In the context of international criminal tribunals and crimes against humanity, such acceptance of responsibility may have even larger societal benefits as a step toward national or international reconciliation.

There is a variety of plea bargaining and other consensual resolution systems employed in different

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jurisdictions. The particular approach adopted reflects past historical experience, different legal cultures, distinct criminal systems, and particular motivations for change.[1]

In countries with civil law traditions where plea bargaining was not historically considered acceptable, the diversion of minor criminal offenses where the punishment did not involve detention was still considered appropriate. There is the possibility of bargaining by the parties in such cases, but without the possibility of imprisonment, such bargaining is not seen as unduly coercive to the accused. Depending on the system, a confession may be required. In other countries, judges are not involved in the diversion.

Another form of consensual resolution of cases is victim accused reconciliation. This approach, which has always existed in traditional criminal justice systems, is enjoying an intellectual renaissance elsewhere under the concept of "restorative justice". Typically involving some type of payment from the accused to the victim or the victim's family, this type of victim-centered resolution is more often applied where the injury is of a more private nature, such as petty assaults, and for offenses where private prosecutors on behalf of the victim, rather than public prosecutors of the state, were empowered to bring charges. It often involves direct bargaining to reach a compromise between the accused and the victim's representatives and therefore is seen as not violating the civil law "principle of legality" as it exists outside the framework of state prosecution. Such reconciliation is seen as a tool to restore community peace and avoid ongoing blood feuds. It faces criticism, however, because it can permit particularly wealthy and powerful defendants to avoid criminal liability.

Pioneered in Prussia in the nineteenth century, penal orders are another form of consensual resolution of cases.[2] Prosecutors offer defendants a specific punishment on a take it or leave it basis prior to the initiation of criminal proceedings, although in some countries additional bargaining remains a possibility. Penal orders face criticism as they are often implemented without the assistance of defense counsel or judicial oversight.

Other countries, such as Italy and Russia, provide for a fixed statutory discount, typically a one third reduction in sentence, for agreeing to plead guilty and forego a criminal trial. Some jurisdictions have limited this option to more minor cases, although once a legal system begins to experience the significant reduction in caseload, the range of cases often has been statutorily expanded.[3] Some countries such as France set a minimum discount of one third, but judges remain free to sentence defendants to shorter term, while in other jurisdictions there is a maximum discount, such as in Croatia which limits the actual sentence to at most two thirds of the sentence provided by statute. Admission of guilt is not always a prerequisite — sometimes a plea of *nolo contendere*, such as in Spain and Italy, is sufficient. As the sentence reduction is determined by statute, there is little bargaining. In jurisdictions where there is a high degree of corruption, such a statutorily-determined plea bargain system reduces a suspicious public's perception that a plea agreement was arrived at corruptly.

Yet other countries, such as Bulgaria and Argentina, still have a trial, but use expedited procedures. The defendant agrees to a trial on the investigative file, waiving some procedural rights to confront witnesses, for example, in return for a lighter punishment. Such forms of abbreviated trials may help with court congestion, but do less to contribute to reconciliation as the defendant does not admit his or her guilt and can even be acquitted.

On the far end of spectrum is the U.S. system of plea bargaining, where all cases are subject to

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[1] A comprehensive description with specific citations of the different approaches to plea bargaining throughout the world is contained in Stephen C. Thaman, Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases, Electronic Journal of Comparative Law, vol. 11.3 (Dec. 2007).

[2] D. T. Johnson, Plea Bargaining in Japan, in M. M. Feeley & S. Miyazawa (eds.), The Japanese Adversary System in Context 142-45 (2002). There is some academic dispute as to whether plea bargaining exists in Japan — some observe that the apparent fact that a Japanese defendant in pretrial custody who admits to his crime is often then released and later sentenced to time served is a form of plea bargaining.

[3] For example, in 2001, Russia first introduced plea bargaining for cases involving punishment less than five years, and then expanded it to ten years only two years later. Similarly, in Italy, the system expanded plea bargaining from cases punishable by three years' imprisonment to those punishable by five.

bargaining both over the charges and the punishment. Given the wide range of punishment for specific offenses, some critics see the plea bargaining system in the U.S. -- which has grown from approximately half of all U.S. criminal cases in the 1920s to around ninety-five percent of criminal cases today -- as highly coercive. Even within such a system, there are potential protections, including increased discovery to the defense prior to the guilty plea, procedural safeguards to the defendant at the time of plea, and judicial control over sentencing. In federal U.S. prosecutions, the plea bargain is memorialized in a written agreement where the benefits of leniency in return for the guilty plea are defined through the United States Sentencing Guidelines, which provide for a specific reduction of the defendant's applicable offense level, and corresponding sentence range, in return for such "acceptance of responsibility."

There has been a significant wave of expansion in the growth of plea bargaining mechanisms throughout the world. Beginning twenty-five years ago with the introduction of the *patteggiamento* in Italy, countries in the former Soviet Union, South America, Europe, and elsewhere have adopted new systems of consensual resolution of cases. These laws more than changed the law books; plea bargaining has rapidly been used to resolve an increasingly significant portion (often more than fifty percent in some countries) of new criminal cases.

This increase in the spread of plea bargaining has not been without its critics. Adversarial systems more readily adopt plea bargaining, finding that if the adversarial parties reach agreement, no trial is needed. Civil law countries hold closer to the idea of the search for the material truth, and therefore legal commentators believed that such plea bargains prevent that truth from being found. Many critics believe that the absence of equality of arms during the investigative stage makes plea bargaining inherently unfair, while others believe that lack of procedural and substantive protections to the accused during the plea bargaining process and the overall lack of judicial supervision increase the possibility that the innocent will increasingly be coerced into pleading guilty to avoid potentially draconian punishment if they go to trial. Some commentators lament the introduction of plea bargaining as part of an "Americanization" of criminal procedures, without appropriate consideration of whether such "transplanted" ideas are appropriate within the existing traditions of the receiving country.[4] Others see plea bargaining as a return to the show trials of the past, while a few see the process of plea bargaining to obtain confessions of guilt as almost the modern form of torture.[5]

With the expansion of different forms of consensual case resolution expanding to many civil law jurisdictions, it appears that plea bargaining, in whatever form, is likely to continue. Whatever particular form that prevails, it would seem that some protections, such as providing the accused some basic understanding of the evidence against them, as well as ensuring that any plea is knowing, intelligent, and supported by a factual basis through a judicially-controlled process with the participation of a defense attorney are emerging as potential international "best practices".

II. COOPERATION AGREEMENTS

By comparison to traditional plea agreements, cooperation agreements are investigatory tools. The cooperating defendant's admission of personal guilt is not the primary goal; the point is to use this cooperating defendant, proactively or historically, to develop evidence to prosecute other individuals, usually co-conspirators. Often seen proverbially as using "the little fish to catch the big fish," in some jurisdictions, such as the U.S., it can involve using the big fish to catch some of the little ones too.

The use of witnesses, sometimes called "crown witnesses,"[6] who themselves are participants in

[4] See, e.g., M. Langer, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, Harv. Int'l L. J. 1 (2004); Cynthia J. Alkon, Plea Bargaining as a Legal Transplant, A Good Idea for Troubled Criminal Justice Systems, 19 Transnat'l L. & Contemp. Problems 356 (2010.

[5] J. H. Langbein, Torture and Plea Bargaining, 46 U. Chi. L. Rev. 3 (1978).

[6] In this Article, such witnesses with their own criminal exposure will be referred to as cooperating defendants when such defendants face criminal prosecution for their own conduct, and immunized witnesses when excused from criminal prosecution. Often provisions for such cooperating witnesses are contained in newer witness protection laws, rather than in the traditional criminal procedure.

criminal activity is an increasingly accepted international practice. For example, Article 37 of the United Nations Convention against Corruption (UNCAC) provides:

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.[7]

The driving motivation for the use of cooperating defendants is the need to combat organized criminal groups more effectively. Often operating under a code of silence, these criminal enterprises are tightly knit and hierarchical. The criminal bosses are often several steps removed from the street-level criminal activity, making their criminal prosecution without the cooperation of lower-level participants unrealistic.

In a case where multiple defendants are arrested, the accused might collectively benefit by remaining silent, but each knows that if one of the other defendants cooperates in the hopes of obtaining leniency, they might be left behind if they hold out. This "prisoner's dilemma" encourages each defendant to consider pursuing cooperation at the earliest moment in the hopes of moving into the cooperating defendant status as quickly as possible before other defendants pursue that option and the door is closed.

While the concept of using cooperating defendants is straightforward, the mechanics can be trickier. Cooperation can take place at different stages of the case. Cooperation with the police, particularly at the time of the arrest or when the investigation first becomes known to that individual can be of substantial value as the cooperating defendant may be able to surreptitiously elicit incriminating statements from co-defendants prior to their learning that the cooperating defendant has been arrested and before the co-defendants have obtained counsel. Such proactive cooperation can also be extended to cooperation in other unrelated cases, where the cooperating defendant's knowledge of how particular criminal activity transpires, such as in the narcotics area, makes them potentially ideal to engage in controlled purchases.[8]

While such early cooperation can be of particular benefit to the investigation, in the U.S., only the prosecutor can formally move a defendant into the cooperating status. An investigator may promise a defendant that they can bring the cooperation of the defendant to the attention of the prosecutor, but they lack the legal capacity to do so unilaterally.[9]

Naturally defendants approach the idea of cooperation with trepidation. There is of course the physical danger that cooperation may place them or their family in for betraying their former partners in crime. Witness protection can help address this problem to varying degrees. Indeed, most individuals in the United States Marshals Service's "Federal Witness Protection Program" are criminal defendants who are cooperating against their co-conspirators, not innocent citizens who happened to

[7] Article 26 of the United Nation's Convention Against Transnational Organized Crime (UNTOC) provides similar encouragement.

[8] Proactive cooperation can potentially take place throughout the process or even after the trial, although its potential for success substantially diminishes over time and such street work may raise problematic bail and liability issues particularly for violent criminals once a cooperating defendant has been charged or after s/he pleads guilty. As time passes from the moment for arrest, historical cooperation in the form of information and testimony regarding past criminal activities become more the normal form of cooperation.

[9] In many jurisdictions around the world, the police may offer to "look the other way" regarding a defendant's criminal exposure and never bring that activity to the attention of prosecutors in return for information on the criminal activities of others. Such "informal" cooperation arrangements are more similar to immunization as the criminal informant will not face any criminal prosecution, although s/he will lack the legal protections of a formally immunized witness.

witness criminal activity.[10]

In addition, the process of cooperation can be a complicated. Seeking to cooperate, the accused may have to waive his or her right against self-incrimination and admit guilt prior to knowing whether the proposed cooperation will ultimately be accepted by the prosecutor and they will receive the benefits of cooperation. Some defendants may face such overwhelming evidence of their guilt that confession without any form of limitation against its future use may be their only option. For others, the U.S. prosecutor offers a "proffer agreement" a short term written agreement to govern a meeting between the defendant, the defense attorney, the prosecutor and law enforcement agent at which the defendants can offer his or her potential cooperation to law enforcement law enforcement without those admissions being directly usable against the defendant in court so long as their statement are truthful. Indeed, in some jurisdictions, the potential cooperating witness must not only admit their culpability to the crime under investigation, but also must describe their entire past criminal history to allow the prosecutor to evaluate them as a potential trial witness, thereby increasing their potential criminal exposure if their cooperation does not work out.

In some countries, such cooperation in return for leniency can only be offered to the least culpable defendant. In the U.S., it is not so limited based on the idea that since the cooperating defendant will still be pleading guilty, they will face punishment consistent with their role in the criminal activity, minus whatever reduction their cooperation earns them. Thus, serious criminals are not getting a "free pass" for their cooperation, but rather only a reduction.

If the potential cooperation looks promising, the U.S. prosecutor then negotiates a written cooperation agreement with defense counsel which provides that the defendant will plead guilty to specific criminal charges and provide cooperation under the direction of law enforcement. In return, the prosecution agrees that should the defendant's cooperation be determined to be both truthful and "substantial,"[11] the prosecutor will submit a motion to the defendant's sentencing judge detailing the cooperation and attendant circumstances. While the paradigmatic form of cooperation is testimony against co-conspirators, cooperation can come in different forms: in could be both proactive and historical, testimony and information (particularly if that intelligence or possibility of testimony led to guilty pleas of co-defendants), and could apply to cases before that court or in a court in a different jurisdiction, including a different country.

At trial, the cooperating defendant may be in an unusual procedural posture. In some jurisdictions, such as Russia, the defendant remains part of the same case as the defendants against which s/he will testify. This causes some concern, when the defense attorneys for the remaining defendants seek to discredit the cooperating defendant and the court criticizes them for playing the role of prosecutor. In the U.S., by contrast, severance is the approach. The cooperating defendant separately pleads guilty earlier in a separate and generally closed courtroom proceeding, and then testifies against the co-conspirators as a government witness. While the cooperating defendant has pled guilty prior to testifying against their co-conspirators, they typically have not yet been sentenced, allowing the prosecutor and later the judge an opportunity to assess their full cooperation before determining what reduction in sentence, if any, their cooperation has earned.[12] Thus the U.S. prosecutor must determine whether the cooperating defendant will prove to be a productive witness and sufficiently corroborated by other evidence despite the fact that they will be aggressively cross-examined by the remaining defendants regarding the cooperation agreement that they have entered into with the government and their motivation to blame their co-defendants in an effort to gain the favor of the prosecutor in order to receive a reduced sentence.

Under the U.S. system, the judge maintains discretion over the sentencing of the cooperating defendant. The United States Sentencing Guidelines gives the sentencing judge the authority to reduce the sentence of the cooperating defendant as follows:

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[10] Robert E. Courtney III, Insiders as Cooperating Witnesses: Overcoming Fear and Offering Hope (2010).
[11] As noted above, the UNCAC also makes use of the "substantial" standard to measure cooperation.
[12] Rule 35 of the U.S. Rules of Criminal Procedure permits post-sentencing reductions under limited circumstances, so most cooperating defendants hope to have their sentencing delayed while they cooperate.

§5K1.1. Substantial Assistance to Authorities Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.[13]

III. IMMUNITY ORDERS

Immunized witnesses are a close cousin of the cooperating defendant, but for the immunized witness, the result is even better. So long as they provide truthful testimony, they typically face no criminal liability at all.

There are two broad categories of immunity. First a witness could receive the broader "transactional immunity", which precludes the Government from prosecuting a witness for any offense (or "transaction") related to their compelled testimony. Alternatively, a witness could receive "use immunity," which precludes the Government from using, directly or indirectly, the witness' compelled testimony in a later prosecution of that witness. As a practical matter, the limitations on indirect use of compelled testimony make use immunity the near functional equivalent of transactional immunity.

The concept of immunity enjoys some international sanction. Section 37(3) of the UNCAC specifically encourages the state parties to consider such provisions:

> Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.[14]

Given that the immunized witness receives immunity from prosecution, in many countries, the immunized witness is limited to the individual in the conspiracy with the least culpability.

Why provide such an attractive offer to the witness? Generally speaking, there are two reasons. The first is that the witness has a minor role with little criminal exposure, but until the threat of that limited exposure is legally removed, the witness can still exercise their right against self-incrimination to testify. In order to secure their testimony, an immunity order or a non-prosecution agreement[15] can be negotiated removing the possibility that their testimony can be used directly or indirectly against them so long as it is truthful (perjury by a witness following the grant of immunity still remains a basis for criminal liability). This tool can be particularly useful in the area of corporate criminal liability,

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[13] See United States Sentencing Commission Guidelines Manual (Nov. 2012).
[14] Similarly, Article 26(3) of the UNTOC provides similar encouragement.
[15] Immunity orders and non-prosecution agreements serve the same purpose, but are slightly different in form and process. An immunity order is entered before the court whereas a non-prosecution agreement is an agreement, much a plea agreement, between the prosecutor and witness.

where lower-level employees engage in criminal activity at the instruction and for the benefit of senior management.

The second type of immunized witness is where there is suspicion of serious wrongdoing by the witness but insufficient evidence against them in order to pressure him or her to be a cooperating defendant. Therefore, the offer of immunity is the only means to gather sufficient evidence in order to bring a criminal case against the co-defendants. Indeed, if all the co-defendants could enforce an agreement to remain collectively silent, there might be no criminal convictions at all. At least in the U.S., the grant of immunity allows the government to compel testimony from a defendant, like it could from any other person under its jurisdiction, because the right against self-incrimination no longer exists when the possibility of criminal prosecution against the testifying witness has been removed. This second category of immunized witness presents a more significant problem — a potentially very significant criminal may be avoiding prosecution and the prosecutor may not have a full sense of their criminal exposure. The general public may be outraged that an admittedly guilty individual is facing no criminal sanctions at all because they received immunity. It is therefore more of a tool of last resort.

Because immunity will generally allow a guilty person to avoid criminal liability, there need to be adequate safeguards to ensure that it is not misused. In the U.S. federal system, the grant of immunity can only be obtained from a centralized office, the Department of Justice's Office of Enforcement Operations, to ensure that the grants of immunity are used only in appropriate cases and to ensure that one prosecuting office does not inadvertently grant immunity to a witness who was subject to an active criminal investigation in another office without proper consultation.

As a result of these concerns, immunity must be granted only after careful deliberation. Some criteria in making this decision could include:

a. The seriousness of the offense, and the importance of the case in achieving effective enforcement of the criminal laws;

b. The value of the potential witness' testimony or information to the investigation or prosecution;

c. The likelihood of the witness providing useful testimony;

d. The person's culpability relative to other possible defendants;

e. The possibility of successfully prosecuting the witness without immunizing him; and

f. The possibility of adverse harm to the witness if he testifies pursuant to a compulsion order.

While thought of as primarily a tool in criminal prosecutions, immunity can be used outside the criminal law context. For example, under U.S. law, an immunity order is potentially available:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

- (1) a court or grand jury of the United States,
- (2) an agency of the United States, or
- (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
- and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false

statement, or otherwise failing to comply with the order."[16]

In short, the grant of immunity is a significant tool in investigating criminal enterprises. Because of the substantial concern in allowing the truly guilty to go free, it must be used carefully.

[16] Title 18, United States Code, Section 6002.

COMPARATIVE TRIAL ADVOCACY

*Robert R. Strang**

Trial technique is one of the more idiosyncratic aspects of the law, where wide variations in legal rules, cultural norms, and historical traditions have led to divergent courtroom practices. There are fundamental differences in criminal procedures of many legal systems — professional versus lay fact finders, oral versus written testimony, and judicial versus party questioning of witnesses. Practitioners in different countries often appear to speak a different legal language. At first glance, comparative trial advocacy would seem to offer little opportunity for meaningful cross border sharing of experience, except in narrow circumstances where countries come from a similar legal tradition.

Nevertheless, recent experience suggests there are some sufficiently universal or near universal issues in advocacy such that trial skills can be shared across jurisdictions. Trial advocacy programs conducted in various countries and across various legal traditions over the past ten years indicate that there is a basis for productive comparative cooperation, even if such programs should be tailored to reflect local procedures and sensibilities.

There is also a convergence in the methods of teaching trial advocacy. The learn-by-doing, repetition-based experiential model for trial advocacy skills transfer is seeing wider adoption. This technique, pioneered by the U.S. National Institute for Trial Advocacy (NITA), relies less on lectures by distinguished legal academics, and instead focuses more on small group exercises where participants test their own skills before receiving both skilled practitioner and peer critique to sharpen core trial skill competencies, followed by a moot court experience.

This Article will focus on two trial skills for prosecutors that can be fruitful areas for sharing of best practices: examination of government witnesses (direct examination) and examination of defense witnesses including the defendant (cross examination). These topics are often individually the subject of multiple chapters in books on trial technique, or even the subject of an entire book by itself. Therefore, this Article will necessarily only discuss some of the broader tactics and considerations.

Persuasive direct examinations begin with witness preparation. In some jurisdictions, prosecutors do not meet with witnesses in advance of trial out of concern that they could be accused of improper coaching. In reality, preparation insures that witnesses provide coherent, streamlined testimony focused on the key issues of trial. The benefits of good witness preparation outweigh the potential downside of giving a defense lawyer the opportunity to make the argument that there was collusion.

Proper witness preparation requires having both the prosecutor and the investigator present during meetings with the witness. This ensures that the prosecutor has the benefit of the investigator's knowledge of the case and ensures that if there is any allegation of fabrication or prosecutorial misconduct, the prosecutor has a witness (the investigator) to rebut that claim without having to become a witness in their own proceeding. Having the investigator participate in the trial preparation also helps build a strong team model of police/prosecutor cooperation that should begin at the outset of the investigation and continue through the trial itself where the investigator can sit with the prosecutor during the testimony.

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Through witness preparation, the witness understands the process of being a witness, what will be involved in direct and cross examination, and how to be comfortable in the courtroom setting. The prosecutor better understands the strengths and limitations of the witness, how to phrase questions so the witness understands what is being asked, and often discover additional relevant information, not necessarily reflected in the investigator's interview notes, that the witness has to offer. Standard procedures include simulated questioning, review of prior statements, and use of exhibits. A properly prepared witness will know what to wear in court, where to sit, what to do if there are objections, what to do if they do not remember, how to respect both parties in the proceeding, and how to conduct themselves generally in the courtroom. Some general instructions all government witnesses should receive from the prosecutor could include:

- TELL THE TRUTH ALWAYS.
- Speak in your own words as you answer the questions.
- Look directly at the person asking you questions—prosecutor, defense attorney, and/or the court.
- Take time and think before answering questions. Don't feel rushed.
- Use the same effort in answering questions from the court and all lawyers.
- Be positive in answers.
- If you don't know an answer, say you don't know.
- Ask for the question to be repeated or clarified if you are not sure you understand it.
- Be comfortable with your limitations-every witness knows only parts of the case.
- TELL THE TRUTH ALWAYS.

Prosecutors need to keep in mind two significant psychological observations: listeners' attention spans are approximately 20-30 minutes, listeners understand better when provided with both visual and oral information together, and listeners recall the information they hear first and last ("primacy and recency") more accurately than information conveyed in the middle. The witness will be judged not only on the substance of their testimony, but also on their background and their demeanor. To keep the listeners' attention, unnecessary detail should not be included. The trier of fact will be making judgments throughout the trial and filtering the evidence to fit those judgments. Therefore losing their attention with unnecessary details or repetitive witnesses will undermine the case from the outset regardless of how strong later witness testimony proves to be.

An effective direct examination itself can be divided into several stages: personal background; scene setting; transition to get the trier of fact's attention; action description; exhibits to highlight and repeat; acknowledgment of any bias or weakness; and a strong ending. During direct examination, the prosecutor wants to make the witness the star, yet still control them. Questions should use simple words that convey an image, generally beginning with who, what, where, when, how, and please explain. Use of transitional sentences between new areas of testimony is key to keep the listener's attention. Prosecutors must avoid interjecting their own views and also avoid personal bad or distracting habits. It is critical to listen to the witness' answers — the prosecutor may have heard the answers a dozen times during witness preparation, but under the stress of trial it may come out differently. It can be helpful to repeat a witness' own words to a previous answer in a follow up question, although this should be done only on important answers and in moderation to avoid invoking the judge's ire. Pace is also extremely important — it is necessary to slow down for key areas by using a series of narrow questions and verbal and nonverbal cues. A prosecutor must maintain interest in their own witness no matter how familiar the prosecutor is with their testimony or risk inadvertently signaling to the trier of fact that the witness can be safely ignored or is unimportant.

Physical exhibits are an important way to both corroborate a witness' testimony and give them an opportunity to repeat key portions of the testimony. A witness should have multiple opportunities to make their point. For example, first, they can describe how a gun was pointed, second, they can then identify it in a search scene phone, and then third, they can show how the gun was pointed using the gun itself. Using the same exhibits with different witnesses demonstrates to the court how the witnesses reinforce each other. Demonstrative exhibits, such as summary charts, timeline charts, diagrams or models, may not actually be evidence, but they can also substantially aid the fact finder. Complex information or information from different witnesses who may have testified days or weeks apart can be combined in a single demonstrative exhibit. Witnesses will be more confident with demonstrative aids to assist them, particularly if they have practiced with the demonstrative aids during witness preparation. In cases where there is little physical testimony, demonstrative exhibits can give some much needed visuals to sharpen the case and bring the facts to life.

While all prosecutors have experience with direct examination of their witnesses, it is still possible to apply new techniques to streamline the government's proof to make it both more efficient and more effective.

By contrast, the cross examination of defense witnesses, particularly the defendant, provides a significant challenge to prosecutors worldwide. Defendants who breakdown on the stand and admit their own guilt make for good movies but that rarely happen in real courtrooms. The defendant is not bound by the truth; they will testify in any manner they reasonably hope will allow them to convince the fact finder of their innocence. In addition, prosecutors generally do not receive a great deal of specific information regarding the defendants' testimony in advance — the prosecutor may possess some reports of post arrest statements by the defendant that can be used for cross examination, but generally prosecutors do not receive significant helpful pretrial discovery regarding a defendant's testimony and are left guessing what that testimony may be based on the defense attorney's oral or written submissions to the court. In addition, most criminal trials have a predominance of witnesses for the prosecutions, rather than witnesses for the defendant, so prosecutors generally have less practical experience in cross examining defense witnesses than their defense counterparts. Therefore, following the direct testimony of the defendant or a defense witness, the prosecutor may have little time to develop an effective cross examination on the spot.

An effective method to address these structural disadvantages to the prosecutor is to use a concession-based cross examination approach. In a concession-based approach, the prosecutor prepares in advance a series of questions to use during cross examination that the witness will have to concede or the witness will look like a liar or a fool to the fact finder. In other words, the prosecutor can push through the theory of his case and support the testimony of prior government witnesses through careful questioning of the defendant or defense witness before the witness becomes more hostile.

Maintaining control of the defense witness through asking narrow, fact-based questions that the witness must agree with is one key to successful concession-based questioning. This is not the time to seek opinions from the defense witness, or to ask the defendant or defense witness how or why they did something or give them an opportunity to explain by asking a question that is too open ended. The prosecutor should be seeking concessions on facts, not on conclusions — the defendant will rarely concede a conclusion and attempting to seek it may simply result in an unproductive argument over what conclusions to draw. This in turn will muddy the careful factual concessions that the prosecutor hopefully has achieved.

Concession based questioning does not have to focus only on the testimony provided by the defendant during the direct examination. This is not an opportunity to allow the defendant to simply repeat their direct testimony, which would only strengthen its impact through repetition and further the defense's theory of the case. The cross examination also does not have to cover all areas that were covered by the defendant on direct examination. Instead, the prosecutor should use this time more strategically and focus on the areas the prosecutor wants to highlight, such as the defendant's need for money, the items found in their home, the incriminating statement made at arrest. In fact, the prosecutor does not have to pursue topics in chronological order — it can be disorienting to the

defendant if the prosecutor moves around in topics and the defendant does not know what will be next, although the prosecutor must not also make it too disorienting for the fact finder. As with direct examination, "primacy and recency" still matter, so the prosecutor should consider beginning the cross examination in an area where they feel comfortable that they will score concessions.

One of the benefits of starting the cross examination with the concession-based approach (compared to the frontal-assault approach where the prosecutor seeks to force the defendant to improbably admit their guilt) is it allows the prosecutor to stay in control and develop a rhythm with the defendant in which the defendant is having to admit a series of small facts that strengthen the prosecutor's case. The concession-based approach does not require of displays indignation or outrage. Quite the opposite, it allows the prosecutor to appear to the fact finder as the systematic and reasonable person trying to get to the truth rather than create an image of the prosecutor as an intimidating or emotional bully trying to force a defendant to admit conclusions.

A straightforward example of a concession-based cross examination of the defendant would be where the defense's theory is self-defense. A series of fact-based concession questions, if supported by other facts in this case, could proceed as follows:

- You drove to victim's apartment
- You were there at 9:00 p.m.
- You were with the victim
- You owed the victim money
- You had an argument with the victim
- You had a knife
- This knife (showing the exhibit)
- You stabbed victim in the chest
- You left victim in his apartment
- The victim was bleeding
- The victim was moaning
- You didn't call 911
- You didn't contact neighbors
- You went to your car
- You put the keys in the ignition
- You put into gear
- You drove away
- You didn't stop along the way
- You threw the knife away
- You drove to your apartment

- You entered it
- You closed and locked door
- You didn't call the police
- You didn't call the ambulance
- You went to bed

At this point, the prosecutor could stop this line of questioning. It is critical to resist the urge to ask the hostile witness to draw your conclusion — "So, you fled to avoid getting caught?" This question would only lead to the defendant coming up with their own explanation and would undermine the facts the prosecutor developed through careful concession-based questioning.

Once logical areas of concession-based cross examination are exhausted, it may be time to turn to a more confrontational approach but still focusing on using preplanned lines of impeaching the defendant or the defense witness. Such impeachment can come in many forms — by prior inconsistent statement, by prior omission, by other bad acts, by bias and interest, by motive, by ability, by lack of perception or by memory. Concession-based cross examination can even effectively be used in these impeachment categories of cross examination in appropriate cases.

For example, a defense alibi witness provides a statement in court that is inconsistent with a statement that the witness provided earlier to the investigator. There is an effective three-step process to show the original statement was more truthful, and demonstrate that the new story has been fabricated to save the defendant's skin.

The first step is to confirm the new statement, locking the alibi witness into this new version.

You testified a moment ago on direct examination that you were with the defendant during the night of the burglary, correct?

The second step is to credit the prior statement to demonstrate the witness' first version of the facts was more likely true by asking the defense witness a series of short questions. Such question could be as follows:

Back on July 1, you were interviewed by the police correct?

And that was at your home?

And they asked you a series of questions?

And you provided them with answers?

You understood that you were talking to the police?

This was a criminal matter, it was important to be truthful to the police, you would agree?

When they asked you that question, the burglary in question had taken place only a few days earlier?

Then comes the final step, to confront the witness with the prior inconsistent statement (which should be ready and marked). The confrontation should be done with the precise words used by the witness on the prior occasion as much as possible.

You were asked by the police where you were on the night of the burglary, and you replied that "I was in my house with my girlfriend the whole time," isn't that correct?

Having confronted the witness with the prior inconsistent statement, it is generally then a bad idea to ask why their story has changed or to explain the contradiction. To do so, would blunt the impact of the approach; let the defense attorney try to address the contradiction, you now move on to another contradiction and another contradiction, if possible. Perhaps if there are no other significant contradictions, time to move on to the bias of the alibi witness, for example, that they are good friends with the defendant:

- Known each other for ten years
- Play basketball together every week
- Live close to each other
- Went to school together
- Visited defendant in jail
- Would you agree he's one of your best friends
- You try to be a good friend to him
- You don't want any harm to come to him
- You don't want to see him go to prison

More effective to build up facts then to start with the opinion question ("you're good friends with the defendant, correct?") that will lead to a long and not very helpful response by the witness.

Given that defense witnesses are likely to be hostile, the prosecutor has to be prepared for nonresponsive answers. It is advisable to have an escalating strategy to address it. First, repeat the question, word for word if possible. If the witness still does not respond to the question, ask if witness understands the question. Then, ask the witness if something is preventing him or her from answering the question. If there is still no answer, consider asking the court to order the witness to answer the question. If the defense witness is still non-responsive, the prosecutor can ignore the witness and, when stops talking, say, "Oh, are you finished? Now please answer my question."

As with every witness, preparation is essential. If a fellow prosecutor can play the role of the defendant and act in a uncooperative and hostile manner, the prosecutor can practice asking questions and determine what concessions they can reasonable obtain, what strategies actually work, and determine how and when to end the cross examination on a strong note.

Both direct and cross examination require planning and practice. Prosecutors stand to gain when they consider trial techniques developed and tested in other jurisdictions and properly adapt them to the context of their own courtroom. While rules are different, the common goal of effective advocacy is true everywhere — to add value to the case by being persuasive.

PARTICIPANTS' PAPERS

INVESTIGATION OF CRIMINAL OFFENCES IN BHUTAN

*Kinlay Wangdi**

I. INTRODUCTION

The Royal Bhutan Police is the main law enforcement agency in Bhutan for the investigation of criminal offences in Bhutan. The responsibilities of the Royal Bhutan Police are to prevent and detect crimes, to maintain law and order and to prosecute offences. As per section 161 of the Civil and Criminal Procedure Code of Bhutan, it shall be the duty of every police personnel to promptly detect and apprehend all persons, when sufficient grounds exist to bring them to justice. Section 41 of the Royal Bhutan Police Act provides prevention, detection and investigation of criminal offences as the main responsibilities of the Royal Bhutan Police. Crime in Bhutan consists of cognizable offences as provided by section 165 of the Civil and Criminal Procedure Code of Bhutan, the offences under the Penal Code of Bhutan, the criminal offences under the various minor Acts of Bhutan and any other offences which are criminal in nature. Investigation by a competent police officer is a fact-finding operation authorized by law from its inception till it concludes by placing the evidence and material collected before a court. The investigator discharges a statutory function and, therefore, must exercise his best judgement and take steps and actions that are correct, ethically and legally. Investigation includes all the proceedings for the collection of evidence conducted by a police officer or by any person. It primarily consists of ascertainment of facts and circumstances of the case after the Police Crime Report (PCR) is registered. As per section 161 of the Civil and Criminal Procedure Code of Bhutan, the police shall lodge the criminal complaint in writing, if the complaint has not already been submitted in writing and make efforts to verify the accuracy of the complaint expeditiously by carrying out preliminary investigation. The police or the person making the statement and the person providing any record or evidence shall sign all statements and records emanating from the investigation. The police shall also make a record of the description of the suspect as first given to them by potential witnesses. It is mandatory for the Investigating Officer to take a statement of a material witness questioned during the course of investigation. As per section 90 of the Royal Bhutan Police Act, In order to establish a fair and efficient enquiry and investigating system, the Police department shall be provided with adequate modern facilities and scientific aids to investigation.

II. INVESTIGATION PROCEDURE IN BHUTAN

A. Investigation Steps

The investigation steps in Bhutan shall encompass proceeding to the spot/scene of crime; ascertaining all the facts and circumstances of the case; discovery and arrest of the suspected offender; collection of evidence relating to the commission of the offence, which may consist of examination of various persons (including the suspect) and the search of places or seizure of things considered necessary for the investigation and to be produced at the trail; and formation of the opinion as to whether, based on the materials collected, there is a case to place the accused before a Court for trial and, if so, taking the necessary steps for the same by making a charge sheet under section 187 of the CCPC and section 105 of the RBP Act. As per section 91 of the RBP Act, any Police officer investigating a crime shall conduct such investigation based on the minimum requirements laid down as hereunder:

(a) The investigations shall be based upon reasonable suspicion of an actual or possible commission of an offence consequent to the filing of Police Crime Report (PCR) by an affected person or by any person on behalf of the aggrieved person;

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(b) The investigator shall inform the accused of the offence he is being charged with and to prepare his defense either in person or through *Jabmi* (lawyer);

(c) The investigations shall be objective and fair. The investigator shall provide special attention to the interest of the accused, especially if the accused is a vulnerable person;

(d) The guidelines for the proper conduct and integrity of interviews shall be established and systematic records of interviews shall be maintained;

(e) The investigator shall safeguard the rights of the suspect including the right to remain silent;

(f) The investigator shall submit the result of the investigation in the form of a charge sheet or final report to a court of law;

(g) The investigating officer shall protect and collect any sample which shall have evidentiary value in the investigation of a case;

(h) The investigation report must be submitted in accordance with the prescribed format;

(i) All the statements of the suspects/accused/witnesses must be recorded in writing as required under the Evidence Act of Bhutan;

(j) In the event a suspect is required to be detained for more than 24 hours, the investigating officer must submit a request for remand to a court of law under the Civil and Criminal Procedure Code of Bhutan, for 49 days;

(k) Obtain further remand under of the Civil and Criminal Procedure Code of Bhutan, after 49 days till a maximum period of 108 days in cases of heinous offences; and

(l) An investigating officer must send a request for arrest or search warrant to a court of law for all arrests and searches to be made in accordance with the provisions under the Civil and Criminal Procedure Code of Bhutan.

As per section 101 of the RBPSRR, investigation of a case shall be conducted based on the minimum requirement laid down under the Royal Bhutan Police Act, 2009. It involves:

(a) Recording of the PCR, GD and case diary;

(b) Proceeding to the crime scene with an investigation kit box and investigation team;

(c) Ascertaining all the facts and circumstances of the case;

(d) Taking photographs and drawing sketches of the scene of the crime;

(e) Search, seizure, collection of evidence and examination of concerned persons;

(f) Registering of the case, interrogation, recording of statements and charge-sheeting of the case to the court;

(g) Dismissal of case if there is no prima facie case after preliminary investigation; and

(h) Releasing of the suspect by obtaining a release order from the court if there is no substantive evidence.

B. General Principles of Investigation

In Bhutan, it is mandatory for the investigation officers to follow certain general principles of Investigation as provided by the CCPC and the RBP Act. A successful investigation is one in which a

logical sequence is followed, all physical evidence is legally obtained, and all witnesses/suspects are efficiently questioned/interrogated. As per section 102 of the RBPSRR, the general principles of investigation are:

(a) Investigation should be started without any pre-conceived notion or bias;

(b) Investigation should be started without any delay;

(c) Provide emergency assistance if required;

(d) Cordon the scene of the crime to protect the evidence;

(e) Make a preliminary survey of the scene of the crime and seek technical or expert help as may be necessary;

(f) Secure atleast two independent witnesses;

(g) Photography and videography and maintenance of a case diary;

(h) Take note of all witnesses with their details;

(i) Make a systematic search of the scene of crime for evidence and clues;

(j) Carefully handle, collect, pack and label the physical evidence as per the seizure list in presence of witnesses for further examination by experts;

(k) Study the *modus operandi*;

(l) Reconstruct the crime scene and find out the motive for the crime;

(m)Identify the victim if not done;

(n) Formulate theories based on available information as to the commission of the offence and whereabouts of offenders; and

(o) Follow any other guidelines and procedures as provided by section 161 of the Civil and Criminal Procedure Code (CCPC) of Bhutan and chapter 14 of the Royal Bhutan Police Act, 2009.

C. Purpose of Investigation and Qualities of a Good Investigator

The purpose of investigation in Bhutan is to find out whether the allegation made out in the Police Crime Report (PCR) is true or not: if true, who are the offenders, i.e. identify and locate the perpetrator and solve the crime; if not true, why it is not true. The result of investigation, if successful, shall answer the following questions: did a crime as described by a code or statute occur; where and what time and date, did the crime occur; who is the victim; who are the individuals or organizations involved in the planning, execution and after effects of the crime; were there any witnesses to the crime; is there evidence to prove the crime? A good investigating officer shall have the following qualities:

- Sincerity, honesty, integrity and loyal;
- Sound knowledge of the law, legal procedures and police practices;
- Perseverance, zeal, tact and application of knowledge, and objectivity and freedom from preconceived notions;
- Agreeable manners with firmness in dealings;
- Good power of observation, analysis, deduction and an eye for details;

- Be a good judge of human psychology;
- Hard working and determined;
- Strong will and determination to achieve desired objectives;
- Have informers and sources from among the criminals of the area and should utilize them frequently for detecting the crime; Proficiency in writing reports;
- Strong commonsense;
- Extraordinary capacity for observation, recollection and attention to details;
- Well-disciplined and time conscious;
- A fair knowledge about elementary principles and application of science and technology;
- Logical and having a sixth sense with superior reasoning ability;
- A good investigator is imaginative, creative, patient and persistent;
- An investigator should be capable of differentiating between fact and opinion, determining cause and effect relationships, determining the accuracy and completeness of information presented recognizing the logical fallacies and faulty reasoning, developing inferential skills through deductive and inductive reasoning, superior reasoning ability and critical thinking;
- Should be physically fit, have knowledge and ability to use scientific aids, should have the ability to collect and analyse information;
- Should be able to maintaining good sources and contacts and should have good public-relations skills;
- Should have good communication skills, good command and control, and should be disciplined.

D. Multi-Disciplinary Approach to Investigation

For any investigation to be successful, the involvement of the following agencies is very important:

- Fellow police officers within the jurisdiction and also outside the jurisdiction;
- Crime Record Bureau;
- Intelligence;
- Informers and sources;
- Forensic science laboratories;
- Medical and forensic experts;
- Prosecutors;
- Technical experts;
- Judges (*Drangpons*).

III. EFFECTIVE COLLECTION OF EVIDENCE

A. Types of Evidence and Its Collection

As per section 84 of the Civil and Criminal Procedure Code of Bhutan, the Court shall grant the opportunity to present evidence including the right to subpoena witnesses and to compel the production of physical evidence on the defendant's behalf. Evidence may include physical exhibits, the testimony of witnesses or expert opinion in accordance with this Code. As per section 3 of the Evidence Act of Bhutan, evidence means all types of proof or probative matter presented and permitted by the Court at a legal proceeding by the act of the parties or required by the Court on its own through the medium of witnesses, documents inclusive of electronic records and physical evidence in relation to matters under inquiry.

1. Types of Evidence

Section 4 of the Evidence Act of Bhutan provides that evidence shall be categorized into the following types:

(a) Testimonial;

(b) Documentary including electronic records;

(c) Physical; and

(d) Expert opinions;

(e) Section 5 of the Evidence Act of Bhutan provides that evidence may be:

(i) Direct; or

(ii) Circumstantial or indirect.

2. Collection of Physical Evidence

As per section 34 of the Evidence Act of Bhutan, where there is physical evidence produced before the Court, other evidence shall not be admitted unless there is substantive and reasonable ground for such physical evidence to be untrue and irrelevant. It is essential for every Investigating Officer to know how to look for clues at the scene, how to seize, handle, label and pack them, where to send them for examination by the concerned authority/expert and how to preserve their identity throughout. The investigating officer should handle movable articles carefully so that no clue is lost or damaged or its relative position disturbed e.g.: fingerprints, footprints, saliva, remains, blood stains on weapons, and hair adhering to blunt instruments. Due care must also be taken not to obliterate any clues like fingerprints by careless handling of fixed objects, like polished walls, doors, windows and their handles and fastenings. The Investigating Officer should, if possible, use a pair of rubber gloves when handling articles. Steps in collection of physical evidence include seizure in presence of two disinterested and respectable local witnesses, labeling, packing and forwarding. Usually for detection and collection of trace evidence and evidence like fingerprints, footprints, etc., expert help is requisitioned. The services of Mobile Forensic Labs will be very helpful in this regard. While selecting the detection, collection, and preservation methods and the processing sequence, consider the circumstances of the case, ambient conditions, the discriminatory power of the different techniques, and the need to preserve or collect other types of evidence. It is important to record the techniques used for detection, collection, and preservation of the evidentiary items and the location from which they are removed. Methods used for detecting trace evidence include but are not limited to general visual searches; visual searches assisted by different types of illumination, such as oblique lighting and alternate light sources (UV, laser, high intensity); and visual searches assisted by magnification. Trace evidence recovery or collection techniques used should be the most direct and least intrusive technique. Collection techniques include picking, lifting, scraping, vacuum sweeping, combing, and clipping. The Forensic Science Unit will usually provide the following services to the Investigating Officer:

- Fingerprint lifting and comparison;

- Collection and examination of biological materials;
- Examination of questioned documents;
- Toxicological services;
- Examination of firearms and ballistics;
- Lie detection;
- Voice-test analysis;
- Audio/Video-tape analysis;
- Analysis of digital evidence;
- DNA profiling;
- Analysis of hair, fiber and other materials;
- Comparison of paint, wood and glass;
- Comparison of tool marks, recovery of erased writings, etc.;
- Cyber-crime investigation.

3. Oral Evidence and Interrogation of Suspects

Chapter 5 of the Evidence Act of Bhutan provides for oral evidence. Oral evidence in a criminal offence may be obtained from the victim, complainant, witnesses and suspects/accused. Interrogation is the art of systematic questioning of a person who is suspected to have committed a crime or to have been involved in a crime and of making the suspect reveal everything. It is an interaction of two minds — the mind of the interrogator and the mind of the suspect. This goes on till one-mind triumphs over the other mind. It aims at not only establishing guilt but also at establishing innocence. The primary object of interrogation is not, as is often supposed, to obtain a confession from a suspect. It is rather to obtain truthful information. The interrogator should be vigilant about false confessions, made under duress which, if swallowed, would put the interrogator to shame and in jeopardy. As per section 184.2 of the Civil and Procedure Code of Bhutan, any statement made to police by the suspect, to retain its evidentiary value in courts, must be voluntary in nature, include a statement to that effect and carry the signature of the suspect. Section 184.3 of the CCPC provides that the interrogation of a suspect shall be permitted provided the person charged has been informed of his/her right to consult a *Jabmi* before any such interrogation.

4. Questioning of Witnesses

Witnesses may be interested witnesses, disinterested witnesses, nervous, unwilling, lying, hostile, and child witnesses. In Bhutan, a police officer is empowered to require the attendance of the witness while making an investigation within the limits of his police station or adjoining station. The person who is acquainted with facts and circumstances of the case is bound to answer all questions truly, and the police officer may reduce to writing any statement made to him. Any person is bound by the Civil and Criminal Procedure Code of Bhutan to assist any police officer in investigation of a case, and if such person fails to assist, he may be liable for failure to assist lawful authority as per the Penal Code of Bhutan. The reasons for the reluctance of a witness to give his statement may be prejudices, fear and self preservation, anger, pressure against talking, no trust in police, fear of being implicated in the crime, time, energy and money, and harassment. While questioning a witness, an investigating officer shall bear the following in mind:

- Interrogate the witness soon after the commission of the offence;

- Examine as much as possible at the scene of the crime;
- Do not allow witnesses to discuss the case with each other;
- Question witnesses individually;
- Examine the most trustworthy first;
- Be kind and polite to the witnesses;
- Ask one question at a time;
- Do not ask specific questions;
- Do not ask leading question;
- Avoid questions with yes or no answers;
- Listen to answers, but at the same time anticipate your next question;
- Watch your body language and tone of your voice;
- Never threaten, frighten, or injure a witness to give information;
- Method of questioning should vary according to witness's age, sex, religion, political views, social status, education, etc.;
- Start the conversation on neutral territory;
- React to what you hear;
- As you move in to difficult territory slow down;
- Don't rush to fill silence;
- Pose the toughest questions simply and directly;
- Aid the witness's memory;
- Cross checking should be done carefully;
- Do not get annoyed with irrelevant details;
- All statements need not be recorded;
- Statements should be recorded in the language of the witness;
- Statements form part of the case diary; and
- A copy has to be supplied to the witness/suspect/accused.

IV. CONCLUSION

Bhutan is a peaceful, small developing country with a mere population of around seven hundred thousand people. Therefore, the crime rate in Bhutan is very low compared to other neighbouring countries like India and China. Nevertheless, various crimes are being committed every year around the country and the highest rate of crime is committed in the capital city, Thimphu. At present, the

Royal Bhutan Police, comprising around 4,000 personnel, is entrusted with the responsibility of preventing, detecting, investigating crime and maintaining law and order, and protecting and safeguarding the lives and property of the people. The Royal Bhutan Police is trying its level best to fulfill its responsibility in the most efficient, effective and professional manner with more emphasis on prevention and investigation of crime. To date, the Royal Bhutan Police has been successful in preventing, detecting and investigating many crimes. However, since Bhutan is a developing country, the lack of modern and the latest scientific aids, equipment and techniques for investigation has been a deterrence to the Bhutanese police force in its quest of providing the best policing service to the people. The lack of a full-fledged forensic laboratory in the country and dependence on other countries for complex forensic analysis has also added to the inefficiency of the police investigation. Yet, the Royal Government of Bhutan is taking a lot of initiative to provide its police force with the best facilities and policing equipment which is most suitable and required in this modern era. Hence, with such noble initiative and encouragement from the Government, the hard work and professionalism of the Royal Bhutan Police, the policing service in Bhutan may certainly become efficient and effective, which will ultimately lead to minimization of crime in society and the prevalence of peace, happiness, harmony and security in Bhutan.

CRIMINAL PROCEDURE IN BHUTAN

Kinlay Wangdi, Sonam Tashi** and Tandin Dorji****

I. INVESTIGATION

The main organization responsible for criminal investigation in Bhutan is the Royal Bhutan Police (RBP) which consists of twelve field divisions covering the twenty districts of Bhutan. Each field division is headed by a Senior Superintendent/Superintendent of Police and comprises various police stations under it as per the area of jurisdiction. Each police station is headed by an Officer Commanding and consists of other investigation officers, non-commissioned officers and constables. A police station is responsible for investigation of criminal offences committed within its jurisdiction. Every investigation is directly supervised by the respective Superintendent of Police in case of heinous offences and the Officer Commanding in other cases, and an investigation team shall consist of a minimum of eight personnel.[1] After thorough investigation of a case, the investigation report, consisting of the details of the case, brief facts, findings and charges against the offender, is prepared by the investigation officer.

In cases of misdemeanor offences (1 year to 3 years imprisonment) and above, the investigation report is handed over to the Office of the Attorney General (OAG) for the prosecution of the case. After receipt of the investigation report from the police, the case is deliberated by the Office of the Attorney General and a prosecutor for the prosecution of the case is assigned. The OAG frames the charges based on the investigation report of the police and shall coordinate with the concerned investigation officer for any assistance. After the charges are framed, the case is forwarded to the jurisdictional court of law for trial by the OAG. However, the arrest and detention of the suspect, any searches and seizures, remand, extension of remand, production of the suspect to the court whenever required, custody of the evidence, etc., shall be the responsibility of the police in coordination with the OAG prosecutor. The OAG as the prosecutor on behalf of the state has the right to question and investigate on the case handed over to them by the police for prosecution but they cannot command the RBP directly in criminal investigation. Normally, the OAG bases its action on the investigation report submitted to them by the police, and any doubts or ambiguity in the investigation is cleared by the police investigation officer. The RBP provides as much assistance and support as possible to the OAG for the smooth prosecution of a criminal case. In case the OAG, after deliberation, decides to return a case to the RBP without forwarding to the court, it may do so in writing stating the reasons for the non-acceptance. In such cases, the RBP shall respect the decision of the OAG if it is satisfied with the reasons for non-acceptance of the case. However, if the reasons stated by the OAG are not very satisfactory, the legal division of the RBP shall seek clarity from the Attorney General of Bhutan and accordingly apprise the Chief of Police.

On the other hand, cases of petty misdemeanor offences (1 month to 1 year imprisonment) and below, are prosecuted by the police by the police prosecution units of respective police stations around the country. In such cases, the investigation officer prepares the investigation report including the charges and forwards the case to the court for trial. Such cases are prosecuted by the police prosecutors.

The arrest and pre-indictment detention procedure shall be as per the provisions of the Civil and

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[1]One investigation officer, two first responders, two forensic experts including a photographer, one crime clerk, one prosecution unit, and the CCIS unit.

Criminal Procedure Code of Bhutan (CCPCB) and the Royal Bhutan Police Act (RBPA). As per Article 7 (Fundamental rights) of the Constitution of Bhutan, a person shall not be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence nor to unlawful attacks on the person's honour and reputation, and a person shall not be subjected to arbitrary arrest or detention. As per the CCPCB, no person shall be subjected to arrest or detention, except in accordance with this Code and a person arrested shall not be subjected to more restraint than is reasonably necessary to prevent his/her escape.

The CCPCB also provides that a person shall not be subjected to torture/cruelty/inhumane/degrading treatment/punishment, and a person suspected of carrying out such activity shall be subjected to criminal prosecution. A statement/pleading/testimony given under such circumstances shall be inadmissible. As per section 163 of the CCPCB, a Court is empowered to issue a warrant of arrest upon request by the police for criminal offences in accordance with this Code or other laws. The Court upon receipt of the crime report may direct the police to carry out additional investigation if reasonable cause of guilt has not been satisfactorily established. The warrant shall empower the police to arrest a person in a lawful manner. Section 164 of the CCPCB provides that the warrant of arrest shall state: (a) the name and address of the accused; (b) the crime with which he/she is charged; (c) the name of the Issuing Court; and (d) bear the seal of the Court and the warrant shall remain valid until it is executed or cancelled by the Issuing Court. Arrest warrants may be executed within Bhutan, beyond the jurisdictional boundary of the Issuing Court. If a warrant of arrest is to be enforced outside the territorial jurisdiction of the Issuing Court, the police shall: (a) obtain an endorsement from the Court having territorial jurisdiction; or (b) upon arrest, inform the Court having territorial jurisdiction. No line of appeal or judicial review shall vest in the Receiving Court with regard to any warrant from an Issuing Court, and the right to assert a motion for improper arrest or improper issuance of a warrant shall vest directly with the suspect and his/her *jabmi* (lawyer). The section also provides that a warrant may be served by the intervention of a foreign state, where the suspect to be served is outside Bhutan and in a country with which the right of extradition has been established by treaty, convention or mutual agreement.

Section 165 of the CCPCB provides that a police officer may arrest without a warrant in a public place if any person is reasonably believed to be: (a) abusing or physically assaulting another person; (b) attempting to forcibly dishonour a female; (c) suspected of dealing in illegal business; (d) in possession of illegal arms/ammunition, etc.; (e) using false weights and measures; (f) dealing in harmful drugs; (g) causing harm to public property such as telephone lines, lamp posts, roads, water pipes, etc. (h) wanted criminals; (i) a deserter from the uniformed services; (j) fishing and hunting on prohibited days and months under the Laws of Bhutan; (k) a receiver of stolen property; (l) obstructing police in the execution of lawful duties; (m) willfully and indecently exposing one's person or disgracing or committing nuisance, or exposing a contagious disease to the general public or contaminating drinking water; or (n) neglecting to fence in or duly protect any dangerous tank or other dangerous place or structure. The power of the arresting Police officer to enter a private dwelling to effect an arrest without warrant is limited to instances of immediate necessity or other exigent circumstances. As per section 167 of the CCPCB, a citizen may arrest or cause to be arrested any person whom he/she reasonably believes: (a) has committed or intends to commit a criminal offence; or (b) is wanted by the law for the commission of an offence. A person so arrested shall be handed over to the police or in the absence of police, relevant public official without delay.

As per section 184 of the CCPCB, immediately following arrest, an arrested person shall be informed of the charge for which he/she is being arrested and subsequent to arrest, the police shall make reasonable attempts to inform the parent, guardian or member of the family of the person so arrested and detained as soon as possible. As per section 186 of the CCPCB, the Court may order an accused to be remanded to police/judicial custody if there exists reasonable cause that he/she has perpetrated a crime. As per section 188 of the CCPCB, any person arrested and detained with/without warrant shall be produced before a Court within twenty-four hours of the arrest exclusive of the time necessary for the journey from the place of arrest and the Government holidays. As per the RBPA, a police officer shall have power to arrest a person upon obtaining warrant from a competent court and subject to the Civil and Criminal Procedure Code of Bhutan, a police officer may, without warrant, arrest a person for an offence if the Police officer believes on reasonable grounds that the person has just committed

or is committing the offence or is wanted for any criminal offence.

Another agency which investigates criminal offences is the Anti Corruption Commission (ACC), which is governed by the Anti-Corruption Act (ACA) of Bhutan. The ACC has all the powers of investigation of corruption offences and is supported by other law enforcement agencies such as the RBP. However, the ACC has the power to investigate only corruption offences provided by the ACA. After completion of investigation of a corruption offence, the ACC hands over the case to the Office of the Attorney General for prosecution.

Investigators' interviews of suspects are sometimes recorded on video and produced before the court in case the suspect retracts his statement. Such video recordings are produced at the court to show that the statement of the suspect was recorded as per the legal requirements and that no unfair or illegal means were used to record the statement. The recording is also used to refresh the memory of the suspect. However, to qualify as evidence in a court of law, the video recording should be supported and corroborated by other evidence proving the guilt of the suspect.

A suspect's attorney may attend an interview conducted by the investigative organizations, especially in case of minor suspects whereby it is mandatory. However, if the investigative organization justifies that the presence of the suspect's attorney during the interview is likely to hamper the investigation, the suspect's attorney can be excluded from the interview after justifying and providing the reasoning in writing.

After the interview, the oral statement of the suspect is converted into writing either by the suspects themselves or by the investigator if the suspect is illiterate. The statement is recorded on a statement form, which is signed by the suspect and a witness. Therefore, since the written statement is either recorded by the suspect themselves or by an investigator as told by the suspect, the suspect shall have the opportunity to confirm and correct mistakes by countersigning or by recording new statements.

The procedure for searches and seizures is provided by the CCPCB and the RBPA. As per section 168 of the CCPCB, a Court may issue a search warrant to the police to conduct a search for criminal evidence. A search warrant shall only be issued upon showing probable cause of a criminal offence to the Court. The police requesting a search warrant shall present to the Court: (a) the name of the accused and address; (b) the suspected criminal offence; (c) the place of search; and (d) the facts establishing probable cause for the search. As per section 169 of the CCPCB, all search warrants shall be executed within twenty-one days of their issuance, unless the Issuing Court has granted an extension. Section 170 of the CCPCB provides that a search warrant may be executed within Bhutan, beyond the jurisdictional boundary of the Issuing Court. If a search warrant is to be enforced outside the territorial jurisdiction of the Issuing Court, the police shall: (a) obtain an endorsement from the Court having territorial jurisdiction; or (b) upon search, inform the Court having territorial jurisdiction. In accordance with this Code, the Receiving Court shall ensure that the search warrant from the Issuing Court is enforced. As per section 171 of the CCPCB, a search shall be made in the presence of *Chimi/Gup/Chipon/* member of *Dzongkhag and Geog Yargye Tshokchung*/witness. A police officer executing the warrant shall: (a) announce that he/she is a police officer; and (b) show a search warrant. Where there is a danger of destruction of evidence and/or the distances from the Court to the places to be searched are substantial, police on the scene may conduct the search without having a search warrant. As per section 176 of the CCPCB, a police officer has, upon arrest of a suspect without a warrant, the right to search the area under the suspect's immediate control/possession. A police officer making any arrest shall seize from the person arrested any weapon, contraband or any other evidence of an offence carried on his/her person. As per section 180 of the CCPCB, a police officer may seize any property, which may be alleged or suspected to have been stolen or which may be found under circumstances, which create suspicion of the commission of an offence. The police shall prepare a list of all the articles taken into possession at the time of the search, and the copy shall be given to the owner or the person in occupation of the premise, as the case may be. The list shall be signed and dated by the officer making the search, the owner of the premise or person in occupation of the premise and by a witness present at the time of search. When an article discovered is of such a nature that its immediate destruction is necessary for public safety, it shall be lawful for the police officer making the search to destroy or have the same destroyed. A police officer making a search shall turn over all evidence to the police station with

labeling where it shall be maintained until required by the Court with jurisdiction over the case. If the police, prosecutor or the Court deems that a specific item is irrelevant to a case, the item shall be returned to the owner without delay. As per the RBPA, every police officer shall have the power to seize or search a person or a place upon obtaining a warrant from a Court of law. However, any police officer may search any place, dwelling, store, conveyance or any person, without warrant if he has sufficient reasons or grounds to believe that such a search is indispensable for the successful detection of a crime, subject to the CCPCB.

II. TRIAL

After thorough investigation of a case, the suspect is charged with the appropriate provisions of the law and the investigation report is forwarded to the court for prosecution either by the police in cases of petty misdemeanor and below, or by the Office of the Attorney General in cases of misdemeanor and above.

Before the registration of the case with the Registry division of the Court, the Court shall conduct miscellaneous hearings expeditiously. The Chief Justice in High Court, Chief Judge/Judge in the *Dzongkhag* (District) Court and the Judge in *Dungkhag* (Sub-district) Court hear the miscellaneous hearing. Hearings are conducted strictly in accordance with the CCPCB. Each Bench clerk maintains a Bench book. The Bench book enumerates the order as to how the hearing should proceed. During the miscellaneous hearing, the court shall make an initial determination whether sufficient legal cause exists to admit the case for proceedings according to the law. The Court shall give written reasons if the petition of a party is dismissed. The hearing is always conducted within the prescribed period and in accordance with the CCPCB. After the miscellaneous hearing, accordingly, the petition if registered by the registry is distributed to the Benches and a bench clerk is identified. After that, a preliminary hearing is conducted within ten days of registration in criminal cases and one hundred and eight days of registration in civil cases. The purpose of the preliminary hearing is to enable the Court to entertain challenges to pleadings based on cause, procedure and jurisdiction and clarify substantive or procedural legal issues. Furthermore, the Court shall conduct the judicial process in accordance with the CCPCB as follows:

Registry of a complaint => Miscellaneous Hearing => Preliminary Hearing => Production before Judge => Show Cause => Opening Statement => Defence Reply => Rebuttal => Evidence => Independent Testimony => Exhibit => Cross Examinations => Judicial Investigation => Closing Statement => Judgement.

There is a system of plea bargaining in Bhutan. As per section 197 of the CCPCB, with agreement to provide information to the prosecution and in lieu of a full criminal trial, a suspect may choose to plead guilty to an offence lesser than the offence charged and be sentenced accordingly. The prosecution may consider a plea bargain in exchange for evidence deemed critical for prosecution against other criminal suspects. Discretion as to whether or not to consider a plea bargain rests fully with the prosecution which shall, among other factors, consider: (a) the nature of the offence; (b) the circumstances under which the crime was committed; (c) the person's prior criminal record and status; and (d) whether it is voluntary in nature. Before confirming a plea bargain, the prosecution shall determine whether the defendant is mentally competent and is a child in conflict with law, and if so, whether the child is represented by parent/member of a family/legal guardian/*jabmi*, and understands: (a) the nature of the charges emanating from the plea bargain; (b) the mandatory minimum and maximum penalties provided by law, if any; (c) that a plea bargain may be made as well during the course of the criminal trial; and (d) that if the prosecution accepts the plea bargain, the defendant waives his/her right to a trial.

All the evidence and documents which are relevant to the case and are the facts in issue are referred to the judge after indictment. However, the evidence and documents which are not relevant to the case are filtered by the prosecutor.

The confession of a suspect is admissible in a court of law if it was taken as per the legal requirements and if it is corroborated by other evidences. As per section 84 of the Evidence Act of

Bhutan (EAB), any statement made at any time by a person charged with a crime stating or suggesting that the person committed the crime shall be the confession of the person. Section 85 of the EAB states that the Court shall not consider any confession to be valid unless the confession is proven to be: (a) made voluntarily; (b) given independently; and (c) made without duress, coercion, undue influence or inducement. As per section 86 of the EAB, if the confession is made to the police officer or any other police official, it shall not be valid unless the confession is proven to be made after the police officer or the police official had: (a) warned the person that anything he says can be used against him in a legal proceeding; (b) notified that he has a right to a *jabmi* (lawyer); and (c) informed that, if he cannot afford a *jabmi*, the Government will provide him with a *jabmi*. Section 88 of the EAB provides that a confession made to a police officer or other police official shall not be admissible without corroborating evidence of the validity of the confession. When a person confesses to a police officer, the police officer must follow the procedure set forth in this Act. As per section 91 of the EAB, a confession made by any person is irrelevant and inadmissible in a criminal proceeding if the making of the confession appears to the Court to have been caused by any: (a) inducement; (b) threat; (c) promise; (d) intoxication; or (e) incompetence or incapability. As per section 92 of the EAB, the Court shall proceed further if a person: (a) had confessed and then denies the confession; or (b) has made counter-charges. In instances where a confession is retracted or denied, the person shall be: (a) examined in the Court; (b) warned of the consequence of giving false information; (c) called upon to remember whether the person has or has not consciously committed the offence; (d) liable to be charged of perjury; and (e) investigated for the difference between the statement and words given or spoken before and after.

All the relevant evidence collected through investigation is permitted to be submitted to the court to prove or disprove the case. However, evidence which is irrelevant or which is likely to mislead the court and waste time may not be permitted. As per Section 32 of the EAB, although relevant, evidence may be excluded if: (a) its probative value is substantially outweighed by the danger of unfair prejudice; (b) it could cause undue confusion of the issues; (c) it could mislead the Court; (d) it could cause undue delay or a waste of time; or (e) it is cumulative.

The hearsay-rule in Bhutan is provided by the EAB. As per section 76 of the EAB, hearsay is an out of court statement made by a person who is not examined as a witness. As per section 77 of the EAB, the following types of oral statements are not hearsay — when a prior statement by the witness: (a) who is giving oral evidence and the prior statement is inconsistent with the statement made while giving oral evidence or was made in another legal proceeding or was written down in a document that is available for inspection by the Court and the parties; (b) giving oral evidence is consistent with a statement given by the witness while giving oral evidence and is offered to rebut an expressed or implied charge against the witness of fabrication or improper influence or motive; or (c) giving oral evidence is one of identification of a person made after seeing or perceiving the person. As per section 78 of the EAB, the following types of written statements are not hearsay: (a) records of regularly conducted business activity made at or near the time of that activity by a person with knowledge of that activity and kept in the course of the regularly conducted business; (b) records maintained by the Government that are generally available to the public for inspection or sale; (c) entries in any public or official book, register or record made by a public servant in the regular course of official duties; or (d) published maps, charts, and plans offered for public sale and made under the authority of the Government. Section 79 of the EAB provides that hearsay evidence is not admissible except with leave of the Court in considering whether: (a) it would have been reasonable and practicable for the party by whom the evidence was introduced to have produced the maker of the original statement as a witness; (b) the original statement was made contemporaneously with the occurrence or existence of the matters stated; (c) the statement involves multiple hearsay; and (d) any person involved in the statement had any motive to conceal or misrepresent the matters involved in the statement.

In Bhutan, during trial, victims and witnesses are protected whenever the court deems it necessary for such protections. As per section 33 of the EAB, no person's identification shall be revealed if the person is the source of evidence or a witness to the issue and the Court believes that his identification needs to be protected. As per section 198 of the RBPA, the Royal Bhutan Police shall provide physical protection to any state witness vulnerable to any real security threats to his life and property. Section 112 of the RBPA states that no Police person shall disclose any personal source of information under any circumstance to any person or authority. As per section 68 of the EAB, the Court shall exercise

reasonable control over the mode and order of questioning of witnesses and presenting evidence so as to: (a) make the questioning and presentation effective for the ascertainment of the truth; (b) avoid needless consumption of time; and (c) protect a witness from harassment or undue embarrassment.

III. CONCLUSION

The Bhutanese legal system is based on the adversarial (Accusatorial or the Common law system) principle of procedure with some elements of the inquisitorial system (Continental or the Civil law system). The courts take no sides and the judges are umpires of the litigants. The judges allow uninterrupted hearing to the litigants or their *jabmis* (lawyers). They are given the opportunity to make presentation to the Court and answer questions posed by the judges. The plaintiff and the defendant or their *jabmis* can submit evidence to substantiate their legal contentions, and the courts decide cases based on the facts and issues submitted by the parties. Thus, *onus propandi* or the burden to proof beyond reasonable doubt lies on the prosecutor in a criminal case and on the plaintiff to prove his case by a fair preponderance of the credible evidence in a civil action. The adversarial principle is well enshrined in the *Bardo Thoedrel* (Book of the Dead — *Garun Puran*), which is performed on the third day of the *Tshechu* (religious festival in Bhutan) every year all over the country and dates back to the 8th century.

Thus, after thorough investigation of a criminal case by the jurisdictional investigative organizations, the investigation report of the case is forwarded to the prosecuting agency. The prosecuting agency in turn forwards the case to the court of law having jurisdiction and after registration of the case at the court of law, the trial procedure begins with the miscellaneous hearing. Thereafter, the judicial process of preliminary hearing, production before judge, show cause, opening statement, defence reply, rebuttal, evidence, independent testimony, exhibit, cross examinations, judicial investigation, and closing statement commences. The trial procedure ends with pronouncement of the judgement.

THE EFFECTIVE COLLECTION AND UTILIZATION OF EVIDENCE IN CRIMINAL CASES: CURRENT SITUATION AND CHALLENGES IN BRAZIL

*Andrey Borges de Mendonça**

I. INTRODUCTION

The Brazilian Constitution of 1988[1] grants express rights to defendants, especially in the case of arrest. This is due to its publication after a dictatorship period (1964-1984), when several cases of abuses and torture of detainees occurred. Paradoxically, the State use of violence against civilians in the 60s, 70s and 80s led later to the recognition of numerous fundamental guarantees. In fact, the dictatorial experience still influences the Brazilian case law.

The 1941 Code of Criminal Procedure is the basic law regulating the criminal procedure in Brazil. Published during a previous dictatorship period (1937-1945), the Code was originally inspired by the fascist Italian Code of Criminal Procedure (1930)[2] and has been amended by several laws and constitutions.

The 1988 Constitution and the 1941 Code of Criminal Procedure discipline the collection and utilization of evidence in criminal cases, being complemented by other thematic and sparse rules. It is important to mention that on August 2, 2013 the new Organized Crime Act (Federal Statute n. 12.850/2013) was enacted. This law, besides providing the definition and punishment of organized crime, regulates the special techniques of investigation to prevent and to investigate such crimes.

II. COLLECTION AND UTILIZATION OF EVIDENCE IN CRIMINAL CASES

A. Effective Investigation Methods for Acquiring Statements

1. Interrogation of Suspects

In Brazil, the right to remain silent is a constitutional guarantee: "the arrested person shall be informed of their rights, among which the right to remain silent" (1988 Constitution, Article 5.LXIII). Therefore the interrogation of a suspect or a defendant is not preceded by any oath. Moreover, there is no punishment even in the case of a proven lie. Despite the reference to the "arrested person", it is unanimously accepted that any suspect or defendant, whether or not arrested, has the right to remain silent. The Code of Criminal Procedure adds that silence may not be valued in prejudice of the defence; in other words, presumptions against suspects who refuse to testify are explicitly prohibited (Article 186). In synthesis, there are virtually no legal limits to the right to remain silent. In fact, if the suspect or defendant prefers, they are allowed not to show up for questioning, according to the majority of Brazilian judges. There is an exception created by the new Organized Crime Act (Federal Statute n. 12.850/2013), which says that the defendant who makes an agreement with the prosecutor must waive his right to be silent and has to tell the truth.

In general the suspects are initially interrogated by the Police and, in practice, are usually not warned of their right to remain silent at that time. Their statements, however, must be confirmed before the judge, after the warning (that is truly made by some judges, whereas others limit themselves

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[1] Câmara dos Deputados, 〈http://bd.camara.gov.br/bd/bitstream/handle/bdcamara/1344/constituicao_ingles_3ed.pdf?sequence=7〉 accessed 29 June 2013 (English version).

[2] Presidência da República, 〈http://www.planalto.gov.br/ccivil_03/decreto-lei/del3689.htm〉 accessed 29 June 2013. At the same website, there is a complete database of Brazilian rules.

to issue the warning on paper, but do not really care to do it). If the confession before the Police is not confirmed in the judicial phase, it will be given little or no value; if the judge forgets to alert the defendant about their right to remain silent, an eventual confession will be void. In any case, there is no need of a warning at the moment of detention, but only at the beginning of the hearing.

While the assistance of a lawyer is mandatory during judicial interrogation, it depends upon the suspect's choice in the case of interrogation by the Police. Unfortunately, those who cannot afford paying will be given no assistance during the investigation by the Police and poor assistance during the judicial process.

Enhanced techniques to obtain confessions, such as torture or the administration of truth serum, are not officially accepted in Brazil. According to the Article 5.III of the Brazilian Constitution, "no one shall be submitted to torture or to inhuman or degrading treatment". However, torture by the Police is sometimes reported by suspects.

2. Interrogation of Victims and Key Witness

Everyone may be a witness in Brazil. Since 2008, victims and witnesses are cross-examined by both the public prosecution and the defence, and then the judge may formulate complementary questions.[3] Although called "cross-examination system", it is not allowed in Brazil to the party who called the witness to make an examination in chief, after the other party cross examination. Before 2008, there was a different sequence and method. The judge would interrogate the victim or the witness, and afterwards the public prosecution and the defence were allowed to direct questions to the judge, who would reformulate and redirect the questions to the victim or the witness. Except for judicial mediation, the old procedure is still adopted during the interrogation of the defendant.

As in the interrogation of a suspect or a defendant, the enquiring of a victim is not preceded by any oath, and they are not punished merely because of lying. On the other hand, witnesses testify under oath commit perjury if they do not tell everything they know about the investigated facts. There are, however, some exceptions to the obligation to testify, such as professional confidentiality.

Attending the hearing is mandatory for both victim and witness. If either of them does not attend the hearing, the judge may conduct them to the court *manu militari*. The difference, as above mentioned, is that the witness will be criminally punished merely by lying or remaining silent, while the victim will not.

In general, a witness or a victim must testify in the presence of the defendant. But to prevent intimidation, it is possible to use the video-conference system. If the required equipment isn't available, the court may allow the hearing in the absence of the defendant. But the defence lawyer must always be present.

B. Methods to Facilitate Testifying at Trial by Protecting Witnesses, Victims and Suspects

If the witness or victim is at risk due to their collaboration in a criminal investigation or procedure, it is possible to admit them in a protective programme (there is one federal programme and there are many State protective programmes). The protective programmes were officially implemented in 1999 and are organized by the civil society in cooperation with the government. As many witnesses are in need of protection because of threats made by police officers' groups, the collaboration of civil society has been reinforced and is important to guarantee that the system operates well. The increase in civil society's responsibilities may be considered a good practice. The State, however, coordinates and finances the programmes of protection.

Federal Statute n. 9.807/1999 regulates and organizes the system of victims and witnesses' protection. Some protective measures that may be adopted are (Article 7): (i) security in the habitual residence of the witness or victim; (ii) new residence or temporary accommodation in a location compatible with the protection; (iii) preservation of identity, image and personal data; (iv) monthly stipendium to provide a livelihood to the individual and family, if the protected person is unable to perform regular

[3] It is not allowed, in general, for witnesses to give their mere opinion, and the parties cannot ask leading questions.

work or lacks any source of income; (v) temporary suspension of functional activities, without loss of wages or benefits when the protected person is a public or military official; (vi) social, medical and psychological care. In exceptional cases the person under protection may change their full name and assume a new civil identity. Up to now, such change has happened in five cases.

But the system of protection does not have sufficient resources. In 2003 the budget of the Brazilian system was about four million dollars. The accommodations and facilities offered to the witnesses and victims are precarious. In consequence, the usual witness in the case of a federal offence, who is either rich or middle class, does not accept being admitted to the programme of protection.

There is also a leniency programme in Brazil. The Witnesses and Victims Protection Act (Federal Statute n. 9.807/1999) grants some benefits to the cooperative defendants, such as remission. Additional thematic rules also provide for leniency agreements, especially the Organized Crime Control Act and the Money Laundering Control Act.

Until the New Organized Crime Act, there was no regulation of the procedure in these cases, which was appointed as a flaw in the legislation. However, this new law now regulates the agreement between the defendant and the prosecutor, when that one gives important information to the investigation or prosecution of the crimes or information about the other offenders. The new Act, accepting a practice that was developed in the case law, made a broad regulation of this new technique, especially regulating the procedure of the agreement.

The new law imposes a written assignment between the parts and gives to the informant a range of benefits, like judicial pardon, diminution of the penalty, suspension of prosecution, and others. The judge will not be part of the agreement and will just supervise the legality of the agreement. If the informer is not the leader of the organization and gives, first hand, an effective contribution, the Prosecutor can dismiss the charges against him. According to the new law, the informant must wave his right to be in silent and has the duty to tell the truth. It will be a difficult task to carry out this duty with the idea that the informant cannot be persecuted if he doesn't tell the truth.

In any case, the judge cannot convict anyone based just on the word of an informant, and it is necessary to confirm the defendant's information with other elements (the corroboration rule). The prosecutor must have sufficient additional information to convince the judge, and the defendants cannot be found guilty solely on the basis of an informant's declaration.

C. The Utilization of Special Investigation Techniques

The utilization of special investigation techniques is not yet so common in Brazil. This was due to the absence of a systematic regulation on the matter. The special investigation techniques' regulation was sparse and interspersed in various federal statutes, such as the Organized Crime Control Act and the Drug Control Act. However, the New Organized Crime Act was enacted, aiming to change this scenario. As an exception, wiretapping is regulated by the Wiretapping Act and its practice is frequent.

1. Electronic Surveillance

Wiretapping is the most usual special investigation technique involving electronic surveillance. It is regulated by the Federal Statute n. 9.296/1996 and the Constitution, that states: "the secrecy of correspondence and of telegraphic communication, data and telephonic communication is inviolable, except, in the latter case, by court order, in the cases and in the manner prescribed by law for the purposes of criminal investigation or criminal procedural finding of facts" (Article 5.XII). Therefore a court order is a constitutional requisite. The Federal Statute n. 9.296/1996 (Wiretapping Act) adds three other requisites: (i) the investigated crime should be punished with reclusion — wiretapping is not allowed in the case of misdemeanors and offences punished with detention; (ii) there must be no other way to collect the evidence; (iii) there must be a reasonable indication of authorship or participation in a criminal offence (probable cause). The wiretapping can last for 15 days at maximum, but the judge may authorize a prorogation if necessary. The Federal Statute n. 9.296/1996 (Wiretapping Act) also applies to electronic communications (e-mail wiretapping).

The new Organized Crime Act (Federal Statute n. 12.850/2013) authorizes the registration of

environmental electromagnetic signals, both optical and acoustic (bugging), in the investigation concerning an organized criminal group.

The use of GPS is not regulated in Brazil and there is a debate about whether a judicial authorization (court order) would be required in this case.

2. Undercover Operations

The old Organized Crime Act and the Drug Control Act (Federal Statute n. 11.343/2008, article 53.I) authorized the utilization of "undercover agents, but there was not enough regulation of the matter. However, the new Organized Crime Act wants to change that.

The new Organized Crime Control Act regulates the "undercover agent" broadly. It depends, in all cases, on the judge's decision and it's authorized just for police officers. In other words, it's not possible for an informant to act as an undercover agent. The requirement to begin an undercover investigation should expose the necessity of the measure, tasks which the agent will do and, when possible, the names of the people who are investigated and the places where the infiltration will occur.

The undercover agent, as a drastic and dangerous measure, should be used just if the other measures to obtain evidence are insufficient. The infiltration can last for six months, but can be extended if necessary. At the end of each six months, the agent should make a detailed report and inform the judge and the Prosecutor. However, at any time, the prosecutor can demand more information about the measure. Regarding the limits of the undercover agent, if he commits a crime, he cannot be punished if another conduct isn't expected. Otherwise he can be punished if he acts beyond reasonable limits.

After the charge, the reports made by the undercover agent should be available to the defence lawyer, but preserving the agent's identification. The agent has the right to change his name, according to Law 9807/99, and his image and voice should be preserved during the trial, although the agent has to testify in court. Besides that, the agent cannot be photographed or filmed by the media without his consent.

3. Controlled Delivery

The former Organized Crime Control Act (Article 2.II) and the Drug Control Act (Federal Statute n. 11.343/2008, Article 53.II) allowed the realization of controlled delivery, which is a technique of frequent use in the investigation of drug trafficking. The Drug Control Act demands a court order, whereas the former Organized Crime Control Act was silent about it

The new Organized Crime Control Act regulates "controlled delivery". According to the new law, it's possible to retard the administrative or police intervention to obtain more evidence of the crime. It's requested that the offender must be supervised from the beginning until the end of the proceeding, to avoid escaping. The judge should be advised and, if necessary, he should authorize the limits of the "controlled delivery" and, then, communicate with the Prosecutor. In a case involving two countries, "controlled delivered" with the cooperation of both authorities is allowed if the itinerary of the person is known.

The new law is unclear on which cases will or will not require a court order and, certainly, this issue will be a point of discussion in the case law. It is also unclear what the police should do in case of emergency, when it is not possible to communicate with the judge.

4. Personal Data

The new Organized Crime law grants access to Police and Prosecutors to the data containing personal information, like address, filiation and personal qualification, kept by the Electoral Justice, banks, internet providers, telephone companies and others, without the necessity of a judicial order. Furthermore, the transportation enterprises should grant to the Police and Prosecutors the information of reservations and travels registration for the last five years. Finally, the telephone records should also be granted to the Police and the Prosecutor, and the telephone companies should preserve these records for at least five years.

Access to bank records requires a judicial warrant. Regarding this matter, it is important to mention — and can be described as a good practice in Brazil — the system developed by the Federal Prosecutors Office called the Bank Movements System (SIMBA), which aims to obtain the bank data in a standardized format. In other words, the model establishes a standard model for receiving data and analysing large volumes of financial records. In this new process, all the banks send the data via a secure system and in a standardized electronic format to the Research and Analysis Branch of the Public Prosecutors' Office, after the judicial decision was granted. When the information is received, within generally two months, the programme already has issued five types of reports that help the Prosecutor to analyse the information. The programme was granted to all investigation agencies and is now used in most of the cases of bank secrecy in Brazil.

III. CONCLUSION

Besides the points already mentioned, there are some underlying problems with regard to the investigation practice in Brazil. The Brazilian system is still very inefficient in collecting evidence, especially in white collar criminal cases. About 8% of the crimes committed are effectively punished. The panorama is worse in complex crimes. According to The Financial Action Task Force Mutual Evaluation of Brazil (June 25, 2010), after more than 10 years of the criminalization of money laundering, Brazil had significantly enhanced its ability to prosecute this crime, but there were only 11 final condemnations.[4] In other words, money laundering generally remains unpunished. Among other reasons, this is because the Police still rely on traditional techniques to investigate, even in complex and white collar crimes.

Until recently, there was no comprehensive legal regulation about the special investigation techniques. The New Organized Crime Act is aimed to change the panorama. This new law provides some new special techniques to investigate organized crime that can help to obtain evidence and allow the State to punish these offenders properly and efficiently. However, the enforcement of this new law will depend especially on the case law interpretation, trying to bring efficiency without disregarding the interests of the suspect/defendant.

Also, the police officers are not well trained and do not count on sufficient resources and devices to make use of the especial techniques. Some possible measures to foster an efficient system of collecting evidence, especially in complex crimes, are: (i) use properly and efficiently all the new investigation techniques; (ii) to provide training and equipment to the law enforcement agents; (iii) to allow the prosecutors to propose *nolo contendere* agreements to the suspect or defendant, even in the case of serious crimes.

Brazil needs to assure better protection for witnesses and victims, and more precisely: (i) to provide appropriate financing and organizational structure to the Witness Protection Program; (ii) to facilitate the change of their civil identity; (iii) to allow the international relocation of the protected witness or victim.

Finally, it is important to find a balance: nowadays there is an excessive judicial tolerance in the interpretation and application of the law in order to make up for the cruelty and deficiency of the criminal system in practice, *inter alia*. This posture propitiates impunity. Disregarding the public interest is not a legitimate way to deal with the frequent violation of fundamental guarantees of suspects, defendants and convicted people.

[4]GAFI. *Mutual Evaluation Report Anti-Money Laundering and Combating the Financing of Terrorism. Federative Republic of Brazil*, 2010, p. 35. 〈http://www.fatf-gafi.org/dataoecd/13/50/45800700.pdf〉.

THE CRIMINAL JUSTICE SYSTEM IN BRAZIL: A BRIEF ACCOUNT

*Andrey Borges de Mendonça**

I. INTRODUCTION

Brazil embraces the Civil Law tradition, and therefore its legal system depends upon a systematic interpretation of written and general rules, passed by the legislature or, exceptionally, by the Executive. Nonetheless, the influence of Common Law practices is increasing. For instance, since 2004, the Brazilian Supreme Court is authorized to set mandatory precedents in exceptional circumstances, obliging both the Executive and lower ranks of Judiciary. Up to now, the Supreme Court has acted in 32 instances.

The Brazilian criminal justice system is framed by the 1988 Constitution, which includes dispositions about: (i) the elaboration of rules on criminal and procedural matters; (ii) the Judiciary and other essential institutions; (iii) the procedural guarantees; (iv) juridical international cooperation. In a lower hierarchy than the 1988 Constitution, the 1941 Code of Criminal Procedure and many sparse regulations address criminal investigation, prosecution and adjudication in a more detailed manner.

II. THE FUNCTIONING OF THE BRAZILIAN CRIMINAL SYSTEM OF JUSTICE

In Brazil, besides the Especial Justices, or Special Courts, (Military and Electoral Courts), there are Federal and State Justices. In general, the Federal Justice (Federal Courts) has jurisdiction over crimes involving the interests of the Federal Government and other crimes indicated by Article 109 of the Constitution. The competence of the State Justice (State Courts) is residual. The Federal Public Prosecutors act in the Federal Courts, investigating and prosecuting federal crimes, like currency counterfeiting; smuggling; federal tax dodging; evasion of social security contributions; slave labour; formation of cartels; money laundering; illegal transfer of money overseas; banking frauds; international drug trafficking; internet paedophilia; crimes committed by Internal Revenue employees, Federal Police officers or by personnel of any federal agency or department; environmental crimes, etc.[1] The

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[1] According to the Federal Constitution, Article 109: "The federal judges have the competence to institute legal proceeding and trial of: (....) IV — political crimes and criminal offenses committed against the assets, services or an interest of the Union or of its autonomous agencies or public companies, excluding misdemeanours and excepting the competence of the Military and Electoral Courts; V — crimes covered by an international treaty or convention, when, the prosecution having started in the country, the result has taken place or should have taken place abroad, or conversely; V-A — cases regarding human rights referred to in paragraph 5 of this article; VI — crimes against the organization of labour and, in the cases determined by law, those against the financial system and the economic and financial order; VII — habeas corpus, in criminal matters within their competence or when the coercion is exercised by an authority whose acts are not directly subject to another jurisdiction; VIII — writs of mandamus and habeas data against an act of a federal authority, except for the cases within the competence of the federal courts; IX — crimes committed aboard ships or aircrafts, excepting the competence of the Military Courts; X — crimes or irregular entry or stay of a foreigner, execution of letters rogatory, after exequatur, and of foreign court decisions, after homologation, cases related to nationality, including the respective option, and to naturalization; XI — disputes over the rights of Indians. (....) Paragraph 5. In cases of serious human rights violations, and with a view to ensuring compliance with obligations deriving from international human rights treaties to which Brazil is a party, the Attorney-General of the Republic may request, before the Superior Court of Justice, and in the course of any of the stages of the inquiry or judicial action, that jurisdiction on the matter be taken to Federal Justice". This and all the quotations are from *Constitution of the Federative Republic of Brazil*: Constitutional text of October 5, 1988, with the alterations introduced by Constitutional Amendments no. 1/1992 through 64/2010 and by Revision Constitutional Amendments no. 1/1994 through 6/1994. — 3. ed. — Brasilia: Chamber of Deputies, Documentation and Information Center, 2010

State Public Prosecutors act in the State Courts and investigate and prosecute crimes like murder, robbery, fraud, and all the offenses not framed in the other Courts.

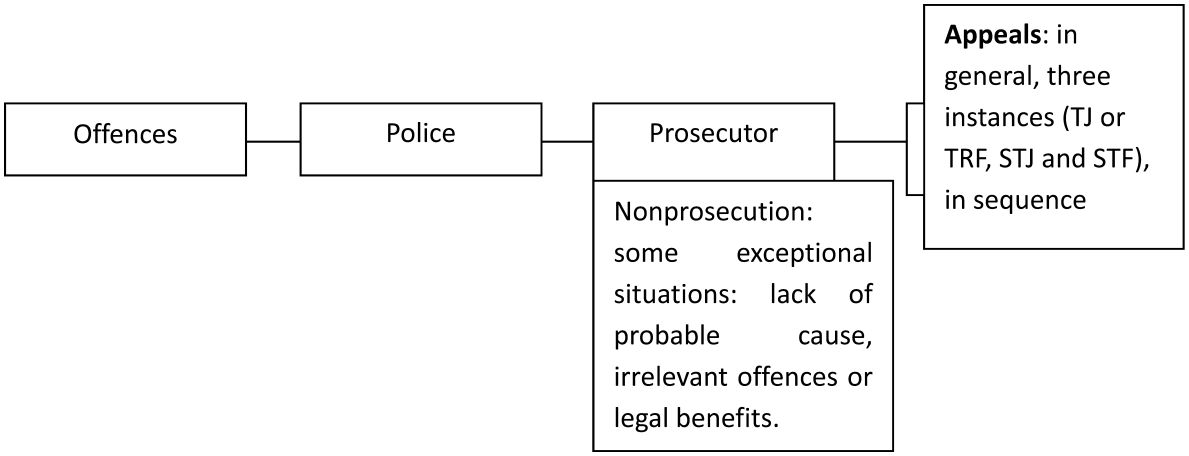
In essence, there are four different moments in the functioning of the Brazilian criminal system of justice: firstly, the investigative Police, the Public Prosecution or another legally authorized organ collects, if necessary, evidence of a fact that might be a crime and its agent (investigation); secondly, the Public Prosecution or, exceptionally, the victim accuses the possible agent (prosecution); thirdly, the Judiciary convicts or acquits the defendant (adjudication); fourthly, the criminal condemnation is implemented (execution).

During the first phase, there is an inquisitorial and not an adversarial system; the suspects may choose whether to be assisted or not by a lawyer, and, on their own initiative, may access non-sealed evidence regarding themselves. Judicial intervention occurs exceptionally, for instance, when a temporary prison is required.

In the second phase, the Prosecutor decides whether to sue or not. This decision is not discretionary, and whenever there is some evidence of a crime, there shall be an accusation. However, there are a few attenuations to this rule: (i) insignificant disconformities to criminal law may be considered irrelevant; (ii) some minor offences may not be investigated and tried if, given certain conditions, the possible agent voluntarily accepts light "penalties".

In the third and fourth phases, there is a judicial process in an adversarial system; the legal assistance is mandatory and, in practice, ineffective to those who cannot afford private lawyers. It may be noticed that also during the investigation phase, the optional legal assistance will be guaranteed only to those who can afford private lawyers. With regard to criminal execution and imprisonment, Fingermman reports that Brazil maintains the fourth largest imprisoned population in the world, being exceeded only by the USA, Russia and China.[2] The author adds that "nearly half of Brazil's incarcerated population is composed of pre-trial prisoners" and "80 per cent of the prisoners in Brazil are unable to afford a private lawyer".[3]

The first, second and third phases — investigation until trial — will be the objects of deeper explanations. The next flowchart shows, briefly, how Brazil's criminal system works.



A. Investigation

The agencies and organizations responsible for criminal investigations in Brazil are, mainly, the Federal Police (as the name explains, act in the whole country) and the Civil Police (that act in each State). The Federal Police investigate: (i) criminal offences against the political and the social order or to the detriment of property, services and interests of the Union and of its autonomous government

[2] Isadora Fingermann, "The challenges of access to justice and enforcement of the right to counsel in Brazil", *Criminal Justice Matters*, 92:1, 24-25.
[3] Ibid.

entities and public companies (in one word, federal crimes), as well as other offences with interstate or international effects and requiring uniform repression as the law shall establish; (ii) illegal traffic of narcotics and like drugs, as well as smuggling, without prejudice to action by the treasury authorities and other government agencies in their respective areas of competence. According to the Brazilian Constitution, it is incumbent upon the civil police, except for the competence of the Union, to investigate criminal offences, with the exception of military ones. In other words, the Civil Police investigate crimes adjudicated by the State Courts and the Federal Police the crimes judged by the Federal Courts, the illegal traffic of narcotics and like drugs, smuggling and other offences with interstate or international effects requiring uniform repression as the law shall establish.

Also, there are other government agencies that investigate crimes in their respective areas of competence, although this is not their primary attribution. These agencies investigate when a criminal offence is discovered during the regular exercise of their legitimate functions. For instance: (i) The Environmental Agency (Ibama[4]) is responsible for investigating offences related to the environment; (ii) Internal Revenue Service ("Receita Federal"[5]) is responsible for investigating offences related with revenue frauds and other federal tax frauds; (iii) the Central Bank ("Banco Central do Brasil"[6]) investigates financial crimes; (iv) the Securities and Exchange Commission of Brazil ("Comissão de Valores Mobiliarios- CVM"[7]) investigates offences in the securities market; (v) the COAF is the Brazil's FIU — Financial Intelligence Unit — acting in anti-money laundering and countering the financing of terrorism activities.[8]

As said above, these agencies are not focused primarily on investigating crimes. They do so when, while developing their activities, they realize that a crime has been committed. In general, at the end of their activities, these agencies communicate to the Prosecutor's Office, sending the evidence that an offence has occurred. Sometimes, just with the information sent by these agencies, it is impossible to initiate an immediate prosecution, so the prosecutor can complement the investigations, or it is possible to order the police to continue the investigation.

The investigation conducted by the Police is made in a police enquiry ruled by a chief police officer or police commissioner. These agents are graduated from law school and conduct the police enquiry under the supervision of the prosecutor. The judge acts in the investigation exceptionally, just when it is necessary to restrict the suspect's rights or guarantees.

In Brazil, in general, public prosecutors cannot command the above-mentioned investigative organizations directly in a criminal investigation, but can request investigatory procedures and the institution of a police investigation. Nonetheless, there are few good examples of Joint Venture investigations, the so called "Task Forces" (like the *Banestado* case, that investigated the financial crimes related to the Bank of Banestado, in the Brazilian State of Paraná, with great results), where the Prosecutors can command the agents of other agencies, although there is no regulation of the Task Forces in Brazil.

According to the Brazilian Constitution, among other institutional functions of the Public Prosecution, it is their task to initiate, *exclusively*, public criminal prosecution,[9] under the terms of the law (article 129, I) and to exercise external control over police activities (article 129, VII). According to a part of the doctrine and the case law, based on these constitutional articles, it is possible for the prosecutors to conduct their own investigation, grounded in the implicit power theory. In fact, a lot of corruption cases and important crimes were solved because of the prosecutors' investigations, bringing to court a lot of politicians and agents used to impunity. In general, the prosecutors' investigations are more efficient and independent than the ones conducted by the police, especially because the police

[4] More information available at ‹http://www.ibama.gov.br›, but only in Portuguese.
[5] More information available at ‹http://www.receita.fazenda.gov.br/›, but only in Portuguese.
[6] More information available at ‹http://www.bcb.gov.br/?ENGLISH›, in English.
[7] More information available at ‹http://www.cvm.gov.br/ingl/indexing.asp›, in English.
[8] More information available at ‹https://www.coaf.fazenda.gov.br/conteudo-ingles/about-money-laundering›, in English.
[9] Private prosecution in Brazil is possible in two cases. The first, when the criminal code said that a specific offence just can be prosecuted by the injured. The second, according to article 5º, LIX, of the Constitution: "private prosecution in the cases of crimes subject to public prosecution shall be admitted, whenever the latter is not filed within the period established by law"

officers do not have independence in their investigations and can be taken off the case by their superior, which is impossible when it comes to prosecutors.[10]

On the other hand, a part of the doctrine dissents about the possibility of prosecutor's investigation, based on the alleged abuses committed by the prosecution and the lack of legal regulation about the subject. In fact, there is no legal regulation about investigations conducted by the public prosecutors. Despite that discussion, it is common for prosecutors to investigate a lot of crimes on their own, especially crimes committed by police agents and corruption, with very good results. In this sense, to regulate these activities, there is a resolution (the level of which is below law) by the National Council of the Public Prosecution that regulates the investigation made by the prosecutors.[11] When the Prosecutor directly makes the investigation, he may interview the suspects and key witnesses directly. Furthermore, he is authorized to access public databases, to require information, exams, expert examination and documents from public and private authorities and request the police force to help the investigation.

The Grand Bench of the Supreme Court in Brazil has not decided yet whether it is possible for prosecutors to investigate, although there are other decisions of that court, from the benches,[12] accepting the prosecutor's investigation. The tendency of that Supreme Court is to accept the prosecutor's investigation at least in cases involving crimes committed by police officers and in other cases where the police do not have interest in investigating.

Very recently, there was a legislative proposal for changing the 1988 Constitution in order to restrict the legitimacy to conduct investigation solely by the Police, especially to forbid the prosecutor's investigation. This attempt, *inter alia*, has motivated several recent popular manifestations all over Brazil, and ended up being rejected by the Congress on June 25, 2013. There was a general belief that the proposed legislative alteration would propitiate impunity, as criminal investigations would become more unlikely, especially because the police crime clearance rate is very low, below 10%.

To sum up, there is a lot of discussion in this field in Brazil currently, but the tendency is to accept, although with limitations, the possibility of the prosecutors to investigate. In cases where the prosecutors investigate, the judge oversees the investigation, especially authorizing restrictive measure. Also, when a suspect's rights are disrespected, the judge may be required to correct the alleged abuse.

At this point, it is important to outline the investigative procedure. In fact, there is no procedure to be strictly observed. The president of the investigation (the police officer, in the police inquiry) has a relative discretionary power to determine the collection of evidence through the investigation. In other words, the strategy of the investigation is under the police officer's discretion. Despite that, the prosecutor, throughout the whole investigation, can interfere in this strategy, ordering the police to take specific measures or to obtain further proof. This is explained because the investigation is aimed to give the prosecutor the information needed to file a charge.

In general, the Brazilian Police does not have a good structure. There are a lot of crimes to investigate and little structure. In addition, especially in the State Police, unfortunately it is very common for police agents to be corrupted.

In general, the investigation is based just on acquiring statements from suspects, victims and key witnesses, as the primary means of gathering evidence, without the use of new techniques. Sometimes simple exams are made (as to prove the falsity of a document). In investigations related with drug trafficking, it is common to see the use of wiretapping. However, the Federal Police has been develop-

[10] In Brazil, public prosecutors have equivalent status as the judges in terms of qualification, salary and guarantees of independence. Aside from disciplinary proceedings, they cannot be suspended from the performance of their duties

[11] Resolution n. 13/2006 can be obtained at: ‹http://www.cnmp.mp.br/portal/images/stories/Normas/Resolucoes/res_cnmp_13_2006_10_02.pdf›.

[12] The Brazilian Supreme Court is composed by 11 Justices, divided in two benches composed by five Justices each. In some cases, the Grand Bench (the eleven Justices together) votes to decide certain aspects, especially in important matters and when there is conflict between decisions among the two benches.

ing, since 1988, a better structure to investigate and sometimes to use new techniques of investigations.

During the investigation, the interviews of the suspect are, in general, documented in a written record, signed by the suspect. Generally, it has given the suspect the opportunity to confirm and to correct mistakes in the recorded statement. In some cases, the police records on video the interview, to give more reliance on the suspects' confession. To avoid further allegation of coerced confession — unfortunately still very common in Brazil — especially during detention, the police sometimes orders a medical exam, to show that no harm occurred during the interview. According to Brazilian regulation, in all cases the suspect's attorney can attend the interview conducted by investigative organizations.

The confession — documented on paper or on video — is able to be used as evidence to prove the defendants' guilt. Their statements, however, must be confirmed before the judge. According to article 200 of the Brazilian Criminal Procedure Code, retraction is possible in pre-trial confession. Due to that, if the confession before the Police is not confirmed in the judicial phase, it will be given little or no value. In Brazil, no one can be convicted in cases where the only proof against him is his own confession, according to articles 197 and 158 of the Brazilian Procedural Criminal Code.

In Brazil, the prevalent interpretation nowadays is that any interference with the suspect's privacy requires a warrant. Due to that, warrants are required to search in residences, in enterprises or to obtain data protected by constitutional secrecy (such as bank records, call logs and telephone communications, the secrecy of correspondence and other fiscal data). Judicial warrants are also necessary to authorize wiretapping, electronic surveillance, controlled delivery and "undercover agents".

Warrants are not required for personal searches, whether the suspect carries weapons or evidence. Finally, the Police and Prosecutors have access to the data containing personal information, like address, filiation and personal qualification, kept by the Electoral Justice, Banks, Internet Providers, Telephone Companies and others, without the necessity of a judicial order.

The investigation can last months and even years, until the expiration of the legal term. In certain periods of time (generally each 30 or 90 days), the Police must ask the prosecutor for an extension of the investigation. The prosecutor should, in this case, consent to the extension and determine the diligence the police must make during the period.

It is important to mention that the reported crime clearance rate in Brazil is very low, below 10%, and although it is difficult to measure, especially because the data are not reliable, it shows how inefficient the Brazilian criminal justice system is. Also, the system allows the defendant to indefinitely postpone the beginning of serving the conviction's sentence. This and other features give the sensation of impunity throughout Brazilian society, especially in offences like corruption, widely spread in society. In fact, in the 2012 Corruption Perception Index, Transparency International ranked Brazil 69th of the 174 jurisdictions covered by the index.[13] According to Transparency International, some studies show corruption is now costing upwards of $40 billion each year in Brazil.[14]

1. Pre-Indictment Detention

Regarding pre-indictment detention, according to the Brazilian Constitution (art. 5º, subsection LXI), "no one shall be arrested unless in flagrante delicto or by a written and justified order of a competent judicial authority, save in the cases of military transgression or specific military crime, as defined in law".

In this way, the pre-indictment detention occurs, in general, if there is a warrant to arrest, issued by a judge, on the ground of (i) flight risk; (ii) risk of recidivism; (iii) risk that the suspect will destroy evidence or otherwise affect the investigation of the crime. The pre-indictment detention is only admitted whether there is probable cause and the crime has, in general, a statutory maximum penalty of at least 4 years. Pre-trial detention is only admitted if the use of other non-custodial solutions (such

[13] 〈http://cpi.transparency.org/cpi2012/results/〉.
[14] 〈http://www.transparency.org/news/feature/brazil_one_million_people_demand_accountability〉.

as bail, reporting to justice and electronic surveillance, for instance) are insufficient, taking for granted that pre-trial detention is used as an exceptional measure. Recently the Law 12.403/2011 was enacted, which changed a lot of aspects of pre-trial detention and changed the Brazilian system, especially creating a lot of alternative measures, to avoid, as much as possible, the use of detention.

The request of the detention could be from the prosecutor or the police officers (in this case, passing by the prosecutor). During the investigation, the judge cannot issue a warrant detention ex officio, although it is still possible during the trial. The suspect should be listened to, in general, before the expiration of the warrant, except whether there is risk of ineffectiveness of the measure. In this case, the detainee should present a reply after the detention. In Brazil, there is no detention hearing by the judge.

However, besides the warrant to arrest, the pre-indictment detention is possible when someone is caught while perpetrating a crime or immediately after it. In this situation, the offender can be arrested in *flagrante delicto*. It is important to mention that, although there is the right to silence, the police does not warn the detainee about this right in the moment of detention (but just before the interrogation). In other words, there is no similar warning as the "Miranda warnings". The police, then, take the detainee to the police station and book him, although the criminal identification is exceptional.[15]

After the arrest, the police have 24 hours to obtain the statements of the witnesses and interview the detainee (custodial interrogation), making a report of the detention (called "record of the *flagrante delicto's* detention"), to be sent to the judge and the prosecutor.[16] This record indicates the circumstances of the prison and the legality of the detention. In some cases (offences with statutory maximum penalty lower than 4 years), after the report, the Police Officers can release on bail (*stationhouse bail*). In the other cases, the arrested will continue to be detained, until the judge's decision. The detainee has the opportunity to be assisted by a lawyer during police interrogation, although it is not mandatory.

According to the Constitution, in case of *flagrante* delicto, the arrest shall be immediately informed to the competent judge — in practice, it occurs in 24 hours by sending a copy of the *flagrante's* record to the judge — and the illegal arrest shall be immediately remitted by the judicial authority. After the communication and if the detainee was not released on bail by the police, the judge may release, with the use of one or several non-custodial measures. If the detention is necessary, the judge should issue a warrant to detain — and the suspect will continue to be detained.

The police or the prosecutor, except in the case of *flagrante delicto*, cannot detain a suspect without a judicial warrant, even in cases of urgency. In other words, there is no emergency exception and the police should obtain a detention warrant, unless the suspect is committing a crime or has just perpetrated it.

In Brazil, although there is no specific or explicit regulation, the maximum period to detain the suspect in pre-indictment detention is 10 days in State jurisdiction or 30 days in Federal jurisdiction. In some grave crimes — torture, illicit traffic of narcotics and related drugs, as well as terrorism, and crimes defined as heinous crimes — the pre-indictment detention could last for 60 days.

B. The Decision to Prosecute

At the end of the police enquiry, the police officer makes a brief and objective report, describing the diligence performed and the evidence obtained, and sends the police enquiry to the Prosecutor. The prosecutor has, then, three alternatives: (i) dismiss the case, if it is not possible to prosecute (for instance, where there is no probable cause related to the author of the crime or the materiality or if the offence is insignificant). The judge can disagree with the non-prosecution decision and, in these cases,

[15] According to the Brazilian Constitution, "no one who has undergone civil identification shall be submitted to criminal identification, save in the cases provided by law" (Article 5º, subsection LVIII). The cases that the law allows the criminal identification are related to non-reliable documents or some types of crimes (as adulteration, fraud or forgery of documents).

[16] In some small offences (with statutory maximum penalty not more than 2 years), the police do not make the report and interview the witness and the offender, releasing the offender on his or her own recognizance.

the superior organisms of the Public Prosecutor's Office will decide whether or not to prosecute; (ii) demand more investigation by the police; (iii) prosecute, if there is probable cause that an offence was committed. In this case, the police enquiry (or the previous investigation) and all the evidence collected go along with the indictment, during the whole trial.

C. Trial

The trial phase is an adversarial system, where the due process clause and a fair trial are granted to the defendant, with all the means related. In the first instance, in general, the cases are heard by a single judge, the same one that oversees the investigation. In other words, the competent judge is the same, from the beginning of the investigation until the first instance sentence. However, in cases involving crimes against life, such as homicide, the judgement is before a jury trial, formed by 7 lay citizens and the verdict does not have to be unanimous — a simple majority is sufficient. It is not possible to waive the right to a jury trial.

For crimes punishable by imprisonment for less than 2 years, there is a more simplified procedure that can lead to an agreement between the prosecutor and the suspects (called *transaction*). In these cases, if the suspect and his lawyer accept the proposition of a restriction, the case is dismissed.

In general, after the indictment, the procedures at trial begin. There is not a system of plea-bargaining in Brazil, where the defendant can plead guilty. There are just two benefits that mitigate the general rule: the transaction (see above) and the "suspension of the process". The latter allows the prosecutor to suspend the procedure, from two to four years, and, during that period, the defendant would be on a type of probation. The prosecutor considers some of these factors concerning the defendant and the crime: (i) the statutory minimum penalty should not be superior to 1 year; (ii) the offender's character and the circumstances under which the offence was committed; (iii) the defendant cannot be accused of another crime. If these factors are present, the prosecutor can offer the benefit and, if the defendant and his lawyer accept, the judge will suspend the process for, in general, two years. During this period, the defendant submits to some conditions and, in the end, the procedure could be dismissed. Besides that, the Brazilian criminal code does not allow summary procedure even when the defendant pleads guilty. Even in these cases, all the long and last procedure should be observed and the prosecutor has no discretion in the decision to prosecute.

If there is no suspension, the step-by-step from indictment to sentencing can be described as follows: (i) the judge analyses whether the accusation has probable cause and begins the trial, if so; (ii) after that, the defendant is summoned and presents an initial written reply, by his lawyer; (iii) on the ground of the defence's response, the judge can summarily acquit the defendant. If not, a hearing is appointed; (iv) on the occasion of these hearings, that are supposed to be unified, the victim, the witness and the expert witness testify (in general, maximum of eight for each part) and make their statements. After that, there is the judicial interrogation, when the defendant can remain silent, without any negative consequence. Then, the prosecutor and the defence should make their closing arguments, orally, in 20 minutes. At the end of the hearing, the judge should pass the sentence. This is the basic legal chronology of a criminal case.

Although this is the legal system, as a matter of fact it is very difficult to have a continuous and unified hearing. It is very common to have two or more hearings, for many reasons (difficulty to find witnesses, witnesses that do not appear, etc.) and, for that, it is very rare, in practice, to have a continuous and unified hearing. There usually is one hearing for the prosecutor's witnesses, one hearing for the defence's witnesses and a final hearing for the judicial interrogation. It is very common, too, for the prosecutor and the defence to require the judge to change the oral closing arguments for written allegations and the judge rarely sentences during the hearing. This is due to a very strong written tradition in Brazil.

The evidence collected during the investigation and the documents prepared by investigators are all referred to the judge after indictment. As previously said, the police enquiry or the previous investigation and the evidence collected during this stage go along with the indictment. In other words, the prosecutor cannot choose the best evidence appropriate to prove the defendant's guilt to the court. The evidence collected during the investigation, exclusively, cannot allow a conviction, although, according

to Article 155 of the Brazilian Criminal Procedural, it can be used to reinforce the evidence obtained in the trial phase.

Although it is not forbidden, the prosecutors in general do not prepare their witnesses before trial, probably because this may be misunderstood by the judge as an attempt to coerce the witness. However, the defence lawyers usually prepare their witness before trial.

As said before, if the confession before the police is not confirmed in the judicial phase it should be given little or no value. As a matter of fact, the judge should analyse the existing proof, to see if there is evidence to convict. In Brazil, no one can be convicted in cases where the only proof against him is his own confession, according to articles 197 and 158 of the Brazilian Procedural Criminal Code. In practice, however, it is common to see the courts admitting the pre-indictment confession with considerable value, although it is rare to convict only on the ground of the pre-indictment confession.

The evidence collected thorough the investigation is, in general, allowed to be submitted to the court. The only exception is the exclusionary rule, settled in the Constitution as follows: "evidence obtained through illicit means is unacceptable in the process" (Article 5º, subsection LVI). For instance, evidence obtained with violation of privacy or bank secrecy and coerced confessions cannot be used to convict. Brazil does not adopt the rule against hearsay and, in fact, it is very common to see police officers testifying about the suspect's confession during the arrest, which is accepted by the case law.

Federal Statute n. 9.807/1999 regulates and organizes the system of victims and witnesses' protection (see pages 5-7). The Brazilian Criminal Code (Article 212), to prevent intimidation, authorizes the adoption of the video conference to hear the witness or the victim. If the required equipment is not available, the court may allow the hearing in the absence of the defendant. But the defence lawyer must always be present.

After the conviction, the defendant will remain at liberty until the final decision, unless there is the necessity of a warrant detention. The problem is that the parts could appeal on the ground of any argument and, besides that, there are almost three instances, what makes the beginning of the execution of the sentence very slow. In other words, the postponement of the final decision is very common, what allows, in a lot of cases, expiration of the statute of limitation and impunity.

III. CONCLUSION

The 1988 Brazilian Constitution structures our criminal justice system in a reasonable way. In practice, however, it does not work properly. Many different reasons have been pointed out to explain the problem, such as: (i) lack of governmental investment in building and maintaining prisons (building schools and hospitals is more appealing to voters, convicted people do not have the right to vote and temporary prisoners encounter many difficulties to vote); (ii) political influence over the high ranks of the Judiciary; (iii) an obsolete 1941 Code of Criminal Procedure, edited in a dictatorship and inspired by the fascist Italian Code of Criminal Procedure of 1930; (iv) absence of a systematic regulation on juridical international cooperation.

Nonetheless, there is hope. Brazil is receiving international pressure to improve conditions in the prisons, temporary prisoners were recently allowed to vote, important Brazilian politicians have been convicted of corruption in the recent Mensalão scandal, drafts of a new Code of Criminal Procedure and a Juridical International Cooperation Act are under discussion and many sparse federal rules, and the 1988 Constitution itself, have changed the essence of the 1941 Code of Criminal Procedure. Recently, as a result of popular demands to combat corruption, Law 12.850, of August 3, 2013, was enacted, aiming to regulate the new techniques of investigation to combat organized crime.

CRIMINAL JUSTICE IN MALDIVES

*Mahmood Saleem**

I. INTRODUCTION

The Maldives is well known as paradise on earth and a tourist haven for its enormous natural beauty, safety, and peace loving and friendly people, even though the crime rate has increased considerably in recent years. Until the enactment of the Constitution on 7 August 2008, the criminal justice system of the Maldives heavily relied on the use of confessions. There was a lack of other forms of evidence gathering, including the development of forensic and other scientific investigative skills. More than 90 per cent of convictions are said to be have been based on confessions made during investigation. According to the Criminal Court, in 2002-2003, 97 per cent of cases were confession based.[1] In 2004, 64 per cent of cases relied on confessional statements.[2] However, with the Constitutional reform in 2008, the Maldives is moving from a confession-based to an evidence-based system, which is in line with international standards and thus strengthening the rights of the accused.

II. THE LEGAL SYSTEM

The legal system of the Maldives, due to minimal commercial activity and a low crime rate evolved at a slow space and remained greatly underdeveloped. In addition, the Maldives did not receive English common law culture, although it remained a British Protectorate during the period 1887 to 1965. However, due to the Islamic *shari'ah* and British influence, the Maldivian legal system is based on *shari'ah* law and codified common law.

The Report of the Special Rapporteur on the independence of judges and lawyers stated that the legal system still falls short of international standards including in criminal justice.[3] According to the Draft Discussion paper by the Hon. Justice Marcus R. Einfeld,[4] it is generally recognized that the Maldivian legal system has been struggling to keep abreast with recent socio-economic developments associated with rapid economic development, a boom in tourism, increased international trade and investment, fast population growth and changing living standards and lifestyle.[5]

The Draft Discussion Paper also identified a number of weaknesses in the legal framework including weak procedural structures and a lack of laws governing legal procedures, the absence of a formal law reporting system which is inhibiting the establishment of a strong doctrine of legal precedent, uncertainty regarding the respective standards of proof in criminal matters, and unclear principles regulating the admission of evidence.[6]

However, following the incidents in 2003 including the brutal murder of 19-year-old inmate Hassan Evan Naseem, three of his fellow inmates who were also shot to death in *Maafushi* prison and riots in Male' as well as local and international demand,[7] the Maldives had put greater effort into the development and reform of its criminal justice system.

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1 Bendic Rogers, A Report on a visit to the Maldives (2006) at 7.

2 Ibid.

3 Leandro Despouy, Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/4/25/Add.2 (2 May 2007).

4 Hon. Justice Marcus R. Einfeld AO QC PhD, Strengthening the Maldivian Judicial System, Draft Discussion Paper, Sydney, Australia, (June 2005).

5 Ibid.

6 Ibid.

III. CRIMINAL LAW

The Penal Code of the Maldives was enacted in response to civil unrest in certain regions of the country in 1967. Whereas this current Code was enacted due to a specific uprising in certain regions of the country and lack of reform to date it is not comprehensive and is in principal unable to address current crime patterns and escalation of crime in the Maldives.

According to the former Attorney General, Dr. Mohamed Munavver, the current Penal Code, which was put together in a haphazard manner from extracts of the Sri Lankan Penal Code, is long since outmoded. Apart from this, the Criminal Procedure and comprehensive Evidence Act are non-existent.[8]

In 2006, a new Penal Code was drafted. However the draft Penal Code is still pending in the Parliament's committee stage.[9] Former Attorney General, Husnu Suood, said that a revised Penal Code was very much the need of the hour as the current Penal Code has been in place for about half a century and does not serve its need as certain punishments are not appropriate for the offence or certain punishments are not even implemented in the country. Mr. Suood also stated that the current Penal Code does not suit the present day needs, and if the draft Penal Code gets enacted, the criminal justice system will be more effective.[10]

IV. OVERVIEW OF CRIME TRENDS, THE CURRENT SITUATION AND CHALLENGES

A. Crime Trends

There is no comprehensive study of crime in Maldives. According to the Statistical Report 2010 of the Maldives Police Service (MPS), 4,567 criminal cases were reported to the MPS in 2000. In 2007, 11,452 cases were reported to the police. This report shows that the number of cases filed with the police fell 11 per cent from 19,259 cases in 2009 to 16,995 cases in 2010. However this drop in the crime rate is still very high compared to the statistics of the year 2007 and 2000.[11] According to the Statistical Report 2011-2012 of the Maldives Police Service, 17,804 cases were reported to the MPS in 2011. This report shows that the number of cases filed with the MPS rose 15.2 per cent from 17,804 cases in 2011 to 20,512 cases in 2012.[12] The Crime rate is extremely high when taken as a percentage of the total population of the country. The Maldivian population numbers approximately 300,000 people.[13]

B. The Current Situation

In a Press Statement on 21 March 2010, human rights Non-Governmental Organizations (NGOs) stated that serious crimes such as assault with sharp weapons, drug trafficking, sexual abuse of women and children, and murder have become common in Maldivian society, and they condemn this increase in serious crime and also the failure of the State and responsible authorities to convict those responsible for these crimes.[14] According to the Human Rights Commission of the Maldives (HRCM), in recent times gang violence, burglary, mugging, sexual abuse of children and murders are increasing to levels of alarming concern in the society.[15]

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[7] Hussain Shameem, MALDIVIAN LEGAL SYSTEM: CORRUPTION CONTROL MECHANISMS AND CODES OF CONDUCT FOR LAW ENFORCEMENT OFFICIALS at 305 〈http://www.unafei.or.jp〉.

[8] Asian Human Rights Commission, MALDIVES: The Human Rights Situation in 2006 〈http://material.ahrchk.net/hrreport/2006/Maldives2006.pdf〉.

[9] "Penal Code draft bill sent to Majlis committee" *Miadhu* (online ed, Maldives, 15 October 2009) 〈http://www.miadhu.com/2009/10/local-news/penal-code-draft-bill-sent-to-majlis-committee/〉.

[10] Ibid.

[11] MPS, Statistical Report 2010, (27 April 2011) 〈http://police.gov.mv/〉, MDN, Maldives Police Service in 2010: A Snapshot 〈www.mvdemocracynetwork.org/maldives-police-service-in-2010-a-snapshot/〉.

[12] MPS, Statistical Report 2011-2012, (2013) 〈http://police.gov.mv/〉.

[13] Maldives, *National Adaptation Programme of Action* (NAPA) (2006).

[14] Maldivian Democracy Network, Press Release — Escalation of crime (23 March 2010) 〈www.mvdemocracynetwork.org/press-release-escalation-of-crime/〉.

[15] HRCM, ISSUES FOR CONSIDERATION WHEN COMPILING THE LIST OF ISSUES on the Initial Report of Maldives under the International Covenant on Civil and Political Rights (May 2011) at 8.

Since 2008, the courts of the Maldives have not admitted confessions made to the police by the defendants if they withdraw the confession at the trial except in *PGO v Mohamed Nabeel.*[16] Similarly, courts are also reluctant to admit witness statements made during police investigation if they retract the statements or the witnesses prefers to keep silent at the trial. This is one of the major reasons for the low conviction rate that the Maldives is currently experiencing. Many people blame the rise in crime and low conviction rate on the new democratic system and human rights guaranteed under the new Constitution of the Maldives.

Article 52 of the Constitution stipulates that "No confession shall be admissible in evidence unless made in court by an accused who is in a sound state of mind. No statement or evidence must be obtained from any source by compulsion or by unlawful means and such statement or evidence is inadmissible in evidence."[17]

Torture during investigation was very common until recently. This was the major reason why the new Constitution does not allow confessions as evidence unless made in court. Whilst there was a very high conviction rate prior to 2008, there were no safeguards to ensure that the confessions were fairly and lawfully obtained.

Nevertheless, now it has become a trend for the offenders to make confessions to the police and get leniency from any possible remand or detention. The police also take their investigation easy when an offender has made a confession during investigation. However they simply withdraw the confessions at the trial and escape from the conviction.

It has to be noted that as several facilities and services provided by the police are inactive or suffer from shortages of resources and capacity in most serious cases, the police also fail to collect evidence other than a mere confession. Therefore the Maldives needs to establish an effective mechanism on crime investigation to improve the police's capacity in effective collection of evidence in criminal cases such that it inspires confidence in the criminal justice.

C. The Causes

According to the HRCM, the increase in the crime rate has been aggravated due to a number of direct and indirect factors. It noted some of the direct factors including, inadequate legislation pertaining to the criminal justice system, such as a Penal Code that does not reflect the spirit of the present Constitution as it has many parts which are not relevant to the present context, inadequate legislation pertaining to evidence and witnesses, dismissal of forensic evidence by the courts, and the absence of a witness protection programmes.[18]

D. The Challenges

1. Low Conviction Rate

As mentioned before until recently, the Maldives' criminal justice system depended heavily on confessions. There was lot of criticism of this high confession rate. However, after the adoption of the present Constitution in August 2008, the Maldives criminal justice system changed from being confession-based to evidence-based, thus strengthening of the rights of the accused.[19] This is one of the major reasons for the low conviction rate that the Maldives is experiencing now. The recent statistics released by the MPS show a significant decrease in the proportion of criminal cases which reach the courts leading to a conviction. As noted by the MDN, the most worrying figures come from the number of cases that reach the courts and end in convictions. There were 3,323 cases sent to the Prosecutor General's Office (PGO) in 2010 by the MPS. From the cases filed in 2010, only 75 convictions were recorded.[20] Many human rights NGOs in the country, have noted that the conviction rates are alarming

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[16] "Nabeel's execution order appealed in Maldives' High Court" *Haveeru Online* (online ed, Maldives, 21 March 2011) 〈www.haveeru.com.mv/news/34905〉.

[17] Constitution 2008 (MV), at 52.

[18] HRCM, ISSUES FOR CONSIDERATION WHEN COMPILING THE LIST OF ISSUES on the Initial Report of Maldives under the International Covenant on Civil and Political Rights, above n 15, at para 19.

[19] United Nations Development Programme in the Maldives and the Government of Maldives, Prison Assessment and Proposed Rehabilitation and Reintegration of Offenders Report (2011) at 19 〈www.undp.org.mv/v2/publication_files/4e649d60b9b4a.pdf〉.

and, called upon all relevant State authorities to improve relations and communications among the various institutions as these relationships are vital for the effective collection and utilization of evidence in criminal cases.

However, the Maldives is moving to an evidence-based system, and there is no evidence-related or other relevant legislation, rules or procedures. The police, prosecution and other relevant institutions need capacity building, proper training, resources and facilities to work in an evidence-based system.

2. Lack of Coordination

Lack of understanding and coordination among relevant institutions including the MPS, the PGO, the Executive and the Judiciary is one of major challenges. Inadequate communication and corroboration between relevant institutions is another major cause of concern caused by the lack of policies and procedures. Dangerous offenders often appear to have withdrawn from the penal system and are seen to be living in the community as free citizens.[21] The MDN highlighted that while courts point their fingers at the police and the prosecution for not presenting enough evidence, the police have gone on record very publicly saying that courts were obstructing their investigations. The MDN further noted that this apparent breakdown in the relationship between the judiciary and the police is certainly cause for great concern.[22]

3. The Intimidation of Witnesses

According to the Report on Capacity Development Needs Assessment of the Prosecutor General's Office of the Republic of Maldives, yet to be published, the intimidation of witnesses is a growing problem in the administration of justice in the Maldives.[23] The Prosecutor General Mr. Ahmed Muizzu stated that reluctance of witnesses to testify at trial is a growing concern during criminal trials. Mr. Muizzu said that "*there are witnesses reluctant to testify at the Court due to intimidation and also there are witnesses [who] do not want to testify at the Court due to various influences.*"[24] Likewise, the Criminal Court also has great concern on the same issue stating that large number of serious assault and murder cases end acquittals due to witnesses refusing to give evidence in the Court.[25]

4. Lack of Capacity

The main function of the MPS is to investigate criminal cases. They do this by collecting evidence. The police will send the investigation case file to the PGO who will decide what action should be taken next. The PGO also provides assistance during investigation mostly if the police so request. If the prosecution decides there is enough evidence and grounds for charging the offender, then the case will be sent to the court for adjudication.

The Capacity Development Needs Assessment of the Prosecutor General's Office of the Republic of Maldives Report 2008 stated that at the time of the assessment advocacy skills of prosecutors were at basic levels and preparation was not always thorough. This Report also noted that confidence in the way in which cases are handled will grow when greater experience and expertise is demonstrated in court.[26]

Many locals as well as some members of the Parliament have been criticizing the performance of the PGO due to losing serious criminal cases. However this research showed that the higher number of acquittals is not only due to the ineffectiveness of the prosecution but also due to weak investigation and delaying trial and the way the trial is conducted in the Criminal Court.

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[20] Maldives Police Service in 2010: A Snapshot.
[21] United Nations Development Programme in the Maldives and the Government of Maldives, Prison Assessment and Proposed Rehabilitation and Reintegration of Offenders Report, above n 19.
[22] Maldives Police Service in 2010: A Snapshot, above n 20.
[23] Capacity Development Needs Assessment of the Prosecutor General's Office of the Republic of Maldives (2008), para 24.1.
[24] Ibid.
[25] Adam Haleem, "*Jinaaee bodethi massala thakuge sharuee maruhalaagai hekibas nulibeythee varah kan boduvey*: PG [We are deeply concerned over the lack of evidence presented during trials over serious criminal offences: PG]" *Haveeru Online* (2 February 2010) 〈www.haveeru.com.mv/dhivehi/news/86164〉.
[26] Capacity Development Needs Assessment of the Prosecutor General's Office, above n. 23, at para 21.1.

It has to be noted that the MPS's Forensic Science Department has now been awarded an International Standard of Organization (ISO) certificate and this will help the shift in reliance on confessional evidence to that of establishing an evidence-based system of criminal investigation. Further, in July 2010 the MPS established a separate forensics building, which houses modern technologies for forensic investigations. On the other hand, as the MDN noted there remains room for skepticism about the MPS's ability to effectively deploy their new forensic tools and the judiciary's capacity to engage with forensic evidence.[27]

5. Inadequate Evidence Act

The Evidence Act[28] is inadequate to deal with evidence issues. This Act comprises only the basic provisions and does not address many of the requisites in this area including the issue of admissibility, the probative value of evidence from different sources and the concept of illegally obtained evidence.[29]

V. POSSIBLE SOLUTIONS

(1) Enact the new draft Penal Code pending before the Parliament without further delay and ensure that the new Penal Code is fully consistent with international standards;

(2) Amend the Police Act, as it came into force before the current Constitution;

(3) Expedite efforts to enact the Criminal Procedure Bill, the Witness Protection Bill and the Juvenile Justice Act;

(4) Provide further legal and practical training and education for judges and prosecutors and provide judges and prosecutors with the possibility to observe how trials are conducted in other common law countries;

(5) Amend and enact a uniform Evidence Bill adding a provision which allows and regulates admissibility of confessions and provision on effective collection and utilization of evidence in criminal cases. The Bill also needs to add a provision on the basis for excluding involuntary or improperly obtained confessions;

(6) Reform investigation practices by reviewing and adopting interrogation rules and make video recordings of interrogations mandatory and introduce safeguards to the legal rights of suspects and the integrity of the process. In addition, all custodial interviews and interrogations of suspects should be videotaped with an equal focus on suspects and interrogators;

(7) Develop procedures for crime scene examination, collection and protection of evidence;

(8) As effective utilization of evidence at trial can help to convict the offender it is therefore very important that police know how to manage crime scenes and collect evidence effectively. Such evidence should be protected and preserved.

VI. CONCLUSION

According to the police reports many serious criminal cases, even when investigated by the senior police officers, are only capable of being solved by means of a confession from the accused. As noted before, serious criminals abuse the right given in art 52 and purposefully admit to the police during investigation to escape convictions as they know the courts do not admit confessions unless made before the court. As the Maldives is concerned about the recent rise in crime and the inability to successfully prosecute criminals, the Maldives needs to limit art 52 of the Constitution.

In general, some very important steps have been taken over the recent years to reform criminal

[27] Maldives Police Service in 2010: A Snapshot, above n. 20.
[28] Evidence Act (Law Number 24/76) (MV).
[29] Attorney General's Office, Maldives, National Criminal Justice Action Plan 2004-2008 (2004) at 12.

justice in the Maldives. However specific steps have not been taken to move to an evidence-based system. As a result, so far very few suspects have been convicted among those involved in serious cases, most notably homicide cases. This can only be achieved by reforming the country's existing legislation, strengthening relevant institutions and enacting important bills aimed to respond to crime. Especially, as the Maldives is moving from a confession-based to an evidence-based system, it is therefore vital that the Maldives have an Evidence Act without further delay.

To address the low conviction rate and the issue of offenders abusing art 52 as a way to escape conviction, it is therefore vital to narrow the right stipulated under art 52. It is also a responsibility of the police, working along with the prosecution and judiciary, to protect the people, to investigate criminal offences and collect evidence that may be later utilized at trial.

THE CRIMINAL JUSTICE SYSTEM IN MALDIVES

Abdulla Shatheeh and Mahmood Saleem***

I. INTRODUCTION

In Maldives after notice of an alleged offence has been brought to the attention of the investigating authorities, the matter shall be investigated promptly, and where warranted, the Prosecutor General shall lay charges as quickly as possible. Article 51 (b) stipulates that everyone charged with an offence has the right to be tried within a reasonable time.[1]

II. INVESTIGATION

A. The Maldives Police Service

The Maldives Police Service as the principal law enforcement agency derives its powers from the Police Act 2008.[2] Under the Police Act, the police force is recognized as a civil organization.[3] Prior to September 2004, the National Security Service (NSS) was mandated with policing in the Maldives. The NSS had both a policing branch and a military branch. Both branches were given the same initial military-style training, with very little focus on community orientation.[4] The MPS has to build a good professional working relationship with agencies in the criminal justice system to promote and develop police service in the Maldives and to prevent homicide and other crimes.

B. Forensic Science Department

The MPS's Forensic Science Department has been awarded the International Standard of Organization (ISO) certificate. This will help the shift in reliance on confessional evidence to that of establishing an evidence-based system of criminal investigation. In July 2010 the MPS established a separate forensics building, which houses modern technologies for forensic investigations. However, as the Maldivian Democracy Network (MDN) stated, there remains room for skepticism about the MPS's ability to effectively deploy their new forensic tools and the judiciary's capacity to engage with forensic evidence.[5]

C. Community Policing

In the Maldives community policing efforts also increased in recent years, with the police working with the youth, community elders, students, parents and even gang members to prevent and reduce crime levels. The MPS approach to community policing is focused more on being proactive in crime reduction rather than investigations or prosecutions.[6]

Community policing focuses more on the increase in gang-violence which is also related to a large extent to drug trafficking. According to the MDN, the MPS has taken some proactive steps to reduce gang-related crimes through a community policing philosophy. Among the proactive steps used include

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1 Constitution of the Maldives 2008, art 51 (b).
2 Police Act 2008 (Law Number 05/2008) (MV).
3 Police Act 2008, s 5.
4 MPS, Statistical Report 2010, (27 April 2011) 〈http://police.gov.mv/〉, MDN, Maldives Police Service in 2010: A Snapshot 〈www.mvdemocracynetwork.org/maldives-police-service-in-2010-a-snapshot/〉.
5 Maldives Police Service in 2010: A Snapshot, above n 4.
6 Maldivian Democracy Network, Community Policing in the Maldives, (5 May 2010) 〈www.mvdemocracynetwork.org/community-policing-in-the-maldives/〉.

engaging with elders and businessmen in local communities where gangs are resident.[7]

According to the MDN, attempts to talk with and engage gang leaders themselves and try to reduce crime through dialogue and positive relationships have proven to be effective with at least one Male' gang which has been remarkably quiet since the engagements took place. The MDN also noted that whether this approach fits the theoretical description of community policing is open for debate. However the MPS officials insist that it does, and if it helps reduce crime, not many will complain or care either way.[8]

Another approach of community policing recently used by the MPS in both Male' and the Atolls to combat gang crimes has been to involve local youth and even gangs themselves in sports events with the police. According to the MDN football matches and other such events have proven to be effective tools in building trust and respect between law enforcement officials and local youth.[9]

D. Crime Prevention Committees

The MPS has setup Crime Prevention Committees in all Atolls of the country with varying degrees of success. The aim of the Committees is to bring together community leaders and the police to come up with community-based approaches to crime prevention.[10]

E. Institute for Law Enforcement and Security Studies (ILESS)

The Maldives Police Service Institute for Law Enforcement and Security Studies undertakes courses and programmes that will ensure that members of the MPS and other law enforcement officers undergo required training.

F. Other Investigating Agencies

There are other agencies responsible for criminal investigation. The following are the agencies which have power to conduct criminal investigation and their field of investigation.

1. Anti-Corruption Commission

Section 21 (a) of the Anti-Corruption Commission Act (Law no: 13/2008) states that "to inquire into investigate all allegations of corruption; any complaints, information or suspicion of corruption must be investigated."[11]

2. Maldives Customs Service

Under s 88 (b) of Maldives Customs Act, (Law no: 8/2011) Customs can investigate cases of unlawful smuggling in and out of Maldives and can forward these cases to the Prosecutor General for prosecution.

3. The Police Integrity Commission

Under the Police Act 2008, an independent Police Integrity Commission (PIC) has been established.[12] The PIC is vested with the powers to monitor the code of conduct of the police and take measures to curb any conduct that could pave the way to corruption and/or misconduct.

In s 19 of the Maldives Police Act, it is the objective of PIC to independently investigate unlawful activities occurring within the police and take actions as mentioned in the Law.

According to the MDN the establishment of the Police Integrity Commission further helped to strengthen the public's confidence in the police. However the police have been finding it difficult to maintain this confidence, with the crime rates increasing and conviction rates for high profile cases remaining very low. This apparent inability of the police to clampdown on increasingly brazen acts of

[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Maldives Police Service in 2010: A Snapshot, above n 4.
[11] Anti-Corruption Commission Act (law no: 13/2008).
[12] Police Act 2008, s 18.

gang crime has put further pressure on public confidence.[13]

Apart from the PIC's power to investigate cases and submit to the PGO to take legal action it has to be noted that the decisions and actions taken by the PIC are not binding and are merely submitted to the Minister for Home Affairs for further action. It seems the PIC is more of an advisory body. Therefore, the Parliament should pass the Police Integrity Commission's bill[14] giving the PIC more binding powers to carry out its work in order for its full effect to be realized.

4. Maldives Inland Revenue Authority

Under s 30 of the Tax Administration Act (Law no: 3/2010), the Maldives Inland Revenue Authority has the power to audit and investigate cases regarding taxation.[15]

G. Investigative Procedure (MPS)

It is stipulated in art 46 of the Constitution of the Maldives that no person shall be arrested or detained for an offence unless the arresting officer observes the offence being committed, or has reasonable and probable grounds or evidence to believe the person has committed an offence or is about to commit an offence, or under the authority of an arrest warrant issued by the court.

Under art 47 of the Constitution no person shall be subject to search or seizure unless there is reasonable cause. Residential property shall be inviolable, and shall not be entered without the consent of the resident, except to prevent immediate and serious harm to life or property, or under the express authorization of an order of the court.

According to art 48 of the Constitution everyone has the following rights on arrest or detention:

(a) To be informed immediately of the reasons therefore, and in writing within at least twenty four hours;

(b) To retain and instruct legal counsel without delay and to be informed of this right, and to have access to legal counsel facilitated until the conclusion of the matter for which he is under arrest on detention;

(c) To remain silent, except to establish identity, and to be informed of this right;

(d) To be brought within twenty four hours before a judge who has power to determine the validity of the detention, to release the person with or without conditions, or to order the continued detention of the accused.

Article 49 of the Constitution provides that no person shall be detained in custody prior to sentencing, unless the danger of the accused absconding or not appearing at trial, the protection of the public, or potential interference with witnesses or evidence dictate otherwise. The release may be subject to conditions of bail or other assurances to appear as required by the court.

The maximum period of detention varies with each offence and is at the discretion of the judge. In some cases a suspect is detained until the investigation or trial is complete.

Interviews of suspects are recorded under r 101 of Police Regulation. Audio recordings are compulsory while video recordings are optional. In some cases these recordings are submitted to trials but it is not used as a confession/statement.

Right to legal counsel is provided at all stages of the investigation and trial as a constitutional right.

After conducting interviews and suspect's oral statement, reports are prepared by the investigators.

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[13] Maldives Police Service in 2010: A Snapshot, above n 4.
[14] Police Integrity Commission's Bill (2011) (MV).
[15] Tax Administration Act (law no: 3/2010).

The suspect is given the opportunity to confirm and correct mistakes in such documents.

During the investigative process, if the need arises to search a home/building/communications of a suspect, if permission is denied by the owners, police shall get a court order or warrant, in order to do so.

III. PROSECUTION

A. The Prosecutor General's Office

As part of the recent reforms to the criminal justice system, an independent Prosecutor General (PG) is appointed. The Prosecutor General's Office (PGO), as an independent institution was created by the new Constitution and came into being from 7 September 2008.

The PGO derives its Constitutional independence from art 220 of the Constitution. Article 220 (a) states that "*There shall be an independent and impartial Prosecutor General of the Maldives*".[16] It further states that:

> The Prosecutor General is independent and impartial, and he shall not be under the direction or control of any person or authority in carrying out his responsibilities and the exercise of his powers. He shall carry out his responsibilities and exercise his powers without fear, favour or prejudice, subject only to the general policy directives of the Attorney General, and on the basis of fairness, transparency, and accountability.[17]

The responsibilities and powers of the PG are contained in arts 223 to 229, inclusive.[18] The PG has the power to order investigations, monitor detentions, lodge appeals and review existing cases. The PG of Maldives is appointed by the President and has to be approved by the Parliament. In addition, the Prosecutor General's Act[19] specifies how the Prosecutor General should be appointed, as well as the responsibilities, powers and qualifications of the PG.

The Attorney General is mandated to issue general directives to the PG on the conduct of the prosecutions.[20] However, art 220(c) states the independence and the impartiality of the PG who shall be free from direction or control of any person or authority in carrying out his functions.[21]

B. Advocacy Skills and Performance

According to the Capacity Development Needs Assessment of the Prosecutor General's Office of the Republic of Maldives Report 2008 at the time of the assessment advocacy skills were at basic levels and preparation was not always thorough. The Report noted that confidence in the way in which cases are handled will grow when greater experience and expertise is demonstrated in court. The Report emphasized that the quality of dispatch and the delivery of casework in court should be uppermost in the minds of the PGO.[22]

Some locals as well as some members of the Parliament have been criticizing the performance of the PGO due to losing serious criminal cases including homicide cases. The Maldivian Democratic Party MP, Ahmed Rasheed said that the hard work of the police to prove the charged guilty fails because of the inexperience of the prosecutors.[23]

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16 Constitution 2008, art 220 (a).
17 Article 220 (c).
18 Articles 223 - 229.
19 Prosecutor General's Act (Law Number 9/2008) (MV).
20 Constitution, 2008, art 133(g).
21 Article art 220(c).
22 Capacity Development Needs Assessment of the Prosecutor General's Office of the Republic of Maldives (2008), at para 21.1.
23 *Abdul Latheef* "Police's work to prove the charged guilty fails because of inexperienced state lawyers-Ahmed Rasheed" *Miadhu* (online ed, Maldives, 15 April 2011) at 〈http://www.miadhu.com/2011/04/local-news/police%e2%80%99s-work-to-prove-the-charged-guilty-fails-because-of-inexperienced-state-lawyers-ahmed-rasheed/〉.

Rasheed noted that those prosecutors assigned by the PGO to represent the State in trials of criminal prosecution are mostly very young, inexperienced and naive. "*As a result of this, it is saddening to say that, those charged with dangerous criminal offences are acquitted*."[24]

However this research showed that the higher number of acquittals is not only due to the ineffectiveness of the prosecution but also due to weak investigation and delaying trial and the way the trial conducted in the Criminal Court.

It is important to note that the advocacy issue is systemic and rooted in the qualification process which does not require advocacy training to be undertaken by a graduate — after a law degree or similar qualification an application to the Attorney General Office is made for a practicing certificate, which if granted allows the lawyer to practice in court without any advocacy training.[25]

The Constitution stipulates that the responsibilities and powers of the PG may be assigned with his express instructions, to any person working under his mandate or to any other person.[26] The purpose of these provisions may be due to lack of capacity and currently the PGO is working with this system. Allowing prosecutors to prosecute in the court who have not got proper advocacy training will impact on institutional performance. Therefore it is important to take corrective measures instead of sticking on the current system. According to the Report, the evidence points to the need for the change current system.[27]

Unlike before, prosecutions are now based on use of evidence of a forensic nature, changes to the criminal procedure rules and upcoming Penal Code, Criminal Procedure Code and Evidential Act points to a need to raise capacity of the PGO to be prepared for the changes.[28]

Therefore the PGO needs to train prosecutors to provide them with the skills, knowledge and the expertise to enable them to perform their roles better to deal with crimes, most notably homicide.

C. Departments

Currently the PGO has a general department to deal with all sorts of crimes known as the Public Prosecution Department. Due to crime patterns and available resources, the PGO needs to consider establishing a drug-related offence department, a serious and organized crime department and a witness and victim protection department in order to place more focus on homicides and issues which have an impact on homicide.

D. The PGO, the MPS and the Courts

This research shows that in most cases the PGO and the MPS have a positive and cordial working relationship. Periodic conversations have been held between the two institutions. However the courts, especially the Criminal Court, are far from such approach. However the PGO and the Criminal Court have some sort of mutual understanding while the Police and the Criminal Court have been criticizing each other through public media recently. The PGO and the MPS have recently introduced a partnership approach in complex cases most notably homicide cases, working together to build cases together or where the police seek advice from the PGO at an early stage in the case.[29]

Therefore there is a need to set up a formal institutional mechanism among the PGO, the MPS and the courts through which investigation and prosecution issues and delay reduction can be discussed and corrective action be taken. In addition such a mechanism would help to close doors for those who escape from the system without paying the price for the crime committed.

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[24] Ibid.
[25] Capacity Development Needs Assessment of the Prosecutor General's Office, above n. 22, at para 21.2.
[26] Constitution 2008, art 224.
[27] Capacity Development Needs Assessment of the Prosecutor General's Office, above n. 22, at para 21.2.
[28] Ibid. at 21.4.
[29] Ibid. at 13.1.

IV. JUDICIARY

In this section the main focus will be drawn on the present setup of courts for the administration of criminal justice in the Maldives.

A. An Introduction to the Maldivian Court System

In the current Maldivian court system, the judicial power is vested in the Supreme Court,[30] the High Court[31] and lower courts established by the Judicature Act[32] of the Maldives, and any other statute.[33] According to the Judicature Act of Maldives, the Maldives Court system is made up of three levels: the Supreme Court, the High Court and the lower courts including the superior courts and the magistrate courts.

Under the Constitution, judges of the Supreme Court, including the Chief Justice, are appointed by the President in consultation with the Judicial Service Commission and confirmation of the appointee by a majority vote of the Parliament.[34] The appointments and removal of all other judges are entrusted to the Judicial Service Commission set up pursuant to art 157 of the Constitution.[35]

Superior Courts are first instance courts created under the Judicature Act in the upper category of the lower courts. Male' has five specialized first instance courts namely: the Civil Court, the Family Court, the Criminal Court, the Juvenile Court and the recently established Drug Court. The lower category of courts created from within the lower courts is the magistrate courts created under the Judicature Act.

B. Large Scale Acquittals

This research shows that large scale acquittals of heinous and ghastly offences including homicides are eroding people's faith in the effectiveness of the criminal justice system. According to the Criminal Court, apart from delays, not getting assistance and protection to the courts as required under the Constitution,[36] failure to enforce sentences and lack of important legislation are major reasons for the large number of acquittals.[37]

Despite this, it is crucial that the Criminal Court, the Juvenile Court and the Magistrate Courts must respond to society's call for justice and punish the guilty by a proper and judicious approach even with the difficulties it faced.

C. Delay in Disposal of Cases and Arrears in Courts

It is in the interests of the people as well as the State that the cases sent to the courts for adjudication should be decided within a reasonable time. Under art 51 of the Constitution everyone charged with an offence has the right to be tried within a reasonable time.[38] If the course of trial is inordinately long, the chances of miscarriage of justice are more and expenses of adjudication increase as well. This has subjected the Maldives criminal justice system to severe strain. It has also shaken the confidence and faith of the people in the efficacy of the courts.

The impact of delay in trials includes loss of important evidence, because of fading of the memory or the death of witnesses. In addition there are also possibilities of the material witness succumbing to undue pressure and being won over, if there is a long time lag between the actual occurrence and the date of recording of their deposition in the Court. It is therefore essential, so far as criminal cases are concerned, that the delay in their disposal be eliminated as far as possible.

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30 Constitution 2008, art 145.
31 Article 146.
32 Judicature Act (Act No: 22/2010) (MV).
33 Constitution 2008, art 141.
34 Articles 147 and 148.
35 Article 157.
36 Constitution 2008, art 141 (d).
37 HRCM, Report on Causes for Increase in Incidents of Crime (2009).
38 Constitution 2008, art 51 (b).

According to the Report on Capacity Development Needs Assessment of the Prosecutor General's Office there is structural, endemic and systemic delay in the system. It noted that delay takes place at different stages in the process. It can classified them as at the investigation stage, post investigation when the case is received by the PGO, post registering of the case, during the hearing phase, no case management systems.[39] The low number of judges compared to the number of cases, absence of defence counsel, unnecessary adjournments, absence of witness, the absence of prosecutors, failure to examine witnesses though present in the Court, absence of day-to-day hearing and delay in delivery of judgements are all causes which lead to delay in criminal cases. Another cause for delay in the disposal of cases is procedural delays. The rules governing criminal procedure in the Maldives are currently based on a number of regulations and circulars that came into force prior to the criminal justice reform in the country. Therefore they are out of date and inadequate.

The right to speedy trial is an essential part of the fundamental rights enshrined in the Constitution of the Maldives. The Constitution provides that after notice of an alleged offence has been brought to the attention of the investigating authorities, the matter shall be investigated promptly, and where warranted, the PG shall lay charges as quickly as possible.[40]. As mentioned before it also afford the defendant a trial within a reasonable time.[41]

The Report also noted ways in which delays can be managed. It stated that some of these can be managed in the short term and others require long-term consideration.[42] According to the Report, the current practice is to send back cases which need further investigation, or which are incomplete or require correction, to the MPS so that the gaps can be filled in terms of documentation and further investigation. The Report recommended to set up with the police a formal institutional mechanism through which day-to-day prosecution issues, file content, delay reduction, etc., can be discussed and corrective action taken.[43]

As the Report stated, a way which will help cut out delay may be for the PGO and the police to train the police on file preparation and content or have a senior prosecutor stationed at the MPS to carry out those functions in the MPS before cases are sent to the PGO.[44]

According to the Report, the delay in hearing cases is also because of listing and scheduling practices in the criminal justice system. As the Report stated, the current system of scheduling cases is "court-centric" not "user-centric". The current system is based on the benefit and the working practices of the Court and the individual administrative practices of judges managing their own cases.[45] The Report also noted that the current case scheduling system is adversely affecting the efficiency of the PGO in terms of how staff is deployed. According to the Report, often, the Criminal Court does not inform the PGO about "cancelled" cases until the prosecutor arrives at the Court. This wastes the prosecutors' time, preventing them from carrying out other duties that day.[46]

The Criminal Court has no case management system. The Report suggests that only upon the defendant entering a not guilty plea should a case be scheduled for trial. The Repot recommends the PGO to lobby for formal case management hearings — if defendants wish to enter a guilty plea they should be allowed to do so at an early stage.[47]

The Criminal Court also has no practice of continuous hearings. As a result cases have to be listed many times. The Report noted that block hearings are also affecting the efficiency of the PGO in that greater demand is made on the number of prosecutors and the number of times they have to cover one case. Due to this, witnesses are left in uncertainty and may lose interest in the case and the opportunity

[39] Capacity Development Needs Assessment of the Prosecutor General's Office, above n. 22, at 25.1.
[40] Constitution 2008, art 50.
[41] Article 51(b).
[42] Capacity Development Needs Assessment of the Prosecutor General's Office, above n. 22, at 25.1.
[43] Ibid, at Recommendation 4.
[44] Capacity Development Needs Assessment of the Prosecutor General's Office, above n. 22, at 25.2.
[45] Ibid. at 25.3.
[46] Ibid.
[47] Capacity Development Needs Assessment of the Prosecutor General's Office, above n. 22, Recommendation 12.

for a defendant to intimidate or influence the witness is greater. In addition, the continuity of prosecutor may not always be possible because of operational reasons in the PGO. Therefore the PGO needs to lobby for continuous hearings. This will help cutting out unnecessary hearings allowing the Court and the PGO to carry out other duties.[48]

Adjournments appear to be very common for a variety of reasons in the court. As the Report noted often witnesses or defendants either do not attend or are not produced by the DPRS and the MPS. There are obvious difficulties for defendants and witnesses who travel from the islands due to the geographical nature of the country. Apart from institutional deficiency, transportation cost, affordability and climate have a direct bearing on the efficiency of the Court.[49]

In instances where witnesses and defendants do eventually attend, there is further pressure on the system to deal with the cases, and this creates last minute and urgent demands upon the PGO to provide a prosecutor to cover that case. Due to this, prosecutor may be dispatched to cover the case on short notice, inevitably affecting performance for lack of preparation.[50] According to the Report there was evidence that it is not unusual that as many as 50 per cent of the hearings listed for a day result in adjournments. The Report recommends need for a "user-centric" instead a "court-centric" scheduling/listing practices (set joint targets to reduce adjournments).[51]

V. JUDICIAL SERVICE COMMISSION

The Judicial Service Commission (JSC) is an independent institution established on 4 September 2008. The JSC is empowered to investigate complaints about the judiciary and to take disciplinary action, including recommendations for dismissal, to make rules regarding schemes for recruitment and procedures for the appointment of judges, to establish ethical standards for judges, to provide for such matters as are necessary or expedient for the exercise, performance and discharge of the duties and responsibilities of the Commission, and to advise the President and the Parliament on any matter regarding the administration of the courts.

To date, due to its composition[52] and their political affiliation, the JSC seems to be very ineffective, In addition, recently its orders have been stopped by the courts. This shows that the JSC is incapable of carrying out its functions due to the courts intervention to its works.

As the HRCM noted, the JSC is constantly being accused and criticized by media and NGOs as well as persons within the judiciary for failing to work towards the independence of the judiciary, and for its lack of proper procedure and transparency.[53]

VI. DEPARTMENT OF PENITENTIARY AND REHABILITATION SERVICES

Prisons in the Maldives are operated by the Department of Penitentiary and Rehabilitation Services (DPRS) under the Ministry of Home Affairs. In the Maldives one of the main reasons of the recent high crime rate and homicide rate is due to failure to enforce sentences for convicts. The Report on Causes for Increase in Incidents of Crime[54] noted that failure to enforce sentences for more than 500 convicts loose in society was among the main reasons for the rise in criminal activity in the Maldives. Criminals who were sentenced to life imprisonment for murder are also seen roaming the streets. In addition, the DPRS is recently not following court orders, which has reached a very alarming magnitude. According to this research the DPRS's ineffectiveness is due to a shortage of human resources, inadequate prison facilities, funding and strategic action plans.

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48 Ibid, Recommendation 13.
49 Capacity Development Needs Assessment of the Prosecutor General's Office, above n. 22, at 25.6.
50 Ibid.
51 Capacity Development Needs Assessment of the Prosecutor General's Office, above n. 22, Recommendation 14.
52 Constitution 2008, art 158.
53 ISSUES FOR CONSIDERATION WHEN COMPILING THE LIST OF ISSUES on the Initial Report of Maldives under the International Covenant on Civil and Political Rights (May 2011) at 23.
54 HRCM, Report on Causes for Increase in Incidents of Crime (2009).

Former President of the HRCM said that the operations of the DPRS, which is tasked with enforcing prison sentences, have deteriorated. He also said that the main national prison, in *Maafushi*, was effectively under the control of the inmates.[55]

Prison reports heavily criticized the Government for the ineffective detention facilities for juveniles as they found that juveniles were held in same cells as adult prisoners.[56] However the Government is recently taking steps to hold juveniles in separate detention facilities.

A Report on prison conditions, published by the Human Rights Commission of the Maldives (HRCM) in January 2007, noted that conditions in the prisons are generally poor. However compared to January 2007, the whole prison environment is being improved under good supervision of prison officers. The DPRS has managed to establish a good prison system between 2006 and 2008. Due to the absence of prison legislation and a strategic action plan to sustain the existing capacity and prison system, the whole prison system collapsed in March 2009.[57]

The Prison Assessment and Proposed Rehabilitation and Reintegration of Offenders Report has made a number of recommendations to address prison problems in the Maldives. The Report recommends strengthening the infrastructure and capacity building of prison staff and management.[58] It also recommends strengthening the database and documentation of records maintained by the DPRS. According to the Report the DPRS will need to keep adequate data on arrests and releases, re-offenders and the escaped and escapees in a properly managed database. In addition, the inclusion of the offenders' fingerprints in the system could also be effective for monitoring purposes.[59] Furthermore it recommends establishing rehabilitation programmes in prisons.[60]

According to the Report information sharing, storing and collecting is in dire need of reform. The data collected from the AGO, the PGO, the MPS, the Criminal Court and the DPRS reveals that, the method in which criminal databases are maintained and the manner in which criminal data is reported differ significantly and are thus deeply flawed.[61] The Report also noted that the existing parole system lacks properly formulated procedures, transparency as well as adequate monitoring of parolees.[62]

The Maldives is also taking steps to improve prisons and its facilities, although these steps are hindered by significant capacity constraints. Draft Prison Rules are currently under development to improve prison conditions. In addition, the Prison and Parole Bill, is believed to be an important instrument in improving the current situation in prisons. This bill is expected to modernize and rationalize the prison system, placing a higher emphasis on rehabilitation.

VII. PARLIAMENT

According to the Constitution "*The legislative authority of the Maldives shall be vested in the People's Majlis* [Parliament]."[63] The Parliament has the power to amend the Constitution, enact legislation and amend or repeal any laws.

Under art 92 of the Constitution "*A Bill passed by the People's Majlis shall become law when accented to by the President*".[64] However works within the Parliament are believed to be to be chaotic

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55 "Urgent action needed to combat rising crime, says HRCM" *Minivan News* (online ed, Maldives, 1 April 2009), see ‹www.asiapacificforum.net/news/maldives-urgent-action-needed-to-combat-rising-crime-says-hrcm.html›.
56 Republic of Maldives, Common Core Document, Forming Part of the Reports of States Parties (16 February 2010), ‹http://www.ccprcentre.org/doc/HRC/Maldives/HRI.CORE.MDV.2010_en.pdf›.
57 Ibid.
58 United Nations Development Programme in the Maldives and the Government of Maldives, Prison Assessment and Proposed Rehabilitation and Reintegration of Offenders Report (2011) at Recommendation 10 at 27 ‹http://www.undp.org.mv/v2/publication_files/4e649d60b9b4a.pdf›.
59 Recommendation 7 at 26.
60 Recommendation 4 at 26.
61 Ibid. at 19.
62 Ibid.
63 Constitution 2008, art 70.

to the point of stalemate, due to political divergences and to the fact that most of the members are not trained in parliamentary work. There is complete lack of will among the members towards their work, and this amounts to a severe shortcoming of the parliamentary system.

The HRCM member Abdul Kareem said the Parliament should give due consideration to the HRCM reports by debating them on the Parliament floor: "*Every time someone is knifed on the street, Majlis goes into alert. They will have debates and petitions will be submitted. But it will fade away after a few days and nothing is done.*"[65]

The criminal justice system would not be efficient without the support of the Parliament. There are a number of bills regarding the criminal justice system which are yet to be passed by the Parliament, such as the Penal Code Bill, Evidence Bill, Legal Aid Bill, Juvenile Justice Bill and Prison and Parole Bill.

[64] Article 92.

[65] "Urgent action needed to combat rising crime, says HRCM" *Minivan News* (online ed, Maldives, 1 April 2009), at ‹http://www.asiapacificforum.net/news/maldives-urgent-action-needed-to-combat-rising-crime-says-hrcm.html›.

CRIMINAL PROCEDURE IN THAILAND

Bhornthip Sudti-Autasilp and Unchalee Kongsrisook***

The criminal procedures in Thailand are governed by the Criminal Procedure Code B.E. 2477 (1934). This paper is divided into three parts. The first and second parts describe the process of investigation and trial in accordance with the Criminal Procedure Code by elaborating the important sections in the criminal proceedings. The third part is the summary of the criminal procedure in Thailand.

I. INVESTIGATION

A. Agencies and Organizations Responsible for Criminal Investigation

1. Administrative or Police Official:

[The Criminal Procedure Code Section 2] "Investigation" means collection of facts and evidence which was conducted by administrative or police official under his power and duties in order to maintain public order and to obtain details of a commission of offence.

[The Criminal Procedure Code Section 2] "Administrative or Police Official" means an official vested by law with power and duty to maintain public order; this shall include a warden, an official of Excise Department, Customs Department, Harbor Department, an immigration officer and other officials when acting in accordance with arresting or suppressing law offenders whom they have duty to arrest or suppress.

[The Criminal Procedure Code Section 17] An administrative or police official shall have the power to investigate any criminal matters.

2. Special Case Inquiry Official:

One mission of the Department of Special Investigation (DSI), Ministry of Justice is prevention and control of crime that has a devastating impact on the economy, social security, and international relations.

[The Special Case Investigation Act B.E. 2547 (2004) (Amended by the Special Case Investigation Act (No.2) B.E. 2551 (2008)]
[Section 21] Special Cases required to be investigated and examined according to this Act are the following criminal cases:
(1) Criminal cases according to the laws provided in the Annex attached hereto and in the ministerial regulations as recommended by the BSC where such criminal cases shall have any of the following natures:
(a) It is a complex criminal case that requires special inquiry, investigation and special collection of evidence.
(b) It is a criminal case which has or might have a serious effect upon public order and moral, national security, international relations or the country's economy or finance.
(c) It is a criminal case which is a serious transnational crime or committed by an organized criminal group.
(d) It is a criminal case in which influential person being a principal, instigator or supporter.
(e) It is a criminal case in which the Administrative Official or Senior Police Officer, who is neither the Special Case Inquiry Official nor Special Case Officer, is the suspect as there is

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reasonable evidence of crime committed, or being the alleged culprit, or being the accused. This however shall be in line with details of the offence provided by the BSC.

[Laws Provided in the Annex Attached to the Special Case Investigation Act B.E. 2547 (2004)]

1. Law on Loan Amounting to Public Cheating and Fraud
2. Competition Act
3. Commercial Banking Act
4. Law on the Finance Business Securities Business and Credit Foncier Business
5. Chain Loan Control Act
6. Foreign Exchange Control Act
7. Law on Government Procurement Fraud
8. Act for the Protection of Layout-Designs of Integrated Circuits
9. Consumer Protection Act
10. Trademark Act
11. Currency Act
12. Tax and Duty Compensation of Exported Goods Produced in the Kingdom Act
13. Interest on Loan by the Financial Institution Act
14. Bank of Thailand Act
15. Public Company Act
16. Anti Money Laundering Act
17. The Industrial Product Standard Act
18. Copyright Act
19. Board of Investment Commission Act
20. Enhancement and Conservation of National Environmental Quality Act
21. Patent Act
22. Security and Exchange Commission Act
23. Revenue Code
24. Customs Law
25. Excise Law
26. Liquor Act
27. Tobacco Act
28. Foreign Business Act
29. Casualty Insurance Act
30. Life Insurance Act
31. Law on Agricultural Futures Trading
32. Computer Crime Act
33. Land Law
34. Forest Law
35. National Park Act
36. National Reserved Forest Act
37. Wildlife Preservation and Protection Act

B. Public Prosecutor

[The Criminal Procedure Code Section 2] "Public Prosecutor" means an official who has a duty to prosecute an alleged offender in court; a public prosecutor can be either a government official in the Office of the Attorney General or other officials authorized to act in the same manner.

The public prosecutor will have the power to conduct their own investigations when;

[The Criminal Procedure Code Section 20] In case that an offence punishable under Thai law was committed outside the Kingdom of Thailand, the Attorney General on his surrogate shall be the responsible inquiry official; the Attorney General may delegate such duty to any public prosecutor or inquiry official to conduct inquiry on his behalf, if he so chooses.
In case that the Attorney General or his surrogate assigns an inquiry official the responsibility

to conduct an inquiry, the Attorney General or his surrogate may assign a public prosecutor to join in conducting such inquiry, if he so chooses.
A public prosecutor assigned to be a responsible inquiry official or to join an inquiry official in conducting an inquiry shall have the power and duty in such inquiry as does an inquiry official. However, other powers and duties as prescribed by law shall be of such public prosecutor.
In case that a public prosecutor joins an inquiry official in conduct an inquiry, the inquiry official shall comply with orders and recommendations given by the public prosecutor when the matter is related to the collection of evidence.

C. Investigative Procedure

[The Criminal Procedure Code Section 130] The proceedings of an inquiry shall be commenced without delay and also be conducted at any time and place as deemed appropriate, and the alleged offender is not required to be present.

1. Gathering Evidence:

[The Criminal Procedure Code Section 131] The inquiry official shall gather all types of evidence as possible in order to know the facts and other circumstances concerning the offence alleged, and to find out who the offender is and prove his guilt or innocence.

[The Criminal Procedure Code Section 131/1] In the case that scientific evidence is requisite for proving the facts under Section 131, the inquiry official is empowered to examine any persons, objects or documents by scientific means. . . .

[The Criminal Procedure Code Section 150] In case that a postmortem examination shall be conducted, the inquiry official of the locality in which the corpse is found and a physician specialized in forensic medicine who has received a certificate or an approval letter from the Medical Council shall conduct the examination as soon as possible.

[The Criminal Procedure Code Section 132] For the purpose of gathering evidence, the inquiry official is empowered to do the following:
(1) to examine the injured person with his consent, or the alleged offender, or any things or places which may be adduced as evidence, including taking a photograph, drawing a map or sketch or creating a mould or taking a finger-print, hand-print or foot-print as well as recording any details which may be used to prove the case clearly;
In the inspection of the injured person's body or the alleged offender's body according to the first paragraph, if the injured person or the alleged offender is female, the inspector shall be a female official or any other women. In the case where appropriate, the injured person or the alleged offender may request for the attendance of any persons requested in such inspection;
(2) to search for an article of which its possession constitutes an offence; or which is obtained by committing the offence; or used or suspected of having been used for the commission of the offence, or may be used as evidence, but execution under this paragraph shall comply with the provision on search under this Code;
(3) to issue a summons to a person who possesses any articles which may be used as evidence. However, such person needs not to come in person and shall be deemed to have complied with a summons if the article required therein is delivered;
(4) to retain all the articles found or delivered as provided in sub-sections (2) and (3).

[The Criminal Procedure Code Section 133] The inquiry official is empowered to issue a summons to the injured person, upon the reasonable ground to believe that his statement may be useful to the case, to appear before him at the time and place specified in a summons, such person shall then be examined. . . .

2. Notification of the Charged:

[The Criminal Procedure Code Section 134] When the alleged offender is summoned or brought, or voluntarily appears before the inquiry official, or when any persons appearing before the inquiry official is the alleged offender, the inquiry official shall ask his/her name, middle name, surname nationality, parentage background, age, profession, address and place of birth, and inform the alleged offender of the fact concerning his commission of a crime alleged, then notify the alleged offender of the charged offence.

3. Inquiry File:

[The Criminal Procedure Code Section 139] The inquiry official shall make a note of the examination in accordance with the general provisions on inquiry under this Code, and shall combine any noted documents including those forwarded by other inquirers of the same case with the inquiry file.
All documents presented as evidence shall be gathered in the inquiry file, and other materials shall also be listed and attached to the file.

4. Indictment of the Suspect:
When the responsible inquiry official has an opinion that an inquiry is completed, he shall perform as follows:

(i) If it is unknown who committed the offence: **[The Criminal Procedure Code Section 140]**
(1) If such offence carries a maximum imprisonment not exceeding three years, the inquiry official shall stay an inquiry and note down the reason thereof, and subsequently submit a note together with the inquiry file to the public prosecutor.
If such offence carries a maximum imprisonment exceeding three years, the inquiry official shall submit the inquiry file together with an opinion of staying an inquiry to the public prosecutor.
If the public prosecutor issues the order to stay the case or to continue with an inquiry, the inquiry official shall comply with such order.

(ii) If it is known who committed the offence but he could not yet be summoned or arrested, the inquiry official shall, upon the result of an inquiry, submit an opinion whether a prosecution order or non-prosecution order should be made together with the inquiry file to the public prosecutor.

[The Criminal Procedure Code Section 141]
If the public prosecutor agrees with an opinion not to prosecute, he shall end the inquiry by issuing the non-prosecution order and notify the inquiry official of such order.
If the public prosecutor considers that an inquiry should continue, he shall order the inquiry official to carry out accordance with such opinion.
If the public prosecutor considers that the prosecution order should be issued, he shall take any actions to obtain the alleged offender. If the alleged offender resides abroad, the public prosecutor shall make a request for his extradition.

(iii) If it is known who committed the offence and he has been kept in custody or detained, or has been granted provisional release, or it is believed that such offender would show up if summoned, the inquiry official shall, upon the result of an inquiry, submit an opinion whether the prosecution order or non-prosecution order should be made together with the inquiry file to the public prosecutor:

[The Criminal Procedure Code Section 142]
In the case that the non-prosecution opinion has been submitted, only an inquiry file together with such opinion shall be forwarded to the public prosecutor, but as for the alleged offender, the inquiry official is empowered to grant him the release or provisional release. If the alleged offender is detained, the inquiry official shall apply on his own account or request the public prosecutor to apply to the Court for the release.
In the case that the prosecution opinion has been submitted, the inquiry file along with the alleged offender shall be dispatched to the public prosecutor except that alleged offender has

already been detained.
However, if the offence is the one which can be settled by the inquiry official, and the offender has complied with a settlement, a note thereof shall be made and submitted with the file to the public prosecutor.

After having received the inquiry file together with an opinion of the inquiry official, the public prosecutor shall perform as follows:

[The Criminal Procedure Code Section 143]
(1) in the case where the non-prosecution opinion has been rendered and the public prosecutor agrees with such opinion, he shall issue the non-prosecution order, but in the case where the public prosecutor disagrees with such opinion, he shall issue the prosecution order and inform the inquiry official to take the alleged offender to be prosecuted
(2) in the case where the prosecution opinion has been rendered and the public prosecutor agrees with such opinion, he shall issue the prosecution order and bring the case against the alleged offender to the Court, but in the case where the public prosecutor disagrees with such opinion, he shall issue the non-prosecution order

5. Arrest, Detain and Imprison:

[The Criminal Procedure Code Section 78] An administrative or police official is unable to arrest any person without an arrest warrant or a court order, except in the following cases:
(1) when a person has committed a flagrant offence as prescribed in Section 80;
(2) when a person has been found with tools, weapons or any other objects which may be used to commit an offence, in a circumstance with reasonable cause to suspect that such person is going to cause injury to a person or property of other persons;
(3) when there exists a cause of issuing an arrest warrant under Section 66 (2), but due to a necessity and urgency of the matter which has rendered the request of an arrest warrant against such person in Court not possible;
(4) when an arrest is to be conducted against an alleged offender or accused person who has escaped or is going to escape during his provisional release granted under Section 117.

In conducting an arrest, the official to conduct such arrest:

[The Criminal Procedure Code Section 83]
- shall notify the person to be arrested that he is going to be arrested
- shall notify the arrested person of his charge, in case an arrest warrant has been issued, such warrant shall produced to the arrested person
- shall notify the arrested person that: he may choose whether to plead or not; such pleaded statement may be used as evidence against him in trial; and the arrested person has the right to meet and consult with his lawyer or the person who shall be his lawyer
- shall allow the arrested person who wishes to notify his relatives or the person whom he confides in of the arrest and such notification: can be done with convenience; does not obstruct the arrest; does not obstruct custody of the arrested person, and does not endanger any person
- shall have the power to exercise any methods or preventative measures, as far as it is deemed appropriate to the circumstances of such arrest in case that the person is to be arrested: has obstructed or is going to obstruct the arrest; has escaped or is going to escape

[The Criminal Procedure Code Section 85] An official who conducts an arrest or whom the arrested person has been delivered to shall have the power to search the alleged offender and seize articles which may be used as evidence

An arrested person shall be kept in custody only to the extent that it is necessary for the circumstances of the case:

[The Criminal Procedure Code Section 87]
- in case of misdemeanors - only for the period of time necessary for inquiring into his plea, his

identity and his place of living

- in case that an arrested person has not been granted a provisional release - shall be brought to Court within 48 hours from the time that the arrested person has been delivered to the office of the inquiry official under Section 83
- in case of an offence which carries a maximum punishable imprisonment term not exceeding 6 months, or, a fine or not more than 500 Baht or both - the Court shall have the power to issue a detention order only once, with the term of not more than 7 days
- in case of an offence which carries a maximum punishable imprisonment term of more than 6 months but less than 10 years, or, a fine of more than 500 Baht or both - the Court shall have the power to issue several detention orders consecutively but the term of each detention order shall not be more than 12 days and the total term shall not exceed 48 days
- In case of an offence which carries a maximum punishable imprisonment term of 10 years or longer, regardless of whether a fine can also be imposed or not - the Court shall have the power to issue several detention orders consecutively but the term of each detention order shall not exceed 12 days and the total term shall not exceed 84 days

D. Interviewing

The investigator's interviews of suspects are not recorded on video but his statement shall be written down. During the interview, the suspect's attorney can attend the interview conducted by investigative organizations as below:

> **[The Criminal Procedure Code Section 134/3]** The alleged offender is entitled to have the counsel or any persons trusted to attend his examination.
>
> **[The Criminal Procedure Code Section 134/4]** Prior to taking of a statement of the alleged offender, the inquiry official shall inform the alleged offender of the following rights:
> (1) the right to give or not to give the statement, if the alleged offender has given the statement, it may be used as evidence against him in the trial;
> (2) the right to have the counsel or any persons trusted to attend the examination.
> When the alleged offender voluntarily gives his statement, it shall be noted, and if the alleged offender refused to give the statement, such refusal shall also be written down.

E. Investigative Report

After conducting the interview, the investigators prepare reports about the contents of the suspect's oral statement and provide the suspect with an opportunity to confirm and correct mistakes in such documents as below.

> **[The Criminal Procedure Code Section 8]** Upon filing a case an accused person of such case shall have the following rights:
> (1) to receive a speedy, continuous and fair trial;
> (2) to hire a defence lawyer in a preliminary examination proceeding or trial in the Court of First Instance, including those in the Court of Appeal or Supreme Court;
> (3) to have a private meeting with his lawyer or the person who will be his lawyer;
> (4) to examine the evidence which will be adduced in trial, make copies or take photographs of such evidence;
> (5) examine preliminary examination proceeding file or trial file and make a copy of such documents or request a certified copy of such documents upon payment of fee, except where the court orders exemption of such fee;
> (6) examine or make a copy of his testimony given during the inquiry.
> A lawyer of an accused person shall be entitled to the same rights as such accused person
> Once the public prosecutor submits a prosecution order to the Court, an injured person shall be entitled to the same rights according to the first paragraph (6) as an accused person.

F. Warrants

1. Search Warrant:

> **[The Criminal Procedure Code Section 69]** The cause for issuing a search warrant shall be

as follows:
(1) to discover and seize an article which shall be used as evidence for an inquiry, a preliminary examination or a trial;
(2) to discover and seize an article which: its possession is an offence or; has been obtained through illegal means or; there is a reasonable cause to believe that it was used or is intended to be used for a commission of offence;
(3) to discover and rescue a person who has been illegally confined or detained;
(4) to discover a person prescribed in an arrest warrant;
(5) to discover and seize an article in accordance with a judgement or court order, but only in case that such article is unable to be discovered or seized by any other means.

2. Arrest Warrant:

[The Criminal Procedure Code Section 66] The cause for issuing an arrest warrant shall be as follows:
(1) where there exists reasonable evidence that a person has committed an offence with the maximum punishment of three years' imprisonment or longer;
(2) where there exists reasonable evidence suspecting that a person has committed an offence and there is a reasonable cause to believe that he would escape, interfere with evidence, or cause any other injury;

II. TRIAL

A. Competency of Courts

[The Criminal Procedure Code Section 22] When an offence has been committed, alleged or believed to have been committed within the territorial jurisdiction of any court, it shall be tried and adjudicated by such Court. However:
(1) where the accused has residence or has been arrested in a locality or when the official is conducting the inquiry in a locality outside the territorial jurisdiction of the Court above mentioned, the case may be tried and adjudicated by the Court within whose territorial jurisdiction such locality is situated;
(2) where the offence has been committed outside Thailand, it shall be tried and adjudicated by the Criminal Court. If the inquiry has been conducted in a locality situated within the territorial jurisdiction of any Court, the case may also be tried and adjudicated by such Court.

B. Prosecution of Criminal Cases

1. Persons Entitled to Institute Criminal Prosecution in the Court

[The Criminal Procedure Code Section 28] The following persons are entitled to institute the criminal prosecution in the Court.
(1) the Public Prosecutor
(2) the injured person

2. Persons Entitled to Proceed with the Case in Case the Injured Person Dies

[The Criminal Procedure Code Section 29] Where an injured person dies after having instituted the prosecution, his ascendant, descendent, husband or wife may proceed with the case in his stead.
Where the injured person, who is a minor or an incompetent person, dies after criminal prosecution has been instituted on his behalf by his legal representative, custodian or representative *ad litem*, the latter may proceed with the case.

C. Procedure in the Courts of First Instance

1. Charge before the Court

[The Criminal Procedure Code Section 157] Prosecution of criminal cases shall be preferred

a charge before any of the Courts competent according to the provisions of this Code or the other laws:

[The Criminal Procedure Code Section 158] A charge must be made in writing and contain:
(1) the name of the Court and date;
(2) the names of the parties in the case and the offence charged;
(3) the official position of the Public Prosecutor or, in case of private prosecution, the name, the surname, age. Place of residence, nationality and protection;
(4) the name, the surname, age. Place of residence, nationality and protection of the accused;
(5) all the acts alleged to have been committed by the accused, all the facts and particulars regarding the time and place of such acts, and the persons or articles concerned which are reasonably sufficient to give the accused a clear understanding of the charge;
in a charge for defamation, the words, writings, sketches or other matters pertaining to the alleged defamation shall be fully stated or attached to the charge;
(6) a reference to the Section of the law which enacts that such act constitutes an offence;
(7) the signature of the prosecutor, the drawer and the writer or type if the charge.

[The Criminal Procedure Code Section 160] The distinct offences will be able to be joined in the same action, but they shall be separated and stated in consecutive order.
Each count of offences will be able to be deemed as charges separated from the other charges. If the Court deems it expedient, the Court will order to separate the file for trying any count or several counts of offences, and the Court will be able to issue such order either before or during the trial.

[The Criminal Procedure Code Section 161] Where the charge does not conform with the law, the Court shall order the prosecutor to correct the charge, or dismiss, or refuse to accept the charge. The prosecutor has the power to appeal against such order of the Court.

2. Procedures after the Court Accepts the Charge

[The Criminal Procedure Code Section 162] Where the charge is found conform with the law, the Court shall act as follows:
(1) in the case where a private person is the prosecutor, the Court shall make a preliminary examination, but, if the prosecutor has also instituted a criminal prosecution with the same charge, sub-section (2) shall apply;
(2) in the case entered by the prosecutor, the Court need not hold a preliminary examination, but it may do so if it thinks fit.
In case there is a preliminary examination as aforesaid, if the accused pleads guilty, the Court shall accept the charge for trial.

[The Criminal Procedure Code Section 165] In the case where the charge is entered by the prosecutor, the accused shall, on the day fixed for holding the preliminary examination, appear or be brought before the Court. The Court shall serve a copy of the charge on each of the accused; and, after the Court has been satisfied as to the identity of the accused, the charge shall be read out and explained to him, and he shall then be asked whether or not he has committed the offence and whether he wishes to make any statement in defence. The statement made by the accused shall be written down. If the accused refuses to make any statement, this shall be written down in a memorandum and the preliminary examination shall then proceed. The accused is not entitled to adduce evidence in the course of the preliminary examination, but this shall not debar him from having the assistance of a counsel.
In the case where the charge is entered by a private prosecutor, the Court has the power to hold the preliminary examination in the absence of the accused; the Court shall serve on each accused a copy of the charge and notify him of the date fixed for the preliminary examination. The accused may attend the examination with or without a counsel to cross-examine the witnesses for the prosecution. If he will not attend, he may appoint counsel to cross-examine the witnesses for the prosecution. The accused shall not be asked by the Court to make a statement, and, before acceptance of the charge, the accused shall not be treated as such.

[The Criminal Procedure Code Section 167] If it appears that there is a prima facie case, the Court shall accept the charge only as regards the count for which there is a prima facie case for trial, and, if there be no prima facie case, the charge shall be dismissed.

[The Criminal Procedure Code Section 170] The order of the Court to the effect that there is a prima facie case in final, but the order to the effect that there is no prima facie case may be appealed or *dika* appealed against by the prosecutor in accordance with the provisions of the Code governing appeal and *dika* appeal.

3. Trial and Taking of Evidence

[The Criminal Procedure Code Section 172] Unless otherwise provided, the trial and the taking of evidence shall be conducted in open Court and in the presence of the accused.
When the prosecutor or his counsel and the accused are before the Court, and, after the Court has been satisfied as to the identity of the accused, the charge shall be read out and explained to him, and he shall then be asked whether or not he has committed the offence and whether he wishes to make any statement in defence. The statement made by the accused shall be written down. If the accused refuses to make any statement, this shall be written down in a memorandum and the preliminary examination shall then proceed.

[The Criminal Procedure Code Section 172 bis] After the proceedings under section 172, second paragraph, has been taken by the Court, and the Court deems expedient that the trail shall proceed without delay, it has the power to conduct the trial and the taking of evidence in the absence of the accused in the following cases:
(1) in the case of offences punishable with imprisonment the maximum of which does not exceed ten years, irrespective of any punishment with fine imposed or not, or in the case of offences punishable with fine only, the accused has counsel and has been granted permission from the Court not to attend the trial and the taking of evidence;
(2) in the case of several accused, if it thinks fit, conduct the trial and the taking of evidence upon each accused in the absence of any other accused.
In the case where the Court has conducted the trial and the taking of evidence according to (2) or (3) in the absence of any accused, no Court shall, in any case whatever, be bound by the trial and the taking of evidence conducted in the absence of, and to be detrimental to, such accused;
(3) in the case of several accused, the Court may, if it thinks fit, conduct the trial and the taking of evidence upon each accused in the absence of any other accused.
In the case where the Court has conducted the trial and the taking of evidence according to (2) or (3) in the absence of any accused, no Court shall, in any case whatever, be bound by the trial and the taking of evidence conducted in the absence of, and to be detrimental to, such accused.

[The Criminal Procedure Code Section 173] In the case of the offence punishable with death, or in the case of accused aged not more than eighteen years on the date entered an action in Court, before commencing the trial, the Court shall ask the accused whether he has counsel or not, if he has none, the Court shall appoint one for him;
In the case of the offence punishable with imprisonment, before commencing the trial, the Court shall ask the accused whether he has counsel or not, if he has none and requires one, the Court shall appoint one for him;
The Court shall pay the fees and expenses to the counsel appointed by the Court under this section by taking into consideration the case and economic conditions as designated by the Rule by Administrative Committee of the Court of Justice with an agreement of Ministry of Finance.

[The Criminal Procedure Code Section 173/1] For a speedy, continuous and impartial trial in the case where the accused makes no statement or makes a negative statement, if any of the parties makes a request to the Court or the Court deems suitable, the Court may notify the parties of the designated date for the evidence to be inspected, not less than ten days prior to the date as designated for taking of evidence....

[The Criminal Procedure Code Section 174] Before adducing the evidence, the prosecutor is entitled to open the case for the purpose of stating to the Court the case for the prosecution, that is to say, by setting forth the nature of the charge and the evidence which he proposes to bring in order to prove the guilt of the accused. The Prosecutor shall then adduce the evidence for the prosecution.
As the witness for the prosecution has been taken, the accused is entitled to open the case for the purpose of stating to the Court the case for the defence, by setting forth the facts or provisions of law upon which he proposes to rely, and the evidence which he proposes to bring. The accused shall then adduce the witness for the defence.
After the witness for the defence has been taken, the prosecutor and the accused are entitled to close their respective cases either orally or in writing, or both.
In the course of the trail, if the Court is of opinion that it is not necessary to take further evidence or to carry out any further proceedings, it may issue an order dispensing with the taking of such evidence or the carrying out of such proceedings.

[The Criminal Procedure Code Section 176] In the trial of a case, if the accused pleads guilty to the charge, the Court may give judgement without taking any further evidence, provided that if the minimum punishment in the case where the accused pleads guilty to the charge is imprisonment from five years upwards or heavier, the Court must hear the witness for the prosecution until it is satisfied that the accused is guilty.
In the case of several accused, and only some accused have pleaded guilty to the charge, the Court may, if it thinks fit dispose of the case for those who refuse guilt in order that the prosecutor may institute the prosecution against such accused as another case within the period fixed by the Court.

4. Judgment and Orders

[The Criminal Procedure Code Section 182]....After the trial is over, a judgement or order shall be given in accordance with the merits of the case.
A judgement or order shall be read in open Court either on the day the trial is over or within three days from such date. If there are reasonable grounds, the Court may postpone the reading to a later date, but the grounds for the postponement shall be written down in the memorandum.

[The Criminal Procedure Code Section 192] No judgement or order shall be pronounced for anything in excess of, or not included in, the charge.
If the Court is of the opinion that the facts as they appeared in the trial differ from the facts as stated in the charge, the Court shall dismiss the case, unless such differences are not the essential elements, the Court may inflict punishment on the accused upon the facts as found in the trial....

D. Appeal and *Dika* Appeal

1. Appeal to the Appeal Court

[The Criminal Procedure Code Section 193] An appeal on questions of fact and questions of law shall lie to the Appeal Court against any judgement or order of a Court of First Instance, except where such appeal is prohibited by this Code or other laws.
Every appeal must set forth in order a summary of facts or the points of law relied upon.

[The Criminal Procedure Code Section 193 bis] No appeal shall be against the judgement of the Court of First Instance on the questions of fact in the case where the maximum rate of imprisonment does not exceed three years or fine not exceeding sixty thousand baht, or both. Unless;
(1) the accused has been sentenced by the judgement of Court to be punished with imprisonment or confinement in lieu of the imprisonment;
(2) the accused has been sentenced by the judgement of Court to be punished with imprisonment, but the Court suspends the infliction of punishment;

(3) the Court passes the judgement that the accused is guilty, but determination of the punishment is suspended, or
(4) the accused has been sentenced by the judgement to be punished by fine exceeding one thousand baht.

[The Criminal Procedure Code Section 193 ter] In the case where appeal is prohibited according to Section 193 bis, if any judge, who tried or set the signature in the judgement or given the dissenting opinion in the Court of First Instance, considers that such matter is an important question to be decided by the Appeal Court and gives permission to the party to appeal, or the Director-General of the Public Prosecution Department or the Public Prosecutor receiving the power from the Director-General of the Public Prosecution Department sets the signature to certify that there are reasonable grounds for the Appeal Court to decide such matter, such appeal shall be accepted for further decision.

[The Criminal Procedure Code Section 198] The Appeal shall be filed with the Court of First Instance within one month from the date of judgement or order has been read or has been regarded as having been read to the party lodging the Appeal.

2. *Dika* Appeal (Appeal to the Supreme Court)

[The Criminal Procedure Code Section 216] Subject to the provisions of sections 217 to 221, the parties are entitled to lodge a *dika* appeal against a judgement or order of the Appeal Court within one month from the date of such judgement has been read or has been regarded as having been read to the party lodging *dika* appeal.
Such *dika* appeal shall be filed with the Court of First Instance, and the provisions of Section 200 and 201 shall be applied mutatis mutandis.

[The Criminal Procedure Code Section 218] In the case where the Appeal Court has confirmed the judgement of the lower Court or modified it only on immaterial points, and sentenced the accused to imprisonment for a term not exceeding five years or to a fine, or to both fine and imprisonment for a term not exceeding five years, there shall be no right to *dika* appeal on questions of facts.
In the case where the Appeal Court has confirmed the judgement of the lower Court or modified it only on immaterial points, and sentenced the accused to imprisonment for the term not exceeding five years, whether it shall have the other punishment also or not, the prosecutor shall have no right to *dika* appeal on question of facts.

[The Criminal Procedure Code Section 219] In cases where the Court of First Instance has sentenced the accused to imprisonment not exceeding two years and fine not exceeding forty thousand baht, or both, if the Appeal Court has sentenced the accused not exceeding the above limits, the party shall have no right to *dika* appeal on the question of facts, but this prohibition shall not enforce the accused in the case where the Appeal Court has passed the judgement to modify it on material points and to increase punishment of the accused.

[The Criminal Procedure Code Section 220] The party shall have no right to *dika* appeal in the case where the Court of First Instance and the Appeal Court dismisses the charge of the prosecutor.

III. SUMMARY

The law guarantees the criminally accused the right to a speedy trial. Consequently, prosecutors must file the charges without delay. The court must conduct a speedy trial. The law also guarantees the right to a public trial by an impartial judge. The law provides for an impartial judge by permitting both sides to exercise peremptory challenges. If a party exercises a peremptory challenge against a prospective judge, then the court must excuse that particular judge from the panel.

Due process requires that the criminally accused receive a fair trial. In high-publicity trials, trial

judges have the responsibility to minimize effects of publicity, perhaps by implementing a gag-order on the parties and to eliminate outside influences during the trial. Due process further commands that the accused have the right to call their own witnesses, and mount their own evidence.

There is no system of plea bargaining in the Thai criminal procedure. After the police conclude the investigation and the prosecutor is of an opinion that the accused committed the crime, the public prosecutor shall institute the case by entry of a charge in the competent court. The prosecutor usually prepares his witnesses before trial by meeting his witnesses and their statements through questions and answers. Witnesses are protected from threatening by protection measures under the Witness Protection Act B.E. 2546 (2003). These measures include relocation of the witness, change of witness's identity, testing via video link and other appropriate measures. The protection also extends to witnesses' families. At trial, the law provides further rights for the criminally accused. Trying to avoid convicting an innocent defendant at all costs, the burden of proof lies with the public prosecutor who must show, to the satisfaction of the court, that the accused is guilty as charged. This very high burden differs from a civil trial in which the plaintiff must only prove a claim by a preponderance of the evidence. One such right includes the right to cross-examine the prosecution's witnesses. Both parties may submit all kinds of evidence; including hearsay statements, they deem appropriate to prove the guilt or the innocence of the accused. Confession of the suspect is admissible. However, the value of evidence submitted is weighed by the court. Specifically, the Criminal Procedural Code section 227 states that the court shall exercise its discretion in considering and weighing all the evidence taken. Moreover, section 227/1 states that in considering and weighing hearsay evidence or evidence with bad character the court must do so with due diligence. No judgement of conviction is delivered unless there is a sound reason to believe or there is other supportive evidence that the accused has committed the offence.

The law guarantees the accused the right to assistance of counsel during trial. If the accused cannot afford an attorney, the government is required to provide the accused an attorney. Such accused receive legal representation from the Attorney Association. However, if the accused chooses to waive assistance of counsel and self-represent, he may do so.

After law enforcement arrests a suspect, a judge will set the suspect's initial bail, which is a specified amount of cash that allows the accused to get out of jail after the initial arrest. If the accused shows up for the proper court dates, the court refunds the bail, but if the accused skips the date, then the court keeps the bail and issues a warrant for the individual's arrest.

The arraignment follows next. During an arraignment, a judge calls the person charged and takes the following actions: reading the criminal charges against the accused, asking the accused whether the accused has access to an attorney or needs the assistance of a court-appointed attorney, asking the accused to plead, deciding whether to amend the initial bail amount, and setting the dates of future proceedings.

Upon the parties' request, a pre-trial hearing may be conducted. The prosecution and the accused team use the pre-trial to file motions before a judge. These motions usually concern whether the court should suppress certain evidence, whether certain individuals can testify, or whether the judge should dismiss all charges for lack of evidence.

After all these stages, the court will conduct a trial by hearing evidence from both sides in open court and in the presence of the accused. Before commencing the trial, the Court must be satisfied with the identity of the accused, read out and explain to the accused that he has been charged with a crime and ask whether the accused has committed the offence and what the accused's plea will be.

As mentioned above, the law guarantee the accused's right to counsel. Therefore, if the offence is punishable with death, the court must ask the accused whether he has a counsel. If he has none the court must provide him with counsel. If the offence is punishable with imprisonment or the accused is not over eighteen years old on the day he is brought before the court, the court must ask whether he has counsel. If he has none and requires one, the court must appoint counsel.

Both sides then offer opening statements first, although the accused can reserve opening statement

until the prosecution rests. The prosecution presents its witnesses and evidence first. Then, the accused presents witnesses and evidence. Both sides have the right to cross examination. After the accused rests, the accused offers a closing argument, and then the prosecution offers the final closing argument. After closing arguments, the court pronounces a judgement. However, if the court deems it necessary, the judge may set a later date to pronounce a judgement.

If the party is unsatisfied with the judgment, he may appeal to the Court of Appeal within one month after the judgement has been read. An appeal must set forth in order a summary of the facts or the points of the law relied upon. However, no appeal shall be against the judgement of the Court of First Instance on the questions of fact in the case where the maximum rate of imprisonment does not exceed three years of fine not exceeding sixty thousand baht, or both, unless (1) the accused has been sentenced by the judgement of the Court with imprisonment or confinement in lieu of the imprisonment (2) the accused has been sentenced by the judgement of the Court with imprisonment, but the Court suspends the infliction of punishment (3) the Court passes the judgement that the accused is guilty, but determination of punishment is suspended or (4) the accused has been sentenced by the judgement to the punishment of a fine exceeding one thousand baht.

On the same notion, if the party is unsatisfied with the judgement of the Court of Appeal, he may lodge a *dika* appeal to the Supreme Court within one month after the judgement has been read. The provisions in the appeal sections apply to the lodging of *dika* appeal mutatis mutandis. However, the party may not lodge a *dika* appeal if the Court of Appeal has confirmed the judgement of the lower court or modified it only on immaterial points, and sentenced the accused to imprisonment for a term not exceeding five years or to a fine, or to both fine and imprisonment for a term not exceeding five years.

THE CRIMINAL JUSTICE SYSTEM OF UKRAINE

*Svitlana Oliynyk**

I. POLITICAL SYSTEM OF UKRAINE

Ukraine is a sovereign, independent, democratic, social, legal state. As well Ukraine is a unitary democratic presidential-parliamentary republic and has a multiparty political system. The basic institutions of government are the President and the legislative, executive and judicial branches. The legislative branch consists of the Parliament, which is called the *Verkhovna Rada*. The executive branch consists of the Cabinet of Ministers, which is responsible to the President and under control of and accountable to the *Verkhovna Rada* of Ukraine. The judicial branch is represented by the general and special courts of different instances.

II. CRIMINAL JUSTICE SYSTEM OF UKRAINE

A. The Tasks of Criminal Justice of Ukraine

The main tasks of criminal justice are to protect the rights and legal interests of individuals and legal persons who take part therein as well as a speedy and full detection of crimes, identification of those guilty and ensuring correct application of law so that anyone who has committed a crime is prosecuted while everyone innocent is not punished.

B. The Main Principles of Criminal Justice of Ukraine

The main principals of criminal justice are guaranteed by the Constitution of Ukraine:

- Legality
- Equality of all participants of a trial under the law and before the court
- Ensuring that the guilt is proved
- Adversarial procedure and freedom of the parties in presenting their evidence to the court and in proving the cogency of the evidence before the court
- Prosecution by the prosecutor in court on behalf of the State
- Ensuring the right of an accused person to a defence
- Openness of trial and its complete recording by technical means
- Ensuring appeal and cassation against a court decision save as in cases established by law
- The mandatory nature of court decisions

C. Criminal Justice Reform in Ukraine, Legal Aspects

According to the obligations and commitments of Ukraine, which have been taken joining the Council of Europe in 1995, the criminal justice system is at the stage of active reformation. In this field a range of new laws were adopted in Ukraine, for example:

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- The Law of Ukraine "On the Judicial System and the Status of Judges", July 7, 2010 with amendments from June 9, 2013. This Law defines the legal principles of the judiciary and the administration of justice in Ukraine.

- The Law of Ukraine "On the Advocacy and the Bar Activity", July 5, 2012. This Law defines the legal principles of organization and implementation of advocacy and bar activity in Ukraine.

- The Criminal Procedure Code of Ukraine, came into force since November 20, 2012. The criminal procedure of Ukraine is absolutely reformed and answers the international standards.

- The Law of Ukraine "On Amendments of Some Legislative Acts of Ukraine on Issues of Development of the Activity of the Public Prosecution", 2012. In view of this, the Law of Ukraine "On Public Prosecution" was amended.

These are some of the latest laws which brought transformations into the criminal justice system of Ukraine.

D. Judicial System of Ukraine

The judicial system of Ukraine comprises courts of general jurisdiction and the court of constitutional jurisdiction.

1. Courts of General Jurisdiction

(a) Local courts

Local courts are the courts of the first instance:

- Local courts - hear civil, criminal, administrative cases

- Local commercial courts - hear cases arising from the commercial relations

- Local administrative courts - hear cases of the administrative jurisdiction

(b) Appellate courts

Appellate courts are the courts of appeals:

- Appellate courts of *oblasts* (regions), cities Kyiv and Sevastopol, the Appellate Court of the Autonomous Republic of Crimea

- Appellate commercial courts - are formed in the appellate districts

- Appellate administrative courts - are formed in the appellate districts

(c) Higher Specialized Courts

Higher courts are specialized courts of cassation:

- The Highest Specialized Court of Ukraine for Civil and Criminal Cases

- The Supreme Commercial Court of Ukraine

- Higher Administrative Court of Ukraine

(d) The Supreme Court of Ukraine

The Supreme Court of Ukraine is the highest judicial body of general jurisdiction:

- The Judicial Chamber on Administrative Cases

- The Judicial Chamber on Commercial Cases

- The Judicial Chamber on Criminal Cases
- The Judicial Chamber on Civil Cases

2. The Court of Constitutional Jurisdiction

The Constitutional Court of Ukraine is the sole body of constitutional jurisdiction in Ukraine, whose purpose is to guarantee the supremacy of the Constitution of Ukraine as the Basic Law of the State. This Court resolves issues of conformity of laws and other legal acts with the Constitution of Ukraine and provides the official interpretation of the Constitution of Ukraine and laws of Ukraine.

E. The Public Prosecution of Ukraine

The public prosecution of Ukraine constitutes a single system and headed by the Prosecutor General of Ukraine. The main task of the prosecution in Ukraine is to support the rule of law, protect human beings and citizens and the State from illegal encroachments. The functions of the public prosecution in Ukraine are:

- Prosecution in court on behalf of the State
- Representation of the interests of a citizen or of the State in court in cases determined by law
- Supervision over the observance of laws by bodies that conduct operative-investigative activities, inquiry and pre-trial investigations
- Supervision over the observance of laws in the course of execution of court decisions in criminal cases and application of other measures of coercion in relation to the restraint of personal freedoms of citizens
- Supervision over the observance of human and civil rights and freedoms and over the observance of laws regulating these issues by executive power bodies, by local self-government bodies, their officials, and officers

The Prosecutor General of Ukraine and subordinated prosecutors coordinate combating crime and corruption with the law-enforcement bodies, security agencies, the tax police, the customs service, the military law-enforcement service of the Armed Forces of Ukraine and other law-enforcement agencies.

In order to ensure coordination of the above-mentioned bodies the prosecutor shall convoke coordinating meetings, organize task forces, request the statistical and other relevant information, and participate in meetings of the Coordinating Committee for Combating Organized Crime and Corruption attached to the President of Ukraine.

Also it is necessary to explain the role of the public prosecution in the field of fighting against organized crime and ensuring the rule of law at the international level. According to the legislation and international agreements of Ukraine, approved by the Parliament of Ukraine, the Prosecutor General's Office is the central authority of Ukraine for mutual legal assistance and extradition in criminal matters (in the pre-trial investigation phase). The Ministry of Justice of Ukraine is determined as a central authority of Ukraine in the trial phase.

III. CRIMINAL PROCEDURE OF UKRAINE

A. Investigation

1. Agencies Responsible for Criminal Investigation

Investigative jurisdiction (competence) is covered by Article 216 of the Criminal Procedure Code of Ukraine. The investigators of internal affairs, of bodies of security, of bodies supervising compliance with the tax legislation conduct pre-trial investigations, as well as investigators from units of the State Bureau of Investigations of Ukraine, shall engage in pre-trial investigation of the crimes committed by officials holding a particularly responsible status pursuant to Part One of Article 9 of the Law of Ukraine "On Civil Service" and the persons whose positions refer to categories 1-3, judges and law

enforcement personnel.

At the same time, according to the Transitional Provisions of the Criminal Procedure Code of Ukraine before the day of entry into force of provisions of the above-mentioned Article 216 of the Criminal Procedure Code of Ukraine concerning investigative competence of the State Bureau of Investigations of Ukraine, powers of pre-trial investigation of the criminal offences such as military crimes and official crimes, specified in the Criminal Code of Ukraine, shall be exercised by investigators of prosecutor's offices, which enjoy the powers of the investigators.

2. Whether Public Prosecutors can Command the Above-Mentioned Investigative Agencies Directly in Criminal Investigations

According to Article 36 of the Criminal Procedure Code of Ukraine, a public prosecutor in the course of performing his duties is independent in his procedural activities, and any interference therein by persons who have no legitimate authority, shall be forbidden. Public prosecutors, while supervising the compliance with law during pre-trial investigation in the form of providing procedural guidance in a pre-trial investigation, shall have the right to:

- Start pre-trial investigation if grounds specified in the Criminal Procedure Code are present
- Have full access to materials, documents, and other details related to pre-trial investigation
- Assign a pre-trial investigation agency to conduct pre-trial investigation
- Assign an investigator of the pre-trial investigation agency to conduct within a time limit set by the public prosecutor, investigatory (detective) actions, covert investigatory (detective) actions or other procedural actions, or give instructions in respect of conducting such actions, or participate in them, and where necessary, conduct investigatory (search) and procedural actions in accordance with the procedure set by the Criminal Procedure Code
- Assign the conduct of investigatory (search) actions, covert investigatory (search) actions to the relevant operational units
- Institute audits and examinations in accordance with the procedure established by law
- Overturn illegitimate and ungrounded rulings of investigators
- Initiate with the head of the pre-trial investigative agency the issue of suspending the investigator from pre-trial investigation and the appointment of another investigator if grounds specified in the Criminal Procedure Code are present for his disqualification or in case of inefficient pre-trial investigation
- Take procedural decisions in cases specified by the Criminal Procedure Code, including with regard to termination of criminal proceedings and to extending the time limits for the pre-trial investigation if grounds as prescribed in the Criminal Procedure Code are present
- Support or refuse to support the motions of investigators addressed to investigating judges on the conduct of investigatory (search) actions, covert investigatory (search) actions, other procedural actions in cases specified by the Criminal Procedure Code or individually submit such motions to the investigating judge
- Notify the individual of suspicion
- Enter civil action for the Government and those individuals who are unable to defend their rights pursuant to the Criminal Procedure Code and the law due to their physical or economic circumstances, being underage or elderly age, incompetence or limited legal capacity
- Approve or refuse to approve the indictment, submissions on the application of measures of

medical or educational nature, modify an indictment drawn up by the investigator or submission above, draw up indictments or motions concerned

- Refer to court an indictment, request to enforce measures of a medical nature, request to enforce compulsory medical or educational measures, or request to discharge an individual from criminal liability

- Prosecute on behalf of the State in court, resign from supporting public prosecution, alter the accusation or lay additional accusations according to the procedure specified by the Criminal Procedure Code

- Coordinate requests for international legal assistance or referral of criminal proceedings made by pre-trial investigation authority, or independently file such motion in accordance with the procedure as set in the Criminal Procedure Code of Ukraine

- Commission a pre-trial investigation authority to respond to a request (commission) for international legal assistance or criminal referral made by a competent authority of a foreign state, verify the completeness or legitimacy of procedural actions and also the completeness, comprehensiveness and objectiveness of investigation under the referred criminal proceeding

- Verify the documents concerning surrendering a person (extradition) provided by a pre-trial investigation authority prior to referring them to a higher level prosecutor, and return these documents to an appropriate authority with written comments, if these documents are unjustified or fail to meet the requirements of international treaties to which the *Verkhovna Rada* (Parliament) of Ukraine consented to be bound or laws of Ukraine

- Commission pre-trial investigation authorities with search and apprehension of those individuals who committed a criminal offence outside Ukraine, and carry out specific procedural actions to surrender (extradite) a person at the request made by a competent authority of a foreign state

- Appeal court decisions in a procedure established by the Criminal Procedure Code

- Exercise other powers envisaged in the Criminal Procedure Code

3. Whether Public Prosecutors Have the Power to Conduct Their Own Investigations (or Whether There is an Examining Judge who Oversees the Investigation), and If So, Does the Public Prosecutor or the Examining Judge Interview the Suspects and Key Witnesses Directly?

Firstly, please pay attention to the above-mentioned provisions concerning the investigative jurisdiction (competence) covered by Article 216 of the Criminal Procedure Code of Ukraine. Also according to Article 36 of the Criminal Procedure Court of Ukraine, a public prosecutor, while supervising the compliance with law during pre-trial investigation in the form of providing procedural guidance in a pre-trial investigation, shall have the right to assign an investigator of the pre-trial investigation agency to conduct within a time limit set by the public prosecutor, investigatory (detective) actions, covert investigatory (detective) actions or other procedural actions, or give instructions in respect of conducting such actions, or participate in them, and where necessary, conduct investigatory (search) and procedural actions in accordance with the procedure set by the Criminal Procedure Code. This means that the public prosecutors have right to interview the suspects and key witnesses directly. As well, public prosecutors have the right to interview these persons when supporting criminal charges in court, and judges — during court hearings respectively.

4. The Outline of the Investigative Procedure from the Beginning of Investigation to the Indictment of the Suspect (Especially the Arrest Procedure and Pre-Indictment Detention Procedure, Including Maximum Period to Detain the Suspect)

(a) Start of the pre-trial investigation

Pre-trial investigation shall start from the moment the information concerned has been entered in the Integrated Register of Pre-Trial Investigations. By rule, investigators and public prosecutors shall

be required immediately but in any case no later than within 24 hours after submission of a report containing information on a criminal offence that has been committed or after they have learned from any source about circumstances which are likely to indicate that a criminal offence has been committed, to enter the information concerned in the Integrated Register of Pre-Trial Investigations, and to initiate investigation. The investigator engaged in pre-trial investigation is appointed by the supervisor of a pre-trial investigation chief.

Conducting pre-trial investigation before entering the information in the Register or without such entering shall not be permitted and shall entail liability established by law. Inspection of the place of crime may be carried out before entering the information in the Integrated Register of Pre-Trial Investigations, which shall be done immediately after completion of the inspection. If signs of a criminal offence are found on a ship or river craft outside Ukraine's borders, pre-trial investigation shall begin immediately; information on that shall be entered in the Integrated Register of Pre-Trial Investigations at the first opportunity.

(b) Written notice of suspicion

Written notice of suspicion shall be served the day on which it has been drawn up by the investigator or public prosecutor, and if it appears impossible to serve it, in the way prescribed by the Criminal Procedure Code of Ukraine for serving notifications, written notice of suspicion shall be served on the apprehended person within 24 hours after he has been apprehended. In case a person has not been served the notice of suspicion after 24 hours elapsed after the moment of his apprehension, such person is subject to immediate release. Date and time of serving the notice of suspicion, legal qualification of criminal offence of the commission of which the person is suspected, with indication of Article (Article part) of Ukraine's law on criminal liability, shall be immediately entered by the investigator or public prosecutor into the Integrated Register of Pre-Trial Investigations.

(c) Time limits for pre-trial investigation

Pre-trial investigation is required to be completed:

- Within one month from the date the person concerned is notified of suspicion in committing a criminal misdemeanour
- Within two months from the date the person concerned is notified of suspicion in committing a crime

The total duration of pre-trial investigation may not exceed:

- Two months from the date the person concerned is notified of suspicion in committing a criminal misdemeanour
- Six months from the date the person concerned is notified of suspicion in committing a crime of small or medium gravity
- Twelve months from the date the person concerned is notified of suspicion in committing a grave crime or a crime of special gravity

The period between the day of adoption of a ruling to terminate criminal proceedings and the day of revoking thereof by the investigating judge or of adoption of a ruling to resume criminal proceedings, shall not be included in the time limits specified above.

(d) Measures of restraint

The following are measures of restraint:

- Personal commitment
- Personal warranty

- Bail
- House arrest
- Custody

The investigating judge or court shall deny enforcement of a measure of restraint unless an investigator or public prosecutor proves that circumstances established in the course of considering the motion on enforcement of measures of restraint are sufficient for belief that none of the less strict measures of restraint specified above, can prevent the risk or risks proved in the course of consideration. At that, the least strict measure of restraint is personal commitment, and the most strict, custody.

Measures of restraint shall be enforced: during pre-trial investigation, by investigating judge upon motion of investigator approved by public prosecutor, or upon motion of public prosecutor; and during trial, by the court upon motion of public prosecutor.

(e) Circumstances taken into account in choosing a measure of restraint

To decide on the issue of choosing a measure of restraint, the investigating judge or court, drawing upon materials submitted by parties to criminal proceedings, is required to assess the totality of circumstances including:

- Importance of available evidence concerning the commission of criminal offence by the suspect or accused
- Severity of punishment which can be imposed on the person concerned if the suspect or accused is found guilty of the commission of the criminal offence he is suspected or charged of
- Age and state of health of the suspect or accused
- Firmness of social relations the suspect or accused has in the place of his permanent residence, including whether he has a family and dependants
- Whether the suspect or accused has the place of permanent employment or study
- Reputation of the suspect or accused
- Property status of the suspect or accused
- Previous convictions of the suspect or accused
- Compliance by the suspect or accused with terms of previously enforced measures of restraint, if any
- Existence of the notice that the person concerned is suspected of having committed another criminal offence
- The amount of property damage, in causing which a person is suspected or accused, or the amount of proceeds, resulting from committing a criminal offence a person is suspected or accused, and also, the validity of available evidence justifying the appropriate circumstances

(f) Keeping a suspect in custody

Custody is an exceptional measure of restraint that shall not apply except as follows:

- A person suspected of or charged with an offence the primary punishment for which by law is a fine in the amount exceeding 3,000 times the minimum citizen's income, except where the public prosecutor has proven that the suspect or accused person failed to fulfil the obligations imposed upon him when an earlier measure of restraint or failed to comply as prescribed with

the requirements concerning depositions of bail and submission of documentary proof of such deposition

- A person with a prior record of convictions who is suspected of or charged with an offence punishable by imprisonment of up to 3 years, except where the public prosecutor has proven that such person, when at large, was fleeing pre-trial investigation or trial, obstructed criminal proceedings or has been notified of suspicion in the commission of another offence

- A person without prior convictions who is suspected of or charged with an offence that according to law is punishable by imprisonment of up to 5 years, except where the public prosecutor has proven that such person, when at large, was fleeing pre-trial investigation or trial, obstructed criminal proceedings or has been notified of suspicion in the commission of another offence

- A person without prior convictions who is suspected of or charged with an offence punishable by imprisonment of more than 5 years

- A person with a prior record of convictions who is suspected of or charged with an offence punishable by imprisonment of up to 3 years

- A person wanted by competent authorities of a foreign state for commission of a criminal offence in connection with which the issue of extradition to such foreign state for the purpose of instituting criminal proceedings against him or execution of the sentence may be decided, in the manner and on the grounds provided for by the Criminal Procedure Code or an international treaty of Ukraine to which the *Verkhovna Rada* (Parliament) of Ukraine consented to be bound

The investigating judge or court, when making a ruling on application of custody as a measure of restraint, shall be required to determine an amount of bail sufficient for ensuring that the suspect or the accused should comply with the duties provided for by the Criminal Procedure Code of Ukraine. The investigating judge or court, when rendering a decision on application of custody as a measure of restraint, may put aside a decision on the amount of bail in criminal proceedings:

- In the matter of a violent offence or one involving threat of violence

- In the matter of an offence causing death of an individual

- In regard of the person who has violated the terms of bail selected earlier as a measure of restraint, within the same set of proceedings

(g) Term of validity of the ruling to commit to custody, extend custody

The term of validity of the investigating judge's or court's ruling to commit to custody or to extend custody may not exceed sixty days. Duration of custody shall be calculated from the date of having been committed to custody, and if commission to custody was preceded by apprehension of the suspect, accused, from the date of apprehension. Time of custody shall include the time spent by the person concerned in a medical institution while undergoing in-patient psychiatric examination. In case of repeated commission to custody of a person in the course of the same criminal proceedings, time of custody shall be calculated with account of the time of the previous term under custody.

Time of keeping a person in custody may be extended by the investigating judge within the time limits of pre-trial investigation according to the procedure laid down in the Criminal Procedure Code of Ukraine. Total duration of custody of the suspect, accused in the course of pre-trial investigation shall not exceed:

- Six months in criminal proceedings in respect of crimes of small or medium gravity

- Twelve months in criminal proceedings in respect of grave or especially grave crimes

During investigation, investigative and covert investigative (detective) actions are conducted by the investigators.

(h) Forms in which pre-trial investigation should be completed

A person shall have the right to have charges brought against him be reviewed by a court as early as possible, or to dismissal of such charges through closure of the proceedings. After a person has been notified of being a suspect, the public prosecutor is required within the shortest possible time to do one of the following:

- Close criminal proceedings
- Submit to court a motion on releasing the person from criminal liability
- Submit to court an indictment, motion to impose compulsory medical or educational measures

The public prosecutor shall enter information on completion of pre-trial investigation in the Integrated Register of Pre-Trial Investigations.

5. Whether Investigators' Interviews of Suspects are Recorded on Video, and If So, Whether that Video is Able to Be Used as Evidence to Prove the Defendant's Guilt

Article 224 of the Criminal Procedure Code of Ukraine states that photographing, audio and/or video recording may be made during interviewing. According to Article 104 of the Criminal Procedure Code of Ukraine, if during pre-trial investigation a procedural action may be recorded with technical means, the appropriate entry should be made in the record.

If interrogation is recorded with technical means, the text of testimony may not be entered in the relevant record on the condition that none of the participants in this procedure insists upon this. In such cases, entry should be made in the record that the testimony has been recorded on a medium that is attached to the record. So the answer to this question — video is able to be used as evidence to prove the defendant's guilt.

6. Whether the Suspect's Attorney can Attend the Interview Conducted by Investigative Organizations

According to Article 46 of the Criminal Procedure Code of Ukraine, defence counsel has a right to participate in interviews and other proceedings conducted with the participation of the suspect, accused person, to confidentially meet the suspect prior to the first interview, without authorization of the investigator, public prosecutor, court, and, after the first interview, to have such consultations without any limitation with regard to the number and length of consultations. Such consultation may take place under visual control of the competent official but in the environment, which precludes wiretapping or eavesdropping.

7. Whether the Investigators Prepare Reports about the Contents of the Suspect's Oral Statement after Conducting Interviews, and If So, Whether Investigators Provide the Suspect with an Opportunity to Confirm and Correct Mistakes in Such Documents

During criminal proceedings procedural actions, including suspect's oral statements, are recorded in a record (protocol). If the interviewee so desires, he may provide his testimony written by his own hand. Based on such written testimony, he may be asked additional questions.

Also it is necessary to mention that according to Article 224 of the Criminal Procedure Code of Ukraine interviewing may not last more than two hours without breaks, and in the aggregate more than eight hours per day. Before being interviewed, the person of the individual concerned is established; his rights and the way in which interviewing is conducted are explained. If the suspect refuses to answer questions, the interviewer is required to stop immediately. The interviewee may use his own documents and notes during interviewing if his testimony involves any calculations other information difficult to keep in memory.

A person is allowed not to answer questions with regard to circumstances in whose respect there is a direct prohibition in law (secrecy of confession, medical secrets, defence counsel's professional

secrets, secrecy of deliberation room, etc.), or which may become grounds for suspicion, accusation of commission by himself, his close relatives or family members of criminal offence, as well as with regard to officials who conduct covert investigative (detective) actions and persons who confidentially cooperate with pre-trial investigation agencies.

8. Searches, Seizures and Other Investigations That Require Warrants

Procedural acts which need an investigating judge's ruling taken on the grounds provided in public prosecutor's or investigator's requests are:

(a) Investigative (detective, search) actions

- Search of home or any other possession of a person
- Inspection of home or any other possession of a person
- Investigative experiment

(b) Covert investigative (detective) actions

Interference in private communication:

- Audio, video monitoring of an individual
- Arrest of correspondence
- Collecting information from telecommunication networks
- Inspecting publicly inaccessible places, home or any other possession of a person
- Establishing the location of a radio electronic device
- Covertly obtaining samples, which are necessary for comparative analysis

(c) Other procedural actions

- Measures to ensure criminal proceedings (summons by investigator, public prosecutor, court summons and compelled appearance; imposition of pecuniary penalty; temporary restriction on a special right; suspension from position; provisional access to objects and documents; provisional seizure of property; attachment of property)
- Measures of restraint (personal commitment; personal warranty; bail; house arrest; custody)
- Entering home or any other possession of a person

B. Trial

1. Procedures at Trial (Step-by-Step from Indictment to Sentencing)

Court proceedings:

- Preparatory court session
- Court hearing
- Taking court decision
- Announcement of court decision
- Criminal proceedings in the court of appellate instance

- Criminal proceedings in court of cassation
- Revision of judgements by the Supreme Court of Ukraine
- Criminal proceedings upon discovery of new circumstances

2. Whether there is the System of Plea-Bargaining, Immunity of Witnesses, Etc.

A special chapter of the Criminal Procedure Code of Ukraine is devoted to the criminal proceedings based on agreements. The following types of agreements may be concluded in criminal proceedings:

- reconciliation agreement between the victim and the suspect or the accused
- plea agreement between the public prosecutor and the suspect or the accused about pleading guilty

(a) Initiation and conclusion of agreement

The reconciliation agreement may be concluded on the initiative of the victim, the suspect or the accused. Arrangements in respect of the reconciliation agreement may be made independently by the victim and the suspect or the accused, the defence counsel and a representative or with the assistance of another person as agreed between the parties to criminal proceedings (except for the investigator, public prosecutor or judge).

The plea agreement may be concluded upon initiative of the public prosecutor or the suspect or the accused. The reconciliation agreement between the victim and the suspect or the accused may be concluded in proceedings in respect of criminal misdemeanours and crimes of minor or medium gravity, and in criminal proceedings in the form of private prosecution.

The plea agreement between the public prosecutor and the suspect or the accused may be concluded in proceedings in respect of criminal misdemeanours, as well as crimes of minor or medium gravity, grave crimes, perpetration of which caused damage only to state or public interests. Conclusion of the plea agreement in criminal proceedings with the participation of the victim shall not be allowed.

Conclusion of a reconciliation agreement or a plea agreement may be initiated at any time between the moment of notifying the person of the suspicion and retirement of judges into the deliberation room to pass the sentence/judgement. In case of failure to reach an agreement, the fact of initiating conclusion of the agreement and the statements which were made to arrive at an agreement may not be considered as refusal from prosecution or pleading guilty.

The investigator and the public prosecutor shall be required to inform the suspect and the victim about their right to reconciliation, explain to them the mechanism of its realization, and not to impede conclusion of the reconciliation agreement. In case criminal proceedings are conducted in relation to several persons who are suspected or accused of committing one or several criminal offences, and not all suspects or the accused agreed to conclude the agreement, such agreement may be concluded with one of the (several) suspects or the accused. Criminal proceedings in relation to the person (persons) with whom agreement was reached shall be subject to disjoining in separate proceedings. In case several victims, who suffered from one (the same) criminal offence, participate in the criminal proceedings, the agreement may only be concluded and approved with all victims. In case several victims, who suffered from different criminal offences, participate in the criminal proceedings, and not all of them agreed to conclude the agreement, such agreement may be concluded with one (several) victims. Criminal proceedings in relation to the person (persons) with whom agreement was reached shall be subject to disjoining in separate proceedings.

(b) Circumstances to be considered by the public prosecutor when concluding a plea agreement

When making a decision on the conclusion of a plea agreement, the public prosecutor shall be required to take into consideration the following circumstances:

- Degree and nature of cooperation on the part of the suspect or the accused in conducting

criminal proceedings regarding him or other persons

- Nature and severity of the charges brought (suspicion)
- Availability of public interest in ensuring a faster pre-trial investigation and trial, and detection of more criminal offences
- Availability of public interest in prevention, detection and termination of more criminal offences or other more serious criminal offences

(c) Content of a reconciliation agreement

A reconciliation agreement shall indicate its parties, statement of the suspicion or charges and their legal determination with the reference to the article (paragraph of the article) of the Law of Ukraine on criminal liability, the circumstances essential for the criminal proceedings concerned, the amount of damage caused by criminal offence, the time period for its compensation or the list of actions other than compensation, which the suspect or the accused is required to take in favour of the victim, the time period for completion of such actions, agreed punishment and consent of the parties to the imposition of that punishment or to the imposition of a punishment and relief from serving the punishment on parole, the implications of conclusion and approval of the agreement and implications of non-execution of the agreement. The agreement shall indicate the date of its conclusion and shall be signed by the parties.

(d) Content of a plea agreement

A plea agreement shall indicate its parties, statement of the suspicion or charges and their legal determination with the reference to the article (paragraph of the article) of the Law of Ukraine on criminal liability, the circumstances essential for the criminal proceedings concerned, unconditional admission by the suspect or the accused of his guilt in committing criminal offence, the duties (obligations) of the suspect or the accused regarding cooperation in detection of the criminal offence perpetrated by other person (provided the corresponding arrangements took place), agreed punishment and agreement of the suspect or the accused to imposition of such punishment (sentencing) or to imposition of a punishment (sentencing) and relief from serving the punishment on parole, the implications of conclusion and approval of the agreement and implications of non-execution of the agreement. The agreement shall indicate the date of its conclusion and shall be signed by the parties.

(e) Implications of conclusion and approval of an agreement

Conclusion and approval of a reconciliation agreement shall have the following implications:

(i) For the suspect or the accused — restriction of his right to appeal against a sentence and waiver from the rights — keep silence; be represented by the defence counsel, including getting legal assistance free of charge in accordance with the procedure and in the cases stipulated by law, or conduct his own defence; examine, during trial, witnesses for the prosecution, file motions to summon witnesses, and produce evidence in his favour

(ii) For the victim — restriction of his right to appeal against a sentence and deprivation of the right to demand, at a later date, making the person criminally liable for the corresponding criminal offence and to change his claims for compensation for the inflicted damage

(f) Judgement based on an agreement

If the court makes sure that the agreement may be approved, it shall pass the judgement by which it approves the agreement and imposes the punishment agreed between the parties. The reasoning part of the judgement based on the agreement must contain: statement of the charges with the reference to the article (paragraph of the article) of the Law of Ukraine on criminal liability, which concerns the criminal offence in perpetration of which the person was accused; information about the concluded agreement, its details, content and the imposed punishment; reasons from which the court proceeded when deciding on compliance of the agreement with the Criminal Procedure Code and the law and passing the judgement, and the legal provisions the court was guided by.

The operative part of the judgement based on the agreement must contain the decision on approval of the agreement with indication of its detail, decision on the guilt of the person with reference to the article (paragraph of the article) of the Law of Ukraine on criminal liability, decision on imposition of the punitive measures agreed between the parties for each of the charges and the final punishment, as well as other data/information. Judgement based on the agreement may be appealed against in accordance with the procedure stipulated in the Criminal Procedure Code of Ukraine.

(g) Implications of non-execution of the agreement

In case of non-execution of the reconciliation agreement or plea agreement, the victim or the public prosecutor, respectively, shall have the right to address the court, which approved such agreement, with the motion to revoke the judgement (sentence). The motion for revocation of the judgement, by which the agreement was approved, may be filed within the statutory period of limitations established for making the person criminally liable for perpetration of the corresponding criminal offence.

The motion for revocation of the judgement, by which the agreement was approved, shall be examined in court session with participation of the parties to the agreement and with notification of other participants in the court proceedings. Absence of other participants in court proceedings shall not preclude such examination.

The court, by its ruling, shall revoke the judgement by which the agreement was approved, provided the person who filed the corresponding motion proves that the convict failed to fulfil the terms and conditions of the agreement. The revocation of the judgement shall entail fixing a trial in accordance with the regular procedure, or returning the materials of proceedings for the completion of the pre-trial investigation in accordance with the regular procedure if the agreement was initiated at the stage of the pre-trial investigation.

The ruling on revocation of the judgement by which the agreement was approved, or on the refusal to do so may be appealed against in accordance with the appeal procedure. Deliberate non-execution of the agreement shall be the reason for making the person criminally liable under the law.

3. Whether All Evidence Collected and Documents Prepared by Investigators Are All Referred to the Judge after Indictment (or Does the Prosecutor Choose and Submit the Best Evidence Appropriate to Prove Defendant's Guilt to the Court)

All evidence and documents collected by the investigator are referred to the court, and public prosecutors do not choose some evidence among all. At the same time, evidence must be adequate and admissible. In criminal proceedings, evidence is factual knowledge, which has been obtained in a procedure prescribed in the Criminal Procedure Code on grounds of which the investigator, public prosecutor, investigating judge and court establish the presence or absence of facts and circumstances which are important for the criminal proceedings and are subject to be proved.

Evidence is adequate if it directly or indirectly confirms the presence or absence of circumstances to be proved in criminal proceedings and other circumstances which are important for the criminal proceedings, as well as credibility or non-credibility, possibility or impossibility of using other evidence. Evidence is found admissible if obtained through a procedure prescribed in the Criminal Procedure Code. Inadmissible evidence may not be used in adopting a court judgement.

4. Whether Prosecutors Prepare Their Witnesses Before Trial, for Example, Meeting with Witnesses and Testing Their Statements through Questions and Answers

The public prosecutors do not prepare witnesses before the trial.

5. How Confession of the Suspect is Regarded at Trial If the Defendant Withdraws the Confession

The confession of the suspect is considered by the court as circumstances mitigating punishment and not as circumstances aggravating punishment. It is a right of the person to admit or to deny his/her guilt.

6. Whether There Are Any Cases in which Evidence Collected through Investigation Is Not Permitted to Be Submitted to Court

Evidence collected through investigation is submitted to the court, but such evidence must be adequate and admissible. Evidence obtained through significant violation of human rights is inadmissible, and fundamental freedoms are guaranteed by the Constitution of Ukraine and international treaties consented to by the *Verkhovna Rada* (Parliament) of Ukraine. Any other evidence resulting from the information obtained through significant violation of human rights and fundamental freedoms is therefore inadmissible.

The court shall be required to find significant violations of human rights and fundamental freedoms, in particular the following acts:

- Conducting procedural actions which require previous permission of the court without such permission or with disrespect of its essential conditions
- Obtaining evidence by subjecting a person to torture and inhuman or degrading treatment or threats to apply such treatment
- Violating the right of a person to defence
- Obtaining testimony or explanations from a person who has not been advised of his right to refuse to give evidence or answer questions, or where these were obtained in violation of this right
- Violating the right to cross-examination
- Obtaining testimony from a witness who subsequently will be found a suspect or accused in these criminal proceedings

This evidence shall be found inadmissible during any trial except a trial when the issue of liability for the said significant violation of human rights and fundamental freedoms as result a of which such evidence was obtained. The court shall decide on admissibility of evidence during its evaluation while retired for rendering a court decision. Where evidence has been found manifestly inadmissible during trial the court shall declare such evidence inadmissible, which shall entail the impossibility of its examination or termination of its examination if such was commenced.

The parties to the criminal proceedings and the victim may move during trial for evidence to be declared inadmissible or raise objection against declaring evidence inadmissible. A decision made by a national court or an international tribunal which has taken legal effect and which holds that a violation of human rights and fundamental freedoms set in the Constitution of Ukraine and international treaties has been committed shall have prejudicial significance for the court which decides on evidence admissibility.

7. Whether Your Country Has Adopted a Hearsay-Rule (Excluding Out-of-Court Statements from Evidence That May Be Related to the Defendant's Innocence or Guilt) in the Code of Criminal Procedure

Hearsay testimony is any be a statement made orally, in writing or in any other form with regard to a certain fact, such statement being based on explanations of another person. The court shall have the right to recognize as admissible evidence hearsay testimony irrespective of the possibility to examine the person who provided the initial explanations, in exceptional cases if such are admissible evidence in accordance with other rules of evidence admissibility.

When making such decision, the court is required to take into account the following:

- Importance of explanations and testimony, should they be reliable, for ascertaining a circumstance, and their significance for the understanding of other knowledge

- Circumstances under which initial explanations are given which give rise to confidence in their reliability
- Cogency of knowledge with regard to the fact that initial explanations have been given
- Difficulties for the party against which hearsay explanations and testimony were given in disproving such statements
- Relationship between hearsay testimony and the interests of the person who has given the hearsay testimony
- Possibility to examine the person who has given initial explanations, or reasons for the impossibility of such examination

The court may find examination of a person to be impossible only if such person:

- Does not appear in court because of death or serious physical or mental disease
- Waives testifying in court under Article 63 of the Constitution of Ukraine or disobeys the court's request to give testimony
- Does not appear before court and his location has not been established through conducting required search measures
- Stays abroad and waives testifying

Article 63 of the Constitution of Ukraine states that "A person shall not bear responsibility for refusing to testify or to provide explanations about himself/herself, members of his/her family, or close relatives, the circle of whom is determined by law. A suspect, an accused, or a defendant shall have the right to a defence. A convicted person shall enjoy all human and civil rights, with the exception of restrictions determined by law and established by a court verdict."

The court may admit hearsay evidence if the parties agree to recognize such as evidence. The court may admit hearsay evidence if the suspect accused has created or facilitated the creation of circumstances under which the person concerned may not be examined. Hearsay testimony may not be evidence of the fact or circumstance asserted unless it is supported by other evidence found admissible.

In no event shall hearsay testimony be admissible when given by an investigator, public prosecutor, officer of an operational unit or another person with regard to any explanations given during the criminal proceedings that they were conducting.

8. Whether There Are Any Methods/Measures Stipulated by the Code of Criminal Procedure to Protect Victims and Witnesses at Trial, for Example, Testimony via Video Link or Screening Crime Victims from the Defendant

Court proceedings may be conducted through video conference with transmission from another premise, including such as is located beyond the bounds of the court premises, (distant court proceedings) where:

- It is impossible for a participant of criminal proceedings to participate directly in the court proceedings for reason of health or for other valid reasons
- It is necessary to ensure the persons' security
- A minor or underage person is to be interrogated as a witness or victim
- Such measures are necessary to ensure speedy court proceedings

- There exist other grounds recognized sufficient by the court

The court shall rule to conduct distant court proceedings *proprio motu* or on a motion of a party or other participants in criminal proceedings. Should a party to criminal proceedings or victim object against conducting distant court proceedings, the court may decide to hold said proceedings only by its reasoned ruling, having substantiated thereby the decision so taken. The court may not rule to conduct distant court proceedings with the defendant being outside of the courtroom if the latter object to it.

The use in distant court proceedings of technical means and technologies shall be required to ensure adequate quality of image and sound, respect for the principles of publicity and openness of court proceedings, as well as information security. The participants in criminal proceedings shall be ensured the possibility to hear and observe the course of court proceedings, to put questions and get answers, to realize other procedural rights granted them, and to perform procedural duties specified by the Criminal Procedure Code.

If a person who is to participate distantly in court proceedings stays on any premises located in the territory within this court's jurisdiction or in the territory of the city where the court is located, the secretary of court session of this court shall be required to hand over to such person a leaflet on his procedural rights, check his ID, and stay at his side until the end of the court session.

The course and results of procedural actions conducted through video conference, shall be fixed with video recording technical means. A protected person may be interrogated through video conference with such changes of appearance and voice as shall make his identification impossible. Distant court proceedings may be conducted in the first instance, appellate and cassation courts, the Supreme Court of Ukraine proceeding in any matters within their competence.

REPORTS OF THE COURSE

GROUP 1
EFFECTIVE COLLECTION AND UTILIZATION OF EVIDENCE IN CRIMINAL CASES

Chairperson	Mr. Kawata Hiroshige	(Japan)
Co-Chairperson	Ms. Sudti-Autasilp Bhornthip	(Thailand)
Rapporteur	Ms. Svitlana Oliynyk	(Ukraine)
Co-Rapporteur	Mr. Vuke Gray Luawabani	(Vanuatu)
Members	Ms. Kongsrisook Unchalee	(Thailand)
	Mr. Dhungana Prakash	(Nepal)
	Mr. Parajuli Parmeshwar	(Nepal)
	Mr. Bah Almamy Moussa	(Guinea)
	Mr. Kiyota Shuusuke	(Japan)
	Ms. Suzuki Miki	(Japan)
	Mr. Vitalii Snegirov	(Ukraine)
	Mr. Oleh Harnyk	(Ukraine)
Adviser	Prof. Iwashita Shinichiro	(UNAFEI)

I. INTRODUCTION

Group 1 started its discussion on the 9th of September 2013. Upon consensus of the members of the group, Mr. Kawata Hiroshige was elected as Chairperson, Ms. Sudti-Autalsilp Bhornthip as Co-Chairperson, Ms. Svitlana Oliynyk as Rapporteur, and Mr. Vuke Gray Luwabani as Co-Rapporteur.

The theme of the discussion of the group was "Effective Collection and Utilization of Evidence in Criminal Cases". The agenda for the discussion was as follows: A. Effective collection and utilization of oral statements, 1. Significance of oral statements in criminal cases in each country, 2. Effective methods of interview/interrogation, 3. Obtaining statements of suspects/accomplices — utilization of plea bargaining and immunity, 4. Recorded statements of interviews/interrogation in each country; B. Collection of objective evidence; C. Necessary measures to improve/develop investigation in each country.

II. SUMMARY OF THE DISCUSSIONS

A. Effective Collection and Utilization of Oral Statements

1. Significance of Oral Statements in Criminal Cases in Each Country

All participants emphasized the importance of the statements of witnesses, victims and suspects for successful investigation of a specific criminal case and bringing the person who committed the crime to justice. Most of the group members agreed that to achieve the goal of appropriate sentencing, the following elements of the crime must be established and proved during the pre-trial stage, as well as at trial:

- Person(s) (criminal(s)) who committed the crime
- Motive/cause of committing the crime
- Direct/indirect intention in reference to committing the crime as well as to committing the results of the crime
- Specific actions executed by the criminal(s)
- Time, place
- Accomplice(s)

During the discussions, participants paid attention to obtaining confessions from suspects. Everyone emphasized the importance of obtaining confessions. Also, most of the group members agreed that a confession given by a suspect during an investigation has to be repeated by the suspect in open court. At the same time in spite of the importance of confessions, corroborative evidence shall prevail.

When a suspect (accused) confesses, the suspect should be granted a lighter sentence by the court. Also participants noted that all statements have to be admissible in court in order to bring a criminal or criminals before the court. All statements are subject to evaluation by the investigator, public prosecutor and especially the judge who makes the final decision and orders sentencing.

Statements of witnesses, victims and suspects must be compared. The group referred to the very important issue of statements of accomplices. During discussions moderated by the adviser, Prof. Iwashita Shinichiro, the participants from each country discussed a criminal case. The group considered situations in which the victim, co-offenders, criminal organizers (masterminds) and witnesses were involved. Everyone agreed that the relationship between the organizer and co-offenders has to be established during the investigation. The points to be proved by an investigator are the intent of the organizer, commands given to co-offenders by the organizer, and the impacts and results of the crime.

The group agreed that corroborative evidence is most important. The investigators as well as judges have to evaluate statements given by the co-offenders as they might merely be seeking benefits for themselves. The statements of the co-offenders as well as of the victims have to be accurate and must be evaluated together with the statements of witnesses and corroborative evidence.

Also the group discussed measures to identify suspects. Generally phone and video recordings as well as fingerprints and DNA are used during the pre-trial stage. However, some countries reported that they do not use DNA evidence to identify suspects (for example, Vanuatu).

2. Effective Methods of Interview/Interrogation

Looking at effective interview/interrogation, the group members discussed not only the current situation but also challenges. Each represented country follows the principles of respect for human rights and the rule of law. In each country, the right to keep silence is provided for and guaranteed by the Constitution or Criminal Procedure Code. There are no doubts in ensuring this right to keep silence. Nevertheless, this is a significant challenge for the investigator to collect corroborative evidence. It often happens that statements of a suspect are helpful for discovering a crime in cases where there are few witnesses.

The group agreed that the task of an investigator is to detect crime. Accordingly, investigators should take statements through the way of effective investigation and interrogation. Usually investigators of each represented country use the P.E.A.C.E. model to conduct investigations. The reason is to ensure the admissibility of statements in court.

In some countries, interrogation techniques like REID are used as well. On the one hand, there are no doubts that these techniques are very helpful. On the other hand in some countries the usage of the REID technique raises a question of admissibility of statements in a court (violation of human rights as well as the right to keep silence at any moment of interrogation without being forced to give statements by an investigator).

The group discussed an issue on improving interrogation. This goal could be reached by participation of officials in need to improving their skills in special training programmes, including the exchange of knowledge at the international level. Also, textbooks/manuals are very helpful not only for junior but also senior investigators. At the same time, the junior investigators must be taught by the senior investigators how to conduct interrogation properly.

During the group workshop, participants shared their best practices in the field of successful interview/interrogation. One more question was raised concerning persuading the suspect to confess. Speaking about confession, Japanese participants emphasized the necessity to persuade the suspect to confess, especially in cases where the suspect denies having committed the crime. Also, confession is

not only a way to collect evidence but also to discover other criminals. At the same time there is no need to persuade the suspect to confess if other evidence is sufficient.

The Ukrainian participants explained that confession is not obligatory; much more important is corroborative evidence which proves guilt. Confession is the right of an offender for whom the right to keep silence is guaranteed under the law. Deliberate and voluntary confession is a good way to collect sufficient evidence. The Nepalese participants also agreed that it is reasonable to persuade suspects to confess. If there is corroborative evidence in a case, a confession is evidence which is taken into account by the court. Representatives from Thailand also agreed that the decision has to be made by a judge on the basis of corroborative evidence, and confessions should not prevail in a specific criminal case. Confession must be considered as one form of sufficient evidence. The participants from Vanuatu and Guinea stated that in cases with enough corroborative evidence, confessions are not necessary. In any case it is obvious that, using all investigative techniques for effective interrogation and effective collection of evidence, an investigator must follow the rules of the criminal procedure code of the country in which the investigator operates.

3. Obtaining Statements of Suspects/Accomplices — Utilization of Plea Bargaining and Immunity

After discussion, it was found that plea bargaining is utilized in the following countries: **Ukraine** (covered by the Criminal Procedure Code), **Guinea** (covered by the Criminal Procedure Code), **Nepal** (there are no provisions of general criminal procedure but it is provided for in specific laws regarding narcotic drugs, human trafficking, money-laundering, corruption and organized crime), **Vanuatu** (there are no provisions in the criminal procedure code, but it is used in practice).

As for **Japan**, currently there is no plea bargaining in the criminal procedure code. This question is under discussion for adoption by the Legislative Council. As for **Thailand,** there is no plea bargaining in the Criminal Procedure Code. Whether or not to adopt plea bargaining is a question that is under discussion. However, there are provisions which empower the court to lessen the sentence if the accused gave useful information to the investigator or the court.

In Ukraine the following types of agreements may be concluded in criminal proceedings:

- reconciliation agreement between the victim and the suspect or the accused
- plea agreement between the public prosecutor and the suspect or the accused about pleading guilty

The plea agreement may be concluded upon initiative of the public prosecutor, the suspect or the accused. The plea agreement between the public prosecutor and the suspect or the accused may be concluded in proceedings in respect of criminal misdemeanors, as well as crimes of minor or medium gravity, grave crimes, the perpetration of which caused damage only to state or public interests. Conclusion of the plea agreement in criminal proceedings with the participation of the victim shall not be allowed. Conclusion of a reconciliation agreement or a plea agreement may be initiated at any time between the moment of notifying the person of the suspicion and retirement of judges into the deliberation room to pass the sentence/judgement. In case of failure to reach an agreement, the fact of initiating conclusion of the agreement and the statements which were made to arrive at an agreement may not be considered as refusal from prosecution or pleading guilty. The agreement shall indicate the date of its conclusion and shall be signed by the parties. If an agreement was reached at the stage of pre-trial investigation, the indictment together with the agreement signed by the parties to it shall be referred to court without delay. The court shall verify whether the agreement complies with the requirements of the law. If the court makes sure that the agreement may be approved, it shall pass the judgement by which it approves the agreement and imposes the punishment agreed between the parties.

4. Recorded Statements of Interviews/Interrogation in Each Country

At the end of discussion of Chapter A, participants also paid attention to the recording of statements. All participants noted that statements should be in a written form. At the same time video recording is not used in Nepal and Vanuatu. These written and video records are admissible evidence in a court. Also such video records prove the legality of the process of taking statements and prevent

ill-treatment.

In Japan police officers and prosecutors conduct interviews or interrogation of suspects, victims, witnesses and accomplices. Police officers and prosecutors write the statements, which have to be checked by the interviewed or interrogated person. If there are no mistakes, the statement is signed by the interviewed or interrogated person. Interviews or interrogation of suspects may be video recorded. Also statements have to be disclosed to defence counsel. At trial the defendant has to be examined. Video recording is a measure to prove at court that the statements were taken voluntarily and legally.

In Thailand it is required by law that the statements of suspects, victims, witnesses and accomplices have to be recorded in written form. Interviews might be video recorded. However, in the case of a child victim/witness, the law requires that the investigator arrange a video and voice recorder for the interview which is able to be continuously transmitted as evidence. All evidence collected during investigation can be used at trial provided that they were obtained lawfully.

In Nepal suspects' statements are recorded in written form by a police officer at the prosecutor's office. The statements are not audio-visually recorded. The written statements are signed by the investigator, the public prosecutor and the suspect as well. Suspects must repeat the statements before the judge at trial as well.

In Vanuatu whether or not there is a confession, there must always be sufficient evidence. At the same time, corroborative evidence is very important. If there is no confession taken from the suspect and only circumstantial evidence is provided, then a decision to prosecute depends on how much circumstantial evidence exists.

In Guinea a confession is not needed as evidence, but corroboration of evidence is important. Offenders can be taken to court without having confessed. Suspects can be released and personal details must be obtained by police to appear in court when all elements are established.

In Ukraine the course and results of a procedural action shall be entered in the record. If during pre-trial investigation procedural action may be recorded with technical means, the appropriate entry should be made in the record. Before signing the record of procedural action, participants shall be given the possibility to review its text. Comments and amendments shall be placed in the record before signatures. The record is signed by all participants to the conducted procedural action. If a person, because of his physical disabilities or any other reasons, cannot personally sign the record, such person may review the record in the presence of defence counsel (legal representative) who attests with his signature contents of the records and to the fact that the disabled person cannot sign the record personally. If a person who participated in the procedural action refuses to sign the record, this is mentioned in the record, and such person shall be given the right to explain in writing the reasons therefore, these explanations being entered in the record. Refusal to sign the record or to provide written explanations with regard to the reasons for the refusal shall be attested by the signature of defence counsel (legal representative), and where such is not available, this shall be signed by attesting witnesses. Procedural actions during criminal proceedings may be recorded with the use of technical means including video. Photographing, audio or/and video recording may be made during interviewing.

The decision on recording procedural action with the use of technical means during pre-trial proceedings including examination of matters by the investigating judge, shall be made by the person who conducts the procedural action concerned. Upon motion of the participants to a procedural action, the use of technical means for recording is compulsory. If interrogation is recorded with technical means, the text of the testimony may not be entered in the relevant record on condition that none of the participants in this procedure insist upon this. In such case, entry should be made in the record that the testimony has been recorded on a medium that is attached to the record. The testimony of a suspect which has been obtained by an investigator during an interviewing is evidence. If the examination is conducted in compliance with the law and it contains information that is relevant to criminal proceedings, the results of this investigation may be evidence of the guilt of the suspect. Simultaneously the court may base its findings only on testimony taken directly during court sessions or those obtained

under the rules of the Criminal Procedure Code of Ukraine. The court may not base court decisions on testimony given to investigators, public prosecutors, or refer to such.

5. Some Basic Provisions of the Criminal Procedure in Selected Countries

JAPAN

Effective collection and utilization of oral statements

- The police are the primary investigative agency in Japan. The vast majority of criminal cases are investigated by the police and referred to public prosecutors. As the police do not have the power to make charging decisions, all cases investigated by the police must be sent to public prosecutors for disposition. Public prosecutors are fully authorized to conduct criminal investigations, and they actively supplement police investigation by directly interviewing witnesses and interrogating suspects.

- Police officers and public prosecutors may ask suspects to appear in their offices for interrogation, and suspects under arrest or detention are obligated to comply. However, the Constitution guarantees the right against self-incrimination, and the CCP requires investigators to notify the suspect, in advance of the questioning, that he or she is not required to make any statement against his or her will.

- In order to be admissible at trial, confessions must be voluntarily made. In this regard, CCP provides that "confession made under compulsion, torture or threat, or after prolonged arrest or detention, or which is suspected not to have been made voluntarily shall not be admitted in evidence."

- Written statements are admissible as evidence if the defendant consents to their use, or they are admissible as one of the hearsay exceptions provided for in the CCP.

- When a witness is unavailable to testify at trial, written statements taken by a public prosecutor and signed by the witness may be admitted as a hearsay exception. Likewise, if the witness takes the stand but the testimony differs from previous statements, prior inconsistent statements taken by a public prosecutor and signed by the witness may be admitted as hearsay exceptions, provided there is a circumstantial guarantee of trustworthiness.

UKRAINE

On 20 November 2012, the New Criminal Procedure Code of Ukraine came into force. This Code established a new procedure for an electronic record of crime that is an Integrated Register of Pre-Trial Investigations. Most important aspects of the Criminal Procedure Code of Ukraine are the following:

- enhancing protection of victims
- widening rights of defence
- specialization of the investigators and judges in criminal proceedings in respect of minors (juvenile justice)
- humanization of preventive measures (detention is an exceptional restraint measure)
- investigative judges
- reasonable period of time
- jury trial
- agreements in criminal proceedings (reconciliation and plea agreements)

- cancellation of additional investigation
- public prosecutor leads an investigation

VANUATU

- Victim impact statement and protection of victims
- Juvenile legislation
- Modern technology legislation (phone calls, video recording, etc.)
- Evidence Act
- Leadership Code Act

B. Collection of Objective Evidence

The main aim for collection of objective evidence is to establish the objective truth in a specific criminal case. Scientific investigation techniques gain importance in the course of effective investigation. Nowadays DNA, fingerprints, autopsies, analysis of security camera footage, GPS, digital forensics, etc., are widely used and support the sufficiency of the effective investigation.

In Thailand all types of possible scientific techniques are used, for example, fingerprints, autopsies, forensic pathology, toxicology and chemistry, document examination, firearms and gunshot residues, analysis of security camera footage, GPS, and DNA analysis. Usage of DNA started about twenty years ago. The new DNA testing techniques have been used over the last ten years. DNA analysis is mostly used in criminal case. This technique is also used in other cases including missing-person identification and parentage testing. However, DNA analysis can be used only in identifying whose DNA it is. But why it was attached to such evidence is the responsibility of the investigator to find out. The challenge of DNA analysis is to establish a DNA database system and legislation, and standardize the system as an intelligence tool in order to solve and prevent crime before crime commission occurs, to save money and to exonerate the innocent from accusations of crime. Since digital evidence is in its infancy in Thailand, another challenge is the improvement of digital forensic techniques to keep up with the development of technologies.

In Nepal there are two forensic labs. Forensic techniques such as DNA analysis are widely used in cases of identification of the deceased as well as for the purpose to identify bodies in criminal cases. DNA examination facilities are available at the National Forensic Laboratory only. A DNA database is being established. Also, autopsies are used in Nepal, and they are done in every district at the hospital (a separate Autopsy Department is situated in Kathmandu). There is also the group SOCO (scene of crime officials) in Nepal which is very effective for observation and investigation of a crime scene with appropriate tools. SOCO exist in each district of Nepal. At the same time fingerprint experts are available only in the capital of Nepal — Kathmandu. Security cameras are used in some public places and offices but are not very sufficient. GPS and digital forensics are used. In Nepal, it is also possible to determine the location of a suspect who uses a cell phone at the moment it is being used.

In Japan effective investigation includes scientific investigation techniques. But some scientific forensic techniques such as GPS must still be adopted. Currently, it is necessary to enhance wiretapping for specific criminal cases.

In Vanuatu DNA is not used, in situations where DNA is collected it is send to Australia for analyzing. Fingerprints are widely used but fingerprint experts need to spread across the country. There are no security cameras anywhere, but they exist in the airport.

In Guinea DNA analysis, fingerprint analysis and video recording are essential technologies used to identify and locate the suspect. The central information committee is in charge of collecting and analyzing evidence.

In Ukraine a variety of forensic techniques are used, especially DNA analysis, fingerprint analysis, autopsies, digital forensics, analysis of security camera footage, etc. At the same time there is no general DNA database.

C. Necessary Measures to Improve/Develop Investigation in Each Country

Most of Group 1 agreed on the necessity to improve investigation, especially through upgrading of personal skills of officials.

In Japan

a) The necessity to analyze the methods of interrogation. There must be training for investigators and prosecutors to upgrade their skills.

b) Reasonableness of recording the interrogation and to conduct effective interrogation.

c) The scientific investigation — necessity to draft it in case it is not covered by the law.

d) Organized crime. Suspects and accomplices do not tell the truth.

e) Introduction of plea bargaining. But before doing so, it is necessary to study foreign experiences and to consider the effectiveness of plea bargaining.

In Vanuatu

There are laws that have been adopted for the apprehension of offenders and

a) there are still trainings to be done in investigation;

b) video and audio recording of interrogation,

c) Interrogation methods,

d) Forensic analysing of computers and mobile phones.

Though there are a number of laws that address the collection of evidence, there is a need to develop an evidence act and other legislation.

In Guinea legislation provides for practices of investigation, such as phone call information, verbal questioning, video recording, photographs, biomedical analysis, which are gathered by the police and the general investigation service throughout the country. The service is under the control of the Attorney General.

In Thailand

a) Continuous training for personnel involved in law enforcement

b) Domestic and international cooperation

c) Amendment of laws to catch up with the new technologies

In Nepal

Evidence-based investigation and prosecution:

a) Creating a separate Crime Investigation Police Branch of the Nepal Police.

b) Establishing well-equipped forensic labs in the five regions throughout the country.

c) Enhancing public security using security cameras in most public areas, offices and streets.

d) Enabling the Nepal Police to use digital forensic evidence by strengthening their capacity and building infrastructure for it.

e) Establishing well-equipped separate detention centres throughout the country.

f) Making well-equipped office buildings for every District Public Prosecutor's Office and District Police Office with sufficient physical resources including separate interrogation rooms in every District.

g) By strengthening interviewing and interrogation techniques by using the PEACE and REID models and improving other skills of Public Prosecutors and Investigating Police Officers through On the Job Training (OJT) and making international training courses available to them.

h) Enacting as soon as possible legislation (three unified bills) which have already been submitted to Parliament and which are necessary to modernize the criminal justice system of Nepal. (Criminal Code, Criminal Procedure Code and modernized sentencing and victim friendly sentencing bills). Witness protection and perjury laws are also necessary to improve the criminal justice system of Nepal.

i) Creating working environments in which the Nepal Police and Public Prosecutor can function independently and effectively for the interest of society.

j) Creating effective cordial relationships between the Nepal Police and Public Prosecutors.

k) Developing international cooperation.

In Ukraine

a) Improving, upgrading skills of investigators and prosecutors through personal studying as well through specific training

b) Setting up the general DNA database

c) Developing investigative and interrogation techniques, including the REID and P.E.A.C.E. models

d) Adoption of the New Criminal Misdemeanors Code

e) Establishing the State Bureau of Investigation within the New Criminal Procedure Code

III. CONCLUSIONS AND RECOMMENDATIONS

At the end of the discussion, Group 1 agreed on the following recommendations —

- Taking every possible measure to follow the rule of law in each presented country.
- Enhancing the effectiveness of the investigation of criminal cases in each presented country; adoption of appropriate legislation for effective interrogation methods.
- Sharing the best practices in the field of criminal justice and criminal law.
- Developing international cooperation in the field of criminal justice and criminal law.

GROUP 2
EFFECTIVE COLLECTION AND UTILIZATION OF EVIDENCE IN CRIMINAL CASES

Chairperson	Mr. Mahmood Saleem	(Maldives)
Co-chairperson	Mr. Andrey Mendonca	(Brazil)
Rapporteur	Mr. Alexandru Victor Bejenaru	(Moldova)
Co-rapporteur	Mr. Kinlay Wangdi	(Bhutan)
Members	Mr. Azer Ramiz Taghiyev[1]	(Azerbaijan)
	Mr. Abdulla Shatheeh	(Maldives)
	Mr. Sonam Tashi	(Bhutan)
	Mr. Tandin Dorji	(Bhutan)
	Ms. Miwa Namekata	(Japan)
	Mr. Tetsuya Hagioka	(Japan)
	Mr. Toru Kodama	(Japan)
	Mr. Takayuki Fukushima	(Japan)
Advisers	Prof. Yukako Mio	(UNAFEI)
	Prof. Yusuke Hirose	(UNAFEI)

I. INTRODUCTION

Group Two started its discussion on 9 September 2013 at 0940 hrs. The group elected, by consensus, Mr. Mahmood Saleem as its Chairperson, Mr. Andrey Mendonca as its Co-chairperson, Mr. Alexandru Bejenaru as its Rapporteur, and Mr. Kinlay Wangdi as its Co-rapporteur. The Group, which was assigned to discuss "Effective Collection and Utilization of Evidence in Criminal Cases", agreed to conduct its discussions in accordance with the following agenda: 1) Effective collection and utilization of oral statements; 2) Collection of objective evidence; and 3) Necessary measures to improve/develop investigation in each country.

II. SUMMARY OF DISCUSSIONS

Mr. Andrey, the co-chairperson, suggested that for each subtopic, discussions should be based on questions which could be formatted into a table to save time, and later converted into a report. All participants agreed to proceed with the group work in the format as suggested by Mr. Andrey. The group decided to discuss the three broad topics of discussion country-wise and agreed to conduct its discussion in accordance with the following format.

A. Significance of Oral Statements in Criminal Cases in Each Country

1. Significance of Statements of Suspects

The questions/points on the said topic to be discussed by the group as agreed and the prevailing situation regarding these matters in the participating countries are summarized as follows:

(a) The suspect has the right to remain silent

All the countries stated that the suspect's right to remain silent is in place in their respective countries. There were some discussions on the pros and cons of the suspect having the right to silence. Some participants stated that the right was not necessary while others said that it is crucial. However, the group unanimously agreed that the right to remain silent is a basic human right conferred upon an individual based on natural principles of justice.

(b) Can the suspect be punished if he lies? Any negative consequences?

Except for the countries of Bhutan and Moldova, the rest of the countries stated that they do not have any punishment for the offence of lying by the suspects either during investigation or during trial. In Bhutan, the Penal Code of Bhutan provides for the offences of deceptive practice, perjury and

[1] Mr. Azer Ramiz Taghiyev had to leave training on 21st September, 2013 due to unavoidable circumstances.

hindering prosecution for lying during an investigation or during trial. In Moldova, the suspect may be punished for lying only during trial at the court.

(c) Do you ask further questions if the suspect remains silent?

The participants stated that asking further questions after the suspect chooses to remain silent is not illegal. Participants of some countries stated that further questions are asked to the suspect even if the suspect remains silent. This is done so that the investigator can allow the suspect speak on different issues which may be relevant for the case, and so that there is every chance that the suspect might speak on some other issues though he remains silent on some issues. On the other hand, some countries stated that once the suspect remains silent, they do not ask any further questions to the suspect because they see no reason to ask anything to somebody who remains silent. Further, the participant from Brazil stated that in Brazil, police officers do not ask questions to suspects who remain silent. By doing this, the suspect would not be able to prepare and anticipate the questions which could be asked in court.

(d) Can defence counsel be with the suspect during interrogation?

The participants from Azerbaijan and Moldova stated that it is mandatory for the defence counsel to be present with the suspect during interrogation. The participants from Brazil and Maldives stated that the defence counsel may be present with the suspect during interrogation if the suspect so desires. The participants from Bhutan stated that presence of defence counsel with the suspect during investigation is not a right and the investigating officer has the discretion to disallow counsel if his presence is likely to hamper the investigation. However, during the trial, defence counsel can be present if he wishes to. Lastly, the participants from Japan stated that defence counsel is not allowed to be present with the suspect during investigation.

(e) Can the suspect be convicted just based on confession?

Except for the participants from Bhutan and Maldives, other participants stated that a suspect cannot be convicted based on confession, and other strong evidence is required to support the confession. The participants from Bhutan stated that in Bhutan, the judge may convict a suspect based on his confession but in such cases the judge has to be fully satisfied of the commission of the offence by the suspect, and it also depends case by case and happens rarely. The Maldivian participants stated that the accused could be convicted based on his confession during trial provided that the accused is in a sound state of mind and confesses in court.

(f) Whether or not defendants who confess should receive lighter sentences?

Except for Japan, in the remaining five countries, the defendants who confess could receive lighter sentence. Moreover, in Brazil, such a defendant is even granted a pardon if his confession was useful and significant to the prosecutor, and in Maldives, a suspension of sentence may also be given to the defendants who confess to drug-use offences. On the other hand, the Japanese participants stated that in Japan, their laws do not provide for any lighter sentences for the defendants who confess but in practice, the sentencing could be more lenient if they confess.

(g) Relationship between the suspect and defence counsel during investigation; can defence counsel answer on behalf of the suspect during interrogation?

Some participants stated that defence counsel may guide the suspect but cannot advise him during interrogation and cannot answer on behalf of the suspect. However, police officers sometimes allow the defence lawyer to be present during interrogation. Some participants stated that the defence lawyer could advise the suspect only during their visits and the investigator may allow the presence of the defence lawyer if his presence does not hamper the interrogation. Some participants stated that the defence lawyer could ask questions to the suspects to clarify a suspect's statement.

(h) Coercion during interviewing/interrogation of suspects during investigation

Participants from Brazil and Bhutan stated that in their countries, suspects are sometimes coerced or tortured to make them confess during their interrogation. Statement obtained in such cases are not admissible in court and the burden of proof lies with the defendant. Participants from Japan, Azerbaijan, Maldives and Moldova stated that in their countries, the prosecutors have to prove in court that the statement produced by them in the court was taken voluntarily without any coercion, duress or

undue influence.

(i) Problems faced by countries relating to the statements of the suspects were discussed as follows:

1) Participants from some countries stated that they had problems in the investigation process. There was a lack of professional training of the investigating officers on interviewing and interrogation. There was either a lack of or shortage of scientific aids to investigation like video and audio recording, lie detectors, etc. in many police stations, and there were no proper interrogating rooms in many police stations of some countries.

2) Some participants stated that the possibility of the suspect or defendant to retract their statements during investigation or during trial is very high. The lack of laws to penalize the suspects during the investigation stage itself tempts the suspect to retract his statement in a court of law during trial.

3) Some participants stated that the right to remain silent may sometimes be used as a strategy by defence counsel and there should be a difference between the right to remain silent and denial or telling lies.

4) Some participants stated that it is very difficult to prove perjury in some countries due to the strict standard and it is impossible to establish perjury as an offence. Since a lot of resources are spent in verifying the statements of the suspects, lying by suspects should be controlled by punishment.

5) Some participants stated that if the suspect remains silent during investigation and starts talking in court, that's something which should be objected to as it takes a lot of time to prove, and if the suspect starts talking aat trial, the suspect could be questioned about the credibility of the suspect's statement.

6) Some participants stated that there should be a difference between the right to remain silent and telling lies and the two should not be taken together. The right to remain silent should be a human right whereas lying should be made an offence by the concerned state.

7) The lack of sentencing guidelines such as a separate sentencing law also affects the judges in rendering just and appropriate sentences for the offenders. The participants from Japan, Bhutan and Maldives stated that there are no sentencing guidelines. However in Brazil, there is a guideline for the judge to award sentences. In Moldova and Azerbaijan, there are general principles written in the criminal procedure but there are no separate guide books on the matter.

2. Significance of Statements of Victims

The significance of statements of victims was discussed as follows:

(a) Significance

All the countries agreed that the statements of victims are very significant in the investigation of criminal offences. Some participants stated that a victim's statement could be considered as evidence in a court of law, and could be used for the discovery of evidence and to establish the commission of an offence. It could be used to identify a crime scene and could also be used in court to corroborate other evidence. Some participants stated that victim's statement is very valuable evidence especially in sex-related offences and other offences like robbery, sex offences against children, domestic violence and assault cases where there are no other witnesses. However in most cases, the victim's statement should be accompanied by other evidence. Some participants stated that the victim's statement is very important since it gives clues to the investigator.

(b) Whether victims could be punished for perjury for lying during investigation and during trial

The participants from all countries except Brazil stated that the victims could be punished for perjury for lying during an investigation and during trial. The participant from Brazil stated that

victims cannot be punished for lying as they do not take oaths, but they could be liable for false denunciation. The participants from Japan stated that victims could be punished for perjury only during trial, with some exceptions.

(c) Can the court convict the defendant solely based on the victim's statement

The participants from Azerbaijan, Bhutan, Maldives and Moldova (with some exceptions for some countries) stated that the defendant cannot be convicted by the court solely based on the victim's statement as it has to be corroborated by other strong evidence. On the other hand, participants from Brazil and Japan stated that the defendant could be convicted based solely on the victim's statement especially in sex offences and crimes where there are no witnesses, but it depends on the reliability of the statement of the victims and the full satisfaction of the judge.

(d) Problems faced by countries in relation to the statements of victims

1. Most of the participants stated that they do not have a system of proper protection of victims or programmes for their protection, and that they lack experts, trained manpower or specialized agencies to interrogate and interview or to protect the victims. Some participants stated that the victim's statement may give a wrong impression to the investigator. The victim's statement might make the offence appear heinous but may turn out to be a minor offence. Therefore in order to obtain the most truthful statement, the investigator should be properly trained and professional.

2. Some participants stated that victims may sometimes retract their statements due to fear or due to coming to an agreement with the accused. The non-cooperation from the side of the victim in the investigation adversely affects the prosecution of crime.

3. The participants from Japan also stated that it is very difficult to prove the offence of perjury in a court of law.

3. Significance of Statements of Witnesses

The significance of the statement of witnesses in each country and the problems faced were discussed as follows:

(a) Significance

The participants from all countries agreed that the statement of witnesses in a criminal case is very significant. The participants from Brazil, Bhutan and Maldives stated that the statements of witnesses could be used as oral evidence or testimony in a court of law. The participant from Azerbaijan stated that the statements of witnesses can be significant only in certain criminal cases. The participants from Japan stated that when the objective evidence is not very strong, statements of witnesses are very important.

(b) Whether prosecutor can prepare the witness before trial

The participants from all countries stated that the prosecutors can prepare their witnesses before trial, although it is not commonly practiced in some countries, like Azerbaijan and Brazil. The participants from Japan stated that as per their criminal procedure rules, there is an obligation on the part of the prosecutor to confront and prepare witnesses before trial but during such times, the prosecutors do not try to guide and direct the witnesses but rather confirm the testimony of the witness as required by law and refresh and make the witnesses anticipate questions from defence counsel.

(c) Type of witnesses — interested and disinterested witnesses

The participants from Azerbaijan, Moldova and Japan stated that in their respective countries, some witnesses who are related as family members of the suspect can refuse to stand as witnesses or give statements against the suspect. The participants from Bhutan stated that in their country, in practice, the statement of witnesses who are related (interested witnesses) is not admissible during investigation or trial. The participant from Brazil stated that family members and interested witnesses could be refused by law to be witnesses but the judge could oblige if he deems it important, but in such cases, they do not swear an oath. The participant from Maldives stated that as per their Sharia law,

all statements of witnesses either related or not are admissible in a court and moreover statements of family members against their other family members are strongly considered.

(d) Special measures for protection of vulnerable or intimidated witness — which measures

Most countries have special measures for the protection of vulnerable or intimidated witnesses like video conferencing or linking, in-camera hearings, distortion of voice and image, use of intermediaries and masks, separation of witnesses from the suspects, excusing the witness's presence at trial, providing police protection and witness shielding. In all participating countries, the protection of vulnerable and child witnesses is prioritized. Some of the countries like Azerbaijan, Moldova and Bhutan have special laws relating to the protection of vulnerable and child witnesses while in most of the countries, special measures of protection are provided in practice though not provided by law. In most of the countries, children and vulnerable witnesses are investigated in the presence of their parents or legal representatives and psychologists.

(e) Problems faced by the countries in relation to statements of witnesses

1. Some participants stated that there is a risk of retraction of statements by the witnesses in a court of law if the statement of the witness is not supported by other evidence, which would lead to the failure of the case.

2. Some participants stated that there is a lack of proper interviewing rooms in most of the police stations and also the interviewers are not trained in the interviewing techniques, especially such techniques for interviewing children and vulnerable witnesses. In most countries, advanced witness protection programmes and trained personnel are also not in place. The participant from Moldova stated that the procedure to obtain permission for the protection of witnesses is very difficult.

3. Some participants stated that since the prosecutors do not prepare their witnesses for trial, it becomes difficult to get the best testimony from the witnesses during trial.

4. Some participants stated that in their country, there are no laws regarding witness protection and they lack institutional and human resource capacity. There is also the problem of lengthy trial or delay in trail which greatly hampers criminal justice.

5. Some participants stated that it is impossible or very difficult to change the identities of witnesses and to re-locate them.

4. Significance of Statements of Accomplices

The significance of the statement of accomplices in each country and the problems faced were discussed as follows:

(a) Significance

All the participants stated that the statements of accomplices in their respective countries is very significant mainly in cases where the accomplices confess to committing the crime, and in countries like Japan, it could also be one of the main pieces of evidence. The statements of the accomplices are required to prove the conspiracy in committing the crime and to indict the accomplice himself. The participants from Maldives and Moldova stated that statements of the accomplices should be accompanied by other evidence and as per the participant from Brazil, if one of the accomplices made an agreement with a prosecutor to tell the truth, he must do so in court or else he may be punished for obstruction of justice. As per the participant from Azerbaijan, the accomplices' statement is important for cross examination and the accomplices must be provided legal aid by the state.

(b) Whether a judge can convict an individual solely based on the statement of the accomplice

The participants from all countries except Japan stated that in practice, a judge will not convict an individual solely based on the statement of the accomplice, and it has to be corroborated by other relevant evidence. In Japan, a judge could convict the suspect solely based on the accomplices' statement but the judge must be satisfied with the credibility of the accomplice.

(c) Could the accomplices be cross examined by the other defendant

The participants of all the countries stated that in their countries, the accomplices could be cross examined by the other defendant.

(d) Problems faced by the countries in relation to the statements of accomplices

1. Some participants stated that accomplices do not usually cooperate with the police for fear of being indicted and at times retract their statements in court.

2. Participants from Brazil and Japan stated that it is very common that accomplices make uniform false statements and most of the time in cases of organized crime they are protected by their organization.

3. The participants from Maldives stated that the same lawyer can represent many suspects who are accomplices and accomplices may be intimidated by the suspects, and moreover there were no written laws on the subject.

III. EFFECTIVE METHODS OF INTERVIEWING/INTERROGATION

A. Current Situation in Each Country

The current situation and challenges of interviewing/interrogation in each country and the approaches to enhance the ability of interrogators were discussed as follows:

1. Current Problems/Challenges of Interviewing/Interrogation

Participants from most countries stated that in their respective countries there are no proper interviewing/interrogation rooms in most of the police stations and and that they lacked scientific aids to investigation like audio- and video-recording systems, etc. The participants also stated that there was a lack of trained, specialized, skilled and professional/expert interviewers and interrogators and an absence of a set of reference guidelines for interviewing and interrogation. The participant from Azerbaijan further stated that in his country, there were many investigative agencies for various specific crimes, and, due to this, there were separate research institutes and academies but no uniform institute specifically for interviewing/interrogation. The participant from Brazil also stated that disclosure of all evidence to the suspect and his lawyer at any time during investigation and trial, even before interrogation, is a disadvantage for the interviewers/interrogators. The participants from Maldives stated that in their country there was a different set up of interviewing and interrogation of suspects whereby it is mandatory to have the presence of two officers besides the investigator to witness the interview/interrogation and both officers have to sign the defendant's statement, confirming that the suspect has been interviewed and given his statement in their presence. Therefore, it is felt that it is not necessary to have the presence of the two officers. Lastly, the participants from Japan stated that in Japan, there is no organized, systematic or set techniques of investigation and mainly the techniques are taught by the seniors to juniors. Moreover in some cases, investigators obtain false statements, and in cases where the the recording and use of other investigative aids would be required by law, it would be a challenge for the Coast Guard in Japan.

(a) Current approaches to enhance the ability of interrogators

1. All the participants stated that more domestic and foreign training programmes in interviewing/interrogation for the investigators were needed and programmes for training of trainers in the field of interviewing/interrogation in countries with professionalized and developed systems are required so that they could train the officers back home.

2. The participants stated that proper, well-equipped and modernized interview/interrogation rooms in all the police stations of the respective countries need to be established, and the latest and modernized scientific aids to investigation like audio and video recording, lie detectors, etc., should be developed and provided to all police stations.

3. Some participants also stated that a manual of uniform guidelines for interrogation and

interviewing encompassing the best practices of other countries needs to be formulated and disseminated for reference.

4. The participant from Brazil further stated that the problem of disclosure of evidence even before interrogation in Brazil needs to be reconsidered.

5. The participants from Maldives stated that the adoption of different interview/interrogation techniques may help in the improvement of the interviewing/interrogation and in their country investigators are encouraged to follow the PRICE (P-Preparation, R-Rapport, I-Information gathering, C- Confirmation and Clarification, E- Evaluation) method of interviewing/interrogation. However, these techniques adopted by the countries should be taken into consideration to be implemented by the investigators and the investigators should also possess legal knowledge.

6. The participants also stated that cooperation from other relevant agencies should be made possible and encouraged.

7. The participant from Moldova stated that interviewing/interrogation techniques could be improved with the assistance from more experienced investigators or a psychologist, and since the behaviour of a suspect is the most important, the presence of a person trained in human behaviour should be encouraged.

8. The participants stated that the police and the prosecutor's office should come to a consensus regarding the basic principle of interviewing/interrogation developed in their countries. Also, specialized training of the interviewers of mentally disabled persons should be provided, and recently in the police, the transfer of techniques from the senior to the junior officers has been initiated.

9. Finally, all the participants agreed that countries should adopt and implement the various developed and set techniques of interviewing/interrogation prevalent around the world but these techniques could be modified and developed in such a manner that is most suitable and applicable to the respective countries.

1. Effective Methods of Interviewing/Interrogation

The effective methods of interviewing/interrogation in each country were discussed as follows:

(a) Methods of interviewing/interrogation (PEACE Model/Cognitive Interviewing (UK) or Reid Technique (USA) or any other)

The participants from Japan stated that their technique of interviewing/interrogation is similar to the PEACE model and at present, the Public Prosecutor's Office is researching both the PEACE and REID models. The participant from Azerbaijan stated that in Azerbaijan, there are some elements of the PEACE model but they have established their own model and there are provisions in laws on how to interview/interrogate. The participants from Bhutan and Moldova stated that in their countries, some elements of the PEACE model are adopted but there are no specific models. The participant from Brazil stated that there were no specific models of interviewing/interrogation in his country, and the participants from Maldives stated that though the PRICE model is being practiced, there is no specific model in general.

(b) Can the suspect be persuaded to confess

All the participants agreed that the suspect could be persuaded to confess in their respective countries. However the participants from Maldives stated that though it is possible to persuade the suspect to confess, the need to do so is generally not felt, and the participants from Japan stated that it is not only possible to persuade the suspect to confess but there is also a need to persuade the suspects to confess though it takes much time.

(c) Will you still use the statement of the suspect in a court even if there is a risk of being rejected by the court?

All the participants agreed that the statement of the suspect could be used in court even if there is a risk of being rejected by the court. However, the participants from Japan stated that it depends on the case and if the risk of rejection by the court is minor and the statements are significant, public prosecutors would try to use the statements as evidence.

IV. OBTAINING STATEMENTS OF SUSPECTS/ACCOMPLICES — UTILIZATION OF PLEA BARGAINING IMMUNITY

The utilization of plea bargain immunity in countries which have the system and the status in countries which do not have the plea bargaining system were discussed as follows:

A. Adoption of Plea Bargaining (if yes, contents; if no, whether there is another system or the system is being considered)

All the participants unanimously agreed that there were two types of plea bargaining as explained by the adviser, Professor Mio: one was between the prosecutor and the defendant whereby the prosecutor may mitigate the charges for the defendant if the defendant cooperates with the prosecutor (Type 1), and the other was between the Prosecutor and the accomplice whereby the accomplice must admit guilt, provide information to the prosecutor and testify against the defendant in return for lesser charges (Type 2). The participants from Azerbaijan, Maldives and Japan stated that they do not have both types of plea bargaining in their countries, but in Azerbaijan, a similar principle is provided in the criminal procedure code whereby if the defendants help in investigation, his sentence could be lighter. In Maldives, their Constitution and the Prosecutor General's Act provides the prosecutor with discretion to prosecute a case or not, and this discretion is mainly exercised in offences against children, corruption and other serious offences. And in Japan, the adoption of both types of plea bargaining, especially Type 2, is currently being considered in the legislative committee. The participants from Brazil, Bhutan and Moldova stated that in their countries, both types of plea bargaining are available and provided for by law.

B. Typical Cases in Which the System is Utilized

The participant from Brazil stated that in Brazil Type 1 plea bargaining is used in crimes with penalties of 2 years or less, and Type 2 is used mainly in organized and serious crimes. The participant from Moldova stated that in Moldova, Type 2 plea bargaining is utilized for corruption and organized crime, and the participants from Bhutan stated that plea bargaining is used when the defendant or accomplice provides material evidence to the prosecutor for another more heinous offence in exchange for lighter charges.

C. Statements of Accomplices in Organized Crime — How Obtained?

The participants from Bhutan, Brazil and Moldova stated that statements of accomplices in organized crime are obtained by utilizing the concept of plea bargaining. The participant from Azerbaijan stated that if the accomplice helps in such an investigation, it could be taken into account. The participant from Maldives stated that there is no specific method to obtain an accomplice's statement, and the participants from Japan stated that such statements are obtained by persuasion.

D. Current Problems/Challenges:

1. The participant from Brazil stated that there is a risk to the accomplice due to lack of witness protection and difficulty in providing protection due to inefficiency of the system, and accomplices are reluctant to cooperate because it is better for him to try to get acquitted without confessing than to make an agreement with the prosecutor. Moreover, Type 1 plea bargaining, even in the medium cases, should be considered — not only in minor cases.

2. The participants from Bhutan stated that the principle of plea bargaining is rarely used due to the lack of awareness on the part of the defendants, and the participant from Moldova stated that in order to enter a plea agreement, it should be mandatory that the suspect pay restitution to the victim or society.

3. The participants from Japan stated that in Japan they are facing a lot of problems without the system and in the near future, the method of persuasion may be challenged by the people due to their awareness of the law. Therefore, they are currently working on adopting the system.

4. The participants from Maldives stated that in Maldives there is presently no uniformity and no set rules on the discretion of the prosecutors, and the accomplice has no duty to cooperate with prosecutor.

5. The participant from Azerbaijan stated that in Azerbaijan the concept of plea bargaining could be adopted in the future, but the adoption of such a concept would be difficult to achieve.

V. RECORDED STATEMENTS OF INTERVIEWS/INTERROGATION IN EACH COUNTRY

A. How Statements Are Recorded

All the participants stated that in their respective countries, statements are recorded in written documents with the signature of the persons giving the statement. The participant from Azerbaijan further stated that as per their Criminal Procedure Code, audio/video and other forms of recording statements could be used. The participants from Bhutan stated that audio/video recording is also done, although it is not mandatory. The participant from Brazil stated that in Brazil sometimes audio/video recordings are also done by the police but only in few cases especially in confessions, and during the judicial phase, all statements are audio or video recorded. The participants from Maldives stated that audio recording is mandatory while video recording is optional, and there is a regulation stating that if the suspect demands an audio copy of the statement, it should be given to him. The participant from Moldova stated that in Moldova, audio recording is not used while video recording, though not mandatory, is used for serious criminal cases in practice. The participant from Japan stated that audio/video recording is done for suspects who are detained for some serious offences by the police and prosecutor and for an accomplice who is being interviewed as a suspect.

B. Utilization of Statements at Trial as Proof

All the participants stated that the statements of suspects, victims, witnesses and accomplices, if relevant, could be used as corroborative evidence in a court of law. The participant from Brazil stated that all the statements are submitted to the court with the indictment and statements must be taken again in court to be used as corroborative evidence at trial. The participants from Japan stated that if the reliability and voluntariness of the statement is in question, audio/video recording devices (DVDs) are used as evidence in court to prove the fact. However, all the participants agreed that the statements to be utilized in court as corroborative evidence should have been obtained in accordance with the requirement of the laws of the respective countries.

1. Collection of Objective Evidence

The current situation and the challenges of each country relating to the collection of objective evidence in investigation were discussed as follows:

(a) Current Situation (Scientific investigation techniques and aids to investigation — search, seizure and analysis of crucial evidence)

The participant of Azerbaijan stated that in Azerbaijan, there are two bodies dealing in forensic analysis, one with the Ministry of Justice which deals with all except medical, and one with the Ministry of Health which deals with medical forensics. Currently forensic examination provides 22 types and 44 specializations in Azerbaijan. He also stated that the forensic research centre established in 1938 bought a lot of modern forensic equipment and expertise, and this centre not only did analysis but also research.

The participants from Bhutan stated that in Bhutan, except for simple fingerprint and document analysis, complex issues of forensic examination including DNA analysis, etc., are done in India and some other foreign countries, and autopsies are conducted rarely due to religious beliefs. They further stated that though the police stations are well equipped for lifting, labeling and packaging evidence and forensics-trained manpower, proper and well-equipped forensic laboratories are not available, and

there is a requirement of court order to obtain bank and financial records and phone records as provided by the code of procedure.

The participant from Brazil stated that in Brazil DNA examination is done, though it is very expensive, and they have developed a system for analyzing bank and financial records whereby a standard procedure for all banks to submit documents has been developed. He also stated that in Brazil there is no automated system of analyzing security cameras and there is no DNA database, though it is in the process of developing.

The participants from Maldives stated that in Maldives the Maldives Police Service has established a forensics department, including crime scene investigation, fingerprint development and comparison, digital-evidence analysis (mobile/computer), audio and video analysis, drug analysis, DNA analysis, document analysis and polygraph examinations. They also stated that no autopsies are done due to religious beliefs and the lack of legal framework. By law, it is obligatory for the banks to disclose information if requested in writing by the police.

The participant from Moldova stated that in Moldova no DNA analysis or voice recognition analysis is done. Such requests must be sent to other countries for analysis. Though there are experts, there is no equipment. There is also an absence of facilities from internet providers to track cyber-crimes, and old equipment is used for forensic scientific examination which is time consuming, and there are three forensic laboratories in Moldova.

The participants from Japan stated that in each prefecture, there is a forensic laboratory, and DNA and fingerprints are analyzed in these laboratories. For autopsies, in each prefecture, the body is sent to the medical-forensics laboratory for examination. In Japan, security cameras are set up at various places, and the videos from these cameras are collected by the police for analysis. Digital forensics is done by the forensics laboratories of police bureaus and some private companies. For bank transactions, there is no need to get warrants as the banks would give information just by referral by the police, but to obtain call histories, warrants from the courts are required. In the Japanese Coast Guard, there is a special division for analysis of oil, water and GPS.

(b) Challenges/problems faced

The participant from Azerbaijan stated that in Azerbaijan, there is no DNA database and no equipment for analyzing helicopter and airplane accidents. In Azerbaijan, there is a need of warrants for searches, seizures and analysis of evidence.

The participants from Bhutan stated that in Bhutan, most police stations around the country lack the latest scientific aids for investigation, and complex issues of forensic analysis are sent to India and other countries, which delays investigations. In Bhutan, there is a lack of proper and well-equipped forensics laboratories and limited tools or scientific aids to investigation for the investigators. The requirement by law to obtain court orders for the search, seizure and analysis of bank and financial records, phone records, etc., delays and hampers investigations.

The participant from Brazil stated that in Brazil a DNA database and analysis of security cameras should be developed. He further stated that wiretapping and detection of cyber-crimes is very difficult as there is no digital-forensics expertise or equipment and the forensic analysis of computer evidence takes very long. In Brazil, there is a lack of internet laws and regulation, and there is no national database of fingerprints. There are also no rules in cyber cafes, so it becomes difficult to identify who uses them; since there are no rules about mobile phone chips/sim cards, they could be misused by criminals.

The participants from Maldives stated that in Maldives, there is a lack of specialist training opportunities and limited budgets, and also admissibility of forensic evidence in courts is very difficult. In Maldives, the banks and communication authorities are reluctant to provide information, and the service providers are also very reluctant to provide information due to privacy issues, etc.; there are no laws mandating them to keep records. Security cameras are available but not maintained properly due to limited budgets.

The participant from Moldova stated that in Moldova modern forensic and scientific equipment including DNA analysis equipment and a DNA database need to be established, and special programmes to help investigation of financial and internet crimes also need to be developed.

The participants from Japan stated that in Japan there is only a limited number of samples for DNA databases, and though DNA is collected from crime scenes, for comparison, there is only limited data. In Japan, requirement of conditions for wiretapping is very strict. The domestic financial institutions are very cooperative in providing information on bank accounts but many transactions take place in overseas banks with hidden transactions so it is very difficult to get international assistance in investigation. In Japan, sometimes suspects are found not guilty because the investigators erroneously analyze, overestimate and present the objective evidence at court, so the police and prosecutors must develop analytical ability regarding such evidence. In the Japanese Coast Guard, there is a need to develop experts for forensic analysis.

C. Necessary Measures to Improve/Develop Investigation in Each Country

The necessary measures to improve/develop investigation in each country were recommended as follows:

1. All the participants agreed that it is necessary to develop a system for exchange of information regarding investigation, prosecution and adjudication of criminal cases between countries to be coordinated by an organization like UNAFEI.

2. All the participants agreed that there should be advocacy on interrogation and interviewing techniques, proper collection and handling of evidence and printing of guidelines to research the issues. Research institutes regarding interviewing/interrogation techniques should be established in each country for all investigation agencies. The countries should develop guidebooks with minimum requirements for interviewing/interrogation techniques, and publish a series meant exclusively for investigators with specific cases for sharing of experiences with law enforcement agencies.

3. All the participants agreed to establishing a well-equipped separate room in each police office for interviewing/interrogation, and to establish a practice for assistance during interview/interrogation by psychologists or more experienced investigators.

4. The majority of the participants agreed to considering the development of witness/victim/accomplice protection programmes and funding for such programmes to be managed by a specific and specialized Governmental agency or department. There should be development of a legal framework relating to witnesses, victims and accomplices, and easier procedures to change the names.

5. All the participants agreed that the plea bargaining system should be considered in countries, where possible, due to its advantages.

6. The participants agreed on establishing the position of "assistants for investigators" to assist in investigative techniques where such a system is not in place.

7. All the participants agreed on formulating legal provisions and procedures for dealing with internet issues regarding handling of evidence and cooperation from the service providers.

8. All the participants agreed on considering the audio- and video-recording system relating to oral statements during criminal investigation, whenever necessary, especially in serious crimes.

9. The majority of the participants agreed to consider providing more powers of investigation to the prosecutors in certain cases, especially when the police may not investigate independently.

10. All participants agreed to consider cooperation with private companies to develop digital forensic analysis, such as the Japanese model, through a legal framework.

11. All the participants agreed on establishing an inclusive approach between the police and the prosecution to achieve better results for investigation and prosecution of cases, and the investigating officer and prosecutor should work as a team.

12. All the participants agreed on considering wider institutional opportunities in capacity building for the stakeholders involved in the criminal justice system of countries for development of the respective institutions and staff. For instance, all new staff should have induction, formal monitoring and be assigned a line supervisor. The line supervisor should discuss development and performance issues with the member of staff in a formal way. Development should be periodically reviewed, and also prosecutors should be trained for trial.

13. The participants agreed on considering the preparation of witnesses, victims and accomplices in cases involving serious cases by the prosecution authorities prior to trial.

14. All the participants agreed that there should be enactment of relevant legislation to build a strong legal framework to investigate and prosecute cases to bring criminals to justice, especially the providing for the admissibility of confessions if obtained lawfully, in countries lacking such provisions.

15. The participants agreed on establishing a quality and comprehensive evidence storage facility to store, retain and utilize evidence effectively, in countries where it is lacking.

16. All the participants agreed on considering the development of techniques of interviewing/interrogation best suitable for the respective countries after considering models such as the PEACE model and the REID model.

17. The participants agreed that in countries where coercive interrogation still exists, a system where the burden of proof lies on the prosecutor with the use of video recording, medical and psychological examinations should be established.

18. All the participants agreed on the significance of creation and development of a national DNA and fingerprint database in their respective countries.

19. The participants agreed on reconsidering the obligations of the prosecutors to prosecute all the crimes by establishing a discretionary model.

20. The participants agreed on considering the disclosure of evidence during the investigation phase in some countries.

21. All the participants agreed on considering the need to establish a standard procedure for financial institutions to provide information for investigation purposes, as developed in Brazil.

22. The participants agreed to regulate and develop the analysis of security cameras installed in public places.

23. All the participants agreed on the need for more training for investigators concerning interviewing/interrogation techniques.

24. All the participants agreed on the need to secure funds and equipment from the developed nations and international organizations, and to provide various scientific aids to investigation to the all the police stations of the respective countries.

VI. CONCLUSION

The group thoroughly deliberated and discussed the current issues and problems of each participating country relating to effective collection and utilization of evidence in criminal cases. Following thorough discussions, the group developed certain recommendations and necessary measures to be

implemented in their respective countries for the development and improvement of the criminal justice system focusing mainly on investigation. However, it should be noted that the measures and the recommendations in this report should be adopted and implemented in the respective countries based on the necessity and suitability in their countries with the goal of ultimately achieving an effective and efficient criminal justice system.

PART TWO

RESOURCE MATERIAL SERIES
No. 92

Work Product of the 16th UNAFEI UNCAC Training Programme

"Effective Measures to Prevent and combat Corruption and to Encourage Cooperation between the Public and Private Sectors"

UNAFEI

VISITING EXPERTS' PAPERS

INVESTIGATIVE MEASURES TO EFFECTIVELY COMBAT CORRUPTION

*Rebecca B. L. Li**

I. INTRODUCTION

Corruption is not easy to detect, let alone investigate. From a place ravaged by corruption to one now being recognized as one of the world's leading cities to combat corruption, Hong Kong, China has come a long way. And it has come a long way through the efforts of the Independent Commission Against Corruption (ICAC) working in partnership with a determined public. Established in February 1974 as an independent anti-corruption agency, the ICAC adopted a holistic and coordinated strategy in combating corruption on three fronts — enforcement, prevention and education. These distinct tasks are entrusted to three departments of the Commission: Operations, Corruption Prevention and Community Relations. The Commissioner of ICAC is directly answerable to the Chief Executive of the Hong Kong Special Administrative Region and is independent from the civil service, and this independence of operation is very important to the effectiveness of our work. Our three-pronged strategy is enshrined in the ICAC Ordinance.

The Operations Department is the largest department in the Commission, comprising about 70% of the ICAC's workforce of over 1,300. It is tasked to investigate corrupt activities both in the public and private sectors by enforcing tough laws designed to ensure that corruption remains a high risk crime. All reports received by the Report Centre are considered within 24 hours on a daily basis by the Directorate officers of the Operations Department for investigation under utmost confidentiality. Pursuant to the ICAC Ordinance, the Commissioner has the statutory duty to investigate corruption complaints, including anonymous complaints so long as they contain sufficient details for investigation to be pursued. While it is our statutory duty to investigate corruption, the power to prosecute rests with the Department of Justice. This demarcation of responsibilities guarantees the impartiality in the performance of prosecution function and this is particularly important given the special powers of investigation possessed by the ICAC.

"Prevention is better than cure". The Corruption Prevention Department is entrusted with the important task of examining the procedures and practices of government departments and public bodies to plug corruption loopholes and reduce corruption opportunities. The department also provides confidential and tailor-made corruption prevention advice free of charge, upon request, to companies in the private sector with a view to strengthening corporate governance.

The Community Relations Department is responsible for fostering a culture of probity in the community and enlisting public support in anti-corruption work. We have a network of seven regional offices to maintain face-to-face contacts with people from all walks of life through corruption prevention talks at schools and workplaces, as well as district activities. Members of the public can also report corruption through the regional offices which will refer all such complaints to the Report Centre to follow up. The department produces television drama series based on real corruption cases and also uses television and radio commercials to spread anti-corruption messages.

II. THE NATURE OF CORRUPTION

In sharing the ICAC's experience in investigating corruption and in addressing the problems associated with its investigation, it is necessary to look at the nature of corruption as a crime first. It

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is essential to have an understanding of its nature in order to be able to properly appreciate the difficulties involved in investigating it.

A. A Secret Crime

The feature of corruption that singles it out from other crimes is the secrecy surrounding it. Each corrupt transaction involves at least two parties: the offeror and the acceptor of a bribe who, through the transaction, create mutual obligations to each other and, from the transaction, derive mutual benefits. There is an understanding between the two parties of what they expect from each other and it leads to a situation in which both parties get what they want. This secrecy, which is a consequence of both parties getting what they want, is a major impediment to the effective detection and investigation of corruption. Third parties, including law enforcement agencies, are unaware of the deal between the corrupter and the corruptee. As a crime, corruption can be described as invisible in nature. How can you investigate something of which you have no knowledge?

B. A Crime that Leaves No Trace

Even when detected there are features of corruption that make it hard to investigate. Quite unlike other crimes, there is no obvious crime scene where the perpetrators of corruption effect the commission of the offence. The corrupt transaction can be processed in the absence of the parties concerned, and there may be no direct physical handing over of bribe monies. In these days of electronic banking, there is no need for the corrupt to even meet. Without physical contact with each other, they can launder the bribe through companies and off-shore bank accounts. Proving that there was a payment, linking the parties to the payment and then proving the payment was a bribe is a painstaking and sometimes, ultimately unsuccessful process of investigation. Proving that what was offered was in fact a bribe may be a problem if what was offered was not the payment of money but was instead a less obvious form of advantage. Proving a corrupt purpose which is not apparent may also be a problem. It might be no more than expedition or delay in taking action which can be easily camouflaged by the pretence of some form of lawful justification.

C. A Victimless Crime?

Another characteristic of corruption as a crime that makes it difficult to investigate is that very often, there is no identifiable or immediate victim. With other crimes, you have a victim who has been assaulted or robbed and who, because of his/her experience, is eager to cooperate in bringing the criminal to justice and who has direct evidence of the commission of the crime. Not always but quite frequently this victim is an innocent person who will present himself/herself to the court as a truthful witness.

Where is such a person in a corrupt transaction? Almost invariably there is none. Sometimes an employee to whom a corrupt offer is made reacts righteously and immediately reports it. Likewise a person who receives a corrupt solicitation may similarly respond. But more often than not the corrupt overture goes unreported and leads to a completed corrupt transaction. Where then is the victim? In this situation, the victim is the general public who is unaware that the crime has been committed and that it has been victimized. For instance, when a person pays a bribe for expediting his/her export licence application with the customs department, the victim is the public whose applications have been delayed in the course of processing. When corruption becomes entrenched in the civil service and widespread in society, the general public may be placed at risk as the quality of the public service declines. Corruption as a social problem then becomes visible and operates as an unofficial tax levied on the provision of public services. As public interests are subordinated to private aims, corruption essentially confers benefits on the parties involved in it at the expense of the general public.

III. INVESTIGATING CORRUPTION: ARMING YOURSELF WITH THE WEAPONS

A. A Full Range of Offences

It is the very unique nature of corruption with its features of secrecy, invisibility and no identifiable victim that renders it a difficult crime to detect and investigate. What then, can be done to overcome the problems that are created by corruption having these features?

The first thing that can be done is to ensure that appropriate laws are in place that can meet the needs of the investigating law enforcement agency. A full range of offences to prohibit corrupt conduct in both the public and private sectors is required. Under our Prevention of Bribery Ordinance (POBO), section 4 regulates public sector corruption; sections 5, 6 and 7 deal with corrupt activities relating to public body contracts, tenders and auctions; whereas section 9 concerns corrupt transactions in the private sector.

Apart from general anti-corruption provisions, special statutory offences are required in order to enable the prosecution of government servants who are believed to be corrupt but against whom there is insufficient evidence of bribery. Under section 10 of the POBO, it is an offence for a government servant to maintain a standard of living beyond his/her means or be in possession of unexplained property or pecuniary resources. It is important to have such a provision to regulate illicit enrichment, otherwise corrupt government servants who know how to accumulate their wealth through corruption in an undetectable manner can avoid any enforcement action.

Section 10 has been described as a draconian offence as the burden of proof of the absence of corruption is on the defendant and the onus on the defendant to provide an explanation to prove he is innocent deviates from the Common Law principle that a person is presumed innocent until proven guilty and that the prosecution bears the burden of proving his/her guilt. However, in a Court of Appeal decision, it was held that section 10 does not infringe the Bill of Rights because what triggers the requirement for the defendant to give an explanation is the fact that the standard of living that he/she maintains is incommensurate with, or the pecuniary resources or property that he/she controls are disproportionate to, his/her present or past official emoluments to an extent which is unreasonable in the circumstances. The Court of Appeal recognized that a balance has to be struck between fighting corruption and protecting the rights of innocent people, but accepted that corruption requires special powers of investigation and special offence provisions.

In order to overcome the jurisdictional problem that would otherwise arise when a corrupt transaction takes place out of Hong Kong, our POBO contains a public servant bribery offence which criminalizes the offering, solicitation or acceptance of a bribe wherever it occurs.

It is worth noting that corruption offences often go hand in hand with other offences, usually to enable the more effective commission of those other offences. This is why corruption offences are regarded as offences which are used to facilitate other crimes. Because such other crimes are inextricably linked to the corruption offence, consideration should be given to empowering the anti-corruption agency the authority to investigate those other crimes.

In many cultures, it is perfectly normal for persons to exchange gifts either as an expression of gratitude or as a sign of respect. However, it is sometimes the case that corruption abuses existing cultural practices and transforms them into a tool for paying bribes. It may be considered desirable to incorporate into the anti-corruption legislation a provision that prevents reliance on cultural practices as a justification for bribery. In our POBO, we have section 19 which states "In any proceedings for an offence under this Ordinance, it shall not be a defence to show that any such advantage as is mentioned in this Ordinance is customary in any profession, trade, vocation or calling."

B. Special Powers of Investigation

Apart from seeking out live witnesses, evidence of corruption has to be gathered from all possible sources. However, corrupt transactions nowadays are processed in a very sophisticated way. Bribes are rarely handed over in cash or deposited into local bank accounts. They may be disguised as consultancy fees, dividends of share investment or even remitted to overseas accounts. It has become more difficult to identify and trace corrupt proceeds.

To facilitate the investigation of corruption, it is essential to have strong powers of investigation. For instance, in our POBO, the ICAC is given a number of different special powers of investigation. Under section 13 of the Ordinance, the ICAC Commissioner is empowered to issue authorizations to require banks or financial institutions to provide specified banking records to investigators. Under section 13A, an application may be made to a High Court Judge to obtain access to records of the

Inland Revenue Department. Under section 17, applications may be made to a magistrate or a High Court Judge for the issue of search warrants to authorize ICAC officers to enter and search premises for evidence of corruption. Under section 14(1)(a) and section 14(1)(b), an application may be made to a High Court Judge to authorize the ICAC Commissioner to issue a notice for it to be served on a suspect requiring him/her to reveal the property in his/her possession, his/her expenditure and liabilities and provide information on money or property sent out of Hong Kong. Under section 14(1)(c) and section 14(1)(d), a non-suspect may be required to provide information on property or to appear before an ICAC officer to furnish information or produce documents to facilitate the investigation. Under section 14C, an application may be made to a High Court Judge to freeze accounts or restrain assets. Further, under section 17A, an application may be made to a magistrate for the issue of a notice to be served on a suspect requiring him/her to surrender all his/her travel documents and not to leave Hong Kong for a period of six months and the period may be extended, upon further application, for another three months.

C. Investigating Corruption: Going to Battle

The majority of law enforcement agencies are complaint reactive in nature. Their investigations will usually be commenced upon the receipt of a complaint or the referral of information that a crime has been committed. There then commences a fairly standard process of investigation including the gathering of evidence from the victims and other witnesses who were present at the crime scene or who possess knowledge of the crime. This reactive strategy functions well for crimes that are detectable and which have identifiable victims.

But, as explained earlier, that is not the position with corruption. Hence, the first hurdle encountered by agencies when investigating corruption is the source of the report or information. The secret nature of corruption means that the only persons who have direct knowledge of the crime are the perpetrators and their accomplices and in most cases, there are no immediate victims. Since most corrupt activities are unknown to outsiders, a large number of corruption cases may not be brought to the attention of the investigating agency, resulting in the existence of a "dark figure" of unreported and undetected corruption cases.

In order to be an effective enforcement agency against corruption, it is necessary to get the support of the public and to encourage them to report it. This, in turn, very much depends on their awareness of the harm caused by corruption and their confidence in the integrity and effectiveness of the enforcement agency.

Criminal investigations can be either reactive or proactive in nature. Each has its problems and difficulties and these will be discussed below.

1. Reactive Investigations

For reactive investigations, information of corruption usually comes from complainants. The lesson that the ICAC has learnt after over 39 years of investigating corruption is that developing public confidence in it is crucial to the success of its work. It is only when the public has confidence in, and respect for, the anti-corruption agency that they will provide the agency with the support that it needs The ICAC not only values but also needs community support. In 2012, 2,832 investigations were conducted by the ICAC resulting from the 3,932 corruption complaints received during that year. 93% of the complaints received were made by members of the public of which 75% identified themselves. Our investigations are still predominately complaint reactive. This reliance upon community support is, of course, recognized in the preamble to the United Nations Convention Against Corruption (UNCAC) which urges States Parties to bear in mind that the prevention and eradication of corruption require ....the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations".

In ICAC, we have a Report Centre that operates 24 hours round the clock as well as a hot-line the number of which is well known to the general public for them to report corruption. Some of the complainants who report corruption are persons who were involved in the crime and who bring it to the attention of the investigative body. In such cases, the investigating agency has to guard against the motive of these "tainted" complainants in order not to be misled into directing the course of the

investigation along the wrong path. Though it should be said that there are some instances where the complainants are not the main culprits and have been involved as reluctant parties in the corrupt activities or have been forced unwillingly into facilitating or concealing them.

In those cases that are reported by complainants who were not involved in the corrupt activities, their complaints are very often based on suspicion or hearsay information which may be difficult to verify at the covert stage. What they can provide is speculation or circumstantial information rather than direct knowledge or evidence of the corrupt activities alleged.

Another source of our complaints comes from referrals by government departments, public bodies or the Joint Financial Intelligence Unit. Reports of corruption are also made by the management of private organizations or business firms. There is an established referral mechanism or liaison point between the ICAC and these public or private organizations for them to refer any information or intelligence of corruption so that the ICAC can follow up. It is necessary for an anti-corruption agency to set up a system in this regard so that referrals are made pursuant to the established mechanism rather than on the basis of personal acquaintance so that it will not be affected by any subsequent change in personnel.

2. Proactive Investigations

The process of investigating corruption involves penetrating the many layers of secrecy, and through the use of imaginative investigative techniques, gradually removing the veils of secrecy that surround it. The first step in this process is coming into possession of information which alerts the anti-corruption agency to the existence of corrupt activity. The second step is transforming this information into useful intelligence and the third step is investigating this intelligence in a way which will generate evidence to allow the prosecution of the corrupt.

Proactivity simply means not waiting for the information on corruption to come to the law enforcement agency as happens in a complaint reactive investigation, but seeking out this information from a range of sources. Proactivity, or intelligence-led investigation as it is sometimes called, is becoming increasingly important to law enforcement agencies as a tool to supplement and work in conjunction with complaint reactive investigations.

How does the anti-corruption agency develop intelligence sources? It does so, firstly, as part of its process of engagement with the community. This engagement can take many forms but one of the most important is that of developing contacts within the various elements of the public and private sectors. This is quite separate from developing informants. Rather this is a form of liaison work. As people get to know the anti-corruption agency and get to trust it, they will be more inclined to pass on pieces of information to it. Such persons are not paid informants. They are public-spirited members of the community, who, because of their work, become aware of matters which might otherwise not become known to the anti-corruption agency. When they pass on a piece of information known to them, they are not making a complaint as they may not know whether corrupt conduct is actually taking place. But what they have encountered causes them to be sufficiently concerned at the possibility of some form of serious irregularity that they wish to refer it to the anti-corruption agency.

Another source of corruption information comes from informants who generally fall into two categories. The first is people from the underworld who are of a dubious character, probably with criminal records, and who maintain associations with people inhabiting this world. By this means, they have access to information on the activities of the people with whom they associate. No law enforcement agency can operate effectively if it does not have sources within the criminal underworld. Acquiring and developing these sources is not easy and great care must be taken in handling them. The informant may be hoping for a reward or trying to exact revenge. He may even be deliberately trying to mislead the law enforcement agency. Informants are not usually acting out of a sense of public spirit and good will and they and honesty are more often than not strangers to each other. Nevertheless, if treated with caution, informants can be a very valuable source of intelligence.

The second category of informant is a person working inside the organization in which corruption is occurring, and who has knowledge or suspicion that corruption is taking place. This kind of person

is also known as a "whistle blower". When corruption information is provided by a "whistle blower", his/her anonymity must be preserved. Under section 30A of our POBO, it is an offence to disclose the identity of a complainant or informer unless he/she testifies as a witness in the relevant criminal proceedings.

The most productive type of informant is the one who can facilitate the infiltration of undercover agents to collect direct evidence of corruption against the offenders. However, when embarking on an undercover operation, a proactive form of investigation, the safety of the agent should always be the primary concern. In no circumstances should the operation continue if the agent is at risk. Tape recordings should be made, as far as practicable, of all meetings between the suspects and the agent to preserve evidence. There should be a proper system in place to log these audio or video tapes. Strict adherence to a system is required as these tapes may be of evidential value and their authenticity may become an issue at the time of trial. Furthermore, the undercover agent must make notes at the first available opportunity after each meeting whilst his/her memory is still fresh. No matter how good his/her memory is, his/her testimony will be queried in the absence of any notes to support it if he/she subsequently testifies at court. Every undercover operation entails an element of risk to the agent and therefore it should not go on for too long a time. Investigators therefore work under time constraints.

Intelligence gathering, therefore, is all about obtaining pieces of information from different sources that help you to piece together a clearer picture of a corruption problem. No law enforcement agency can be effective unless it possesses the capacity to acquire criminal intelligence, to analyze it and to develop it into investigations that are able to detect crime and produce evidence that will enable the successful prosecution of those complicit in it.

In investigating corruption, problems are encountered by the law enforcement agency at both the covert and the overt stages.

3. The Covert Stage of the Investigation — Developing Intelligence

At the covert stage of an investigation, the law enforcement agency is developing its intelligence in order to confirm that criminal activity has taken place or is about to take place, to identify those involved in it and to learn what they have done or intend doing and when and where they did it or intend doing it. At this stage, telephone interception can be a very valuable intelligence gathering tool. In Hong Kong, telephone interception and electronic surveillance are regulated by the Interception of Communications and Surveillance Ordinance (ICSO) which requires that any telephone interception or certain type of covert surveillance be authorized by a High Court Judge. To ensure compliance by law enforcement agencies when conducting telephone interception and covert surveillance operations, there is a Commissioner on Interception of Communications and Surveillance who oversees all such operations.

It is our experience that telephone interception provides law enforcement agencies with the means to acquire useful intelligence at the covert stage. It enables us to confirm that criminal activity is about to take place or has taken place, it helps us to identify the suspects and it provides us with information on their plans and how they are going to carry them out.

In order to properly develop this intelligence, the law enforcement agency must have the capacity to conduct physical surveillance. Physical surveillance enables the law enforcement agency to identify the relatives and associates of the suspects and the places they live, work and frequent.

Also during the covert stage, evidence can be obtained from public records, such as companies and business records, land registry records, etc. Evidence can also be obtained from confidential records possessed by organizations such as banks, financial institutions and government revenue department.

By all of these means, a picture is gradually revealed of who is doing what, where and when. It is crucial that at the covert stage the investigators are able to pull aside as much of the veil of secrecy as they can. The overt stage of the investigation takes place when suspects are arrested and interviewed, when search warrants are executed and civilian witnesses approached and statements taken from them. The effectiveness of any interview with a suspect will largely depend upon the investiga-

tors being able to convince the suspect that they already know what he has been doing. If the investigator is questioning from a position of ignorance, he is likely to lose his advantage of dominance over the suspect.

But, returning to the covert stage of the investigation, how else might the investigation be developed, especially how might it be developed to generate admissible evidence? One such way is by electronic surveillance. In Hong Kong, covert surveillance involving the use of surveillance devices is regulated by the ICSO and the product of covert surveillance is admissible in court. Electronic surveillance can take many forms. The obvious and most common forms are audio and visual surveillance by means of surveillance devices to obtain evidence of meetings amongst the suspects and of what is said during the meetings.

Another such way is by undercover operations. Undercover operations can be a particularly effective means of penetrating the criminal enterprise and obtaining evidence against all who are part of it. But undercover operations can be resource intensive. They require the use of physical and electronic surveillance and telephone interception. Those working undercover may have to assume different identities and their private lives will be disrupted. Their lives may be placed at risk. There are many problems and risks associated with undercover operations but the end result can be enormously successful in terms of the evidence they generate.

Another subject that is worth mentioning is ambush operations. An ambush operation takes place when the anti-corruption agency is aware that a corrupt payment will take place at a particular location on a particular day and arranges its officers to lie in wait and arrest the suspects as, or shortly after, the corrupt transaction is concluded.

By all the aforesaid means the anti-corruption agency is able to make use of the covert stage of the investigation to gradually remove as much as possible the veil of secrecy surrounding the corrupt activity. It may start with only minimal information but it gradually develops it into useful intelligence and the intelligence into admissible evidence.

4. The Overt Stage of the Investigation

The problems encountered by investigators are not confined to the stage of covert investigation, however. At the time of overt action, the most important task is to secure the evidence before it is destroyed. Good planning for overt action is the key to the success of every corruption investigation. This is because the secretive nature of the crime renders it difficult to collect evidence at the covert stage and if the evidence is not secured at the first available opportunity when overt action is taken, it can easily be destroyed.

Unlike other crimes where evidence may be available at the crime scene, evidence of a corrupt transaction need not be present at the scene, even in an "ambush" situation when the suspects are arrested. If money does change hands, it is of utmost importance to recover the bribe money at the scene. Thorough planning for the overt action or "ambush" should include a contingency plan in case of any sudden last minute change in the arrangement by the suspects.

Since corruption entails secrecy and a "satisfied customer" situation, sometimes it is necessary to get the cooperation of accomplices in order to get evidence against the main culprits. Consideration may have to be given to gaining the cooperation of accomplices who played a lesser role in order to implicate the main culprits. This, however, is a matter on which legal advice should be sought and followed.

5. Evidence Collation and Analysis

Financial analysis of the involved persons will very often be conducted at both the covert and the overt stages of investigation. This includes retrieval of financial transactions records from banks and financial institutions, property transactions records and other investment details. Analysis of such data helps identify payments of bribes and laundering of corrupt proceeds. This is done not only for the purpose of evidence collection but also with a view to restraining and confiscation of the ill-gotten gains.

With the increased use of off-shore bank accounts as vehicles to eventual disposal of bribe monies, laundering of crime proceeds has now taken a more convoluted route and become more difficult to be unveiled and detected by law enforcement agencies. This necessitates the deployment of experts with the required professional knowledge and skills to do fund tracing and asset identification to prove the chain of bribe payments and to identify, freeze and confiscate the crime proceeds. To this end, the ICAC has its own in-house Forensic Accounting Group, staffed by qualified accountants, to conduct fund tracing and financial analysis and to give expert evidence in criminal proceedings. There is also a separate Proceeds of Crime Section specifically tasked to deal with the identification, freezing and confiscation of corrupt and related crime proceeds. It cannot be emphasized enough that apart from imprisonment, an effective deterrent that can be imposed on the corrupt is to deprive them of their ill-gotten gains.

Another important aspect of evidence collation which requires professional skills is computer forensics. Advances in technology have both posed difficulties to, as well as provided additional avenues for, evidence collation. On one hand, the ever-increasing use of smart-phones and the internet has provided the criminals a convenient platform to communicate with one another in furtherance of their crime. On the other hand, this provides additional avenues for law enforcement agents to gather evidence. To this end, officers of our Computer Forensics Section apply their knowledge and expertise to retrieve evidence of corruption and give expert evidence in criminal proceedings.

6. After Overt Action

The problems do not cease after a case is turned overt. When the evidence comes from an informant with a criminal background, it is almost certain that his/her credibility and bad character will be attacked by the defence. It is, therefore, unsafe to proceed with a prosecution based merely on the uncorroborated evidence of a tainted informant. The same problems apply to cases where an accomplice testifies for the prosecution. Because of his/her status, he/she will be regarded as a tainted witness when he/she testifies under immunity. Therefore, it is important to get corroborating or supporting evidence and not to solely rely on the evidence of immunized witnesses to prove a case of corruption.

Safety of witnesses is another problem that may be encountered by investigators. If the law enforcement agency's assessment is that the safety of a witness or his/her family members is at risk, it will be necessary to arrange protection for them. Pursuant to the Witness Protection Ordinance, the Witness Protection Section in the ICAC is tasked to implement the Witness Protection Programme to ensure the personal safety and well being of ICAC witnesses who may be at risk as a result of their assistance in ICAC investigation and subsequent prosecution. This implements what is required under Article 32 of the UNCAC.

IV. CORRUPTION — A TRANSNATIONAL CRIME

The increasing mobility in international travel and the rapid means by which money can now be transferred have assisted criminals to evade justice by fleeing their jurisdictions and hiding or laundering their corrupt proceeds. The rapid development of international financial and banking systems has enabled the speedy transfer of money from any one place in the world to another. As corruption has become increasingly transnational, so the fight against corruption has become more proactive requiring more and more investigations to be undertaken jointly or with the cooperation with our counterparts in other jurisdictions. To this end, the UNCAC provides a timely set of benchmarks for the criminalization of corruption and the development of a global consensus for the implementation of anti-corruption measures and strategies.

To be able to effectively investigate any form of transnational crime, including corruption, close liaison and mutual cooperation with law enforcement counterparts on the regional and international fronts are important. To achieve this, there needs to be partnerships between jurisdictions that will provide prompt, efficient and responsive cooperation of both a formal and informal nature that cater to the requirements of both the requesting and requested jurisdictions.

Informal cooperation between law enforcement authorities is quick and effective and there is

significant scope for expansion of this process at both the covert and overt stages of an investigation. At the covert stage of investigation, informal mutual assistance involves the sharing of intelligence and the conducting of joint investigations including undercover operations. But this can only happen if the party seeking assistance can trust the party providing the assistance not to breach the secrecy of the investigation. Over the years, the ICAC has worked hard to build up such trust and to develop close relationships with overseas law enforcement agencies and the cooperation this has produced has been of great assistance in the investigation of cross border crimes.

At the overt stage of investigation, the collection of evidence will be with a view to prosecution and so must be obtained without delay. The delay in obtaining evidence can pose great problems to law enforcement officers, such as ensuring witnesses remain cooperative or running a prolonged witness protection programme. As witnesses have to testify based on their memories, the longer the delay, the poorer their memories are likely to become. Long delay can also lead to an application by the defence for a stay of proceedings based upon a claim that the delay has prejudiced the defendant's right to a fair trial. If such a claim by the defence is successful, the confidence of the public in the effectiveness of the criminal justice system is placed at risk.

The importance of expeditious mutual cooperation from foreign jurisdictions can be illustrated by a case example. This case involved an arrest operation conducted by the ICAC. Under Hong Kong law, an arrested person can be detained up to a maximum of 48 hours. Very soon after the suspects were arrested in Hong Kong, we were able to obtain assistance from a law enforcement agency in another part of the world to locate a very important witness whose evidence was crucial to the case. Within hours ICAC officers flew to that jurisdiction to interview the witness and secured importance evidence before the arrested persons were released on bail in Hong Kong.

Apart from informal cooperation, there must also be put in place a legislative underpinning to the obtaining of evidence, in an admissible form, outside the jurisdiction for use within the jurisdiction. This is referred to as mutual legal assistance (MLA). The breadth of MLA, ranging from collection of evidence to search of premises and to asset recovery, can be seen in the articles of UNCAC. MLA is a very important part of the UNCAC and State Parties are encouraged to develop both official and unofficial channels for working more closely together and helping one another.

V. CASE STUDIES OF CORRUPTION INVESTIGATION

The above gives a general idea of the problems that are often encountered by anti-corruption agencies in investigating corruption. In order to better illustrate some of these problems, two cases investigated by the ICAC detailed below reveal what problems were associated with them and the way we went about tackling them.

A. "Operation Bridge": A Proactive Success Story

"Operations Bridge" illustrates the effectiveness of deploying special investigative techniques in an undercover operation. It concerned an investigation into the corrupt activities of three government officials, one from the Customs and Excise Department and two from the Immigration Department. Because of their law enforcement backgrounds, they were extremely alert and this posed difficulties to us when we deployed covert investigative methods. The breakthrough came when we deployed an undercover agent, from an overseas law enforcement agency which rendered great assistance to the ICAC in this particular investigation. Since the undercover agent was non-Chinese, the corrupt officials did not have any suspicions of him and they let down their guard and were at ease when they engaged in conversations with the undercover agent in order to further their corrupt activities. All their discussions and meetings were audio/video tape-recorded and transcribed, and subsequently produced at court. The three government officials and others who were involved were all convicted and received heavy penalties.

This undercover operation produced very good results which would not have otherwise been possible had there not been the infiltration by the undercover agent. Thus in investigating secretive crime of this nature, an imaginative use of special investigative techniques is necessary in order to achieve what might otherwise not be achievable. Of course, in this unique undercover operation, it

would not have been possible without the support of our overseas counterpart who agreed to deploy the undercover agent to assist us.

The importance of proactivity and international cooperation is recognized by the UNCAC which specifically encourages joint investigations and international cooperation in fighting corruption. The value of international cooperation cannot be emphasized enough especially in an era when crimes, including corruption, is increasingly becoming more transnational in nature.

It is worth mentioning that at the covert stage of investigation of "Operation Bridge", an associate of the informant who was the Immigration Chief of an overseas jurisdiction visited Hong Kong. The Immigration Chief solicited huge sums of money from the informant in return for the sale of diplomatic passports of his country. In response, the ICAC deployed one of its own officers as an undercover agent and posed as the head of a drug trafficking syndicate who wanted to obtain diplomatic passports to facilitate his transnational drug trafficking activities. The Immigration Chief was caught "red handed" in a hotel room when he accepted monies from the ICAC undercover agent, after he had stamped the official seal and issued diplomatic passports "under camera". He was prosecuted, convicted and sentenced to heavy penalty. The success of this undercover operation illustrates how important it is to "expect the unexpected" and how being prepared to react swiftly to an unexpected development enables the law enforcement agency to convert what might be regarded as a problem into an opportunity. In an undercover operation, it is not just necessary to be able to respond to changing circumstances, it is also necessary to be able to respond to such circumstances positively and to turn them to your advantage.

In its preamble the UNCAC recites that States Parties are: "Convinced also that a comprehensive and multidisciplinary approach is required to prevent and combat corruption effectively." This conviction has led to the inclusion of Article 50(1) which requires States Parties to take such measures as may be permitted by its laws and as may be necessary to allow for the use of controlled deliveries and special investigative techniques in order to combat corruption effectively. In Hong Kong, we have found that the use of these techniques, in the way described above, is crucial to ensuring our investigations are effective. Removing the many veils of secrecy surrounding corruption is never easy and law enforcement needs more than just hard work and persistence to do so. Being committed to the task is necessary but, on its own, is not enough. It must be supported by imaginative use of every investigative technique available.

B. Uncovering Bribery and Greed through Covert Surveillance

This case illustrates the effectiveness of using covert surveillance as an investigative tool to collect evidence. It concerned an Executive Director (ED) of a publicly listed company (Company A) who, through the arrangement of two middlemen, both investment advisers, offered bribes to a Fund Manager of an international financial institution for arranging the Funds managed by his financial institution to buy in a large tranche of Company A's shares. The ED also offered bribes to a Senior Analyst of an international investment bank in return for the latter causing a favourable research report to be written on Company A so as to promote its shares.

On the day of overt action, when the ED made a corrupt payment to the two middlemen, they were arrested red-handed. Subsequently the Fund Manager and the Senior Analyst were also arrested. When interviewed under caution by ICAC officers, they all admitted offering and/or accepting bribes.

The management of both the financial institution and the investment bank confirmed that none of their employees were allowed to accept any advantages.

In the course of covert investigation of this case, valuable evidence was gathered through covert surveillance by the audio and video tape-recording of two meetings held by the suspects.

The first meeting took place in a private room of a hotel restaurant. Present were the ED, the Fund Manager and the two middlemen. The second meeting took place in another restaurant in a commercial office building. Present were the ED and the two middlemen. During the two meetings, they discussed matters pertaining to their corrupt dealings. Both meetings were audio and video tape-

recorded by ICAC officers.

Though being severely challenged by the defence at the time of trial, the judge ruled the video and audio tapes admissible. Indeed, vital evidence was secured from the above two meetings through covert surveillance. Nothing could be more convincing of the guilt of the defendants than playing in court the actual conversations of them discussing their corrupt dealings. In view of the secretive nature of corruption, this type of evidence is not normally available. It was only through the effective deployment of covert means of recording that this highly incriminating evidence of the actions and words of the offenders could be obtained. A significant feature of this case is that it highlighted the need for a statutory backing to covert surveillance, an important area of law enforcement work. As a consequence of this case and other legal challenges, our Government conducted a review of the legal basis for telephone interception and covert surveillance and this led to the enactment of the ICSO.

After trial, apart from one of the middlemen who had testified under immunity for the prosecution, the ED, the Fund Manager, the Senior Analyst and the other middleman were convicted of bribery offences and were sentenced to imprisonment.[1]

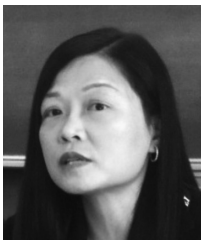
VI. CONCLUSION

As in any criminal investigation, success comes through commitment, hard work and persistence by persons who have been trained in how to investigate corruption. Despite all I have said, and the lessons that I have tried to impart, there is still no guarantee of success. Inevitably, there will be occasions when you know corruption has taken place, but you cannot prove it. You, however, must never allow failure to lessen your belief in the importance of what you are doing. The community is depending upon you to keep up your work even though there are times when you may be disheartened by your inability to prosecute the corrupt. So keep believing and remain committed, for the struggle is worth it in the end.

[1] On appeal, the conviction of the Senior Analyst was quashed as the Court of Appeal found the conviction, based on hearsay evidence, against him unreliable.

MEASURES TO PREVENT CORRUPTION AND TO ENCOURAGE COOPERATION BETWEEN ALL SECTORS OF SOCIETY

*Rebecca B. L. Li**



I. INTRODUCTION

Since its inception, the Independent Commission Against Corruption (ICAC) in Hong Kong, China has recognized that apart from enforcement, it is equally important to work with the community in order to develop an intolerance of corruption. It therefore has adopted a three-pronged strategy in combating corruption — enforcement, prevention and education.

Our first Commissioner, Sir Jack Cater, reported in the ICAC Annual Report for the inaugural year 1974 that "Combatting corruption is not just a matter of investigation and prosecution. There is much history behind corruption in Hong Kong and deeply ingrained attitudes are involved. From its very inception therefore the decision was made that the Commission should launch a three-pronged attack: that it should have, in addition to an investigating arm (the Operations Department), two other departments to be known as the Corruption Prevention and the Community Relations departments. The aim of the former being the elimination, as far as practicable, of the opportunities for corruption; and the aims of the latter, the education of the public against the evils of corruption and the fostering of public support generally in fighting corruption." The three-pronged anti-corruption strategy was, therefore, adopted by the ICAC in order to tackle corruption in Hong Kong on all fronts.

II. CORRUPTION PREVENTION

In providing corruption prevention advice to government departments or public bodies (and upon request, to private sector entities), our Corruption Prevention Department (CPD) will, after all relevant information has been collected, identify potential weaknesses in the system which create opportunities for corruption and make corresponding recommendations for their reduction if not elimination. Once the recommendations have been accepted by the relevant government department or public body, their implementation will be closely monitored by CPD until conclusion of the corruption prevention assignment.

A. Characteristics of Corruption Opportunities

In providing recommendations of prevention measures, it is necessary to identify features giving rise to opportunities for corruption in the relevant practices and procedures. Some of the recurrent features are detailed below.

1. Outdated or Inadequate Policy

Fundamental to each corruption prevention study is the policy behind the practice or procedure under review by CPD. In a number of studies, it has been found that the basic fault is an obsolete policy or the total lack of policy so that procedures may exist, either wholly or partly, to give effect to a policy that is no longer relevant or necessary. In effect this could mean that no one in the department has any knowledge of what is required, leaving scope for staff at all levels to create their own aims and objectives, perhaps with corrupt ends.

2. Un-enforced or Unenforceable Legislation

Legislation can provide opportunities for corruption, particularly if it is unenforced or unenforceable. The continued existence of outdated, inadequate legislation may be due to the failure of depart-

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ments to review their own legislation or a lack of communication between the enforcement agency and the law-making authority. Corruption opportunities exist for law enforcement officers if they have laws at their disposal which cannot be enforced consistently, are unenforceable, or are known by the public that they can be varied in their application by relatively junior officers. Toleration of illegal practices, then, especially when condoned by senior members of the department, renders all staff who are in contact with the public particularly vulnerable to corruption.

3. Lack of Supervision and Accountability

Problems may arise from a lack of supervision of junior staff, particularly those who operate away from the office. Often supervisory staff are preoccupied with their own duties, frequently of an administrative nature, which may keep them at their desks most of the time. Attempts to supervise are often made merely by correspondence on file, which is but an incomplete form of supervision. Not only is there often inadequate supervision, in some instances government officers, especially those charged with monitoring and inspectorate duties, may perform their duties perfunctorily with limited sense of accountability.

4. Insufficient Publicity

The lack of publicity on government practices and procedures may create opportunities for manipulation by dishonest officers. Not only should the public be made aware of government's aims and procedures, they should also be educated to realize, and therefore, to exercise, their rights as members of the community.

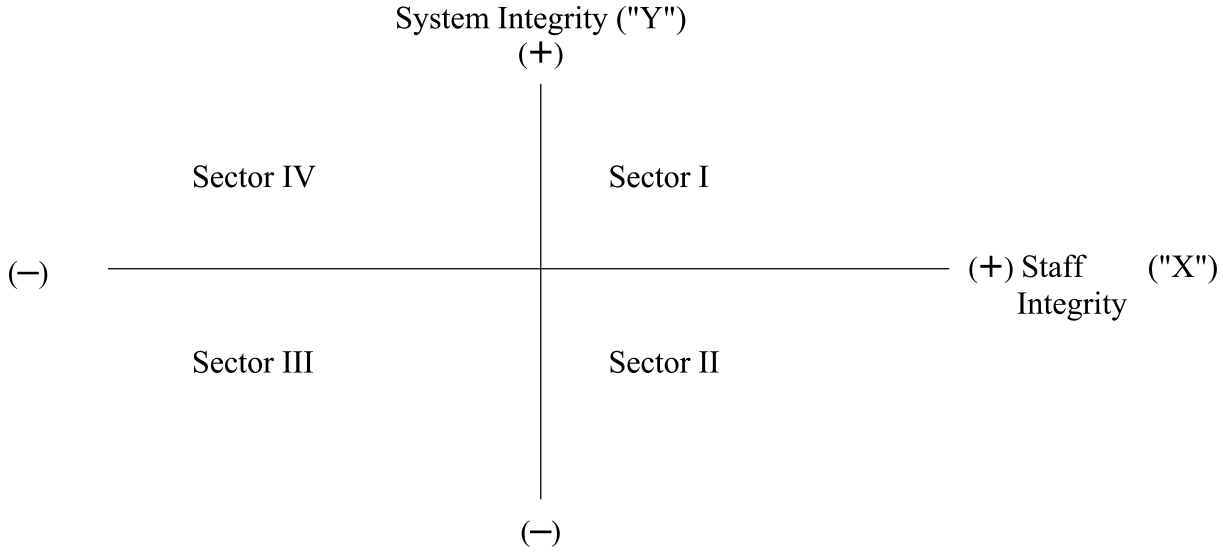
5. Delay

Delay, whatever the cause, provides obvious scope for corruption, as long as there are people who are prepared to pay and/or there are public servants who demand or accept bribes for expediting a case. Delay provides both the opportunity to extort a bribe and the incentive to offer one. It is also an inevitable consequence of the complex bureaucratic processes of a society.

B. Organizational Integrity

To better appreciate how organizations, in particular public organizations, fall prey to corruption and malpractices, it would be useful to make reference to an Organizational Integrity Grid, with the X axis denoting "Staff Integrity" and the Y axis "System Integrity". An organization's system integrity and staff integrity are rated and it is then placed in the grid for analysis.

Organizational Integrity Grid



1. System Integrity

Factors which affect the rating of an organization's system integrity include the organization's policy commitment on integrity; a corporate culture of ethical behaviour; zero tolerance on corruption

and other malpractices; promulgation of and adherence to a staff code governing probity issues; a declaration system for managing conflicts of interest; an accountable hierarchal structure with well defined duties and responsibilities; laid down procedures and clear instructions; publicized performance pledges; an effective checking and reviewing mechanism; a complaints handling system for external and internal complaints (whistle-blower policy); a stringent staff recruitment, development, performance management and monitoring policy; and compliance with laid down policies and procedures, etc.

An organization which possesses the above factors will score high along the Y axis and depending on its score against "Staff Integrity" will be placed either in Sectors I or IV of the Organizational Integrity Grid. On the other hand, an organization lacking in the above factors will score relatively low and may end up in either Sectors II or III, again depending on its rating under "Staff Integrity".

2. Staff Integrity

While rating an organization's system integrity can be based on various objective factors, the measurement of staff integrity of an organization is much harder as subjectivity is involved. The common values which affect staff integrity include morality, honesty, impartiality, fairness, righteousness, conscientiousness, anti-nepotism, attitude against bias and prejudice, and sense of remorse, etc. These are essentially personal attributes and are difficult to be measured objectively. Other than using psychometric tools to gauge the level of integrity of individual staff members thereby reaching an overall rating for an organization, the level of staff integrity of an organization could also be inferred from incidences of failure in staff integrity related issues, including actual and alleged corruption and fraudulent cases. An organization with a relatively high rating under "Staff Integrity" will be placed either in Sectors I or II, depending on its score on "System Integrity". Conversely, an organization with a relatively low rating under "Staff Integrity" will end up in either Sectors III or IV.

3. Rigorous Enforcement

While an organization in Sector I of the Organizational Integrity Grid denotes both its system integrity and staff integrity are positive and hence less likely to be victimized by corruption or other malpractices, an organization in Sector III will be much more prone to problems as any unscrupulous staff member could easily take advantage of the various loopholes in the organization's system for personal gains probably to the detriment of the organization. Not many organizations will thrive for long should their parasitic staff members behave corruptly.

To tackle cases in Sector III, the immediate and obvious solution would be rigorous enforcement by the relevant law enforcement authority; provided that the organization concerned is able to detect and willing to bring forth such cases to light, the latter is unlikely to be an issue for government departments or public bodies as they are publicly accountable but would be more prevalent in private organizations which might have commercial or other short term considerations for reporting such cases. Nonetheless, should an organization be able to detect irregularities and be willing to report them to the authorities, then effectively its rating on organization integrity should rise which would benefit it in the longer term, along with the adoption of other integrity enhancement measures discussed below.

4. Integrity Enhancement and Maintenance

Arguably for organizations placed in either Sectors II or IV, they should be comparatively safer than those organizations in Sector III because either their systems are sound (Sector IV) or they are run by staff who would not take advantage of any system loopholes (Sector II). Problems associated with integrity apparently will not fall on them; but is this true? It is appreciated that complacency breeds contempt but misplaced complacency breeds more than contempt as it often is the root cause of future problems, and more so for complacent organizations which unfortunately may find themselves caught off guard. The eventual price to be paid could be huge as the organization's goodwill will be at stake.

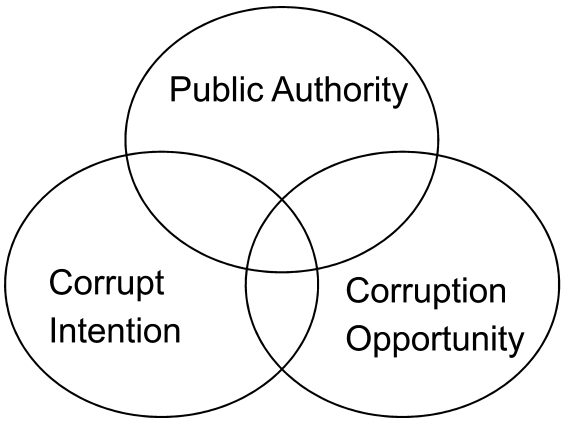
It must be pointed out that the ratings for both system integrity and staff integrity of an organization are both relative in nature and are not absolute. The integrity factors of an organization do not remain static and will change in response to the operating environment and the prevailing norms (market norms for private organizations). Hence it would be in the interest of an organization in either Sectors II or IV to be watchful about its low ratings and take positive measures to enhance those integrity factors it lacks with a view to eventually moving to Sector I. Depending on the nature of the

integrity factors, our CPD is able to offer corruption prevention measures to organizations to directly address the deficiencies identified for system integrity related issues; while our Community Relations Department (CRD) will assist with staff integrity related issues. As integrity issues are dynamic in nature, organizations must recognize that even though they are in Sector I, they have to continually and proactively monitor and maintain their hard-earned stature lest they be relegated to other sectors without realizing it until it is too late.

For an organization in Sector III, it should be obviously necessary for it to adopt decisive measures to enhance all integrity factors; tantamount to a complete revitalization or rebirth of the organization. It is therefore important for these organizations to be aware of the services of our CPD and CRD which can help these "victims of corruption" to benefit from integrity enhancement measures to enhance their system and staff integrity. The above discussion on organizational integrity reflects the three-pronged strategy to attacking corruption holistically.

C. The Fundamental Conditions for Corruption in the Public Sector

The presence of corruption opportunities (COs) by itself does not indicate that such opportunities are being exploited. The following schematic diagram would help explain the fundamental conditions under which COs could be exploited. In order for COs to be exploited, there must exist two other enabling conditions: public authority and corrupt intention. Thus, to prevent corruption from occurring, preventive measures must be introduced to manage these fundamental conditions.



1. Enhancing System and Staff Integrity

Elimination of, or reduction in, COs can be achieved by way of improving system integrity. In respect of corrupt intention, the stepping up of staff integrity is the most effective way to curb such intention by way of promulgating positive values amongst the staff concerned. That said, corruption thrived in Hong Kong in the 60s and 70s because more often than not petty corruption was accepted by many as a means to supplement official emoluments which were then not high. Hence in addition to imparting positive values, it is also necessary to review pay packages and associated benefits to help make sure that the overall pay package will allow an honest public official to maintain reasonable living for himself/herself and his/her family without the need for him/her to resorting to corruption to supplement his/her income except for satisfying his/her greed.

2. Public Authority and Accountability

In order to be corrupt, a public official must have the public authority to enable him/her to either abuse the entrusted authority or to gain from its proper exercise. Hence measures have to be introduced to guard against abuse of such authority and to step up the accountability of the system when public authority is being exercised. Coupled with the introduction of the system integrity measures to reduce or eliminate COs and the enhancement of staff integrity measures, they should go a long way to curbing abuse of authority.

D. The Corruption Prevention Principles

Based on a multitude of corruption prevention assignment reports completed by our CPD over the years, COs in public systems could be effectively reduced if the systems satisfy the broad principles in

that they should be **F**air, **A**ccountable, **S**imple and **T**ransparent, giving rise to the acronym FAST, which provides for a simple set of working tools for examining public systems so that potential problematic areas identified could be suitably addressed to safeguard the system against corruption and malpractices. Thus, if a public system could be made fair, accountable, simple and transparent, then the system should become more corruption resistant.

1. A Fair System

In public administration, particularly in resource allocation, the fundamental principle to be observed is fairness, which means that every eligible applicant who is entitled to the public service has a fair and equal chance of receiving it.

2. An Accountable System

All officers involved in a system have a role to play and each is expected to perform to the best of his/her abilities with the resources given, in accordance with laid down instructions and within any stipulated time frame. Cases should be subject to random supervisory checks and managerial supervisors aware of any prevailing issues affecting the performance of the system.

3. A Simple System

Any system which is highly complicated with elaborate procedures, involving a large number of authorities or departments, is bound to attract middlemen and the likelihood of anxious applicants resorting to corrupt means to expedite the process. Hence any system should be made simple as far as applicants are concerned.

4. A Transparent System

With rising public expectations on accountability in public administration, members of the public are entitled to know and question public policies, decisions and actions. From the corruption prevention angle, transparency is essential to allowing public monitoring on government systems and the associated decisions and actions.

E. Procurement Management — A Case Example of Limiting the Opportunities for Corruption

Corruption prevention, as mentioned above, seeks to identify weaknesses in an organization, its structure, processes and staff in order to discover where it might be vulnerable to corruption and where opportunities might exist for corruption to occur within that organization. Now I want to discuss a core part of an organization's processes, the procurement process, to illustrate how corruption prevention can help to minimize, if not eliminate, opportunities for the corrupt exploitation of this important administrative process.

Procurement is undoubtedly an activity of concern to both public and private organizations as it has the potential for serious loss to an organization, public or private, through corruption and malpractices. A prudent and accountable procurement system should ensure that goods and services are purchased in a competitive and equitable manner as well as through a process which provides value for money. The process should be transparent and accountable.

The basic control principles for procurement entail a fair, open and effective procurement system with appropriate checks and balances. The procurement authorization levels and their corresponding financial limits should be clearly set out with full knowledge by the staff concerned. Requisitions should be approved and quotations or tenders should be adopted in accordance with laid down financial limits.

Segregation of duties is of utmost importance to avoid a single staff member from being able to initiate an order, place and receive the order as well as effecting payment to the supplier concerned. Such functions should be segregated and subject to checks. Any potential conflicts of interest should be properly managed to protect the organization as well as the staff involved in the procurement process from possible perceptions of impropriety. The whole procurement process should be fully documented to provide an audit trail and allow for subsequent compliance checking.

Thus, from the emergence of the novel idea of corruption prevention to the consolidation of the

FAST working tools for improving public systems, corruption prevention has indeed proved to be one of the essential and complementary prongs of the ICAC's holistic anti-corruption strategy.

III. COOPERATING WITH THE PUBLIC AND PRIVATE SECTORS

One of the statutory duties of the ICAC is to educate the public on the evils of corruption and to enlist their support in the fight against it. To this end, we aim at changing the mindset and attitude of people through education and integrity promotion. We put emphasis on people. We see people not only as targets for conveying anti-corruption messages; we see them also as our change agents and multipliers. No matter which sector they belong to, we hope to rally their support for the anti-corruption cause and to encourage them to join forces with us. One strategy adopted by our CRD to achieve this objective is to identify and work with influential partners. By so doing, we hope to reach out to more partners and more multipliers and gradually forming a tremendous force in building a clean culture in society.

A. Partnership to Combat Corruption — The Ethical Leadership Programme

In the government sector, our goal is to help create a culture of integrity in the civil service. We firmly believe that an ethical culture is the best defence against corruption. In reaching this goal, we have partnered with the Civil Service Bureau (CSB). The CSB is a policy bureau assuming the overall policy responsibility for the management of Hong Kong civil servants. It maintains close contacts with other government bureaux and departments to ensure that the Administration is staffed by an effective and clean civil service. With our common goal in mind, the ICAC and the CSB have, for the last decade, jointly embarked on a series of programmes to encourage government departments and bureaux to take steps to promote integrity culture in their organizations. The Ethical Leadership Programme (ELP) is the most significant effort made by our CRD in recent years.

The ELP was launched in December 2006. It has two significant features. The first one is the appointment of an ethics officer in all government organizations and the second one is the establishment of a standing mechanism for regular communication among ethics officers and with the ICAC and the CSB.

1. Appointment of Ethics Officers

Under the ELP, each organization head is requested to appoint a senior directorate officer to be the ethics officer assisting him/her in developing and sustaining ethical culture in the organization on a long-term basis. Ethics officers assume the overall responsibilities of all tasks related to integrity management. Such tasks cover areas like cultivation of values; setting and maintaining a high standard of probity amongst staff; conducting reviews of procedures and systems; arranging education and training for staff; and providing guidance and ensuring enforcement of the requirements and the standards set. These tasks may not be new to government organizations but with the appointment of ethics officers, they can be performed, monitored and reviewed on a regular basis in the context of a well coordinated integrity programme plan.

2. Mechanism for Communication

To facilitate the exchange of views, experiences and information among ethics officers and with the ICAC and the CSB, periodic workshops on different topics concerning integrity, conduct and discipline are organized for ethics officers and their assistants every year. Workshops have been organized and the topics covered included administration of staff discipline; investigative skills in handling staff discipline cases; and contract management and supervisory accountability.

In addition, an intranet for ethics officers has been developed to facilitate communication and provide up-to-date information and reference materials related to integrity issues to ethics officers and their assistants. Contents uploaded include service-wide regulations on conduct matters, provisions of the anti-bribery law; publications on subjects related to integrity of civil servants as well as information on integrity promotion events.

To help the ICAC and the CSB better understand the progress and needs of the organizations so that ICAC can perform its assisting role more effectively, ethics officers are requested to send annually to

CRD a summary of their integrity promotion efforts.

The ELP has generated positive outcomes with more organizations assuming ownership of their integrity programmes and more senior staff getting involved in setting the direction of their integrity management initiatives. After all, ownership and leadership are the key pillars of the ELP, without which integrity messages cannot be spread to the civil service effectively.

With the platform and network established, we will continue to strengthen our partnership and communication with government organizations, identify their needs and provide the necessary services. More importantly, we shall continue to encourage organizations to work on the four Cs which we believe are the core elements in entrenching and sustaining an ethical culture in any organization. The four Cs are:

- Commitment by senior management
- Clear set of values and standards of behaviour
- Communication of the values and standards to staff
- Continuous and consistent actions in promoting integrity

Culture building is a long-term process requiring constant reinforcement and revised strategies. But steady, persistent and continuous steps in the right direction will certainly bear fruit in the long run.

B. Working Together with the Private Sector

Three Articles of the UNCAC, namely, Articles 12, 13 and 39, emphasize the importance of the relationship between government and the private sector and the relationship between the anti-corruption agency and the private sector in carrying out the anti-corruption responsibilities of enforcement, prevention and education. These obligations reflect the approach taken by the ICAC from the time of its inception. Since that time, the ICAC has been putting great effort into developing and fostering close relationships with all areas of the private sector.

In combating private sector corruption, success did not come easily as in the beginning, there was strong resistance from the business community. This resistance was partly due to a misconception that the ICAC was opposed to all business rebates and commissions — even ones accepted as normal and proper. However, through our corruption prevention and community education activities, we were able to dispel this misconception and today the business community is supportive of the ICAC and has become a key partner with it in the fight against corruption.

On the enforcement front, our investigating officers have established liaison contacts with all major banks, insurance companies, accountancy firms and other private entities for cooperation in the investigation of corruption offences in the private sector. The management of the private institutions or business firms may, through the liaison contacts, makes reports of corruption to the ICAC.

On the prevention front, the Advisory Services Group of our CPD offers, on request, tailor-made corruption prevention advice to any private organization on a confidential and free-of-charge basis. The service provided to such private organizations ranges from the compilation of a code of conduct for compliance by staff to a critical review of the organization's operational procedures to identify potential loopholes for corruption and malpractice and provide corresponding measures to plug the loopholes identified.

In enlisting public support in the fight against corruption, our CRD has been engaging the private sector as detailed below.

1. Hong Kong Ethics Development Centre

The change in attitude of the business sector, from one of suspicion of the ICAC and hesitation to working with it, to becoming an active partner in anti-corruption activities, is best seen in the setting

up of the Hong Kong Ethics Development Centre (HKEDC). The HKEDC was set up in 1995 to promote business and professional ethics as the first line of defence against corruption. Six leading chambers of commerce in Hong Kong are represented in an advisory committee to steer the work of HKEDC. The HKEDC provides a wide range of consultancy services on corporate ethics programmes, for instance, formulating and revising company codes of conduct, advising on systems control measures to plug corruption loopholes and suggesting tailor-made training.

The HKEDC also partners with various professional bodies and chambers of commerce in Hong Kong to disseminate ethical governance messages to their members. The HKEDC has co-organized seminars/workshops with different trade associations including those of small and medium size enterprises as well as with relevant professional organizations relating to accounting, securities, construction works, real estate, testing and certification, etc. It has established or maintained different networks with different trades and professions in the private sector to leverage their support for promotion of anti-corruption messages and corruption prevention services to their staff/member companies through workshops, sharing sessions and feature articles.

In the World Bank 2003 publication entitled "Fighting Corruption in East Asia", it regarded the HKEDC as a unique and practical model of public-private sector partnership, saying "having a government agency directly involved in the dissemination of business ethics is quite exceptional worldwide and reflects the very strong policy of prevention implemented in Hong Kong."

2. Interacting with the Business Sector

(a) Business Sector Talks

Since the 1990s, many commercial firms have actively put up requests for organizing corruption prevention staff training. In recent years, an average of 30,000 business executives are reached annually by CRD through talks, seminars, activities and special projects. CRD's presentations are not only focusing on legislation, but also on ethical practices and the managerial role in preventing corruption. Our colleagues would also tailor the content of the training programmes in accordance with the needs and concerns of different industries.

(b) Trade Specific Programmes

CRD identifies priority trades to spread anti-corruption messages. Trade specific programmes have been introduced in industries like banking, construction, insurance, estate agents and many others. To successfully build a culture of integrity in the business sector, we must win the support of the business community and secure their partnership and initiative to take the lead in promoting business ethics.

(c) Listed Companies and Directors' Ethics

An important initiative of CRD's partnership with the business community is its programme for listed companies. With Hong Kong being an international financial centre, listed companies form an important pillar of our economy.

From the financial turmoil in the late 1990s and the subsequent corporate scandals and failures, we all knew that senior management and boards of directors of listed companies play a vital role in preventing corruption and fraud, especially when ethical challenges confront them. CRD therefore organized with 12 key partners, including regulators and professional bodies, a Directors' Forum in 2007 and published a Toolkit on Directors' Ethics to provide practical tips for company directors to perform their ethical leadership role.

To sustain the momentum of the programme, CRD now regularly joins its partners, such as the Securities and Futures Commission of Hong Kong, Hong Kong Stock Exchange and the Hong Kong Institute of Directors, to arrange training for directors serving in Hong Kong listed companies and in Mainland China companies before listing in Hong Kong. CRD colleagues also actively approach newly listed companies within three months after their Initial Public Offers to offer their services.

(d) Continuous Professional Development Requirement

Many professional bodies have proactively partnered with CRD to promote professional ethics to their members. For instance, CRD's training videos have been incorporated in Continuous Professional

Development courses of different trades and industries to make business and professional ethics an integral part of the registration and licensing requirement of professionals.

(e) Guidebooks Publication

With the contribution and advice of various professional bodies, CRD has jointly published a number of practical guidebooks to introduce corruption prevention measures and highlight the importance of ethics regarding specific professional practices.

(f) E-learning Materials

Using the digital platform, CRD has jointly developed e-learning packages with different professional associations, such as those for architects, engineers and surveyors. The e-learning materials provide scenarios, quizzes and guidance for these professionals to resolve ethical dilemmas that they may encounter in their workplace.

C. Engaging the Community in the Fight Against Corruption

There is no better formula for combating corruption than to engage the community. In doing so, our CRD has deployed both mass media publicity and face-to-face meetings with members of the public. They are used in a complementary way to increase both the breadth and depth of our probity messages. By means of the mass media, our messages could reach wide and far to the collective masses. Meanwhile, face-to-face contacts enable our messages to sink deep into the community.

To stimulate optimal impact, CRD's mass media publicity programmes and face-to-face anti-corruption education work are target-oriented and designed to address the needs of society in changing times.

1. Mass Media Publicity

From the outset of its educational work in the 1970s, CRD made extensive use of the media to change the public's attitude and to create an awareness of corruption and an intolerance of it. Nowadays, anytime, anywhere, through different media channels in Hong Kong, the community receives our message.

An effective medium in mass media is the use of short and sharp advertisements on TV. The ICAC was one of the first government departments in Hong Kong to spearhead the use of TV advertisements to disseminate educational messages. Alongside with TV advertisements, a number of posters on the same themes would also be produced to reinforce our messages.

Apart from TV commercials and publicity posters, production of TV drama series is another effective tool to galvanize community support. The episodes are based on real cases. They dramatically project the ICAC as a robust graft fighting agency with commitment and capabilities. They also communicate effectively to the public the evils of corruption.

Our corporate website provides an easily accessible channel for the public to obtain information about the ICAC's work and its latest developments. Thematic websites that are specialized for individual segments of the public were launched to provide tailor-made materials on corruption prevention. Some examples of these special segments include teachers, business executives, building management personnel, election candidates and even children.

The advent and popularity of social media opens up new fronts for us to engage in interactive communication with the internet community. For instance, we now have a group on facebook named "iTeen Xtra" for the youth and run a YouTube channel with videos about our work for the general public.

2. Face-to-Face Interactions

To complement the use of mass media for extensive publicity, we also reach out to the community by engaging in face-to-face interactions with members of the public. On one hand, face-to-face contacts allow our colleagues to grasp first-hand public sentiments. Their concerns could shed light on ICAC's work planning and long-term development. On the other hand, direct contacts provide us with the

opportunity to dispel any misconception by the community and hence help build up the long-term rapport and trust in the ICAC.

(a) Regional Offices

To reach out to the general public, we are now running seven regional offices in Hong Kong. Located in densely populated areas, these regional offices allow us to initiate proactive and intensive communication with the ordinary people in the street. Members of the public can also make corruption reports to any of these regional offices and their reports will be forwarded to the Report Centre to follow up.

(b) Involving Young People

To achieve sustainable control over corruption, the ICAC well understood in our early days that young people could not be ignored. To build up a community intolerant of corruption, we make sure that the younger generation ranging from kindergartens to universities receive our moral messages both in curricula and in activities.

CRD has been disseminating probity messages to the youth in the course of their school lives through teaching packages, educational projects or face-to-face talks/workshops. Over the years, CRD has produced a number of teaching packages to facilitate educators to instil moral values in students of various levels in class. It has launched a "personal ethics module" for incorporation into the university curriculum. Apart from the curriculum, CRD has also put in place a number of activities targeting the younger generation of various age groups starting from kindergartens. For kindergartens, CRD has created a set of cartoon characters for use in its moral education activity packages. The characters are featured in both TV animation series and story books to instil positive values such as honesty, fairness and self-discipline into kindergarteners. To appeal to the secondary school students who look for more challenging and interactive modes of communication, in recent years CRD has appointed professional drama troupes to develop interactive performances that draw young people's attention to the temptations that they may face.

(c) Launching Youth Engagement Integrity Programmes

Since the 2007/08 school year, CRD has been organizing the Ambassador Programme to mobilize tertiary students to promulgate anti-corruption and integrity messages to their fellow students through creative on-campus and inter-institution activities. During the 2013/14 school year, the programme has been extended to all the 17 local tertiary education institutions. In addition, the i-League was established in 2010 to engage the support of past ICAC Ambassadors. Currently, it has more than 500 members.

Riding on the momentum of the ICAC Ambassador Programme, an "i-Relay" Youth Integrity Project (YIP) with a Youth Summit in April 2014 is being organized to promote exchanges on integrity-related issues amongst tertiary students from Hong Kong, Mainland China and overseas.

A territory-wide iTeen Leadership Programme for senior secondary school students has been launched during the 2013/14 school year. The iTeen Leaders assist teachers in organizing integrity activities, such as a visit to the ICAC, interactive drama, video/microfilm show, mobile truck exhibition, etc. They will also be invited to join other voluntary services to promote anti-corruption work.

(d) Forging Partnerships with Educators and Parents

CRD has collaborated with teaching professionals in the production of anti-corruption and moral education resources for young people. These teaching professionals have been invited to join the working groups, conduct pilot teaching and provide feedback, etc. CRD builds teachers' network through the establishment of the Moral Education Website and the publication of the *ICAC Periodical*. CRD also produced parenting publications on positive values for parents. Short videos were also produced to support the organization of parent education programmes in schools.

(e) ICAC Club

After all these years, there exists in the society a group of staunch supporters of the ICAC. To provide a platform for these supporters to realize their involvement in the ICAC, the "ICAC Club" was

established in 1997. The Club gathers volunteers from all walks of life in a systematic and organized fashion to promote civic engagement in the anti-corruption work in Hong Kong. It now has a membership of some 1,500 who provide volunteer service to our daily work.

IV. CONCLUSION

Over the years, the one key message that has been brought home to us in our fight against corruption is that we cannot do it on our own and that any success we might have is largely due to the trust and support of the community we serve. We put considerable effort into developing that support through our community relations work. However, engaging with the community is also for the purpose of enlisting their assistance in preventing corruption from occurring. Our interaction with the community therefore has two key purposes: firstly to foster an intolerance of corruption; and secondly to, through their assistance, prevent corruption from occurring.

It is highly valuable to the ICAC that other than the private sector, public servants are also alert to the problems posed by corruption and how it might arise in their workplace. The ICAC corruption prevention work in the public sector is not just liaising with the senior management to develop less corruption prone administrative practices but is also about developing, amongst the staff, an awareness of and intolerance to all forms of corruption. Of course, ICAC's corruption prevention work is not confined solely to the public sector and it extends to the private sector as well.

ICAC's engaging all sectors of the community in the fight against corruption is instrumental to its success. The ICAC has been in existence since 1974 and since that time, we have learnt many lessons on how to deal with corruption and in this paper, I have tried to convey some of our experiences in the areas of corruption prevention and community education in the hope that they will be of assistance to our counterparts in other jurisdictions.

INTELLIGENCE BASED INVESTIGATION AND PROACTIVE INVESTIGATION: A WAY FORWARD

*Dato' Abdul Wahab Bin Abdul Aziz**

I. INTRODUCTION

Malaysian Anti-Corruption Commission (MACC) has operated as an independent agency since 2009 and the year 2012 earmarked as the year of transformation. The entire MACC workforce has absorbed and accustomed themselves with the various transformation implemented in aspects concerning operations, human capital management and prevention activities. However, the MACC has a long history in which the agency was established in October 1967. Working in the small units of the ***Anti-Corruption Agency*** (ACA) until it became ***National Bureau of Investigation (NBI)*** in 1982 involving national interest cases, and it was assigned back to ***ACA*** till 2009 to tackle corruption cases.

In its efforts to raise the level of confidence of the public and international fraternity as to the effectiveness of the MACC, investigation was one of the most important duties of the MACC that needed to be focused on. Due to the complex and involved cross boundary investigations, MACC has adopted a new approach, which is Intelligence based Investigation (IBI), through intelligence fact gathering.

Intelligence based Investigation (IBI) is a methodology which is essential in producing efficient and effective intelligence for the purposes of open investigations. The IBI approach not only shortens the completion time of an investigation but also enables effective pooling of various expertise needed in dealing with complex investigations to yield positive outcomes in every investigation. With advanced technology equipment, networking facilities and complete one-stop office facilities. Outlining of new SOPs and assembly of operational toolkits are currently in their pilot stages of implementation and development of structured training modules.

Fighting corruption is the priority agenda of the government. Nonetheless, the government alone would not be able to successfully eradicate corruption. The establishment of MACC is only a part of the official mechanism to fight corruption but the commission, however effective it is, would not be able to fully eradicate the scourge without the support and trust by all parties concerned.

Our Commission's logo "***Fairness, Firmness and Trustworthy***" is to ensure that all the Commission's actions are done fairly without any prejudice and discrimination in accordance with the law at all times. Besides firmness, the Commission will also investigate all the corruption cases objectively and impartially, and we keep our promise to discharge our duty with full responsibility at all times. Besides that, our client charter has promised to act on complaints on any form of corruption within 24 hours after receiving a complaint and a complainant will be informed upon request on the status of the complaint after 28 working days from the date of the report which he/she had made. I must stress here that only the legitimate complainants will be notified by the commission on the minimal status of the investigation without disclosing all the material evidence in order not to jeopardize the case.

For MACC, having a strong capability is easier said than done; the current success does not guarantee future success. In a way, it is a race against the corrupt and the criminal minded as they resort to use of technology and more sophisticated *modus operandi* to commit corruption. In order to secure the relevant evidence which builds corruption cases, right-minded officers trained by MACA must be prepared to cope with the spirit of the Commission and to combat the corruptors, regardless of his/her position in society or political parties.

*Director of the Malaysia Anti Corruption Academy (MACA).

In order to complete the basic training, the new cadets must undergo six (6) months basic training in various aspects and tools before they are posted for the on-job training. These enable them to be ready to fight corruption and carry out the agenda of the Commissions.

II. UNCAC RATIFICATION: OVERVIEW OF THE LEGAL AND INSTITUTIONAL FRAMEWORK AGAINST CORRUPTION OF MALAYSIA IN THE CONTEXT OF IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

Malaysia is a constitutional monarchy based on the British Westminster model. The power to enact laws is vested in Parliament at the federal and state levels. According to article 160 of the Federal Constitution, laws include written laws, the common law, and any custom or usage having the force of law. English law has been adapted to local circumstances. Following the common law tradition, laws are constantly developed through case law. Islamic law is applicable only to Muslims and is administered by state ***Syariah*** courts in matters not related to corruption.

Malaysia signed the Convention on 9 December 2003 and ratified it on 24 September 2008. The Convention entered into force for Malaysia on 24 October 2008. Among the relevant institutions in Malaysia that contribute towards the fight against corruption are the Malaysian Anti-Corruption Commission (MACC), the Attorney General's Chambers (AGC), the Royal Malaysia Police (RMP), the Royal Customs and Excise Department, the Financial Intelligence Unit of the Central Bank of Malaysia (FIU), the Ministry of Foreign Affairs, the Public Service Department (PSD), and the Judiciary.[1]

Malaysia is a member of the ***ADB/OECD*** Anti-Corruption Initiative for Asia and the Pacific, the South East Asia Parties Against Corruption (SEA-PAC) mechanism, the Asia Pacific Economic Cooperation (APEC) Anti-Corruption and Transparency Working Group, the Asia Pacific Group (APG) on Money Laundering, the Offshore Group of Banking Supervisors, the Egmont Group of Financial Intelligence Units, the International Association of Anti-Corruption Authorities (IAACA), the International Anti-Corruption Academy (IACA), INTERPOL, and ASEANAPOL. Malaysia has fulfilled the requirements of the Convention.

III. CRIMINALIZATION AND LAW ENFORCEMENT — OBSERVATIONS ON THE IMPLEMENTATION OF THE ARTICLES UNDER REVIEW

MACCA 2009 addresses the following important issues:

- *Bribery and trading in influence (articles 15, 16, 18, 21)*
  Sections 16, 17 and 21 of the Malaysian Anti-Corruption Commission Act of 2009 (MACCA) criminalize active and passive bribery. In all cases the penalty is imprisonment for up to 20 years and a fine, as defined in section 24 of MACCA.

- ***Participation and attempt (article 27)***
  Section 28 of MACCA regulates all forms of participation. Section 107 of the Penal Code On abetment is also relevant. The interpretative notes in the Penal Code clarify that acts Page 6 of 502 of instigating, aiding or facilitating an offence can also be subsumed under the term abetting. The same interpretation is applicable for abetting under section 28 of MACCA.

- Criminal attempts are legislatively covered in section 28 of MACCA, section 4 (1) (a) of AMLATFA, and section 511 of the Penal Code. Section 28 of MACCA also covers "***any act preparatory to or in furtherance of the commission of any offence***".

A. What? — History of Intelligence Based Investigation

Today's achievement may go in vain if the investigation methods and strategies remain the same towards corruptors as yesterday. As we race against the corruptors somehow new counter forces need

[1] Malaysian Anti-Corruption Commission website: 〈http://www.sprm.gov.my/〉.

to be designed in order to prepare the minds and *esprit de corps* of the fellow officers to win the war against corruption. Once a corrupter has been brought forward to the court, all the methods and operation strategies of the commission have been exposed in the court, the potential corrupter changes his *modus operandi* to the new methods which are beyond the imagination of the enforcement agencies, thus creating new challenge for the commission to track down the *modus operandi*.

Early forms of Intelligence Based Investigation were introduced in Great Britain in the early 1990s and is based on the "Kent Policing Model".[2] This investigation focuses on the local crimes depending on the seriousness of the crime and carried out entirely by the intelligence unit. After the completion of the intelligence investigation, all the criminals will be handed over to the open investigation unit to be prosecuted. The "Kent Policing Model" was then upgraded to the new USA model. This new USA model is the combination of intelligence information center and multiple agencies.

Because of misuse, the word "intelligence" means different things to different people. The most common mistake is to consider "intelligence" as synonymous with "information." Information is not intelligence. Misuse also has led to the phrase "collecting intelligence" instead of "collecting information." Although intelligence may be collected by and shared with intelligence agencies and bureaus, field operations generally collect information (or data). Despite many definitions of "intelligence" that have been promulgated over the years, the simplest and clearest of these is "information plus analysis equals intelligence".[3]

1. Strategies of Intelligence

Intelligence is divided into strategic and operational intelligence. Strategic intelligence provides MACC policy makers with the information needed to make national policy or decisions of long-lasting importance. Strategic intelligence collection often requires integrating information concerning politics, economics, societal interactions, and technologies developments which focus less on the big scale. It typically evolves over a long period of time and results in the development of intelligence studies and estimates. Operational intelligence is concerned with current or near-term events. It is used to determine the current and projected capability of a program or operation on an ongoing basis and does not result in long-term projections. Most intelligence activities support the development of operational intelligence.[4]

Intelligence-based investigations are carried out by: collecting databases from public and private to analyze the information, creating a new intelligence product which covers the ways to handle the criminals and targeted groups, analyze the crime's trend to reduce it and setting up multiple objectives strategies.

2. Proactive Based Investigation from MACC's Perspective

Intelligence has been used in the past for the political motivated; however, it was the intelligence policing that sparked most controversy. Undercover policing within the MACC 2009 framework now has been widely used by its officers. On the contrary, it was widely accepted, as long as the MACC officers did not provoke the commission of crimes by those involved in the corrupt practices. Previously, Malaysian anti-corruption laws scholars of the time, similar to our counterparts elsewhere in some of the countries which did not focus on the anti-corruption works, were full of the academics, lawyers and considered these MACC works to fall outside of the framework of enacted legislation.

3. Legal Framework of Undercover Operations

In 2009, under the MACC act by the virtue of *Section 52*, in which the evidence of accomplice and agent provocateur.... (a)[5] no witness shall be regarded as an accomplice by reason only of such witness.... (b) ....*shall be presumed to be unworthy of credit by reason only of his having attempted*

[2] United Nation convention against Corruption, signature and ratification status as of 27 September 2003. ‹http://www.unodc.org/unodc/en/treaties/CAC/signatories.html›.
[3] *Intelligence-Led Policing: The New Intelligence, Bureau of Justice Assistance*, Marilyn Peterson, 2003.
[4] *Intelligence Collection Activities and Disciplines*, Greenbelt, MD: IOSS, April 1991.
[5] *Intelligence Collection Activities and Disciplines, Interagency OPSEC Support Staff, Compendium of OPSEC Terms*, Greenbelt, MD: IOSS, April 1991.

to commit, or abet, having abetted or having been engaged in a criminal conspiracy to commit.... And such evidence against such person.... (c) Any statement, whether oral or written, made to an agent provocateur by such person shall be admissible as evidence at his trial. The Anti-Corruption action the candidly stress that the successful use of the ruses to apprehend wrongdoers reflected the professional qualities of the MACC concerned. Action against wrongdoers without fear or favor to this evolution by issuing secret guidelines on the use of the so-called "*special investigative methods*", had entrusted to the most risky ones to specially trained and equipped special division within MACC also known as the special intelligence division which was led by a director. However, they accepted some of the proactive policing as a means to reach the targets of official investigation in the stricter, lawful, sense of the word.

B. Why?

1. Purpose of Intelligence Gathering

Due to effective intelligence operation conducted jointly by MACC and other relevant agencies, local government agencies combating "Sand" stealing, which is under the purview of the state government, the state officers are vulnerable to all kinds of threats while "on the beat" collecting information, these intelligence operation can be applied. However, the intelligence operations of the state and local law enforcement agencies often are plagued by a lack of policies and procedures.

To neutralize the problem, basic changes are required in the way information is gathered, assessed, and redistributed. All the traditional intelligence functions need to be overhauled and replaced with the cooperative, fluid structures that can collect accurate information for the end users faster.

— Syndicated crimes/organized crimes are alarming and naturally reduce the income of the nation's economy.

— Witnesses afraid of self-security due to threats and less patriotism

— Most of these syndicated crimes are against the public interest and the nation's security, and also the state's natural resources have been taken away without following the proper channels.

— Other relevant authorities, such as local enforcement not capable to encounter the threats of rings which need federal enforcement assistant to crackdown all illegal activities i.e Sand stealing, illegal mining, etc.

The ultimate purpose of proactive investigation is to assist open investigation by:

○ Improving in the overall intelligence operation

○ Solving issues or problems as a good planning techniques

○ Giving quality data analysis

○ Having better development techniques in operation and training

C. How?

The center nerve of intelligence is based on analysis of the collected data; intelligence always requires huge amounts of data and information. Traditionally, collecting data from various sources such as overt and covert, it has aspects of intelligence, with law enforcement and supporting teams dedicating significant resources to gathering data. Current trends should focus on the crime analysis methods which analyze the crime pattern, time-series, behavioral analysis and so forth.

One way to reevaluate intelligence is to include a feedback form with each product that is disseminated. To ensure that the comments made are valuable, the form should focus on the questions which need to be more specific, and it will be useful for intelligence purposes.

Identifying syndicated crime using the relevant approach, finished intelligence products contain

information that are compared, analyzed and weighted to allow the development of conclusions. Finished intelligence is produced through analytical review in the intelligence process. The intelligence process confirms a fact or set of facts through a multiplicity of sources to reduce the chance of erroneous conclusions and susceptibility to deception.

1. Tools

(a) Informants

An informant normally is a person who knows better about the crimes which are going to be investigated. Informants can help the intelligence in high profile cases which are hard to penetrate through normal investigation, by providing a better way for the investigation to start. If someone had been assigned, he or she may be limited to certain information, so all those involved should establish information-sharing databases and receive intelligence awareness training to be able to interpret information using analytical methods.

(b) Deep cover

The deep cover officers task would be to penetrate organized crime circles and collect and gather information which would be used as a strong starting point for open investigation; later they aim to arrest all those perpetrators and seize all the offence-related material to be used as evidence in the trials.

(c) Usage of UCA/UCO

The top management of the MACC would be justified in the withholding of this UCA status by pointing out that the UCA members would gather information and basically they would not be involved in the methods of open investigation. They would have to hand over the collected information to the investigation unit which was created within the intelligence division to established investigation units either in headquarters or zone for further investigation process.

(d) Law, SOP & Guidelines

Create proper SOP and guidelines, regardless of the size and scope of its intelligence operations. Every agency should have mission statements plus policies that can help define the support of command staff for intelligence purposes.

2. Process

The process of proactive based investigation involved:

Step 1 - Focus of the operations

— This IBI method only will be used for syndicated cases which are complex and involve a middle man, and the enforcement agency does not have a forthcoming witness which may lead to the open investigation. It will be carried out through few levels of operation which include intelligence work, undercover operations, spying and investigation.

Step 2 - Facilities in collecting data and information

— This strategy is very important in IBI and the basic technical aid for recording, interception and tapping is a must as a part of the evidence collecting method. Other facilities needed like transportation with a fake licence plate number, a safe house in a hidden place and fake identities for the undercover officers to ensure smooth intelligence operations.

Step 3 - Proactive measurements

— Proactive measurements should be always given a priority in IBI. The systematic working procedures are very important to make sure the operation's success. This method can be achieved by giving important priority to the project paper, using of the undercover officers and undercover agents, fixing the technical aids and zoning system in daily intelligence work.

Step 4 - Usage of informants

— Informant normally is a person who knows better about the crimes which are going to be investigated. Informants can help the intelligence in the high profile cases which are hard to penetrate, by providing a better way for the investigation to start.

Step 5 - Centralized information

— The final strategy in IBI is a centralized information system. By having this type of information system, the investigation can be accomplished in a short period of time, effectively and secretly. Normally a centralized system will be used to profile and intercept the suspects.

3. Training Aspects — Intelligence Based Investigation Course

As a training provider MACA, acting as the key to change within the organization, the recent emphasis on intelligence reveals that many MACC staff involved in intelligence do not fully understand the concepts of intelligence. Its purpose is to establish an awareness program for the young officers to know more about the Intelligence Based Investigation.

Training is basically 40 hours in length and should encompass the intelligence process, the importance of the adopting the IBI concepts, proper handling of information and intelligence, the analytical process, the development and implementation of the collection and plans; and also other ethical issues relating to intelligence.

The course focuses on:

i) Explaining the principle of the intelligence model at all levels and the roles of intelligence-led investigation

ii) Explaining how the intelligence requirement is necessary to intelligence-led criminal investigation

iii) Summarizing security issues in relation to integrity of systems and procedure in an intelligence environment

iv) Demonstrating a thorough understanding of the role of analysts and the need to manage the input of data

In this course would be shared the best practices and effective strategies, not just focusing on the offenders but the right and safe path for all agencies that combat organized crime. The main aim is to enhance the strategies and operational focus of organizations, federal, states and local entities.

The course contents focus on;

— ***National Intelligence model*** — This model was designed to focus on the collectively national agenda which involves local issues, cross border issues and serious and organized crimes.

— ***Intelligence cycle*** — Intelligence requires a leader to understand the basis for planning and conducting tactical operations, as to whether to use local operations or otherwise depending on the situation, particularly with the environment and potential threat. The leaders roles in identifying and understanding the key intelligence needs.

— ***Information management*** — The know how to handle the source person, and integrated intelligence approaches that bring together many different methods using intelligence as a threads to bind them.

— ***Adopting a Proactive Approach*** — This program uses proactive intelligence gathering, technology and teamwork to ferret out offenders in the community and uses that information to begin with surveillance ahead of the commission of the offence.

— ***Intelligence Product*** — The development of intelligence products requires the same responsibilities and resources based on four products, i.e. strategic assessments, tactical assessments, target profiles and problem profiles.

— ***Analytical Investigation Methods***[6] — To share the very basic investigative analysis techniques using information collected in databases. Further, one will understand and know how to use link analysis by various nationwide and regional databases, analyze the data processing and techniques used by investigators for investigation purposes. Develop and analyze flow charts to enhance the investigation.

— ***Operational Order and Briefing*** — Operational order, how the operational manner needs to be executed in applying all the intelligence methods. What a brief should consist of is important, but it is also important to know how to give and prepare a brief; above all it must be good, accurate, brief, and clear, and these should be kept in mind during the brief preparation and execution.

MACA has conducted this IBI course and it is designed to provide the intelligence analysis skills to the participants and focuses more on in intelligence process, critical thinking and undercover approaches and techniques. From the course, it develops knowledge, understanding, skills, attitudes, behavior and application on all aspects of the intelligence-based investigation, theoretically and practically. It is also to equip participants with the basic skills and expertise which are fundamental in the undercover operations. The duration of the course in five days and the methodologies include lectures, practical training on undercover operations, presentations and case studies. Since 2011, MACA received 35 participants from 11 countries from all over the world; Sri Lanka, Fiji, Cambodia, Indonesia, Brunei, Taiwan, Palestine, Swaziland, Maldives, Yemen and Nigeria.

4. Success Stories

(a) Operation "Compact"

- 47 runners and staff of the Computerized Vehicle Inspection Centre (PUSPAKOM) were busted during the operations. The staff and runners giving the "all clear" sign for faulty vehicles and approving inspections without the presence of the vehicles by taking bribes. Each of the staff members and runners were receiving up to RM15,000 monthly as a bribe. — Intelligence Division, MACC

(b) Operation "Kawal"

- Malaysian Custom Officer at Malaysia-Indonesia border checkpoint received corrupt money from gas cylinder smugglers for allowing them to transport prohibited items to Indonesia. Gas cylinders are controlled items in Malaysia under the Control of Supplies Act 1961. They were caught and investigated under Section 16 & 17 of the MACC Act 2009. The outcome from this operation:

- 8 persons were arrested including one customs officer
- 5 accused were charged in court for smuggling controlled goods
- 4 accused pled guilty and one withdrawn charge
- 1st Accused - Fine RM135,000.
- 2nd Accused - Fine RM5,000 and one year imprisonment
- 3rd Accused - Fine RM5,000 and one year imprisonment
- 4th Accused - Fine RM35,000
- Total Fine = RM180,000

5. Challenges

From the beginning, legal scholars and even prominent members of the prosecution, quietly protested against the renewal of the undercover policing. First of all the argument is that there was no adequate legal basis for the systematic use of the undercover methods, which could easily infringe in the private lives of the citizens. The other argument is that, it is fundamentally wrong if there is a separation of the "intelligence investigation unit" from the "investigation action unit" in the corruption investigations cases, simply because they are two sides of the same coin.

[6] Malaysian Anti-Corruption Commission Act 2009.

Due to uncertainty in the law and less development law in the area of undercover operations in this country, the courts cannot set binding precedent, but case law nevertheless is important for the interpretation of the law. It has filled the vacuum to some extent.

IV. CONCLUSION

Currently, the Malaysian government must use all resources to eradicate corruption in all sectors, thus, the IBI mechanism will be a catalyst for other enforcement departments to follow in the journey to fight corruption. As for MACC, we would like to actively strengthen exchanges of ideas with others departments, be it from local government agencies or federal organizations, those who seek to join hands to fight corruption in the name of prosperity, mutual respect, and efficiency so as to make a contribution to the national economic prosperity.

Lately, among the local government agencies and federal departments, awareness has grown that a structured intelligence investigation mechanism has become indispensable. The label "proactive", in our view indicating that law enforcement is taking the initiative which should enable it to prevent crime from occurring or to be present when there are crimes committed, is therefore often used as a synonym for either "*undercover MACC activities*" or for "*special investigation methods*". Further MACC will use all the resources that have been vested to it to further enhance the capabilities of its officers to the maximum.

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Analysts, Law Enforcement Intelligence Unit, and National White Collar Crime Center.

ENHANCING COOPERATION AMONG SECTORS IN CORRUPTION PREVENTION STRATEGY: MALAYSIAN EXPERINCE

*Dato' Abdul Wahab Bin Abdul Aziz**

I. INTRODUCTION

The Malaysian Anti-Corruption Commission (MACC) has been in operation since the inception of the Malaysian Anti-Corruption Act 2009 incorporated in the Laws of Malaysia Act 694 on the 8th of January 2009. Amongst the important provisions of the Act, under Section (7), being the functions of officers of the Commission, sub-section (c), (d) and (e) have been emphasised as, among other provisions, best practices and good governance. The said provisions mentioned specifically and categorically are as follows:

(c) to examine 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 Chief Commissioner may be conducive to corruption;

(d) to instruct, advise and assist any person, on the latter's request, on ways in which corruption may be eliminated by such person;

(e) to advise heads of public bodies of any changes in practises, systems or procedures compatible with the effective discharge of the duties of the public bodies as the Chief Commissioner thinks necessary to reduce the likelihood of the occurence of corruption.

Having said that, the priority of the Malaysian Government is to promote good governance and best practises as the way forward in its agenda for a corruption free public and private environment. Big conglomerates in the private sector who are actively trading in worldwide businesses suffer the wrath of corruption mostly, at least. As mentioned by Arvis and Berenbeim, the fact that corruption hinders the development of the private sector is now widely accepted, to the point that many practitioners tend to rank it as one of the most serious obstacles to business.

The MACC is gigantically tasked with the minimization and, if possible, the total eradication of the disease. Though a herculean and mammoth assignment, the war against corruption is a never ending one. A top down or bottom up approach[1] has to be adapted and adopted, depending on the level of the government's role, public awareness, freedom of the press and civil society. As for Malaysia, a top down approach has been deployed to combat corruption. The level of print media's independence also says a lot about the strategy to be deployed against such a plague of unheard of or untold of magnitudinal scale. Many strategies have been deployed to combat corruption. Many more approaches have been devised to eradicate bribery, the abuse of power, and deviations. Much has been said and done to address the said scourge, yet much more needs to be done to arrest this particular disease. This menace has occurred since time immemorial. This scourge has often been seen and heard as a cancer in society, be it in the first or third world countries. It spreads even faster in underdeveloped and developing countries because the civil society and the populace face poverty and illiteracy, among others.

Though these steps and measures involves massive operations and task forces, the real art of war

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[1] Top down approach refers to governments playing the dominant role in fighting corruption whereas bottom up approach refers to press freedom and civil society leading the war against corruption. Third world countries usually have top down compared to first world countries adopting bottom up approach in the war against corruption.

against corruption must certainly be grabbing the bull by its horns. Preventive measures are the measurables of combating corruption in the twenty-first century. The old adage that prevention is better than cure is relevent and applicable in the present decade. This mode of operation is the in-thing and the in situ typology. Being less messy and more desireable, this paradigm shift has been focussed as the ideal weapon for the war against corruption. It has now widely accepted that corruption has negative economic consequences (Hunt, Jennifer & Laszlo, Sonia: 2005).

The MACC has a logo portraying captions of Fairness, Firmness and Trustworthyness. In simple terms, the MACC practices a culture of acting without fear or favour. The MACC is also colour blind. It pays no respect to social issues of colour, creed and culture. Being impartial, unbiased and unprejudiced has always been the utmost top criteria for the MACC in achieving its objectives and goals. It has an unfair advantage over public and private entities in the sense that its services and goods are free, soverign and independent. However, more often than not, a public official usually abuses his public position for private gain.[2] Part and parcel to its priority in its tasks is the Corporate Integrity Pledge (CIP).

The meanings of the three key words have to be crystal clear and precise so as to further add value to the value chain as well as innovate the very idea of a CIP. According to the Oxford Dictionary, "corporate" refers to the image of a company. Integrity has a far-fetched interpretation in having the quality of being honest and having strong moral principles.[3] Among the necessary tenets of integrity are openness, good governance, accountability and transparency. Some observers have equated integrity to being perfect and sound values. Others have even associated integrity with holy and godly. As for the pledge, it refers to a promise or undertaking. These connotations have to be adhered to strictly and sincerely.

II. WHAT IS A CIP?

The CIP is a document that allows a corporate entity in Malaysia to show their commitment in supporting the principles of corruption prevention. It is a statement (documented) by a company voluntarily committing itself to uphold the Anti-Corruption Principles for Corporations. Hence, the said company which signs the pledge is making a unilateral declaration, amongst others:

a) Will refrain from all forms of corrupt activities, meaning to say it will not commit corrupt acts

b) Will work towards creating a business environment that is free from corruption.

c) Last but not least, it will uphold the Anti-Corruption Principles for Corporations in the conduct of its business and in its interactions with its business and its interactions with its business partners and the Government.

The initial originator of the CIP was the MACC. It was the brainchild of a Minister in the Prime Minister's Department, the Right Honourable Dato' Idris Jala[4] who suggested that the MACC spearhead the movement. He was personally brought into the Malaysian Cabinet by the Honourable Prime Minister Dato Sri' Mohd Najib bin Tun Abdul Razak to enhance the performance of government-linked companies which were in the red. The MACC was made the custodian of the CIP in March 2011 and later passed the baton to the Malaysian Institute of Integrity (IIM) who later on involved Transparency International-Malaysian Chapter (TI-), Companies Corporation Malaysia (CCM), National Key Result Areas (NKRA), Performance Management and Delivery Unit (PEMANDU), Securities Commission (SC) and Malaysian Stock Market (Bursa Malaysia).

[2] Official definition of corruption of the World Bank.
[3] *Oxford Advanced Learner's Dictionary*, Eighth Edition: 2010.
[4] He has served internationally and brought the last organization Shell Malaysia Berhad to greater heights and astronomical achievements. He has also transformed the Malaysian Airlines System and brought it to being a profitable entity.

III. WHY SIGN THE CIP?

A. Effects/Benefits

a) A company will be making a clear stand of how it operates. This will be locked down in writing. It is stating a bold statement on its vision and mission and its anti-corruption stance in its business codes of conduct and ethics. Do the due diligence on them. Never instruct them to do whatever it takes to get the job done. Horowitz, Bruce: 2007).

b) It will encourage a company to work on their own anti-corruption programme and internal systems and processes. This will be a guidance to the company in its business interactions, should it be faced with the possibility of condoning any payments or other activities that would amount to corruption.

c) It will certainly have a positive impact whereby increasing the level of confidence for domestic and foreign investment.

d) A company can use this Pledge to set itself apart from its peers. It demonstrates that its business operations do not include any hidden risks or costs that are associated with corrupt activities. Ira Belkin, former China Legal Exchange Officer for the U.S. Department of Justice, took a hard stand, saying there is never any justification of breaking the law. He said even if bribes are a standard way of doing business, you don't want to be the one person caught and prosecuted. (Silverthorne, Sean: 2005)

To sum up, the main objectives are achieving a zero tolerance for corruption as well as enhancing integrity and formulating a corruption prevention programme. This dual approach has far reaching aspirations and far-sighted, holistic approaches to put corruption in check as far as the business community is concerned.

Having indulged in the above cost benefits and causal reltionships between the CIP signatories and the MACC, the Anti-Corruption Principles for Corporations in Malaysia are as below:

i) It commits to promoting values of integrity, transparency and good governance.

ii) It strengthens internal systems, that support corruption prevention. The law should require interested directors to abstain from voting on transactions in which they have an interest.[5] (McGee, Robert W: 2009)

iii) It complies with laws, policies and procedures related to fighting corruption.

iv) It fights all and any form of corruption.

v) It supports corruption prevention initiatives by the Malaysian Government and the MACC.

IV. HOW THE CIP IS PRINCIPLED?

i. The first step is the signing of the pledge. The said companies sign the respective pledges at their premises with the MACC. The pledge is a standard document with its respective anti-corruption initiatives.

ii. Then, the companies work to self-assess their strength of their corporate integrity system. The CIP ensures the level of corporate governance in place within the said companies. The company also identifies an action plan to strengthen their internal systems. This is the self-assessment stage.

[5] For a full report on Corporate Governance in Developing Economies of Africa, Asia and Latin America, see McGee, Robert W:2009 which incluides a case study on Malaysia.

iii. The next stage of implementation is to close the relevent gaps. The action plans are implemented immediately by the company concerned. The said companies also adopt and adapt anti-corruption business principles. The cases of corruption reported by the media tend almost always to involve a private party (a citizen or a corporation) that pays or promises to pay, money to a public party (a politician or a public official, for example) in order to obtain an advantage or avoid a disadvantage (Argandona, Antonio: 2003). These companies have to establish infrastructure: Governance and Ethics Board Committee. Needless to say, conducting training also has to be in the basket of deliverables.

iv. Finally, they have to do the necessary reporting which includes anti-corruption elements in the audits. Companies also have to include reporting on anti-corruption measures in their annual reports.

However it has to be borne in mind that however the CIP is principled, the syndrome of corruption is a fact of life for all continents around the globe. Not only developed countries suffer from the various syndromes of corruption, the developing, lesser developed and least developed countries also suffer in these aspects of corruption. Johnston, M:2005 has categorised all the nations said above as having characteristics and features clustered as elite cartels as the U.S, Germany and Japan, elite cartels as South Korea, Italy and Botswana, oligarchs and clans as in the Phillipines and Malaysia and official moguls as in Indonesia, China and Uganda.

The author has provided statistics and data for his illustrious work for classifying these countries categorically. His book has been discussed widely and in indepth by Professor Nikos Passas on North Eastern University, U.S. and Professor Claudia Baez Camargo of the Basel Institute of Governance for the MACS 2012-2014 programme at the United Nation Office of Drugs and Crimes in Vienna, Austria.

V. WHEN AND WHERE IS THE CIP MONITORED

The CIP is monitored annually. The Officers from the Consultancy Division make yearly checks on these companies to ensure that the anti-corruption elements have been inculcated in their audit and accoutancy procedures. These companies also have to report on latest and recent anti-corruption initiatives as part of their ongonig anti-corruiption efforts. They also have periodic pledge synchronization meetings to discuss their latest role play in absorbing new and innovative ideas for their existence. Lastly, they too need to enclose implemented anti-corruption initiatives in their annual reports. Though there is much global corporate governance, they too adopt best practises and good governance as a tool to move forward.

The United States and Britain had adopted a shareholder-centric model of corporate governance (often referred to as the Anglo Saxon model). The Germans along with several other European nations, adopted a stakeholder-centric model of governance. The Japanese model was built around business relationships, with Japanese banks, customers, and suppliers all influencing board-level decisions (Larcker, David F &Tayan, Brian: 2007).

VI. TRAINING ASPECTS

Several training programmes and sessions have been introduced by the Malaysian Anti-Corruption Academy to further enhance the Integrity Awareness Programme., being the Generic module and specific module. There are also eight (8) integrity initiatives which have to be adhered to and complied with strictly so as to make the CIP and Certified Integrity officers to function effectively and efficiently. There is also an Ingrity Pact (IP) introduced to the companies who are engaged in procurement activities with mostly government, non-government and government-linked companies.

The difference in the IP is that it is legally binding on the companies which provide goods, services and supplies to the said companies. They may be barred, or suspended or blacklisted if they are known or found guilty of corruption in service contracts, supply which involve these said agencies. An example is Alcatel-Lucent SA which has been debarred for a certain time period from supplying and providing services.

MACA is also being tasked to handle training for the Certified Integrity Officers (CeIO) for the private sector and public sector. The programme components for the CeIO introduce extensively the concept of integrity, the practice of integrity, ethical compliance and monitoring as well as the formation and formulation of an Integrity Plan for their respestive departments. As far as learning objectives are concerned, the CeIO, at the end of the programme will have had the opportunity to:

i. Plan effectively and make an accurate decision on any question or concerning integrity.

ii. Apply the integrity concepts, directly and effectively to the organization's daily operations.

iii. Analyse methodologies for identifying, understanding, handling and response action.

The Corporate Integrity Development Centre (CIDC) has been tasked for such deliverables. The participants have been tasked with managing their department's Integrity Plan and Code of Ethics/ Conduct which were not practised previously. MACA, with its CIDC has been accredited with this success. The honourable Prime Minister of Malaysia has a personal hand on this programme.

The CeIO programme has been seen as attaining the aspirations as well as the accomplishing of the vision and mission of Malaysia to see a corrupt free country for the present generation and the future. The event for international CeIO's on 21 October to 1 November 2013 is testimonial for the success of the CeIO programme as it has gained recognition globally as a milestone in the fight against corruption. As such, Malaysia is a front runner and innovator in this field of adding value to the value chain in the fight against corruption. However it is just a first and foremost step for Malaysia but a giant quantum leap for mankind.

VII. SUCCESS STORIES

Among the multinational conglomerates in Malaysia, and to name a few among the many, Tenaga Nasional Berhad, Telekom Malaysia Berhad, Bank Islam Berhad and Malayan Banking Berhad have taken bold and brave steps to make their signatures on a corrupt-free private, business environment. Up to June 2013, the CIDC has churned out 115 Certified Integrity Officers from 39 private entities and 52 government agencies.

From the 39 private entities that have participated in the CeIO programme, a few of these agencies too have signed the CIP and the Integrity Pact (IP). This, in turn, spearheads a positive momentum in the fight against corruption. These particular individuals will inculcate and promote positve values in integrity within their respective organizations.

Thereby, awareness in anti-corruption strategies is intact in these organizations so as to propel the battle against corruption. Beginning from 1st August 2013, according to government circular number 6 of 2013, every government department has to have a mandatory Certified Integrity Officer who has been trained by the MACA. The integrity unit in the government departments have been tasked to promote good values of integrity amongst their staff.

The Certified Integrity Officer also has to instil good governance among its staff, sustain integrity through the office culture, and execute integrity tenets and principles in the said organizations. The other said duties are the detection and confirmation of corrupt practises amongst staff as well as revealing different breaches of crime to the relevent law enforcement agencies.

Also, the tasks include internal complaints administration against their own staff, compliance with local laws, rules and regulations besides tackling all forms of disciplinary problems amongst staff. Most of the initiatives to counter corruption have been in place since the inception of the CeIO and CIP.

Hence to be a world player in eradiocating corruption, the fight must be an ongoing one and a fight which is never yielding or surrendering. If for a single instance, we are caught off guard, that will undoubtedly be the ultimate downfall against the fight. Since the benchmarking has already been set with high standards of integrity, the guard and fight against corruption must be ongoing without fail

or faulter.

VIII. CHALLENGES

MACA, and the CIDC, being the training arm against corruption as far as the CeIO is concerned, has to nurture the cooperation of all concerned in the battle against corruption. The battle against corruption might be won today, tomorrow, the day after tomorrow, next week or the following, but the long war against corruption is a never ending one which requires persistence, efficacy and determination from all parties, especially from the bureaucracy to the politicians until civil society to the very grassroots.

Each and every individual, organisation or corporation has to make positive contributions if the war against corruption is to move forward rhythmically and forcefully. The momentum or drive against corruption has to encompass all levels of society if it is to be a winner. The war against corruption is anything but near an end. The fight against corruption is never over. The push against corruption to eradicate it is but a dream. The journey to minimize corruption has to be a holistic one yet empowering professionals to combat it on uphill terrain.

IX. CONCLUSION

A total of 284 companies have signed the CIP in Malaysia as of September 2013. Along with the CIP, these companies have also undergone the Certified Integrity Officer's course which has nurtured them with the necessary competencies in integrity, compliance, ethics, responsibility, conduct, governance and also honesty. As Ntim & Soobaroyen's findings reveal, "on average, better governed corporations are (statistically significantly) more likely to pursue a more socially responsible agenda" as measured by disclosure about specific CSR initiatives. Thereby, the CIP is definitely a step forward in enhancing the integrity of a corporation.

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EFFECTIVE MEASURES TO COMBAT AND PREVENT CORRUPTION IN THE UK AND THE CURRENT SITUATION ON ENFORCEMENT OF THE BRIBERY ACT 2010

*David Green**

I. OUTLINE OF LECTURES

A. Hand-outs

A: Lecture outline (this document)

B: Understanding Bribery and Corruption (slides)

C: The Bribery Act 2010 (slides)

D: SFO powers

E: The Bribery Act 2010 (commentary)

F: Deferred Prosecution Agreements (DPAs) (flow-chart)

II. LECTURE 1

A. General

- Brief outline of the criminal justice system in England and Wales
- The problem of fraud in the UK context

B. The SFO

- Origins of the SFO: the Fraud Trials Committee (Roskill) 1983
- The Criminal Justice Act 1987: establishing the SFO
- The Roskill model
- The size and organisation of the SFO
- SFO jurisdiction
- SFO powers
- The SFO and Mutual Legal Assistance (MLA)
- SFO funding
- Recent restatement of the SFO's mission and purpose

*Director, Serious Fraud Office, United Kingdom.

- Self-reporting of criminal activity to the SFO by corporates
- Why investigations are lengthy
- Framing charges
- Examples of contemporary SFO investigations and prosecutions

C. The SFO and Other UK Agencies in Economic Crime

- National Crime Agency
- Police
- Crown Prosecution Service
- Her Majesty's Revenue and Customs (HMRC)
- Financial Conduct Authority (FCA)
- Office of Fair Trading (OFT)
- Competition and Markets Authority

D. Practical Problems Facing the SFO in Investigation and Prosecution

- obstructions in the way of obtaining evidence
- electronic data: uploading and searching
- execution of SFO MLA requests abroad
- the need to keep investigations and prosecutions focused
- media attention
- court delays

III. LECTURE 2

A. The Bribery Act 2010

- Hand-outs C and D
- Background to the Act
- Legislation before the Bribery Act
- Examples of cases before the Bribery Act
- OECD criticisms
- Distinctive features of the Bribery Act 2010
- Act in force from 1/7/2011; not retrospective
- S1 Active bribery

- S2 Passive bribery
- S6 Bribery of foreign public officials
- S7 Corporate liability for failure to prevent bribery
- Statutory defence to an offence under S7
- Territorial application
- Business entertainment
- Facilitation payments
- Ministry of Justice published Guidance
- Joint DPP/DSFO published Guidance
- Sentencing
- SFO enforcement

B. Deferred Prosecution Agreements (DPAs)

- What are DPA's?
- When might they be used?
- Hand-out F: DPA flow chart
- DPA Application process
- DPA compliance and oversight
- DPA breach and variation
- Key differences from US practice on DPAs
- Corporate criminal liability in English law

C. Investigation, Prosecution and Confiscation

- How information comes to the SFO
- Intelligence
- Self-reporting
- Whistle-blowing
- Evaluation
- Investigation by the SFO
- Domestic documentary evidence
- Mutual legal assistance

- Witness evidence
- Prosecution and asset recovery

B

Understanding Bribery & Corruption

Defining Corruption

- No single definition
- Transparency International's working definition states that 'Corruption is the abuse of entrusted power for private gain'

World Bank Institute

- How much does the World Bank estimate is paid in Bribes each year?

- A. US $1 Billion
- B. US $10 Billion
- C. US $ 100 Billion
- D. US $ 1,000 Billion

Defining Corruption

Petty Corruption

- ‘small payments routinely solicited by low ranking officials in the public sector’

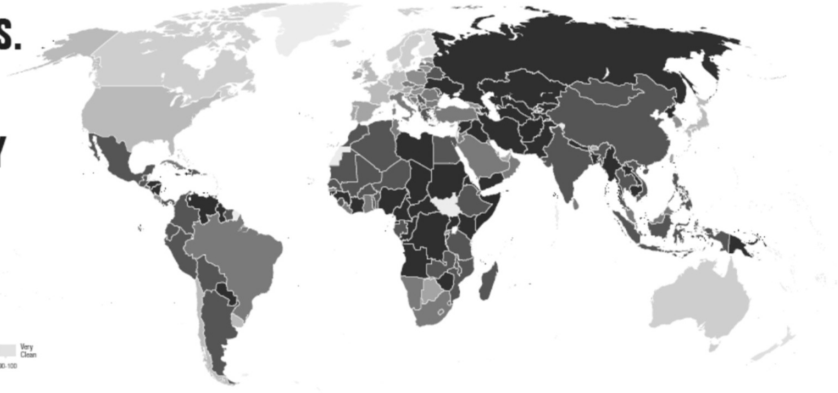
Defining Corruption

Grand Corruption

'Large payments often made to more senior officials to secure significant business'

176 COUNTRIES. 176 SCORES. HOW DOES YOUR COUNTRY MEASURE UP?

The perceived levels of public sector corruption in 176 countries/territories around the world.



RANK	COUNTRY/TERRITORY	SCORE
1	Denmark	90
1	Finland	90
1	New Zealand	90
4	Sweden	88
5	Singapore	87
6	Switzerland	86
7	Australia	85
7	Norway	85
9	Canada	84
9	Netherlands	84
11	Iceland	82
12	Luxembourg	80
13	Germany	79
14	Hong Kong	77
15	Barbados	76
16	Belgium	75
17	Japan	74
17	United Kingdom	74
19	United States	73
20	Chile	72
20	Uruguay	72
22	Bahamas	71
22	France	71
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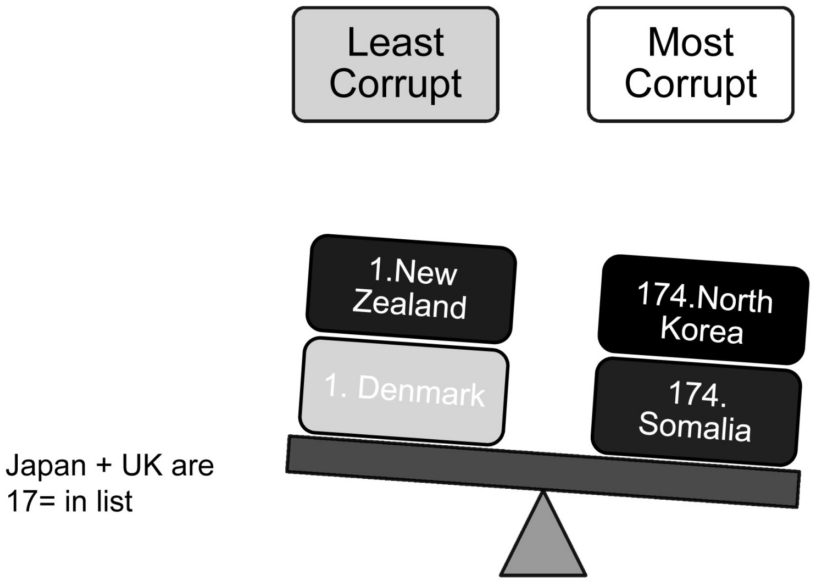
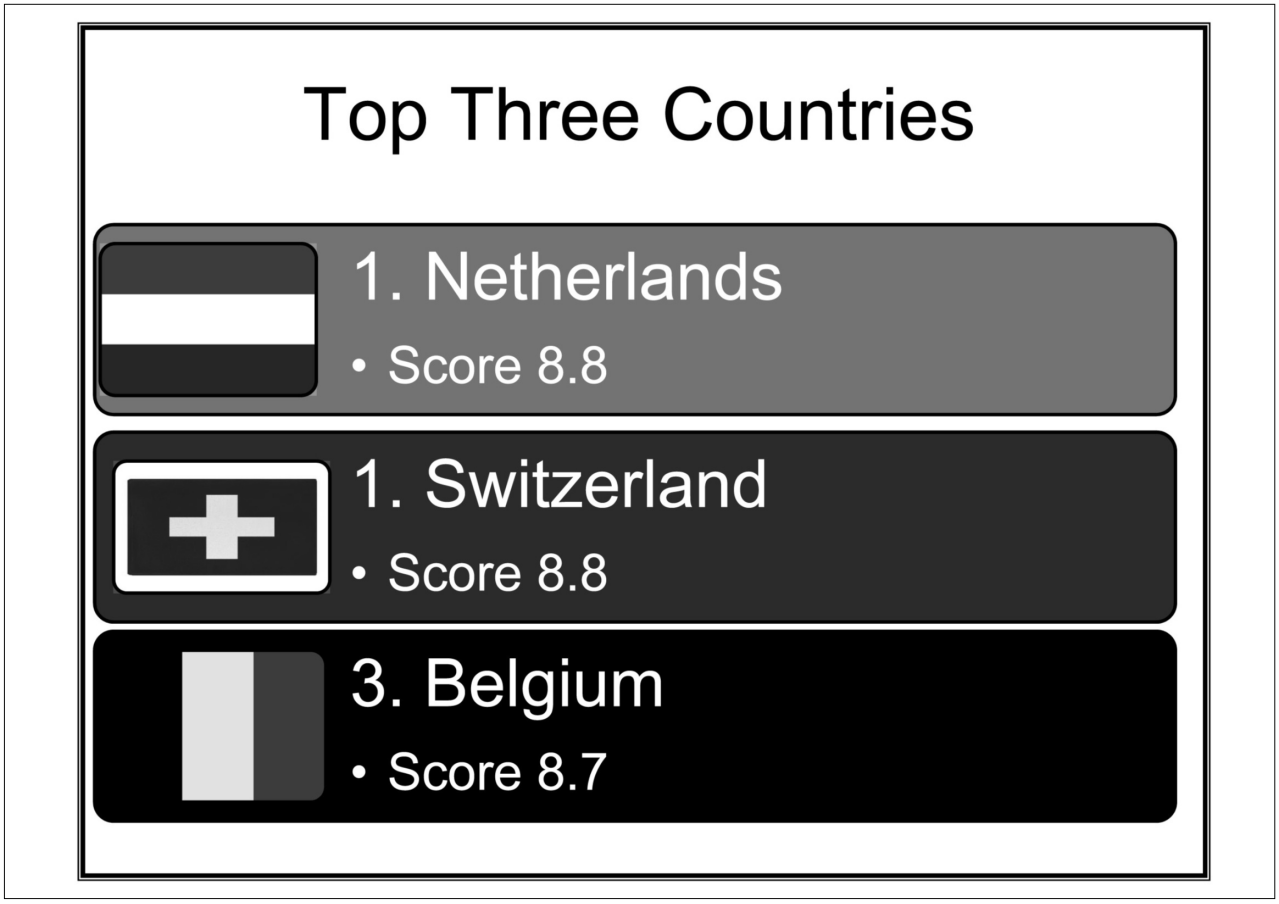
TI Corruption Index 2012

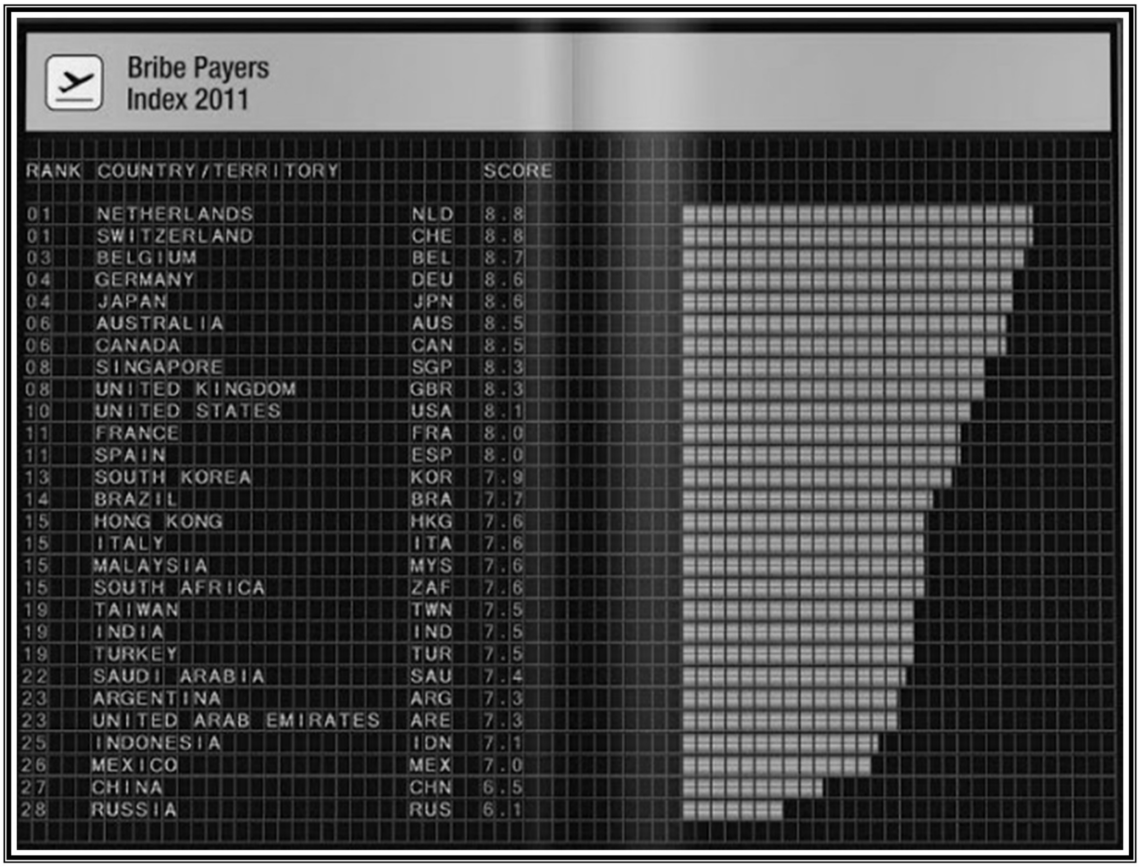


TI Bribe Payers Index 2011

- A ranking of 28 of the worlds most economically influential countries according to the likelihood of their firms to bribe abroad. 10 indicates they never bribe, 0 indicates that they always do.


Top Three Countries
1. Netherlands
• Score 8.8
1. Switzerland
• Score 8.8
3. Belgium
• Score 8.7


Bottom Three
26. Mexico
• Score 7.0
27. China
• Score 6.5
28. Russia
• Score 6.1


Bribe Payers
Index 2011
RANK COUNTRY/TERRITORY SCORE
01 NETHERLANDS NLD 8.8
01 SWITZERLAND CHE 8.8
03 BELGIUM BEL 8.7
04 GERMANY DEU 8.6
04 JAPAN JPN 8.6
06 AUSTRALIA AUS 8.5
06 CANADA CAN 8.5
08 SINGAPORE SGP 8.3
08 UNITED KINGDOM GBR 8.3
10 UNITED STATES USA 8.1
11 FRANCE FRA 8.0
11 SPAIN ESP 8.0
13 SOUTH KOREA KOR 7.9
14 BRAZIL BRA 7.7
15 HONG KONG HKG 7.6
15 ITALY ITA 7.6
15 MALAYSIA MYS 7.6
15 SOUTH AFRICA ZAF 7.6
19 TAIWAN TWN 7.5
19 INDIA IND 7.5
19 TURKEY TUR 7.5
22 SAUDI ARABIA SAU 7.4
23 ARGENTINA ARG 7.3
23 UNITED ARAB EMIRATES ARE 7.3
25 INDONESIA IDN 7.1
26 MEXICO MEX 7.0
27 CHINA CHN 6.5
28 RUSSIA RUS 6.1


NEVER 10
TRANSPARENCY INTERNATIONAL
the global coalition against corruption
Likelihood of companies to bribe abroad, by sector
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7
6
5
7.1
7.1
7.0
7.0
6.9
6.9
6.8
6.7
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6.6
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6.5
6.4
6.4
6.3
6.2
6.1
6.1
5.3
AGRICULTURE
LIGHT MANUFACTURING
CIVILIAN AEROSPACE
INFORMATION TECHNOLOGY
BANKING & FINANCE
FORESTRY
CONSUMER SERVICES
TELECOMMUNICATIONS
TRANSPORTATION & STORAGE
ARMS, DEFENCE & MILITARY
FISHERIES
HEAVY MANUFACTURING
PHARMACEUTICAL & HEALTHCARE
POWER GENERATION & TRANSMISSION
MINING
OIL & GAS
REAL ESTATE, PROPERTY, LEGAL & BUSINESS SERVICES
UTILITIES
PUBLIC WORKS CONTRACTS & CONSTRUCTION
Sectors are scored on a scale of 0-10, where a maximum score of 10 corresponds with the view that companies in that sector never bribe and a 0 corresponds with the view that they always do.
ALWAYS 0
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Top ten largest penalties for FCPA violations				
Rank	Company	Home Country	Amount ($million)	Year
1	Siemens	Germany	800	2008
2	KBR/Halliburton	US	579	2009
3	BAE	UK	400	2010
4	Snamprogetti/Eni	Netherlands/Italy	365	2010
5	Technip	France	338	2010
6	JGC	Japan	219	2011
7	Daimler	Germany	185	2010
8	Alcatel-Lucent	France	137	2010
9	Magyar Telekom/Deutsche Telekom	Hungary/Germany	95	2011
10	Panalpina	Switzerland	82	2010

Bribery Act 2010

C

- OECD pressure on the UK to update its anti-corruption legislation

Changes

- No AG consent required for prosecution (Consent of DPP/DSFO sufficient)
- Maximum penalty ten years
- Increases extra-territorial jurisdiction to prosecute bribery committed abroad

Sections 1 & 2 Offences

- S1 Active Bribery

(offer, promise, give; financial or other advantage)

- S2 Passive Bribery

(requests, agrees to receive or accepts)

Mental element:

Intending to induce improper performance

Improper Performance = breach an expectation of "good faith", "impartiality" "trust" re the function or activity

Bribery of Foreign Public Official

S6 Bribery of FPO

No need for improper performance

Dual intention to influence FPO in performance of functions + retain business

- Any legislative, administrative, judicial position, public function, public agency/enterprise, public international organisation

Defence: If permissible by written law

Corporate Failure to Prevent

- S7 "Relevant commercial organisation" liable for "person associated" (performs services for the org) who pays bribe [under S1/6]
- Defence: If have adequate procedures

(On the balance of probabilities)

- MoJ Guidance:
- https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf

Leadership; Policies; Monitoring; Risk assessment; Recording; Training.

- Extends jurisdiction to any organisation that conducts "part of their business" in the UK

Section 12 - Territorial Application

- If any part of the conduct involved in sections 1, 2 or 6 are committed in the UK then have jurisdiction
- If all the actions in question take place abroad, still have jurisdiction as long as the person performing them is British national, resident in the UK, incorporated in the UK or has a "close connection" with the UK
- As long as the commercial organisation in S7 "carries on its business or part of its business" in the UK, then have jurisdiction

Types of Corrupt Payments

- Kickbacks

(a portion of the value of the contract demanded as a bribe by an official for securing the contract)

- Facilitation/Grease payments

(to perform or speed up performance of the official)

- Commission Payments

(via 3rd party agents for public officials to gain unfair advantage)

- Payments directly to public officials

(to gain unfair commercial advantage)

Corruption Indicators 1

- Abnormal cash payments
- Abnormally high commission payments
- Payments routed through offshore accounts with no apparent business links
- Payments made via 3rd party countries
- Agents with little or no subject knowledge
- Little evidence of due diligence or independent oversight

Corruption Indicators 2

- Lack of evidence re agent's work done
- Inflated invoice prices
- Urgent or advance payments for bringing forward orders
- Bypassing normal tendering or contract procedures
- Lavish gifts or overseas trips provided
- Payment of education fees

Corruption Investigation Issues

- Date of offending, Pre 1 July 2011?
- Secret nature of the agreement
- Need to obtain email corres/PCs
- Need to establish personal associations
- Can involve many layers of moving funds across international borders - MLA slow
- Time limitations to the availability of evidence (Banking, telephone, webmail a/c's)

Corruption Investigation Tips

- Encourage commencement of enquiries overseas via national authorities commencing own investigations
- Engage with MLA processes early
- Engage with SLO's early
- Memorandums of understanding
- Focus and prioritise key lines of enquiry
- Use of I2 and other association charts
- Use of intel / CHIS / Intercepts
- SOCPA agreements

Initial Plan

- Offence(s) under investigation
- Resources
- Intelligence strategy
- Parameters
- Suspects
- Witnesses
- Location of Evidence
- Forensic opportunities
- Financial Investigation

- Proactive opportunities
- Risk Assessment
- Community impact
- Business impact
- Disclosure
- Media
- Target dates for actions
- Victim Liaison

SFO POWERS

I. S.2 CJA 1987 POWERS

- The Criminal Justice Act 1987 provides powers to enable me and my staff to carry out investigations more effectively. They are contained in s.2 of the Act.

- These are wide-ranging powers exercisable only in respect of cases where I have decided to commence an investigation into serious or complex fraud, bribery or corruption. The powers can be exercised personally by me or by staff whom I have designated to exercise these powers on my behalf.

- I can also exercise these powers on behalf of an overseas authority where requested to do so by the Secretary of State but, again, only where it appears to me on reasonable grounds that the offence in respect of which I have been requested to obtain evidence involves serious or complex fraud.

- S.2 of the Act enables me to require, by way of a written notice, any person being investigated or any other person whom I have reason to believe has relevant information to either answer questions or provide me with information with respect to any matter relevant to the investigation.

- Importantly, I can require the production of specified documents that relate to the offence under investigation — this is the single greatest use of the power. It includes a power requiring the person producing the documents to also provide an explanation in relation to any of them.

- What powers of enforcement are there? Where a magistrate is satisfied that there are reasonable grounds for believing that:
    - any person has failed to comply with an obligation to produce documents, or
    - it is not practicable to serve a notice; or
    - the service of a notice might seriously prejudice the investigation

  he can issue a warrant authoring a police constable to enter and search premises and seize relevant documents.

- There are limits as to the use to which the SFO may put any statement that a person is required to give in response to a notice. We cannot rely on such statements in evidence unless it is for a specific offence of providing a false or misleading statement or, in the course of a prosecution for some other offence, the accused makes a statement which is inconsistent with what he said in response to the notice.

- We can, however, rely in evidence on documents which were already in existence at the time we served the s.2 notice — and, indeed, such material often forms the core of many of our cases.

- This distinction — between being able to rely upon documents which already exist as opposed to not being able to rely on the answers to questions which someone is required to provide — is intended to give effect to the law against self-incrimination which, in its most basic form, provides that a person accused of a criminal offence cannot be compelled to produce material that may subsequently be used as evidence against him save and unless that material already has its own independent existence.

- There are also express provisions protecting legally privileged material. In addition, special protection is given to confidential banking material — such material can only be obtained if I personally authorise the making of a requirement (or, if I am unavailable, for example

because I am overseas, an individual nominated by me does so).

- Failure, without reasonable excuse, to comply with any requirement under a s.2 notice is itself a criminal offence, punishable by way of up to six months imprisonment and / or a fine.

- As noted already, making a false or misleading statement in response to a notice is also an offence. The maximum punishment here is two years imprisonment and / or a fine.

- Finally, there is also an offence of knowingly falsifying, concealing, destroying or otherwise disposing of documents relevant to an investigation. This is considered a serious offence — the maximum penalty is seven years imprisonment and / or a fine.

- These powers are an important tool in our armoury. In 2012-13 the SFO issued 402 s.2 notices in relation to both our own domestic investigations and in support of overseas investigations. As at the end of August this year, we have issued 200 such notices.

- The great value of these powers is that they enable us to obtain important documentary evidence that might not otherwise be easily available to us, right at the outset of an investigation. For example, early access to banking material is often a crucial aspect of our cases. Banks, as you will appreciate, hold their clients information subject to a duty of confidentiality and will ordinarily only release information if they are made subject to a court order. A s.2 notice, however, overcomes any legal duty of confidentiality that a bank has and so is a highly efficient means of securing relevant evidence quickly.

- As with any aspect of an investigation, focusing the request being made is critical. Asking, for example, for the entire server of a particular institution is likely to result in the production of millions of documents, all of which then have to be reviewed and many of which are likely to be wholly irrelevant. Our experience is that time spent considering *exactly* what is required (often, where it is appropriate, with input from those upon whom the notice is to be served) is time well spent.

- Finally, in July 2008, the Act was amended to enable me to use my s.2 powers at the 'pre-investigative' stage of a case in relation to overseas bribery and corruption cases. This is because experience has taught us that it is often difficult to make an accurate assessment as to whether it is worth accepting such cases for investigation without at least some assessment of the underlying documentary material and this amendment is therefore intended to enable me to obtain such material even before I decide whether to accept a case for investigation or not.

II. OTHER POWERS

- In addition to s.2 notices, the SFO has access to a wide range of others powers which are not unique to the SFO but which can be used by the police and other law enforcement agencies generally. These include the following:

    - Powers under the Serious Crime Act 2007 to *seek Serious Crime Prevention Orders* — where a person has been convicted of having committed a serious offence, the Crown Court may make an order designed to protect the public by preventing, restricting or disrupting his further involvement in serious crime (we can also apply to the High Court in respect of cases where a person has not been convicted but the Court is nonetheless satisfied that a person has been involved in serious crime).

    - Powers under *the Serious and Organised Crime and Police Act 2005 (SOCPA)* — these provide a legislative framework for those who wish to co-operate with the authorities. Main provisions are:
        - s.71 (full immunity from prosecution),
        - s.72 (an agreement not to use specified evidence against a person — a so-called 'restricted use undertaking'),

- s.73 (written agreement in which a defendant agrees to assist an investigation or prosecution with a view to thereby obtaining a reduced sentence; ordinarily, this will require the accused to plead to certain offences and may also require him to agree to giving evidence on behalf of the prosecution); and
- s.74 (enables a prosecutor to refer a defendant's case back to the court for a review of sentence after conviction; this is used in cases where a defendant offers assistance after he has already been sentenced for his own offending).

○ SOCPA also enables a court to make a *Financial Reporting Order* (s.76) wherever a person is convicted of a relevant financial offence and the court is satisfied that the risk of the offender committing another such offence is "sufficiently high" to justify the making of the order. The order requires the individual concerned to make regular reporting of their financial affairs to the authorities for a specified period.

○ Covert powers under *the Regulation of investigation Powers Act 2000* (RIPA) — this provides a legislative framework for a wide range of covert law enforcement techniques including intercepts (note that the product of domestic intercepts is inadmissible within UK criminal proceedings), the use of covert intelligence sources (i.e. informants) and surveillance (two main types of surveillance are covered; general or 'directed' surveillance and 'intrusive' surveillance (e.g. surveillance within a person's home) that requires a higher level of authorisation and greater safeguards).

○ Powers under *the Proceeds of Crime Act 2002* — these cover a wide range of issues, most of which are related to the preservation (pre-conviction) and the confiscation and subsequent enforcement (post-conviction) of a person's criminal benefit. Key powers include:

- Account monitoring orders (an order of a court which instructs a financial institution to provide an investigator with information on the current activity of an account).
- Restraint orders (an order of the Crown Court that prevents named individuals from dealing with any aspect of their assets without the authority of the court; the aim being to preserve assets in the event of a conviction)
- Confiscation orders (an order of the Crown Court in which a convicted defendant is ordered to pay over their 'benefit' from specified criminal conduct)
- Production orders (an order of the Crown Court for a person or company to produce specified material for the purpose of assisting certain types of investigation, including any investigation into an offence of money laundering and any confiscation investigation)
- Civil Recovery orders (an order of the High Court that specified property is deemed to be 'criminal property' and that the value of that property is thus to be paid to the State; usually used only as an alternative to criminal prosecution where either there is insufficient evidence to bring or maintain proceedings or it is not in the public interest to do so)

THE BRIBERY ACT 2010

1. Background leading up to the Bribery Act 2010

- Recognition that, pre-Bribery Act, the UK's anti-bribery legislation was antiquated and in need of modernisation

- The legislation in force was, in some cases, more than a century old:

    - The *Public Bodies Corrupt Practices Act 1889* (only applied to those working on local public bodies (i.e. local government) and did not extend to Crown employees)
    - *The Prevention of Corruption Act 1906* (this was, and is, the main pre Bribery Act offence; applies to all agents and any person who gives consideration to an agent)
    - *The Prevention of Corruption Act 1916* (extended the PCA 1906 to Crown employees or employees of a public body)

- The only previous change to our law had been contained within *The Anti Terrorism, Crime & Security Act 2001*:

    - This extended the previous legislation to all UK nationals who conduct business overseas
    - It was thus an extension of the existing law — but not a full overhaul.

- Became increasingly apparent that the UK needed a modern 'fit for purpose' anti-bribery legislation

- Pressure arose from the OECD for the UK to update its anti-corruption legislation:

    - E.g. in their 2008 'Phase 2' report[1] into the UK, the OECD's Working Group on Bribery noted that:

      "…the UK's continued failure to address deficiencies in its laws on bribery of foreign public officials and on corporate liability for foreign bribery has hindered investigations. The Working Group reiterates its previous 2003, 2005 and 2007 recommendations that the UK enact new foreign bribery legislation at the earliest possible date." (page 4)

      and on page 71 of the same report the Working Group concluded as follows:

      "The Working Group is disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK … and urges the UK to adopt appropriate legislation as a matter of high priority."

2. Famous cases of combating bribery of foreign public officials before the Bribery Act 2010 was enacted

- *Robert John Dougall* — Dougall was a former DePuy executive who pleaded guilty in April 2010 to his involvement in £4.5 million worth of corrupt payments to medical professionals within the Greek healthcare system. He was sentenced to 12 months imprisonment.

    - Dougall was appointed Director of Marketing at DePuy International Limited in 1999. He was responsible for developing business in Greece. DPI sold orthopaedic products; in order to penetrate the Greek market, inducements and rewards were provided to surgeons in return for the purchase of DPI products.

[1] See 〈http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/41515077.pdf〉.

- DPI used a local distributor, Medec S.A. which was owned and run by Nikolaos Karagiannis. He was paid, in advance, a "commission" by DPI on all sales; a proportion of which was used to make the corrupt payments to surgeons in Greece.
- These payments were made with the knowledge and oversight of Dougall.
- Also worthy of note — Dougall was the first "co-operating defendant" in a major SFO investigation. He entered into a s.73 written agreement with the SFO in June 2009 and provided substantial assistance to the investigation.
- In April 2011, the SFO obtained a civil recovery order against DPI to the value of £4.829 million plus costs, representing the proceeds of crime for the period 1998 to 2006.

- *Mabey & Johnson* — Mabey & Johnson, an engineering firm, was the first corporate in the UK to be prosecuted for overseas corruption offences.

  - The prosecution for corruption arose out of a self-report in which the company disclosed evidence that it had sought to influence decision-makers in public contracts in Jamaica and Ghana between 1993 and 2001.
  - In addition to the corruption offences, the company was also prosecuted for sanctions offences relating to a breach of UN sanctions in 2001/02 as they applied to contracts in the Iraq "Oil-for-food" programme.
  - The company pleaded guilty to these offences in July 2009. They were sentenced in September 2009, paying a total fine of £3.5 million plus a £1.1 million confiscation order, £1.4 million by way of reparations, prosecution costs of £350k and a further £250k towards the cost of an independent SFO approved monitor who would review their internal compliance programme.
  - Richard Alderman, the then Director, hailed the sentence as "a landmark outcome" and noted this was "the first conviction in this country of a company for overseas corruption".
  - Following the conviction, new management took over the company and introduced new anti-bribery measures. The company continued to co-operate with the SFO and, in January 2012, agreed to the making of a civil recovery order in the High Court to the value of £130k in recognition of sums it had received through share dividends derived from contracts won through unlawful conduct.

- *Innospec* — Two senior Innospec executives have pleaded guilty to offences of conspiring to make corrupt payments to individuals in Indonesia and Iraq to secure contracts for Innospec Ltd for the supply of its products.

  - Paul Jennings, former CEO, pleaded guilty in June 2012 to two offences of conspiring to corrupt in that he gave, or agreed to give, corrupt payments to public officials and other agents of the governments of Iraq and Indonesia between 2003 and 2008 as inducements to secure, or rewards for having secured, contracts from those government for the supply of products by Innospec.
  - Another Innospec executive, Dr David Turner, former Global Sales and Marketing Director, had pleaded guilty to similar offences in January 2012.
  - Sentencing has been adjourned pending the outcome of proceedings against two further defendants, due to be tried in March 2014.
  - The company itself had pleaded guilty to offences of bribing employees of Pertamina (an Indonesian state owned refinery) and other government officials in Indonesia in March 2010. The company was fined the sterling equivalent of $12.7 million as part of a global settlement involving the UK and the US authorities.

- *Oxford Publishing* — In July 2012, Oxford Publishing Ltd. agreed to pay a £1.895 million civil recovery order in recognition of sums it had received which were generated through unlawful conduct related to UK subsidiaries incorporated in Tanzania and Kenya.

  - OPL is a wholly owned subsidiary of Oxford University Press. It operates throughout

Africa where it is principally involved in the publication of school textbooks.
  - In 2011, OUP became aware of possible irregular tendering practices involving its education business in East Africa. As a result of an internal investigation, they voluntarily disclosed to the SFO concerns in relation to contracts arising from tenders which it's Kenyan and Tanzanian subsidiaries had entered into between 2007 and 2010.
  - Following further work, supervised by the SFO, it was accepted by OUP that payments had been offered and made, directly and through agents, which were intended to induce the recipients to award competitive tenders and / or publishing contracts for schoolbooks to both the Kenyan and Tanzanian subsidiaries.
  - In the light of the co-operation offered, it was decided that the public interest in this case was best met not by prosecuting but through the making of a civil recovery order.
  - At the time of the order, I said "This settlement demonstrates that there are, in appropriate cases, clear and sensible solutions available to those who self-report issues of this kind to the authorities".

- *BAE Systems plc* — In December 2006, the then Director, Robert Wardle, decided to discontinue an investigation into the affairs of BAE Systems plc as far as they related to the Al Yamamah defence contract with the government of Saudi Arabia. His decision was taken following representations that had been made to both the Attorney General and the Director concerning the need to safeguard national and international security. In reaching that decision, no weight was given to commercial interests or the national economic interest.

3. Outline of provisions and distinctive features in the Bribery Act 2010

- The Act came into force on 1 July 2011. It is not retrospective.

- It repeals the offences outlined above in relation to conduct that post-dates the Act.

- Creates a number of offences:

  - *s1 Bribery of another person* ('active bribery'): committed where a person offers, promises or gives a financial or other advantage to another person, intending to induce them to perform improperly a relevant function or activity, or to reward a person for such improper performance.
  - *s2 Receiving a bribe* ('passive bribery'): committed where a person requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly by themselves or another.
  - *s6 Bribery of foreign public officials*: committed where a person in the act of intending to obtain or retain a business advantage bribes a foreign public official with the intent of influencing them.
  - *s7 Corporate liability for failure to prevent bribery*: this is the most radical innovation within the Act. Under this provision, a 'relevant commercial organisation' is guilty of an offence if any person associated with it bribes another person intending to obtain or retain a business advantage.
    - It is a defence for the organisation to show that it had 'adequate procedures' in place to prevent such activity from taking place.
    - This offence applies to any organisation that conducts "part of their business" in the UK.

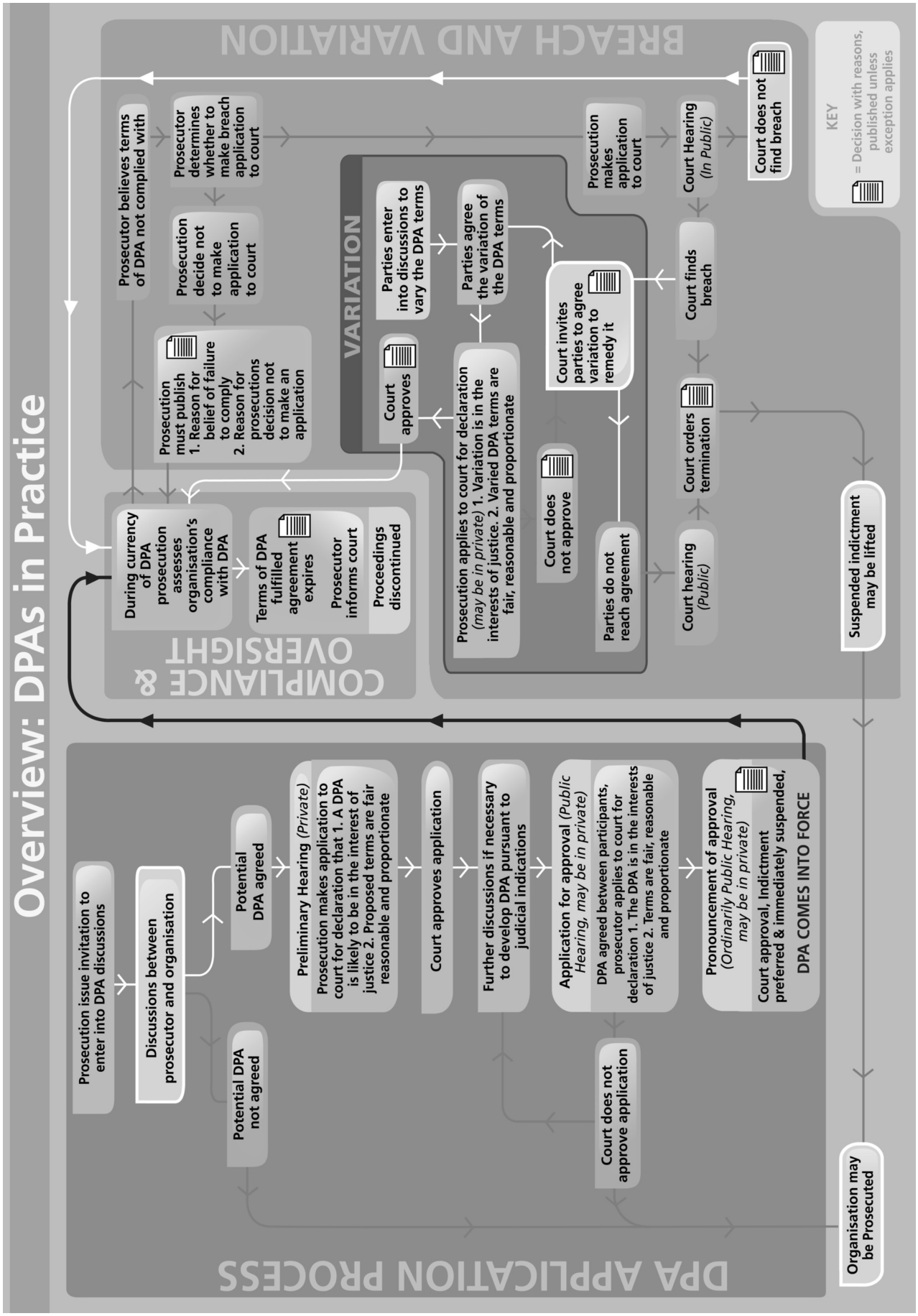
- Territorial application — if any part of the conduct involved in ss.1, 2 or 6 are committed in the UK, then the UK courts have jurisdiction. Even if all the actions in question take place abroad, the UK still has jurisdiction as long as the person performing them is a British national *or* resident in the UK *or* incorporated in the UK *or* has a "close connection" with the UK.

- Two other changes made by the Act:

- ○ The maximum sentence on conviction was increased from seven to ten years (plus an unlimited fine).
- ○ Removal of requirement for consent to be given by our Attorney General — proceedings are now commenced personally by me as Director.

4. Current situation of enforcement of the Bribery Act 2010

- The Act has now been in force for a little over two years
- Much has been made in the British media of the fact that there have been relatively few prosecutions under the Act, including thus far only one case brought by the SFO
- This is not surprising — firstly, as noted, the Act only applies to conduct which occurs after July 2011; secondly, these are cases which, by their very nature, tend to involve conduct done in secret which may not come to light until months or even years later and; thirdly, even once corrupt activity is discovered, gathering and reviewing material sufficient to mount a successful prosecution can be a lengthy and time-consuming exercise.
- At present, the SFO has around a dozen or so active investigations or prosecutions into cases involving foreign public officials — with several more in the pipeline. Of these, at least four involve conduct that, if capable of proof, would fall under the Bribery Act.
- Even with new legislation, these are complex cases that are often difficult to investigate and prosecute successfully. Key issues include:
  - ○ Evidence of corrupt activity is ordinarily hidden, making it difficult to identify and recover for the purposes of criminal proceedings;
  - ○ Potential witnesses are often reluctant to co-operate with the authorities, meaning that the documentary evidence becomes even more important in proving the case;
  - ○ Where there is corrupt activity, this is rarely confined to just one or two instances — often, our investigations unearth a whole system of corruption, often spanning multiple countries;
  - ○ This can mean that we need to make some tough choices about where to best focus our resources in order to ensure that we pursue a focused and manageable case;
  - ○ It also means that we are very much dependent upon assistance from other jurisdictions to secure admissible evidence — not all of whom have a fully developed system of mutual legal assistance.


Overview: DPAs in Practice
DPA APPLICATION PROCESS
Prosecution issue invitation to enter into DPA discussions
Discussions between prosecutor and organisation
Potential DPA agreed
Potential DPA not agreed
Preliminary Hearing (Private)
Prosecution makes application to court for declaration that 1. A DPA is likely to be in the interest of justice 2. Proposed terms are fair reasonable and proportionate
Court approves application
Further discussions if necessary to develop DPA pursuant to judicial indications
Application for approval (Public Hearing, may be in private)
DPA agreed between participants, prosecutor applies to court for declaration 1. The DPA is in the interests of justice 2. Terms are fair, reasonable and proportionate
Court does not approve application
Pronouncement of approval (Ordinarily Public Hearing, may be in private)
Court approval, Indictment preferred & immediately suspended,
DPA COMES INTO FORCE
Organisation may be Prosecuted
COMPLIANCE & OVERSIGHT
During currency of DPA prosecution assesses organisation's compliance with DPA
Terms of DPA fulfilled agreement expires
Prosecutor informs court
Proceedings discontinued
BREACH AND VARIATION
Prosecutor believes terms of DPA not complied with
Prosecutor determines whether to make breach application to court
Prosecution decide not to make application to court
Prosecution must publish 1. Reason for belief of failure to comply 2. Reason for prosecutions decision not to make an application
VARIATION
Court approves
Parties enter into discussions to vary the DPA terms
Parties agree the variation of the DPA terms
Prosecution applies to court for declaration (may be in private) 1. Variation is in the interests of justice. 2. Varied DPA terms are fair, reasonable and proportionate
Court does not approve
Court invites parties to agree variation to remedy it
Parties do not reach agreement
Court hearing (Public)
Court orders termination
Court finds breach
Court Hearing (In Public)
Prosecution makes application to court
Court does not find breach
Suspended indictment may be lifted
KEY
= Decision with reasons, published unless exception applies

Bribery Act 2010

Ministry of Justice guidance on the Bribery Act 2010

〈https://www.justice.gov.uk/legislation/bribery〉

Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions

〈http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf〉

Guidance on Corporate Prosecutions: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions

〈http://www.sfo.gov.uk/media/65217/joint_guidance_on_corporate_prosecutions.pdf〉

Deferred Prosecution Agreements

Draft Deferred Prosecution Agreement Code of Practice ("DPA Code") issued by the Director of Public Prosecutions and Director of the Serious Fraud Office

〈http://www.sfo.gov.uk/media/256647/dpa%20code%20consultation%20final%20approved.docx〉

PARTICIPANTS' PAPERS

STUDY ON THE ALGERIAN ANTI-CORRUPTION LAW

*Touti Fayçal**

I. INTRODUCTION

Algeria has sought like the rest of the world to address the phenomenon of corruption, convinced of the importance of this to try to achieve economic and social development and the consolidation of the rule of law, and also the principles of social justice in the context of transparency and clarity. This has been embodied through the law No. 06/01 of February 20, 2006 on the prevention and combating of corruption, and through the ratification of the United Nations Convention against Corruption of October 31, 2003, ratified by Presidential Decree No. 04/128 of April 19, 2004, with reservations. This law aims mainly as stated in the first article to:

1. Support measures for preventing and fighting corruption

2. Promoting integrity, responsibility and transparency in the public and private sectors

3. Facilitate and support international cooperation and technical assistance to prevent and fight corruption, including asset recovery.

II. DEFINITIONS AND TERMS

It includes several anti-corruption laws and definitions of various terms, including: corruption, public officials, foreign public officials, confiscation and controlled delivery.

A. Corruption

Corruption includes all the crimes set forth in Section IV of this Act, which are: bribery of public officials, unjustified concessions in the field of public procurement, bribery in public transactions, bribery of foreign public officials and officials of public international organizations, misappropriation of property by a public official and use of it illegally, treachery, exemption, illegal reduction of taxes and fees, influence peddling, abuse of function, conflicts of interest, taking illegal benefits, failure to declare or false statement of property, illicit enrichment, receiving gifts, hidden funding of political parties, taking illegal benefits, bribery in the private sector, misappropriation of property in the private sector, the laundering of proceeds of crime, concealment, obstructing the smooth functioning of justice, the protection of witnesses, experts, victims and whistleblowers, abuse of reporting and non-reporting of offences.

B. Public Officer

A public officer is any person who holds an administrative legislative, executive, judicial mandate, or at a popular locally elected assembly, whether elected or nominated, as permanent or temporary, whether paid or not, and regardless of their hierarchical level or seniority. The term also includes any other person holding a function or mandate, even temporary, paid or unpaid, who contributes as such, in the service of the public organism or public enterprise, or any other company in which the State owns all or part of its capital, or any other company that provides a public service, or any other person defined as a public officer or who is assimilated in accordance with current legislation or regulations.

*Examining Magistrate, Chief Court-Ain Defla Tribunal, Ministry of Justice, Algeria.

III. MEASURES TO PREVENT CORRUPTION IN THE PUBLIC SECTOR

A number of measures must be taken into account in the public sector to combat corruption; these are most important when dealing with property and in the field of public procurements.[1]

A. Employment

Several criteria and principles must be taken into account when recruiting in the public sector:

- the principle of efficiency, transparency and objective criteria such as merit, equity and ability.
- appropriate procedures to select and train persons called to occupy public positions considered especially exposed to corruption.
- adequate treatment and adequate compensation.
- programme development of education and adequate training to enable public officers to fulfil their duties in a fair, honourable and proper manner and make them expect to benefit from specialized training to sensitize them to risks of corruption.

B. Property Statement

The anti-corruption law devoted an important chapter to the property statement to ensure transparency in order to give the state an opportunity to discover signs of corruption. This is an obligation on public officers, and this law defines entities that are committed in front of each category of public servants to make such declarations. This liability, which requires public officers property statement submission during the month following the date of his inauguration in the job or the beginning of his electoral term, and he or she must renew this statement periodically. The financial disclosure of public officers includes real estate and chattels in Algeria and abroad, and the law identified the body that each employee must repont to, according to his or her rank, starting from the President of the Republic. The law also urged the elected bodies and public institutions to promote economic integrity and honesty of the officers by adopting codes and rules of conduct.

C. Public Procurement Order

The conclusion of public procurement is subject to specific rules due to the importance of these transactions to the public and private sectors and the national economy in general. The process is subject to several criteria:

- dissemination of information concerning the procedures for public procurement orders
- the prior establishment of the conditions of participation, selection objectives and precise decision-making criteria concerning public procurement orders
- the exercise of any means of redress

IV. MEASURES TO PREVENT CORRUPTION IN THE PRIVATE SECTOR

A. Principles for Fighting Corruption

There are several measures taken to prevent the involvement of the private sector in corruption, and they are:

- strengthening cooperation between the services of detection and repression and relevant private entities.
- promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct to ensure that companies and all relevant professions operate in a fair, honourable and proper way to prevent conflicts of interest and

[1] Penal Code of Algeria.

to encourage the application of good commercial practices between companies and in the contractual relations with the state.

- promoting transparency between private entities
- prevention of improper use of procedure regulating private entities.
- implementation of internal audits of private companies

B. Accounting Standards

These standards are based primarily on the prevention of several incubator acts of corruption, and they are:

- the establishment of off-book accounts, crecords and transactions
- identifieation of the off-book or insufficiently identified operations
- identifying or liabilities which have not been correctly recorded

V. CIVIL SOCIETY PARTICIPATION AND COOPERATION OF PUBLIC AND PRIVATE INSTITUTIONS

The participation of civil society in the prevention of corruption plays an active role in reducing the growth of this negative phenomenon, by adopting transparency in decision-making and enhancing the participation of citizens in public affairs, and the preparation of mentoring programmes and awareness through the public and private media, and through popular channels organized in the form of education and awareness of non-governmental organizations for youth and adults, and also by holding training courses.

In fact, despite the tireless efforts made by the Algerian state in order to reduce and combat the phenomenon of corruption, and the recruitment of security, judicial and financial institutions, to amputate the roots of this phenomenon, Algerian society has not yet achieved giant strides in consolidating the idea of social participation, whether by individuals, non-organized groups or organized groups such as civil society associations or non-governmental organizations to address this phenomenon.

And by working in the field of justice, this role is often limited to the form of letters or faxes signed anonymously, and this is because either the informants fear reprisals from corrupt actors or these messages are submitted for revenge.

For the financial institutions of public or private banks or postal centres where money is transferred, their main role is to detect money laundering through monitoring of regular and electronic bank accounts or monitoring suspicious movements of funds; as a result it is not available question because, on the one hand, it is complex and requires approval from the relevant judicial authorities such as the public prosecutor or the investigating judge; on the other hand, it interferes with privacy and individual freedoms protected by the law, Constitution and international conventions in this area.

VI. THE NATIONAL BODY FOR THE PREVENTION AND FIGHTING AGAINST CORRUPTION

This body is an independent administrative authority that has legal personality and financial independence, made by the President of the Republic, and it is responsible for the prevention and fighting against corruption. It is working on the implementation of the national strategy in this area and has its own legal system and specific tasks.

A. The Legal System of the Body

The body is an independent administrative authority with a legal personality and financial auton-

omy. The autonomy of the body is guaranteed in particular by taking the following measures:

- the swearing in of members and officers of the body empowered to access the personal data and, in general, any confidential information before installation to their duties. The form of oath is set by regulation.

- staffing of the body in necessary human and material resources to accomplish these tasks.

- adequate and high level training of personal within the body.

- safety and protection of members and officers of the body against any form of pressure or intimidation, threat, insult or attack of any nature whatsoever which they may be the subject during or in connection of the performance of their duties.

B. Missions of the Body

The members are required to:

- propose a comprehensive policy for the prevention of corruption embodied in the principles of rule of law and reflecting the integrity, the transparency and responsibility in management of public affairs and public property;

- provide advice for the prevention of corruption to any person or public or private organization and recommend measures, including legislative and regulatory developments and steps for the prevention of corruption and to cooperate with the public and private sectors in the development of the rules of conduct;

- develop programmes for education and citizen awareness about the harmful effects of corruption;

- to collect, centralize and use any information that can be used to detect and prevent corruption, including research on legislation, regulations, procedures, and administrative practices, the factors of corruption in order to provide recommendations designed for their elimination;

- periodically evaluate relevant legal instruments and administrative measures on the subject to determine their effectiveness in the field of prevention and the fight against corruption;

- to collect periodically, respecting Article 6, the declaration of assets of public officers, to examine and use the information they contain, and to ensure their preservation;

- to use the public prosecutor to gather evidence and to carry out investigations on corruption;

- to ensure the coordination and monitoring of activities and actions in the field based on periodic and regular reports with statistics and analysis relating to the field of prevention and the fight against corruption which are addressed by the sectors and the participants concerned;

- to ensure the strengthening of inter-sectoral coordination and the development of cooperation with entities in fighting against corruption, both at the national and international levels;

- generate any evaluation research of the actions undertaken in the field of prevention and the fight against corruption.

C. The Relationship between the Body and the Judicial Authority

When the body reached to events that may constitute a breach of the criminal law, the matter is referred to the Minister of Justice and Keeper of the Seals, which makes use of an experienced attorney general to commence public action in movement, if appropriate.

Corruption cases are initiated at the level of the judicial authorities, as the regular criminal cases

are initiated, through the same procedures and degrees of litigation applicable in the Algerian judicial system. Thus, there are no special or exceptional rules on corruption issues.

Legal persons have penal responsibility for the crimes stipulated in Article 53 of the Anti-Corruption Act. Some of the special investigative techniques adopted in the anti-corruption law are controlled delivery, electronic surveillance and intrusion with permission from the judicial authorities. Any contract or transaction, privilege or license obtained by corruption should be declared null and void by the judicial authorities. In the end, all members and staff of the body are committed to protecting professional secrets, and they must report annually to the President on an assessment of its activities and deficiencies and suggestions they see useful to fight against corruption.

VI. INTERNATIONAL COOPERATION IN COMBATING CORRUPTION

International cooperation in fighting corruption is mainly associated with the presence of international agreements between Algeria and other states, and is governed by international principles such as the principle of reciprocity, and this cooperation is available with the convention's parties, in the field of investigations and prosecutions and judicial proceedings

A. Prevention, Detection and Transfer of Proceeds of Crime

In order to detect financial transactions related to corruption, and without prejudice to the legal provisions relating to money laundering and terrorist financing, banks and non-banking financial institutions shall, in accordance with the regulations:

- comply with data concerning persons or entities on the accounts of what financial institutions should exercise greater oversight, types of accounts and transactions to which to pay attention, as well as measures for the establishment and maintenance of such accounts and the recording of transactions.

- take into account the information provided to them as part of their relationship with foreign authorities in particular regarding the identity of persons or entities that they will strictly monitor the accounts;

- transaction that is recorded, keep adequate records of accounts and transactions involving the persons mentioned in the first and second paragraphs of Article 58 of the anti-corruption law.

B. Relations with Banks and Financial Institutions

In order to prevent and detect transfers of proceeds of corruption, banks which have no physical presence and are not affiliated with a regulated financial group will not be allowed to settle in Algeria. Banks and financial institutions operating in Algeria are not allowed to have relationships with foreign financial institutions that accept their accounts to be used by banks that do not have physical presence and that are not affiliated to a financial group regulated.

C. Measures for Direct Recovery of Property

Algerian courts are competent to know the committed civil action by the States parties to the Convention with a view to know the existence of a right of ownership of property acquired subsequent to the corruption. The court seized of a proceeding accordance with article 62 of the anti-corruption law, may order persons convicted of corruption to pay civil damages to the applicant state for the damage that has been caused. In all cases where a confiscation order may be imposed, the court shall take necessary measures to protect the legitimate owner claimed by another State party to the Convention.

D. Recovery of Property through International Cooperation for Purposes of Confiscation

Foreign judicial decisions ordering the confiscation of property acquired through an offence under the anti-corruption law, or means for its commission, shall be enforceable in national territory in accordance with established rules and procedures. By speaking, under the legislation, an offence of money laundering or such other offence falling within its competence, the seized court may order the confiscation of foreign goods acquired through one of the offences under the anti-corruption law, or

used for their commission. Confiscation of property referred to in the anti-corruption law is declared even in the absence of a criminal conviction due to the extinction of public policy or for some other reason.

1. Requests for International Cooperation for the Purpose of Confiscation

As well as the documentation provided with the information contained in the requests for judicial cooperation, according to bilateral and multilateral agreements, there must also be:

- a statement of the facts relied upon by the requesting State and a description of the actions required and a copy of the order;
- a description of property to be confiscated, its location and value
- a statement of information and facts that defines the scope of the implementation and that authorization of confiscation measures has been taken to notice the States Parties.

2. Measures of International Cooperation for Confiscation

The request of a State Party to the Convention must be directed to the Minister of Justice for the confiscation of proceeds of crime located with in the national territory, then turned to the competent public prosecutor, and the public prosecutor sends it to the competent court; the judgement of the Court shall be subject to appeal, and the appeal, and the provisions are implemented with the knowledge of the Public Prosecution.

Information on proceeds of offences established in accordance with law against corruption may, without prior request, be given to a State Party to the Convention, where such information might assist the receiving State to initiate or conduct an investigation, prosecution or judicial proceedings or might lead to the presentation by the State of a request for confiscation. When a confiscation order is made, the disposal of confiscated property is under the relevant treaties and legislation.

VII. THE EFFECTS OF CORRUPTION

Corruption has strong effects on all fields in the country, and corruption has led to weak political institutions of the country and encouraged the birth of the soft state, which is characterized by a lack of social discipline that leads to wilful neglect of rules and directives by public officers and civil servants. The main qualities of a soft state are the high dependence on outside sources, disobedience of the public authority weakened system of rights and obligations over centralized government, rigid bureaucracies unable to adjust to change, which explains clearly the strong relationship between developed countries and the colonial history on the one hand and on the other hand their relationship with their colonial past which left a deep connection with developed countries. This makes them associates with corruption. Lack of social discipline, combined with the monopoly position of government and a confusing network of regulations has enabled powerful individuals and business groups.[2]

VIII. FIGHT AGAINST CORRUPTION

Considering that corruption is a global phenomenon and widespread around the world, it requires great efforts in order to fight corruption and to keep it from spreading to different regions. There are many measures we can take in order to decrease corruption.[3]

- Parliaments control function (legislation authority)
- Private institutions

[2]David J. Gould and Jose A. Amero-Reyes, *The Effects of Corruption on Administrative Performance*, 20, available at ⟨http://www-wds.worldbank.org/servlet/WDSContentServer/IW3P/IB/1983/10/01/000009265_3980716172221/Rendered/PDF/multi_page.pdf⟩.

[3]Memorandum of Cooperation with the National Agency for Integrity lssues of Romanc Podgorica, 21 April 2008.

- Individual effort and organization
- The application of laws by courts
- Media should work together with government hand in hand
- Exchanging experiences between governments and organizations
- Improve the living conditions of citizens as well as public officers
- Create strong central mechanisms at the level of administration, different institutions and companies

IX. CONCLUSION

To conclude we can say that corruption in general is a national and international problem demanding efforts of countries, institutions and individuals; in addition, it requires consultation between countries and organizations. Thus, we find a radical solution and impose a roadmap to overcome challenges.

Since the accession of Algeria to the United Nations Convention against Corruption, adopted by the General Assembly of the United Nations in New York on October 31, 2003 ratified by Algeria on April 19, 2004 and the issuance of Law No. 06/01 dated February 20, 2006 on the prevention of corruption, Algeria witnessed a remarkable development at the level of legal mechanisms and material means adopted to address all types of corruption. Nevertheless, Algeria must exert more efforts, in particular, to mobilize popular energies to confront this phenomenon.

CRIMINAL JUSTICE RESPONSE TO CORRUPTION

Mohammad Saidur Rahman and Md Golam Rabbani***

I. GENERATING LEADS

A. 24-Hour Telephone Hotlines for Public Complaints and Reports

Sections 17(c) and (k) facilitated receiving complaints. The Anti Corruption Commission (ACC) has an arrangement receiving complaints over telephones for 24 hours.

B. Information about Suspected Transaction Reports (STR) from the Bangladesh Financial Intelligence Unit (BFIU)

The reporting organization under the Money Laundering Prevention Act (MLPA) 2012 includes concepts of unusual transactions and suspicious transactions. Section 2(n) of MLPA 2012 defines "suspicious financial transactions" as:

- A transaction that substantially deviates from the usual norm by which that transaction is usually conducted, or
- There is reasonable cause to believe that the transaction is related to any proceeds of crime.

The MLPA is inconsistent on the meaning of "suspicious transaction" as one definition relates to "any proceeds of crime", while another ties the concept to be "related to money laundering". Section 2 of the MLPA defines a suspicious transaction as when "there is reasonable cause to believe that the transaction is related to any proceeds of crime"; section 25(1)(d) of the MLPA states that a reporting organization shall "inform proactively and immediately Bangladesh Bank, [of suspicious, unusual, or doubtful facts] or transactions likely to be related to money laundering".

The obligation to report terrorist-financing-related transactions is included in section 15 of the Anti Terrorism Act (ATA) 2009 and applies to banks, insurance companies, money changers and remittance companies. The provision states: Bangladesh Bank shall have the power and authority to take necessary measures to prevent and detect transactions intended to commit offences under this Act through any banking channel, and for that matter is empowered and authorized to call for reports about suspicious transactions from a bank and shall keep such report confidential if law does not allow disclosure.

The Anti-Money-Laundering (AML) Circular provides a direct obligation on banks and financial institutions if there is any reasonable ground to suspect that a transaction or an attempted transaction has a connection to financing terrorist activities, and as per ATA 2009 shall have to be reported, with comments of the branch compliance officer, to the BFIU no later than three days from the date of the receipt from the branch. The obligations of sending STR on terrorist financing is indirectly laid out in law with supporting details set out in other enforceable means. In the case of the Terrorism Financing (TF)-related STR obligation on banks in the ATA 2009 and its extension to non-bank financial institutions in the Circular, the limitations with the scope of the TF offence in the ATA undermines the range of TF that would form the basis for suspicion. This results in a gap regarding suspicion of funds provided for a terrorist organizations or an individual terrorist. Financial institutions are required to report to the BFIU when they suspect or have reasonable grounds to suspect that funds are the proceeds of criminal acts that would constitute predicate offences for money laundering.

*Director, Anti-Corruption Commission, Bangladesh.
**Director, Legal and Prosecution Unit, Anti-Corruption Unit, Bangladesh.

C. Protection of Whistleblowers

The Govt. enacted Public Interest Information Disclosure Act (Provide Protection), 2011; this legislation protects the witnesses and informants and describes the procedure elaborately.

II. ACQUIRING AND ANALYZING OBJECTIVE EVIDENCE

A. Documents and Bank Records

Sections 19 and 23 of the ACC Act 2004 empower authorities to compel a suspect or any other person to submit a statement of assets of liabilities and a suspect or any other person who may be holding property on his or her behalf to submit a statement of assets and liabilities and to furnish any other information; summons witnesses, interrogate them under oath and take evidence under oath; request discovery of any document; call for public records; issue warrants for examination of documents; require any person to furnish information in matters relating to any inquiry or investigation; call for any information from the government or any authority or organization under the government; and require the co-operation of the government or any authority or organization under the government in the manner determined by the ACC.

Section 23, 24 and 25 of MLPA 2012 provided BFIU as a unit of Bangladesh Bank, and Bangladesh Bank is able to order schedule banks, financial institutions and reporting organizations to freeze accounts to allow a period for investigation where it is suspected that a transaction involves proceeds of crime. Under section 24(4), the BFIU is able to seek information regarding suspected money laundering from another country on the basis of "any contract signed or arrangements". On demand from Bangladesh Bank, reporting institutions must provide (in the case of open accounts) identification information and (in the case of closed accounts) previous transaction records.

B. Data Stored on Personal Computers or Cell Phones and Videotapes of Security Cameras

Data collected from computers or cell phones cannot be used as evidence under the existing law of evidence. The videotapes also cannot be used under the present Evidence Act 1872 but our Court of Record, i.e., the High Court Division of the Supreme Court of Bangladesh, has given a sanction in a case decided by it.

C. Handwriting Analysis

Sections 45, 46 and 47 of the Evidence Act of 1872 facilitated the handwriting expert opinion as evidence to prove the case before the Court. The Criminal Investigation Department (CID), a unit of the Police, is assigned to give reports on handwriting.

III. ACQUIRING SUSPECTS

A. Electronic Surveillance

In Bangladesh, recent legislation has expanded the scope of electronic surveillance:

(i) Money Laundering Prevention Act (MLPA) 2012,

(ii) Anti Terrorism Act (ATA) 2009,

(iii) The Code of Criminal Procedure (Cr PC) 1898 (as amendment up to 2009),

(iv) The Public Interest Related Information Disclosure (Protection) Act 2011 (The Whistle Blower Protection Act), and

(v) The Mutual Legal Assistance Act, 2012 (MLAA).

The provisions of these laws enhance the scope of acquiring electronic evidence of suspected persons. Nevertheless, the concerned ministry, i.e., Ministry of law, justice and Parliamentary affairs are working for relevant amendments of the Evidence Act 1872, Anti Corruption Commission Act 2004 and the Code of Criminal Procedure 1898, with a view to use evidence collected electronically to ensure justice.

B. Undercover Operations

The Law enforcing agencies, e.g., the Police Department, Rapid Action Battalion (RAB), National Security Intelligence (NSI), Detective Branch (DB), Director General Forces Intelligence (DGFI), Criminal Investigation Department (CID), Special Branch (SB) have frequent undercover operation activities in Bangladesh. The Anti Corruption Commission has a team, formed in the year 2009, to operate undercover operations.

C. Immunity

Section 31 of ACC Act 2004 indemnified the actions performed in good faith. If any person is affected or is likely to be affected by any action taken in good faith in the discharge of duties under this Act, then neither the commission nor any commissioner, officer or employee thereof shall be liable to action under civil or penal codes or otherwise. Moreover, the other members of law enforcment agencies are indemnified for actions performed in good faith in general law that is under the Penal Code, 1860.

D. Plea Bargaining

In our legal system there is no scope for plea bargaining. The Ministry of Law Justice and Parliamentary Affairs (MOLJPA) (The Drafting Wing) is working to develop the scope of plea bargaining through amendment of relevant law.

E. Protection of Witnesses

Section 5 of the Public Interest Related Information Disclosure (Protection) Act, 2011 protects the witnesses, experts, victims, reporting persons and whistleblowers. Section 9 and 10 provides the penalty of violating those provisions. (Maximum 5 yrs and minimum 2 yrs with or without fine)

F. Compulsory Systems to Testify under Subpoena

Section 19 and 20 of ACC Act 2004 empowered the Commission, inquiring or investigating officers to obtain the testimony of suspects and witnesses under compulsory subpoena.

G. Penalties for Perjury and Obstruction of Justice

Chapter X and XI (sec 172 — 229) of the Penal Code 1860, protects public servants and public justice. These provisions described the nature of offences of perjury, contemptuous offences against lawful authority of public servants and offences against public justice and the penalties for those offences. Section 13 of Contempt of Court Act, 2013 provides penalties for contempt of court.

IV. IDENTIFICATION, TRACING, FREEZING AND CONFISCATION OF PROCEEDS AND RETURN AND DISPOSAL OF CONFISCATED ASSETS

A. Identification and Tracing of Property

1. The ACC Act, 2004

The ACC Act confers strong powers upon the ACC for the identification and tracing of property in corruption investigations. These include powers under sections 19 and 23 to compel a suspect or any other person who may be holding property on his or her behalf to submit a statement of assets and liabilities and to furnish any other information; summon witnesses, interrogate them under oath and take evidence under oath:

- Request discovery of any document
- Call for public records
- Issue warrants for examination of documents
- Require any person to furnish information in matters relating to any inquiry or investigation
- Call for any information from the government or any authority or organization under the government
- Require the cooperation of the government or any authority or organization under the

government in the manner determined by the ACC.

B. The MLPA, 2012 Confers Only the Following Investigative Powers

Under section 24, BFIU is working as a unit of Bangladesh Bank (The Central Bank of Bangladesh). Under section 23(1)(c), Bangladesh Bank is able to order schedule banks, financial institutions and reporting organizations to freeze accounts to allow a period for investigation where it is suspected that a transaction involves proceeds of crime. Under section 23(2), Bangladesh Bank shall share information with the designated investigative agency. Under section 24(2) the Government organization, semi govt. organization, autonomous body on their own motion will inform BFIU to fulfill the object of the Act. Under section 24(3), BFIU will inform the law enforcing agency about ML and TF. Under section 24(4), the BFIU is able to seek information regarding suspected money laundering from another country on the basis of "any contract signed or arrangements". Under section 25(1)(c), on demand from Bangladesh Bank, reporting institutions must provide (in the case of open accounts) identification information and (in the case of closed accounts) previous transaction records.

C. Relevant Provisions within the CrPC, 1898

- The power to summon persons to produce documents or things which are considered necessary for investigation or prosecution (but not documents or things in the custody of banks or bankers unless it is for the purpose of investigating certain offences such as theft, breach of trust, fraud and forgery: section 94(1)

- The power to search pursuant to a search warrant: section 96(1)

- The power to search premises suspected of containing stolen property, forged documents or counterfeit material: section 165

- The power to compel the attendance of witnesses and to examine them: sections 160 and 161.

D. Confiscation, Freezing and Seizing of Proceeds of Crime

Bangladesh has legislation for the confiscation, freezing and seizing of criminal proceeds and instruments. Various procedures are available under the following Acts:

- The Money Laundering and Prevention Act, 2012

- The Anti Terrorism Act, 2009

- The Code of Criminal Procedure (CrPC), 1898

- The Anti-Corruption Act, 2004.

Collectively the relevant provisions within the above acts provide a basis for confiscation and freezing action in relation to money laundering (ML), terrorist financing (TF) and other serious offences.

E. The Anti Corruption Act

Forfeiture measures in the ACC Act, 2004 are found at section 27(1), as follows: If there are sufficient and reasonable grounds to believe that a person in his/her own name or any other person on his/her behalf is in possession and has obtained ownership of moveable or immoveable property through dishonest means and the property is not consistent with the known sources of his/her income and if he/she fails to submit to the court during trial a satisfactory explanation for possessing that property, then that person shall be sentenced to a prison term ranging from a minimum of 3 years to a maximum of 10 years, and these properties shall be forfeited. The ACC relies upon the general power conferred upon it by section 19(1)(f), to take action in relation to any other matter required for realizing and fulfilling the aims and objectives of the ACC Act, 2004.

F. The Money Laundering and Prevention Act

Section 17(1) of the MLPA appears to permit forfeiture of both proceeds and instruments of money laundering, since it applies to property "involved with the offence". As noted "property" is broadly defined within the MLPA. In addition section 17(1) specifically applies to property within and outside Bangladesh. Section 17(3) authorizes forfeiture of indirect proceeds to a limited degree, in that it permits forfeiture of property which has been converted and which is in that way indirect proceeds of crime. Section 14(1) of MLPA 2012 empowers the court, upon application of the investigating organization, to make an order for freezing or attachment of property wherever situated within or outside Bangladesh in which the State has interest under this Act. The MLPA also empowers the Bangladesh Bank to issue orders to banks and financial institutions to suspend a transaction or freeze an account "where Bangladesh Bank has reasonable grounds to suspect that the transaction involves proceeds of crime".

G. The Criminal Procedure Code (CrPC)

The CrPC contains a general provision for forfeiture of property upon conclusion of an inquiry or investigation. Section 517(1) is as follows:

> When an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise of any property or document produced before it or in its custody or regarding which any offence appears to have been committed or which has been used for the commission of any offence.

It is clear from the terms of section 517 that both proceeds and instruments of crime can be forfeited, as well as property of corresponding value. A forfeiture order pursuant to section 517 of the CrPC can apply to property held in the names of third parties, as well as to the indirect proceeds of crime. Provisional measures include freezing and or seizing.

The CrPC confers a power upon police officers to seize property pursuant to section 98. However the context indicates that the power is restricted to seizure of physical objects. The CrPC does not contain any provisions for freezing of property.

H. Initial Freezing or Seizing Application to Be Made *Ex Parte* or without Prior Notice

The MLPA is silent as to whether the initial freezing application under section 14(1) may be made *ex parte* or without prior notice. One of the grounds upon which a freezing order can be made, is that there is a substantial likelihood the property will become unavailable before the conclusion of the criminal proceedings (refer section 14(2)(d)), suggesting that the initial application is intended to be made without notice.

The MLPA 2012:

- Sections 14(3), 17(4) and 18 make provision for bona fide third parties to seek return of property which is liable to forfeiture.

Section 517(4) of the CrPC enables a person to claim entitlement to property which is subject to forfeiture. Neither the MLPA and the ACC Act, nor the CrPC contains any provisions to take steps to prevent or avoid actions.

I. ATA 2009

Section 36 makes provision for bona fide third parties to seek return of property which is liable to forfeiture. Any person "aggrieved" by an order for forfeiture may lodge an appeal in the High Court against the forfeiture decision: section 37(1). In case of acquittal confiscated property will be returned, or if not possible to return the value of property will be returned including reasonable interest of the value, according to Section 37(2).

V. PREVENTION

A. Prevention Legislation

Relevant legislation includes the ACC Act, 2004; the ACC Rules, 2007; Prevention of Corruption Act, 1947 (which was the first of its kind in South Asia); the Penal Code, 1860; the MLPA, 2012; the ATA, 2009; Public Procurement Act, 2006; Public Procurement Rules, 2008; Government Servant (Conduct) Rules, 1979; Government Servant (Discipline and Appeal) Rules, 1985; the Competition Act, 2012. These laws contain various provisions to prevent, punish and investigate acts of corruption.

B. Procurement Management

The *Public Procurement Act (PPA), 2006* came into force on 31 January 2008 along with the *Public Procurement Rules (PPR), 2008* which consolidated the whole regime. PPR, 2008 consolidated the lessons learned under PPR, 2003 moving one step forward with the aim of enhancing the capacity of the stakeholders. Moreover, PPR, 2008 criminalizes corruption in procurement processes by public officials and other relevant parties as a means to address some of the existing maladies. Section 3 of the PPA, 2006 provides that the act will extend to the whole of Bangladesh and shall apply to procurement of goods, works or services by any procuring entity (including registered company) using public funds and procurement by any government, semi-government or any statutory body. Further, PPA, 2008 has been amended by the *Public Procurement (Amendment) Ordinance, 2007* adding the provision to the scope and application of the PPA, 2006 in relation to procurement in foreign aided projects providing that the provisions of the act will be applicable in such cases unless there is any thing contrary in the loan, credit or grant agreement with a development partner or a foreign state or an organization. The Government also approved the implementation of the "Public Procurement Reform Project" (PPRP) with WB assistance for improving governance in public procurement. A Central Procurement Technical Unit (CPTU) within the IMED was established under the Ministry of Planning, which is in charge of monitoring the procurement process. The CPTU assists procuring entities in implementing the act and rules and monitors the functioning of the public procurement system. Through its website the CPTU provides information on procurement laws, tender invitations of public entities of certain threshold values of procurement and its monitoring activities. Other components of the project include implementation of public procurement reforms and improvement of procurement management capacity. The PPR, 2008 (rules 13-18, 47-49, 56-60) has specified the basic procurement guidelines, including public accessibility of tendering rules, eligibility and non-discrimination criteria regarding the selection of tender, and the required qualifications of tenderers. Furthermore, section 40 of the act and rule 90 (through rules 61, 62) state that an open national tendering system is the preferred system for procurements in the public sector. These rules also include provisions for the organization of any public procurement, including policy formulation, coordination, and monitoring of the procurement procedure. A detailed legal framework for complaints and appeals to ensure legal recourse and remedies incorporates both administrative and independent review mechanisms (rules 56-60). The PPR, 2008 also provides detailed guidelines for international procurement (rules 83-87). In addition PPR, 2008 requires the establishment of a Tender Opening Committee (TOC) and Tender Evaluation Committee (TEC)/Proposal Evaluation Committee (PEC) for goods, works and services procurement. TECs are in charge of evaluating bids and are required to furnish detailed reports for awards to the approving authority (rules 101-102). The PPA, 2006 and the PPR, 2008 aim to provide a legal framework for governing public sector procurement.

1. Distribution of Procurement Information

Rule 14 of the PPR, 2008 require that procuring entities make publicly accessible in paper and in e-format all relevant information pertaining to any specific tenders, specifically records relating to the tender, information concerning the award of contracts, and legal texts. Further, PPR, 2008 directs procurement entities to furnish, upon request from any concerned person, all documentation relating to the proceedings of an award or termination of any contract. A number of issues continue to exist in relation to advertisement of procurement notices, specifically poor advertisement, i.e., advertisements in "less circulated" newspapers, non-compliance with time requirements, and fraudulent practices relating to the posting of notices. These issues of transparency were raised in a legal action, where it was decided that procuring entities would be responsible for the dissemination of information relating to procurements and that all advertisements must be circulated in government listed newspapers that are "well circulated." Additionally, efforts are also underway to demystify the language of advertise-

ments. Section 40 of the recently effective *Public Procurement Act, 2006* expressly mentions the necessity of distributing information about invitations to tender and other pertinent information required in the provisions of the UNCAC. Moreover, the CPTU has established a website (www.cptu.gov.bd) to provide diversified information on establishing and maintaining databases on prices, quality, volumes, performance of suppliers, and the like that are simple and easy to use. These may help to reduce opportunities for corruption and make the whole process cost effective for its beneficiaries.

2. Predetermined Criteria for Public Procurement Decisions

Rule 8 of the PPR, 2008 requires procuring entities to appoint a TEC at the appropriate level to examine, evaluate and prepare a report with recommendations for the award. The TEC should consist of 5-7 members of which two must be experienced in procurement and from outside the procuring entity in certain thresh hold value. In accordance with rule 100, TECs are required to determine, on the basis of criteria set out for post qualification in the tender document, whether the tenderer with the lowest evaluated cost has the capability and resources to effectively carry out the contracts. Should the tenderer not meet the criteria, the tender is liable be rejected. Section 13 of chapter 3 (part 1) of the *Public Procurement Act, 2006* sets out the obligation of procuring entities for formulating criteria for tenderer qualification assessment and evaluation, which should be stated in the tender or proposal document. These provisions are very important in establishing a proper framework for choosing appropriate actors for procurement purposes and ensuring that the Government and society gets the full benefit of such arrangements. Bangladesh has not only taken significant steps toward meeting the UNCAC demands of transparency in procurement procedures, but has heeded the Convention's encouragement of effectiveness in establishing criteria for public procurement decisions through implementation of the relevant national legislation. Indeed, the current legal discourse has shown the GoB's enthusiasm to achieve the recommended international standard.

C. The Code of Conduct for Public Officials

The codes of conduct for civil servants set out the main principles which govern the behavior of staff in a modernized civil service. Articles 5 to 33 of the *Government Servants (Conduct) Rules, 1979* provide guidelines for the behavior and conduct of public officials in the civil service. They address issues like acceptance of awards and gifts, public demonstration of honor to the Government, raising of funds on behalf of the Government, disclosure of assets and speculation of investment, lending, borrowing buying or selling valuable properties, private trade, and employment. Contraventions of the Rules are dealt with by the provisions of the *Government Servants (Discipline and Appeal) Rules, 1985,* which makes violations liable to inquiry and punishment if proved. The detailed *Rules of Business, 1996* regulates government business transactions and the allocation of functions among different ministries/divisions.

1. Asset Declaration

In accordance with rule 13 of the *Government Servants (Conduct) Rules, 1979,* public officials are required to provide statements of wealth at the time of recruitment, which would include any moveable and/or immoveable assets. Public officials must also provide an annual update of such assets. By implication, this would include assets located in Bangladesh and/or abroad. Furthermore, the Government can also ask for a statement of liquid assets from any public official under rule 14 of the same Rules. Moreover, sections 168 and 169 of the *Penal Code, 1860* provide criminal liability for public officials engaging in unlawful trade, bidding or buying of any property. Both of the sections strictly recommend imprisonment for violation of the law. To strengthen compliance, by a recent administrative order, the Ministry of Finance has asked public officials to submit and update wealth statements in a prescribed format. Comprehensive Civil Service Rules are in the process of being drafted, and they are expected to modify the relevant rules, thus making the domestic legal regime compliant in regard to this provision.

2. Violation of Conduct in Public Service

The *Government Servants (Discipline and Appeal) Rules, 1985* makes a government servant liable to inquiry for the contravention of the provisions stated in the *Government Servants (Conduct)* Rules, *1979,* and recommends measures for punishment when proved. Part II of the Rules describes the issue of discipline in civil service with procedures of inquiry in cases of major and minor penalties. Moreover, part III provides for an appeal procedure against any government order. Overseeing this

issue are the Ministry of Establishment and the Cabinet Division. Disciplinary measures are quite regularly taken against those officers who had been accused of violating the law. However, discipline in itself is likely not sufficient to encourage adherence to codes and standards; if there is no incentive or reward for better performance, then there may be less motivation to uphold codes of conduct.

3. Preventive Measures — Legal and Regulatory Framework

AML preventative measures are set out in the MLPA 2012 and various Bangladesh Bank AML Circulars and in AML Guidance Notes. For CFT, limited preventative measures are set out in the ATA 2009. Section 21 the MLPA 2012 gave the power to make rules to implement the Act. Section 29 of the MLPA 2012 provides the power to make rules to implement the Ordinance. Section 43 of the ATA 2009 provides the power to make rules to implement the Ordinance. Bangladesh Bank has issued a number of Anti Money Laundering Circulars to instruct banks and financial institutions on AML/CFT requirements.

4. Status of Circulars

The Circulars listed above are issued under rule making powers in the MLPA, the Banking Companies Act and the Financial Institutions Act 1993. The Circulars use obligatory language, and while they do not mention sanctions, they reference the previously mentioned statutes which provide for sanctions. Additionally, the regulator checks reporting entities for compliance against obligations in the Circulars and sanctions non-compliance with such circulars.

5. Code of Conduct of Business

In 2012, the government enacted a law to control monopoly and unethical practices in doing business, i.e. The Competition Act 2012.

6. Conditions for Participation

Under PPR, 2008 any government agency who uses public funds is authorized to make decisions and take action as a procuring entity. According to rule 130, the CPTU is vested with the responsibility of providing guidance for setting up an enabling environment and conditions for participation. Rule 47 provides for non-discrimination, while rule 48 sets out criteria for the qualification of tenderers. These criteria include the possession of necessary technical and professional qualifications, legal capacity to enter into contract, and meeting tax and social security payment obligations. Rules 48-49 require any procurement process to stipulate technical specifications for the award of any contract. Rules 56-60 provide for a Review Panel that is responsible for reviewing a tenderer's complaint and recommending corrective action to a procuring entity, with respect to any breach of its obligations under these Rules. From the 31 cases brought before the Review Panel between the years 2003-2007, it is clear issues still exist with regard to setting up transparent and objective selection criteria as the Committee found four instances where the procuring entities did not stipulate clear criteria on the basis of which contractors were selected. The current legal instrument, after its effectiveness in 2008, has sufficiently achieved this aim in line with the provisions of the UNCAC.

D. Anti-Corruption Campaigns

Section 17(g) of the ACC Act, 2004 declared campaigning against corruption as its important object. The Commission has taken steps to promote the value of honesty and integrity in order to prevent corruption and take measures to build up much awareness against corruption. It arranges seminars, symposiums, and workshops. The ACC has formed a strategic planning working group on prevention to work on a specific field. The prevention unit of the commission formed the Prevention Committee in May 2010, and it has formed 492 Committees in 421 *upajila* (Police Stations), 62 Districts, 8 Metropolitan Cities. The committees are working to promote values of honesty and integrity in order to prevent corruption and take measures to build up mass awareness against corruption. The Committee has responsibility to build integrity units in schools, colleges and religious institutes. The Committee has already formed more than 19,000 integrity units all over the country. From 2009 to April 2013, the prevention unit has conducted general discussion over corruption about 5,492 times, debate 594, essay writing competition on corruption 786, rally 376, human wall 170, seminar 475, open discussion 1,980, street show 2,844, work shop 45, speech of personnel of civil society 204, drama 28 and others 1,534. The Committee has also conducted as international Anti-Corruption Day on 9th December in every year through different ways. That the Prevention Unit of ACC is observing "Anti Corruption

week" since 2011 starting from 26th March (Independence of Bangladesh) till 1st April under different activities. The Commission has started to celebrate its establishment day every year, i.e. 21st November, in different ways since 2012.

The prevention unit has been working since 2009 with the Islamic Foundation Bangladesh to promote the values of honesty and integrity in order to prevent and take measures to build up mass awareness against corruption. The ACC is working with electronic media, e.g. Bangladesh Television (Govt.), Channel I (private) to promote the values of honesty and integrity in order to prevent and take measures to build up mass awareness against corruption. The Commission conducted a round table meeting on the "Whistle Blowers" (Protection) Act, 2011 on 13 August 2011 with Joint Collaboration of USAID. It also conducted a round table conference on the "Role of Information and Communication Technology in Combating Corruption" on 4th September 2012. At present the Commission is working with USAID, PROGATI and GIZ, and those NGO'S are helping in different ways. That the ACC has awarded 3 journalists of print media and 2 electronic medias for their courageous reporting on corruption in this year.

VI. INTERNATIONAL COOPERATION

A. Ratification of AML Related UN Conventions

Bangladesh became a signatory to the Vienna Convention on 14 April 1989 without Reservation. Ratification occurred on 11 October 1990. Bangladesh has implemented the provisions of the Vienna Convention. Bangladesh is not yet a party to the Palermo Convention on Transnational Organized Crime. Delays with joining the convention derive from concerns over issues related to the UN Convention on the Rights of Migrant Workers. Bangladesh has adopted some of the language and coverage of a number of offences required in the Palermo Convention, but has not yet comprehensively implemented the requirements of the Palermo Convention. Bangladesh became a member of the Egmont Group on 3rd August 2013.

B. Ratification of the UN TF Conventions

Bangladesh acceded to the UN TF Convention on 26 August 2005, which took effect from 25 September 2005. Bangladesh joined the Convention with a Reservation as follows: "Pursuant to Article 24, paragraph 2 of the Convention [the] Government of the People's Republic of Bangladesh does not consider itself bound by the provisions of Article 24, paragraph 1 of the Convention." Article 24(1) relates to parties submitting to arbitration if any dispute on implementation of the Convention cannot be settled through negotiation within a reasonable time period. Full implementation of the TF Convention has not yet been achieved.

C. Other Forms of International Cooperation

Bangladesh Bank has taken the lead and is working with other agencies to pursue international cooperation through various multilateral bodies related to AML/CFT. Bangladesh is a member of the APG and has served as South Asia's representative on the APG Steering Group. Bangladesh FIU is now actively pursuing international cooperation. Under the MLPA 2012, Section 18 provides general powers for the government to enter into an agreement with any foreign state for carrying out the purposes of the Act. Few steps were taken to implement that provision. With the passage of the MLPA in 2012, greater powers were given to share information and enter into agreements with foreign states.

Exchange of information between the Bangladesh FIU and other FIUs is not subject to disproportionate or unduly restrictive conditions. Section 24 of MLPA permits the FIU to share STRs and other data with foreign FIUs "on the basis of any contract signed or arrangements". This enables the FIU to share information in a rapid manner. The FIU is able to cooperate by searching other databases to which the FIU may have direct or indirect access, including law enforcement databases, public databases, administrative databases and commercially available databases. Section 26 of the MLPA provides for contracts with foreign countries and allows the FIU or the Government to sign MOUs, bilateral or multilateral contracts or conventions to prevent ML. This provision does not extend to sharing information in relation to terrorist financing. At the time of the onsite visit, the BFIU had signed an MOU with the FIU of Malaysia and was pursuing other MOUs. As of September 2013 Bangladesh has signed MOUs with 15 countries including Malaysia, Philippines, Nepal and Indonesia

and is working toward signing MOUs with South Korea, U.A.E. Myanmar, and Sri Lanka.

List of Countries with which BFIU signed MOUs

SL. No	Country	Date of Signing	Place of Signing
1	United Kingdom	29.11.2011	UK
2	Singapore	14.12.2011	Dhaka
3	Mongolia	10.07.2012	Russia
4	South Africa	10.07.2012	Russia
5	Japan	31.01.2013	Japan
6	Myanmar	07.03.2013	Dhaka, Bangladesh
7	Philippines	02.12.2008	Manila, Philippines
8	Malaysia	12.08.2008	Kuala Lumpur, Malaysia
9	Indonesia	16.03.2009	Jakarta, Indonesia
10	Korea	13.07.2009	Seoul, Korea
11	Afghanistan	07.07.2009	Brisbane, Australia
12	Cambodia	26.10.2009	Siam Reap, Cambodia
13	Thailand	21.09.2010	Dhaka, Bangladesh
14	Sri Lanka	23.10.2010	Dhaka, Bangladesh
15	Nepal	21.10.2008	Dhaka, Bangladesh

The Bangladesh police make use of INTERPOL for sharing intelligence and to support police-to-police cooperation. No statistics were available to show that INTERPOL channels have been used in relation to ML or TF investigations by the police.

The ACC has established international cooperation with other anti-corruption bodies, but this is limited to investigations of predicate offences and the laundering of proceeds of corruption. The ACC is working closely with the BFIU to pursue the proceeds of corruption, and together with other agencies, the ACC has been active in cooperating with other countries under the umbrella of the UN/World Bank Stolen Assets Recovery (StAR) Initiative. The ACC is trying to establish a regular channel for cooperation with the designated International Criminal Police Organization (INTERPOL) contact in Bangladesh police to support the ACC's role of ML investigation agency, including pursuing international cooperation through INTERPOL channels.

In relation to cooperation between insurance regulators, Bangladesh is not yet a member of the IAIS, so it is limited in sharing regulatory information relating to insurance. The NGO Affairs Bureau is the recognized point of contact for international cooperation and information sharing in relation to NPOs operating in Bangladesh. There are no statutes in Bangladesh that would bar agency-to-agency cooperation solely on the grounds that they may involve fiscal matters.

D. Mutual Legal Assistance

Bangladesh has legislation to provide for the giving and receiving of mutual legal assistance (MLA) under the Mutual Legal Assistance Act 2012 and under the Mutual Legal Assistance Rules 2013 (8 September 2013). Some offence-creating statutes, such as the MLPA 2012 and the ATA 2009, include MLA 2012 provisions. Bangladeshi laws now make wide provisions for giving and requesting mutual legal assistance. The ACC Act does not make any provision for international cooperation.

Bangladesh ratified the SAARC Convention on Mutual Assistance in Criminal Matters on 9 March

2009. The SAARC Convention requires member states to provide a wide range of mutual assistance to fellow member States. In addition Article 3 of the SAARC Convention expressly requires member States Parties to assist whether or not the conduct the subject of the investigation or proceeding is an offence under the laws of the requested State Party. (As ratification of the SAARC Convention occurred outside of the cutoff date for this assessment, it has to been considered when finalizing the compliance rating).

E. Extradition

The government (through Gazette Notification UNSOC-(27 April 2008) nominated the Ministry of Home Affairs and the Office of the Attorney General as the designated central authorities to receive and execute requests for mutual legal assistance (MLA). The UN Secretary-General has been notified of these matters. Bangladesh can now respond to any request for MLA from a State Party which is made through the central authority; domestic law does not ban such cooperation from being provided. Section 26 of the Money Laundering Prevention Act (MLPA) 2012 provides that the government, or in some cases the Bangladesh Bank, may sign a memorandum of understanding (MOU) or bilateral or multilateral agreements with foreign countries and organizations to prevent money laundering. When such agreements are signed, the government or Bangladesh Bank can request and provide information in response to requests from other countries, as long as it does not affect national security. Moreover, Section 503(2B) of the Criminal Procedure Code provides limited allowances for seeking assistance to gather evidence through the Commission, which can examine witnesses abroad. Bangladesh recently entered into MLA agreements with ten countries. Bangladesh ratified the SAARC Convention on Mutual Assistance in Criminal Matters on 9 March 2009. The SAARC Convention requires member states to provide a wide range of mutual assistance to fellow member States. In addition Article 3 of the SAARC Convention expressly requires member States Parties to assist whether or not the conduct the subject of the investigation or proceeding is an offence under the laws of the requested State Party.

To make MLA more functional and effective, Bangladesh has taken steps to strengthen international cooperation by signing bilateral and multilateral agreements including extradition laws. In Bangladesh, the extradition regime is governed by the Extradition Act (EA), 1974. Bangladesh has opted for compliance of the UNCAC through the formulation of treaties as the legal basis for extradition. The EA, 1974 spells out a list of extraditable offences. Bribery and embezzlement are the only extraditable offences under the UNCAC that have been listed. Consequently, there is a gap in this area as the remaining UNCAC offences are not recognized by the domestic law as extraditable offences. Recognizing Convention offences universally across all States Parties is an important step to full implementation of the UNCAC provisions and is essential for bringing an offender to justice. Accordingly, the list of extraditable offences would need to be amended to include all of the UNCAC offences. One aspect of the domestic law of Bangladesh that complies with the requirements of the UNCAC is that Bangladesh does not allow refusal of extradition on the sole ground that the offence is considered to involve fiscal matters.

According to the EA, 1974, both national and alien fugitive offenders can be extradited. However, to conduct such extradition, the EA, 1974 requires that there be an extradition treaty in place between Bangladesh and the country requesting said extradition. So far, Thailand is the only country with which Bangladesh has an extradition treaty. Nevertheless, the provision for extradition is currently being negotiated in several agreements for mutual legal assistance. Provisions for extradition have been included in two of the three money-laundering prevention agreements currently under process/recently negotiated with India and countries of the South Asian Association for Regional Cooperation (SAARC) and the Bay of Bengal Initiative for Multi-Sectored Technical and Economic Cooperation.

F. Information Exchange between Law Enforcement Authorities

1. Measures to Prevent Corruption Involving the Private Sector and to Enhance Accounting and Auditing Standards

The Government has taken an initiative to frame a guideline for private sector accounting and auditing firms for the purpose of framing standards to exchange information with law enforcement authorities. The framing process is passing a hurdle.

2. Measures to Promote the Active Participation of Individuals and Groups Outside of the Public Sector, Such as Civil Society, Non-Governmental Organizations and Community-Based Organizations

(a) Civil Society Organizations (CSO)

The GoB has made tremendous efforts to restrain the level of corruption in the public sector, along with encouraging the private sector to be more effective and responsive to integrity. The response from the private sector, civil society and the general population has been remarkable. The Government's effort to incorporate people into the process of preventing corruption has had an impact on the expansion and consolidation of democracy. Undoubtedly, sustenance of the anti-corruption mechanism significantly depends upon the participation of civil society and other non-governmental actors, of which raising awareness of the mass drive against corruption plays an important role. The legal anti-corruption framework of Bangladesh, particularly, the *Anti-Corruption Commission (ACC) Act, 2004* supports popular participation in the prevention of corruption. Section 17 of the Act (Functions of the Commission) explains the role of the Commission in research and promotion of anti-corruption ideas through awareness campaigns, along with its legal and prosecutorial activities.

One of the significant activities of the ACC is to promote the values of honesty and integrity in order to prevent corruption and take measures to build up mass awareness against corruption (section 17g). It can also arrange seminars, symposiums and workshops on the subjects falling within the jurisdiction of the Commission (section 17h). These functions of the ACC encourage mass participation by all sectors of society. Moreover, the Commission, under the purview of this Act, can carry out research on the issues of prevention of corruption and prepare recommendations for the President regarding actions which should be taken on the basis of their research findings (section 17f). Their empirical research is likely to incorporate and reflect the demands of the population as part of its methodology. Additionally, there is a provision for the publication of an Annual Report by the ACC. Moreover, section 29 of the ACC Act ensures people's access to information about anti-corruption activities undertaken by the Government. To promote a successful anti-corruption strategy where the voice of public opinion could be an effective and politically neutral mechanism to combat corruption, the ACC has taken steps to raise public awareness. In the past, it was a rare occurrence to find such activities in Bangladesh. The purpose of these efforts is to make the public aware about the impact of corruption on social, political and economic life. In particular, the Government endeavors to spread a message that will foster transparency and accountability which is essential to curb malfeasance by those in the public sphere. To that end, the ACC aims to promote the role of civil society organizations to advocate for such reform initiatives.

As part of this effort, the ACC launched a consciousness-raising campaign against corruption on April 2007, in association with Transparency International Bangladesh. The ACC is also interested in establishing citizens' anti-corruption committees at the district level. This is an exemplary effort in which the Government, with the assistance of civil society, is attempting to involve people in the overall anti-corruption drive. Under this campaign, the Chairman of the ACC has commenced a national tour to meet stakeholders such as civil society groups, local administrations, journalists, students and field-level ACC officials. Moreover, the Chairman and co-organizers visited many places within the country and arranged consultation meetings, colorful rallies, and events led by the young people, along with giving public service announcements for media, organizing debates and dialogues, in addition to other awareness campaign tools, for the purposes of accelerating mass participation in the anti-corruption battle. The architects of the campaign believe that the ongoing drive against corruption will be a comprehensive long-term effort which demands the participation of people from all levels of society in order to be successful. Participation of society and a public-private partnership are critical to the success of any anti-corruption mechanism as such activities promote a sustainable development process of the state by curbing levels of corruption. As a first step, the Government of Bangladesh has approached the issue by incorporating societal participation through the formal legal document of the Anti-Corruption Commission.

Bangladesh has some of the world's best-known civil society organizations namely the Grameen Bank run by the Nobel Peace winner Mohammed Yunus. CSOs have an important watchdog role to play; CSOs act as watchdogs and representatives of the citizenry and keep a constant check on the activities of the government.

(b) Media

Media in Bangladesh has played a leading role in informing, educating, and entertaining the masses and is seen as a potential ally. Since the last Care Taker Government, the standard and frequency of the anti-corruption debate on the electronic media has improved to some extent. Print media allocates a huge part of the media and has been performing its watchdog function by publishing the high profile prosecutions, investigative stories, articles and editorials on issues related to governance and anti-corruption.

(c) International Organization and Donors

International organization and donors are contributing to the reform process. They are helping in translating the ideal of governance and anti-corruption reforms into reality by providing financial and technical assistance. In the area of anti-corruption, ADB is the leading donor. DANIDA and DFID support the project with a technical support component worth $2 1/2 million. DFID is also supporting the MATT programme while UNDP is supporting ethics and integrity through the Public Service Change Management programme and the recently completed ACAC. JICA, KOICA, GIZ, USAID, UNODC and WORLD BANK are also providing technical assistance.

3. Measures to Encourage Cooperation between National Investigating and Prosecuting Authorities and Private-Sector Entities, in Particular Financial Institutions

(a) Self-Regulatory Organizations (SROs)

- The Institute of Chartered Accountants of Bangladesh (ICAB)

The Institute of Chartered Accountants of Bangladesh (ICAB) is the National Professional Accounting Body of Bangladesh established under the Bangladesh Chartered Accountants Order 1973 (Presidential Order No. 2 of 1973). The Ministry of Commerce administers ICAB. ICAB's role is to regulate the accountancy profession; ensure professional ethics and codes of conduct and to provide specialized training. As of 1 July 2007, the Institute had 868 members of whom 730 were resident in Bangladesh. 288 are practicing as public accountants, with the balance serving in public and private sector organizations. The ICAB has an Investigation and Disciplinary Committee. The ICAB has not yet issued any rules related to AML/CFT.

- The Institute of Cost and Management Accountants of Bangladesh

The Institute of Cost and Management Accountants of Bangladesh is an autonomous professional body under the Ministry of Commerce. As of 30 June 2006, membership was 745, excluding 42 members whose names have been removed from the register.
Cost & Management Accountants Ordinance 1977; and Cost & Management Accountants Regulations 1980.

- Bangladesh Bar Council

The Bangladesh Bar Council is constituted under the President's Order No. 46/1972. The Bar Council Rules, 1972 make detailed provisions for disciplinary proceedings, enrolment of advocates, etc. The Bangladesh Bar Council has framed rules of professional conduct to be followed by advocates with regard to other advocates, clients and the public in general, and their duty to the court. The Bar Council has not yet issued any rules related to AML/CFT.

VI. CONCLUSION

Bangladesh became independent by dint of huge sacrifice of life of millions of people. They are a peace-loving people. The people want to live in a corruption-free society, so they support eradicating and preventing corruption in all sectors. ACC is established with these intentions. Effective government commitment is needed here. All other political parties, civil society, and all other people should come forward and work accordingly.

THE BRAZILIAN LEGAL FRAMEWORK AGAINST CORRUPTION

*Vladimir Aras**

I. INTRODUCTION

Corruption is a major global problem, but it is much more serious in developing countries. Due to its economic effects, corruption is a threat to stability and security of societies. It undermines the values of democracy and jeopardizes the rule of law. According to Gerald E. Caiden,

> Corruption has now become a popular subject in international circles. Not that it is new. Far from that, corruption has been with us since the dawn of government. But finally the world has decided that it has become too dysfunctional for global development for it to go unchallenged. Indeed, it has become so menacing that something has to be done about it. But are we talking about the same thing? Despite different words for it, there are common definitions and what is more there seems to be a remarkable degree of agreement in time and place. Ever since written records have survived, the same kinds of objectionable behavior have been identified, irrespective of language, religion, culture, ethnicity, governance, location, philosophy and social values. These have always been considered unworthy of individuals exercising power over others, epitomized in Lord Acton's dictum that "Power corrupts; absolute power corrupts absolutely." They have disappointed those over whom they have exercised their power.[1]

Caiden is right. As stated in the preamble of the United Nations Convention against Corruption (UNCAC), corruption is no longer a local matter but a transnational epidemic that affects all societies and economies, making essential international cooperation to prevent and control it.

Corruption takes advantage of its invisibility, the culture of secrecy and greed. This phenomenon, very similar in all human societies, is directly linked to money laundering and serious forms of organized crime. Drug gangs, human traffickers, arms traffickers and smugglers of wild animals always pay bribes to public servants to keep their business running. Here is a dauting list of the negative consequences of systemic corruption, according to Caiden (2003):

1. It perpetuates closed politics and restricts access to decision making, thereby impeding the reflection of social change in political arrangements.
2. It suppresses opposition, thereby building up public resentment that needs only a flashpoint to erupt into violence.
3. It perpetuates and widens social divisions further dividing the haves from the have-nots.
4. It obstructs policy change, thereby sacrificing the public interest to narrow, partial and select interests.
5. It blocks much needed reforms and perpetuates poor administrative practices that give offence and reduce performance.
6. It diverts scarce resources away from public amenities and services to private affluence amid general squalor.
7. It contributes to social anomie by shoring up inappropriate arrangements.
8. It undermines trust in public institutions and alienates people.
9. It is dysfunctional to globalization, modernization, and effective governance.
10. It entrenches an international political-criminal network that undermines global security.[2]

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[1] CAIDEN, G. E. (2003), *The burden on our backs; corruption in Latin America*. VIII International Congress of CLAD on the Reform of State and the Public Administation, Panama, Oct. 2003.

So, the problem of corruption is really very serious and the Third World countries, like Brazil, need technical assistance and financing to overcome such difficulties. Such nations also need to be part of the international conventions on the subject. They should also have an adequate criminal legislation, which can ensure the punishment of criminals, asset recovery and preventing further illegal conduct.

Brazil is a rapidly developing market. There is much public money in the economy in several projects and public works. Still — and perhaps for this reason — Brazil faces repeated corruption scandals both at federal and state levels. Much has been done since the democratization of the country in the eighties, through the structuring of the law enforcement agencies and programmes of crime prevention and suppression of corruption, as well as through the adoption of appropriate laws.

II. THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

> "In its resolution 55/61 of 4 December 2000, the General Assembly recognized that an effective international legal instrument against corruption, independent of the United Nations Convention against Transnational Organized Crime (resolution 55/25, annex I) was desirable and decided to establish an ad hoc committee for the negotiation of such an instrument in Vienna at the headquarters of the United Nations Office on Drugs and Crime
> [....]
> In accordance with article 68 (1) of resolution 58/4, the United Nations Convention against Corruption entered into force on 14 December 2005. A Conference of the States Parties is established to review implementation and facilitate activities required by the Convention" (UNODC, 2013).[3]

The Convention highlights are prevention of corruption, criminalization of certain behaviours, cooperation on the national level, international cooperation and asset recovery. According to the UNODC,

> Corruption can be prosecuted after the fact, but first and foremost, it requires prevention. An entire chapter of the Convention is dedicated to prevention, with measures directed at both the public and private sectors.
> These include model preventive policies, such as the establishment of anti-corruption bodies and enhanced transparency in the financing of election campaigns and political parties. States must endeavor to ensure that their public services are subject to safeguards that promote efficiency, transparency and recruitment based on merit. Once recruited, public servants should be subject to codes of conduct, requirements for financial and other disclosures, and appropriate disciplinary measures. Transparency and accountability in matters of public finance must also be promoted, and specific requirements are established for the prevention of corruption, in the particularly critical areas of the public sector, such as the judiciary and public procurement. Those who use public services must expect a high standard of conduct from their public servants. Preventing public corruption also requires an effort from all members of society at large. For these reasons, the Convention calls on countries to promote actively the involvement of non-governmental and community-based organizations, as well as other elements of civil society, and to raise public awareness of corruption and what can be done about it. Article 5 of the Convention enjoins each State Party to establish and promote effective practices aimed at the prevention of corruption.[4]

As of May 29, 2013, the United Nations Convention Against Corruption (UNCAC) had 167 parties. Brazil signed the Convention on December 10, 2003. Its ratification dates back to June 15, 2005. But its effectiveness in Brazilian domestic law only occurred in 2006, when the President of the Republic issued

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[2] CAIDEN, G. E. (2003), *The burden on our backs; corruption in Latin America*. VIII International Congress of CLAD on the Reform of State and the Public Administration, Panama, Oct. 2003.
[3] United Nations Office on Drugs an Crime. *UNODC's Action Against Corruption and Economic Crime*. (pubd online, 2013) 〈http://www.unodc.org/unodc/en/corruption/index.html?ref=menuside〉 accessed 28 July 2013.
[4] United Nations Office on Drugs an Crime. *UNODC's Action Against Corruption and Economic Crime*. (pubd online, 2013) 〈http://www.unodc.org/unodc/en/corruption/index.html?ref=menuside〉 accessed 28 July 2013.

Decree 5.687 of January 31, 2006. Seven years have passed and Brazil has not yet implemented all the measures provided for in the Convention.

III. THE BRAZILIAN EFFORTS AGAINST CORRUPTION

Transparency and merit are two concepts essential for good governance, which requires an efficient system of recruitment of public officials. A mandatory merit system was established in 1988 by the Brazilian Constitution (article 37, II). Admission in a public office or position depends on previously passing an exam consisting of tests or tests and academic/professional credentials, in accordance to the nature and complexity of the position, as set forth by law.

Also, the federal government established a system for purchasing goods and services which requires adherence to a mandatory procurement procedure (article 37, XXI, of the Federal Constitution): "*Public works, services, purchases and disposals shall be contracted by public bidding proceedings that ensure equal conditions to all bidders*".

COMPRASNET is the access point to the Brazilian Federal Government's e-procurement system. The portal enables users to view information on all Federal Government purchases of goods and services and to participate in the e-procurement process. This kind of information helps prosecutors to identify and prosecute criminals that defraud public bids.

Brazil's current efforts to tackle corruption are massive. There are many agencies involved in combating bribery and corruption control. In the Brazilian judicial system, the most important role is played by the Public Prosecution Office, at both the federal and state levels, and by the Office of the Comptroller General (CGU).

CGU is the government agency most experienced in promoting cooperation between the public and private sectors. It maintains partnerships with civil society organizations to disseminate best practices in the business world, as well as to promote the education of children in the field of ethics and good governance.

Despite not being a law enforcement agency in the criminal area, CGU assists prosecutors and police in the investigation of crimes of corruption, in a broad sense.

> Apart from being in charge of inspecting and detecting frauds in the use of federal public funds, the Office of the Comptroller General (CGU) is also responsible for developing mechanisms to prevent corruption. The idea is that, besides detecting cases of corruption, CGU has the role of acting proactively by developing means to prevent their occurrence to the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences. (CGU, 2013)[5]

In fact, the existence of specialized authorities is a key factor in the fight against corruption. For this reason, Article 36 of UNCAC provides that States shall ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks. In Brazil, one of these bodies is the Public Prosecution Office.

In accordance with Article 127 of the Constitution, the Public Prosecution is a permanent institution, essential to the jurisdictional function of the State, and it is its duty to defend the juridical order, the democratic regime and the inalienable social and individual interests. Among other functions, this body is responsible for initiating criminal prosecutions; to ensure effective respect to the rights guaranteed in the Constitution; and to institute civil investigation and public civil suits to protect public and social

[5] Office of the Comptroller General. *Preventing corruption*. (Brasília, Brazil, 2009; pubd online 2009) ‹http://www.cgu.gov.br/english/AreaPrevencaoCorrupcao/OQueE/› accessed 20 July 2013.

property, the environment and other diffuse and collective interests.

Among the most effective measures to prevent and combat corruption are policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability. In accordance with Article 5 of the UNCAC, the member countries shall endeavour to establish and promote effective practices aimed at the prevention of corruption, by collaborating with each other and with relevant international and regional organizations in promoting and developing the measures referred to in that article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.

According to Article 38 of UNCAC each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. *Cooperation between national authorities and the private sector is also necessary*, in particular financial institutions, relating to matters involving the commission of offences established in accordance with UNCAC.

IV. THE BRAZILIAN LEGAL FRAMEWORK AGAINST CORRUPTION

Article 37 of the 1988 Brazilian Constitution is a key section of the legislative anti-corruption framework.

> **Article 37.** The governmental entities and entities owned by the Government in any of the powers of the Union, the states, the Federal District and the Municipalities shall obey the principles of lawfulness, impersonality, morality, publicity, and efficiency, and also the following:
>
> **Paragraph 4.** Acts of administrative dishonesty shall result in the suspension of political rights, loss of public function, prohibition to transfer personal property and reimbursement to the Public Treasury, in the manner and grading established by law, without prejudice to the applicable criminal action.

Every Brazilian criminal law is passed by Congress. The relevant laws applied by the Brazilian courts against corruption are:

a) Criminal Code (1940)
b) the Code of Criminal Procedure (1941)
c) Money Laundering Act (1998)
d) Procurement Law (1993)
e) Law of Crimes committed by Mayors (1967)
f) Organized Crime Act (1995)

The Money Laundering Act of 1998 was amended in 2012 in order to comply with the FATF recommendations. Now the AML legislation serves to process any predicate offence that provides assets to the criminal. There is no longer a closed list of predicate offences.

The financial intelligence unit operates satisfactorily in Brazil. The Council for Financial Activities Control (COAF) is an agency attached to the Ministry of Finance of Brazil. The prosecutors and police receive suspicious transaction reports, which can lead to the initiation of criminal investigations.

Federal Decree 5483 of June 30, 2005 provides for the investigation of civil servants' assets, in order to facilitate asset recovery and the identification of illicit enrichment.

Two other non-criminal laws are important to punish bribery and dishonesty: the Administrative Misconduct Act (1992) and the Freedom of Information Act (2011). Acces to information on public spending is an importat tool for the society to control the government.

Brazil is a member of the FATF and therefore must comply with the 40 recommendations that the authority instituted. Several multilateral instruments against corruption have been adopted since the mid-1990s. Brazil is a part of the most important conventions:
i) the United Nations Convention against Corruption (Decree 5.687 of January 31, 2006)
ii) the Organization of American States Convention against Corruption (Caracas Convention) (Decree 4.410 of October 7, 2002).
iii) The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Decree 3.678 of November 30, 2000).

However, Brazil has not yet implemented all obligations assumed when it signed and ratified these treaties. For example, there has not been the criminalization of bribery in the private sector. Therefore, this country does not comply with Article 21 of the UNCAC:

> Article 21. Bribery in the private sector
> Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offenses, when committed intentionally in the course of economic, financial or commercial activities:
> *(a)* The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;
> *(b)* The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

Moreover, we do not have legislation to regulate properly all special investigative techniques yet. The Organized Crime Act of 1995 is insufficient, so much so that Congress just passed a bill amending the current regulation substantially (Bill No. 150 of 2006). This draft law still requires presidential approval.

When the new organized crime act is in effect, there will be clear rules on plea agreements, controlled delivery, undercover operations, among other special investigative techniques. Thus, Brazil will fully comply with Article 50 of the UNCAC, which provides:

> Article 50. Special investigative techniques
> 1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.
> 2. For the purpose of investigating the offenses covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.
> 3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.
> 4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

Unfortunately, the draft law (organized crime bill) has only a brief provision on task forces but says nothing about the joint investigation teams, which are the subject of Article 49 of the UNCAC:

> Article 49. Joint investigations
> States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

Brazilian law for the protection of victims and witnesses (Law 9807 of 1999) is reasonably good. However, there are not very clear rules on the protection of informants in good faith. Few public institutions maintain programmes to encourage whistleblowing. Another bill, which has already been approved by both houses of Congress, will create a specific programme of collaboration within the Office of the Comptroller General (CGU). This is the new Brazilian Anti-Corruption Law, similar to the Foreign Corrupt Practices Act (FCPA) from the United States.

For now, however, Brazil does not entirely meet Article 39, No. 2, of the UNCAC, which requires that each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.

On the same subject, one must bear in mind Article 33 of the UNCAC. By reading it one can see that Law 9807 of 1999 (Victms, Experts and Witness Protection Act) is actually unable to meet all the nuances of proper protection to whistleblowers.

> Article 33. Protection of reporting persons
> Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offenses established in accordance with this Convention.

For this reason, Article 126-A of Law 8112 of 1990 states that no public official can be held responsible, in any civil, criminal or administrative proceeding, just because he/she reported to the proper authority his/her suspicion that another employee is engaged in criminal activity.

Note that this new and future legislation (Bill No. 39 of 2013) is not of a criminal nature. It is a law that imposes civil and administrative penalties for companies. Thus, it is intended to meet the provisions of Article 26 of the UNCAC. Currently, in Brazil there is only criminal liability for legal persons who commit environmental crimes. It is what provides the Law 9605 of 1998.

> Article 26. Liability of legal persons
> 1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offenses established in accordance with this Convention.
> 2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.
> 3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offenses.
> 4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Another problem concerns the fragility and benevolence of the statutes of limitations. Prosecutions, even when serious crimes are engaged, are impeded very quickly. Prosecutors have little time to

investigate and prosecute the defendants. Brazilian courts are almost always buried in a mountain of lawsuits, which increases the difficulty of prosecution. These factors cause large ratios of impunity in the criminal system. Thus, it is safe to say that Brazil does not comply with Article 29 of the UNCAC and does not establish a long statute of limitations period:

> Article 29. Statute of limitations
> Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offense established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

Regarding international cooperation, Brazil has two central authorities in criminal matters. The first and most important is the Department of Assets Recovery and International Legal Cooperation (DRCI), which belongs to the Ministry of Justice. The second one is the International Cooperation Office of the Attorney General's Office (ASCJI/PGR).

Brazil is part of several bilateral treaties on international cooperation in criminal matters. It is also part of the Inter-American Convention on Mutual Legal Assistance in Criminal Matters and the Convention of the Community of Portuguese Language Countries (CPLP). Thus, the country is able to provide assistance in obtaining evidence for the freezing of assets and repatriation of money.

V. INITIATIVES TO IMPROVE THE LEGAL FRAMEWORK ON THE FIGHT AGAINST CORRUPTION

In addition to the initiatives listed in this article that reveal Brazil's efforts to tackle corruption and adapt to the UNCAC, there are other measures that should be mentioned. The President has just signed the law on conflicts of interests in the public administration (Law 12813 of 2013). The bill on the regulation of lobbying has been queued since 2007. The criminalization of illicit enrichment is also on the agenda of Congress.According to Article 20 of the UNCAC,

> Article 20. Illicit enrichment
> Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

VI. CONCLUSION

By investigating and prosecuting criminals, the law enforcement agencies help defend public assets. Other state agencies contribute to enhancing management transparency through internal control activities, public audits, corrective and disciplinary measures. It is essential to promote transparency in public spending, public procurement and public agreements. It seems right to affirm that the only way to improve compliance with anti-corruption laws is through internal and international cooperation. Without it no politics will be effective against corruption. Moreover participation of society is mandatory. Article 13 of UNCAC makes this very clear.

We cannot disregard the media's role in exposing corruption. As Johann Fritz states, corruption is a watchdog of democracy. And the press is the eye of the citizen. Despite the efforts of the international community, the indices of corruption are still very high across the globe. Depriving children of their schools and people of decent health services, corruption kills many people every year. For that reason, the implementation of the United Nations Convention against Corruption will be indeed a real achievement in the global fight against corruption. There is full commitment and willingness of Brazilian authorities towards the enforcement of this and all other international conventions against bribery.

CRIMINAL JUSTICE SYSTEM RESPONSE TO THE PROBLEM OF CORRUPTION IN KENYA

*Abraham Kipkoech Kemboi**

I. CURENT SITUATION IN FIGHTING CORRUPTION

Corruption is a major problem in Kenya which dates back to pre-independent times but gained prominence in the 1970s when smuggling of coffee from neighbouring countries and grabbing of public utility land came into public debate. It gradually permeated the entire body of institutions, and in the 1990s the President then acknowledged official corruption in the country.[1] It was for this reason that Kenya became the first country in the world to sign and ratify the United Nations Convention against Corruption (UNCAC) on 9 Dec 2003.[2]

Kenya was ranked 139 out of 174 worldwide with a score of 27 in the 2012 corruption perception survey conducted by Transparency International. According to the Auditor General, close to 30% of the total national revenue is lost through corruption annually; leading to disinvestment and increased poverty levels among the lower and underprivileged. It cannot be gainsaid that corruption is a major development challenge in Kenya today more than ever.

Various pre- and post-independent anti-corruption initiatives have been made to control corruption in Kenya, but impact of the said efforts is yet to be felt. As already stated, notwithstanding the many efforts made to slay the dragon of corruption in Kenya, very little (if any) progress has been achieved. So it begs the question: what is problem?

Corruption in Kenya is attributed to political patronage, weakened civil society, and lack of ability by the poor majority of Kenyans to hold their leadership to account. In fact in Kenya, for one to gain wealth, you need not be a diligent professional, but rather engage in politics, which affords you the opportunity to swindle public moneys and defend your act whenever attempts are made to hold you to account. Politicians once elected as members of parliament are the ones who develop the instruments and tools for fighting corruption. These tools include passage of enabling legislation, form institutions that fight corruption and allocate sufficient resources. This is usually done with vested interests in mind, leading to instances whereby laws are intentionally passed with loopholes that appear to aid the conspirators and perpetrators of corruption and economic crimes. For example, in the Anti-Corruption and Economic Crimes Act, 2003, some sections which criminalized failure to provide evidence and documents were repealed by the members of parliament. This made the fight against corruption greatly difficult as the enforcement agency now relied on the good will of the-would be suspects to cooperate. Worse still the parliamentarians would frequently threaten to disband the Anti-Corruption Commission (then under an Act of Parliament) whenever they were pursued for engaging in corruption.

In realization of the need to have a properly anchored body constitutionally, there was establishment of the Ethics and Anti-Corruption Commission in the 2010 Constitution. It has the mandate of fighting corruption through law enforcement and public education. It is also charged with the responsibility of developing and promoting standards and best practices in integrity and anti-corruption and oversees the enforcement of codes of ethics prescribed for public officers. The Commission is the lead agency in the fight against corruption and economic crimes. Other allied agencies include the police and revenue authorities. The structure of the Commission is such that it has five directorates which enable

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[1] Kibwana et al: The Anatomy of Corruption in Kenya, 2005.
[2] United Nation Convention against Corruption (UNCAC),
〈http://www.unodc.org/documents/treaties/UNCAC/Publications/08-50026_E.pdf〉.

it to achieve its objectives. The directorates are: Legal Services, Investigations, Ethics & Leadership, Preventive Services, and Administration.

A. Legislative Framework

The laws passed to fight corruption in Kenya are:

1. The Constitution of Kenya[3]

   - Article 10 of the Constitution — the National Values and in particular article 10 (c); good governance, integrity, transparency and accountability.
   - Article 73; the responsibilities of leadership and the guiding principles of leadership.
   - Articles 75, 76 & 77

2. The Anti-Corruption and Economic Crimes Act (2003)–ACECA
   This Act defines the corruption and economic crimes offences and the attendant penalties. Also stipulates the procedure of instituting civil recoveries for stolen public properties and the manner in which plea bargains are to be carried out.

3. The Public Officers Ethics Act (2003)
   Stipulates the manner in which public officers should conduct themselves while discharging their public and private duties. Also deals with wealth declarations.

4. The Public Procurement and Disposal Act (2005)
   Guides the procedure of procuring goods and services in government and violations the procedures as set out in the act are criminalized in the ACECA

5. The Penal Code
   An act of parliament defining the code of criminal law, which covers the substantive criminal justice system in Kenya; including corruption and abuse of office

6. The Mutual Legal Assistance MLA (2011)
   An instrument of engagement with the international community on cross border crimes pursuant to UNTOC

7. The Leadership and Integrity Act (2012)[4]
   This Act gives effect to, and establishes procedures and mechanisms for, the effective administration of Chapter Six of the Constitution and for connected purposes. Criminalizes actions perceived to be avenues of corruption by leaders and defines resultant penalties.

   - Section 17–Participation in tenders
   - Section 18–Public collections
   - Section 21–Care of public property
   - Section 26–Gainful employment
   - Section 30–Falsifying documents

8. Proceeds of Crime and Anti-Money Laundering Act (2009)
   This act provides for the offence of money laundering and to introduce measures for combating the offence, to provide for the identification, tracing, freezing, seizure and confiscation of the

[3] National Council for Law Reporting, The Constitution of Kenya 2010: Chapters Two, and Six.
[4] Kenya Law Reports, <http://www.kenyalaw.org>: Laws of Kenya, The Leadership and Integrity Act.

proceeds of crime, and for connected purposes.

9. The Witness Protection Act (2008)
   Provides for the procedure of protection of witnesses and informants

B. Procedure for Reporting Corruption and Economic Crimes

Complaints are received and processed by the commission, so as to determine the steps to be taken which can be advisory, referral to other agencies, or taken up for investigations. The commission has 24-hour dedicated lines for public complaints and standby officers to act on the complaints received. The commission can on its own motion through the intelligence department covertly access information touching on corruption malpractices and take it up for investigation. The Commission has enlisted the support of other government agencies such as the National Intelligence Services and the Financial Reporting Centre (Financial Intelligence Unit). The National Intelligence Service is required by law to pass any suspicious covert information on corruption to the Ethics and Anti-Corruption Commission for action and information on any other form of crime to the police. The financial reporting centre passes information on any suspicious financial transaction to the Ethics and Anti-Corruption Commission for action. Such suspicious transactions could be proceeds of corruption being laundered. In such cases the commission institutes recovery proceedings. Whistle-blowers can also be a source of information to the commission, and Kenya has a functional witness/whistle-blower protection agency to guarantee safety to such informants.

Many people who come across occurrences of corruption do not report such because of fear of reprisals, or in the event they report, they feel that nothing will happen to the perpetrators because corruption is perceived as not being a serious crime. Statistics have shown that the minority of the complainants are aggrieved parties in the cases of deals gone sour or worse still people report corruption because they have interests in some positions.

C. Investigation of Corruption and Economic Crimes

Once the complaints have been received, assessed and passed for investigations, investigation teams are assembled to act on them. The complaints or information would fall under sting operations, forensic investigation, asset tracing or intelligence probe/development. Sting-operation cases emanate mainly from bribe demands and require prompt action. Forensic investigations are carried out on cases whose foundations mainly lie on documents, witnesses, bank records, data stored in personal computers, or cell phones, videotapes of security cameras and handwriting analysis. These investigations usually take a lot more time to accomplish. Asset tracing refers to location of properties acquired as a result of corrupt acts. Once such proceeds of corruption are traced, the investigation reports are passed on to legal experts for recovery and restitution. The intelligence probe involves covert investigations to fill information gaps that cannot be openly obtained. This takes the form of surveillance or general human intelligence collection. Intelligence reports prepared are passed on to investigators to backup evidence and for use in recovery proceedings.

Various challenges are faced during investigations, especially accessing electronic evidence such as data stored in personal cell phones. The information law allows the mobile telephone service providers to store communications data for up to a period of three months only. This therefore means that crucial data which is over three months old may not be accessed for evidential value. Additionally, most of the private institutions such as the banks are unwilling to divulge suspicious financial transactions because of the confidentiality relationships between the banks and their clients. However, this hurdle has been resolved by the recent formation of the Financial Reporting Centre, which is by law required to report suspect financial transactions to law enforcement agencies.

D. Crime Reading/Evidence Analysis

Once case files are ready, they are forwarded to crime readers (legal experts) for review. The evaluation of evidence is geared towards establishing the strength of the evidence against charges recommended by the investigators. All the files emanating from string operations, forensic investigation and asset tracing are crime read. If the crime readers are satisfied with the report laid before them by the investigators, then they forward the same to the Director of Public Prosecution for legal action. In the event of civil recovery, they initiate the proceedings in court. The government through the

Commission has a plea bargaining arrangement, where suspects of corruption and economic crimes are allowed to plead guilty and surrender the proceeds of corruption in lieu of criminal prosecution.

E. Handling of Recovered Proceeds of Corruption

The anti-corruption laws guide the administration of recovered proceeds of corruption. Once recovered, such properties are surrendered to the Principal Secretary Treasury, who is the custodian of all government properties. If the said property is a fixed asset such as land, the title will be issued in respect of the Principal Secretary Treasury, and restored back to the public institution for the original intended use. If it is in form of money, the proceeds are ploughed back into the government budgetary allocations.

F. Prevention of Corruption

The Commission is also charged with the responsibility putting in place strategies to prevent corruption. It does so by examination/audit of financial, procurement systems and procedures with a view of sealing loopholes exploited by corrupt officials. However, because of the deep nature of corruption in Kenya, most institutions do not follow the recommendations to seal such loopholes. The commission also has the duty of approving codes of ethics for public institutions and enforcing the same. The challenge here is that the commission is small in numbers and cannot enforce all codes effectively. Additionally, the commission engages in public campaigns to enlist the support of the general public and encourage them to report all forms of corruption.

G. Mutual Legal Assistance

The United Nations Convention against Transnational Organized Crime (UNTOC)[5] recognizes corruption as one of the Serious Transnational Crimes. Perpetrators of corruption and economic crimes in most cases hide and launder their proceeds away from their home country for fear of being pursued by state law enforcement agencies. This complicates the investigation and restitution of such proceeds, and therefore close cooperation between partner states becomes necessary. Between 1990 and 2005, mega scandals rocked Kenya in which the country lost substantial financial resources bringing the economy into its knees. Some of the key players in these scandals were foreigners; and to make it worse the proceeds were stashed in foreign jurisdictions. The Commission attempted to pursue the foreign evidence and trace the proceeds but hit a dead end because of lack of enabling procedure of cooperation.

Under Article 13 of UNTOC, States Parties are required to cooperate for the purposes of providing necessary evidential support and confiscation of the proceeds of corruption. The instrument for such cooperation is Mutual Legal Assistance (MLA), which is the internationally accepted practice of accessing such assistance. The hurdle has since been done away with since the MLA Act was passed by the Kenyan Parliament in 2011 and took effect immediately. The government of Kenya through its various agencies such as the Ethics and Anti-Corruption Commission now enjoys the benefits of such cooperation and has recently received assistance from the Government of Japan and several European countries.

II. PUBLIC PRIVATE SECTOR COOPERATION IN FIGHTING CORRUPTION

A. Measures to Prevent Corruption Involving the Private Sector and to Enhance Accounting and Auditing Standards

Article 12 of UNCAC[6] requires each State Party to take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.

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[5] United Nations Conventions against Transnational Organized Crime (UNTOC)
〈http://www.unodc.org/documents/treaties/UNTOC/TOC%20Convention/TOCebook-e.pdf〉.
[6] United Nation Convention against Corruption (UNCAC),
〈http://www.unodc.org/documents/treaties/UNCAC/Publications/08-50026_E.pdf〉.

Experiences have revealed that major scandals are executed with help of private sector players which include but are not limited to banking institutions, lawyers, accountants, auditors, valuers, engineers and investment agents. In Kenya the legal professionals are known to be the main players in aiding the corrupt and facilitating proceeds of corruption flight by assisting the opening of foreign accounts as trustees. They usually cite lawyer-client confidentiality clause whenever pressured to disclose the transactions of their clients.

Engineers are another lot of private persons who play around with engineering designs to defraud government of huge sums of money. The accountants and auditors too can detect a malpractice and fail to report if compromised. All these professions have associations which regulate their conduct in the discharge of their duties. Kenya, by the the Law Society of Kenya Act, regulates the conduct of practicing lawyers who must be members of the Law Society of Kenya (LSK). The consequences of misconduct by errant lawyers, like conspiracy to defraud the public and other private persons, is punishable by penalties defined in the LSK act (which may include debarment) as well as the other prevailing laws. The Engineers Board of Kenya regulates the professional activities of engineers under the Engineers Act of 2012. The Institute of Certified Public Accountants regulates accountants and auditors. The Commission has partnered with these professional associations to help foster the fight against corruption. Another association that is important in the fight against corruption is the Bankers Association (umbrella body for banks) which has been assisting the commission accessing details of suspect accounts and banks which are suspected to be engaged in money laundering. It also reprimands banks engaged in money laundering activities and passes the same information to the Central Bank of Kenya, which registers and supervises all the banks. A bank which is suspected to be engaged in any malpractice including laundering proceeds of corruption risks cancellation of its banking license and therefore closure.

B. Measures to Promote Civil Society, Community-Based and Non-Governmental Organizations

The right to information given under the Constitution of Kenya 2010 has opened up all government transactions for scrutiny by any interested parties. This has enabled civil society, community-based and non-governmental organizations to play a vital role in the fight against corruption. These can mobilize the general citizenry to rise against corrupt individuals as well as whistle-blowing. Most of the mega scandals have been unearthed by these organizations. The Commission has partnered with these organizations in order to create a strong force against corruption. Transparency International (TI) Kenya Chapter is one such civil society organization which has been critical in the fight against corruption in Kenya. Through their research wing they are able to identify areas prone to corruption and pass the same information to the relevant agencies for action. The National Taxpayers Association (NTA) is a community-based organization that monitors the use of devolved funds in Kenya. Through their proactive mode of operation they have managed to pass information of suspected corrupt activities leading to pre-emptive action by anti-corruption agencies.

However, the ability of some civil society institutions to rise against corruption has in the recent past been eroded because of infiltration by moles working for the corrupt. Corruption has also eaten into their moral fabric and most of them have been compromised. Efforts are being made to strengthen them.

C. Cooperation between National Investigating and Prosecuting Authorities and Private Sector Authorities

National investigating and prosecuting agencies should first and foremost cooperate among themselves and then bring in the private sector such as financial institutions. If the investigation and prosecuting authorities do not cooperate, then the fight against corruption will be severely impaired if not lost completely. One of the greatest challenges in Kenya is the failure of these two key institutions which plays out in form of turf wars and blame game when cases are or when they become difficult to handle. There have been calls by concerned Kenyans to grant the Commission prosecutorial power which has been fiercely opposed by the Directorate of Public Prosecutions and other stakeholders in equal measure. Several cases have been lost to the advantage of the corrupt suspects. Attempts for a close working relationship between the two institutions is in the works, and recently held workshops to map out strategies for enhancing collaboration and coordination in the investigation and prosecution of corruption and economic crimes.

Cooperation with financial institutions is crucial for the purposes of passing information of suspect transactions to law enforcement agencies as well as preserving evidence. Proceeds of corruption are usually concealed in financial institutions, and they have a duty to be able to report and facilitate freezing whenever required to do so by authorities including courts. According to article 39 of UNCAC, cooperation between prosecutors and law enforcement agencies on the one hand and the financial institutions on the other is supposed to break barriers brought about by bank secrecy.

STATUS OF THE UTILIZATION OF THE PRIVATE SECTOR IN THE FIGHT AGAINST CORRUPTION IN KENYA

*David Gathii**

I. INTRODUCTION

Corruption in Kenya, like in all other parts of the world, remains a major challenge. Studies undertaken by local and international organizations releases credible reports indicating Kenya is among the countries in the world badly affected by corruption. In response, Kenya has adopted a multi-pronged approach to the fight against corruption.

II. UNITED NATIONS CONVENTION AGAINST CORRUPTION

On 9 December 2003 when the United Nation Convention against Corruption (UNCAC) was opened for signature in Merida, Mexico, Kenya became the first country in the world to sign and simultaneously ratify UNCAC. This strengthened the fight against corruption and the country has continued to put in place measures, both within and outside the purview of UNCAC, to address and mitigate anti-corruption. Kenya undertook a gap analysis on the implementation of UNCAC and presented a report during the International Conference held in Doha, Qatar in 2010. It is also currently preparing its country report for the peer review slated for 2014.

III. THE FIGHT AGAINST CORRUPTION IN KENYA

The war against corruption in Kenya is Government driven. While fighting corruption dates back before independence in 1963, it was not until 2003 when serious efforts began. Key among these included the following:

A. Legal Reforms

- Enactment of various laws critical to the fight against corruption such as the Anti-Corruption and Economic Crimes Act, 2003, Public Officer Ethics Act, 2003; Code of Conduct for Public Servants, Public Procurement and Disposal Act , 2005 and Rules, 2006; Anti-Money Laundering Act (which created the Financial Reporting Centre)
- Establishment of anti-corruption agencies
- Appointment of Special Magistrates to try corruption cases
- Establishment of a Cabinet Committee on Anti-Corruption
- Strengthening prosecutions and undertaking reforms in the public service

To augment the above legal initiatives, the Government also embarked on a nationwide sensitization and awareness creation campaign aimed at changing the behaviour and attitudes of the people towards corruption to prevent corruption.

B. Enactment of the Constitution

Kenya promulgated a new Constitution in 2010, which has various provisions that boost the fight against corruption; key among them are the following:

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(i) National values (art 10)

(ii) Access to information by the public (art 35)

(iii) Ethics and Anti-Corruption Commission (art 79)

(iv) Independent Judiciary (art 160)

(v) Auditor General (art 229)

(vi) Public Service Commission (art 233)

(vii) Police obligated to fight corruption (art 244)

C. Anti-Corruption Agencies

The Government established anti-corruption agencies and continues to support and facilitate them to implement various anti-corruption strategies and activities. The Ethics and Anti-Corruption Commission (EACC) is the national institution dedicated to deal with corruption through enforcement, prevention and education while the National Anti-Corruption Campaign Steering Committee (NACCSC) undertakes the nationwide sensitization and awareness creation campaign. These two anti-corruption agencies (ACAs) have been granted substantial requisite autonomy to discharge their mandates. Other key organizations critical to the fight against corruption include the National Police Service, Kenya Revenue Authority, Auditor General, Director of Public Prosecutions. The following are the approaches to the fight against corruption:

1. Investigations

EACC is the body set up to enforce the law through receipt of complaints, detection, investigation and assets tracing. EACC also recommends to the Director of Public Prosecutions cases where there is sufficient evidence of wrongdoing.

2. Prevention

EACC undertakes system and procedure audits to identify loopholes, corruption risk assessment; and development of anti-corruption plans and codes of conduct for publicly funded institutions and, upon request, for private firms. It also conducts the Public Service Integrity Programme to train Integrity Assurance Officers who then spearhead the formation and facilitation of Ministerial/Departmental Corruption Prevention Committees.

3. Education

EACC discharges its education mandate through the development of the anti-corruption education curricula for primary, secondary and tertiary institutions, sponsorship of the anti-corruption category in the annual national drama festivals for schools and colleges in Kenya, establishment and sustenance of Integrity Clubs in schools and educating the public on the dangers of corruption and to foster support for EACC. It also undertakes research and corruption perception index studies.

4. Anti-Corruption Awareness Campaign

The awareness campaign mainly targets the ordinary Kenyan citizen who is on the supply side of the corruption equation. The war against corruption cannot be won without the support and active participation by the members of the public. The campaign is implemented by NACCSC in partnership with various stakeholders such as civil society, religious organizations, youth and women's groups, among others. Key interventions include multi-media anti-corruption programmes through television, radio including community radio, print media, Internet and social media; conducting capacity building and sensitization seminars, workshops, religious forums and rallies; undertaking social audits and public-reporting forums on projects and programmes funded by the tax payer.

Others are advocacy campaign programmes such as marking the UN International Anti-Corruption Day on 9th December every year and organizing national Prayer Days for religious organizations; anti-corruption music, production and distribution of Information, Education and Communication (IEC)

materials such as banners, brochures, caps, t-shirts; establishing civilian oversight committees to receive complaints and address corruption issues at the grassroots and generating credible data to inform and affirm campaign strategies and activities through research/studies on corruption.

IV. IMPLEMENTATION OF UNCAC

Kenya has been implementing the UNCAC and the following is the status of the provisions of articles 12, 13 and 39 of the convention:

A. Article 12 — Private Sector

Article 12 requires each State Party to UNCAC to take measures to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures. The following is the progress on the implementation:

1. Measures to Prevent Corruption in the Private Sector

The private sector in Kenya is well developed and the Government has made big strides in involving the sector in the fight against corruption mainly through the umbrella body Kenya Private Sector Alliance (KEPSA). Corruption in the private sector pushes up the cost of doing business and may, in the extreme deny firms business. The following measures have been implemented:

(i) KEPSA is one of the agencies that implement the National Anti-Corruption Plan (NACP) under the Kenya Integrity Forum (KIF) through the Association of Professional Societies of Eastern Africa (APSEA) and Institute of Certified Public Accountants of Kenya (ICPAK). These professional bodies regulate the conduct of their members which is important in the fight against corruption.

(ii) All companies listed at the Nairobi Stock Exchange (NSE) are regulated by the Capital Markets Authority (CMA) Act, Cap 485A and Regulations, 2009. They are required to publish half and full year audited reports in the local dailies as well as display them in conspicuous places.

(iii) ACECA was amended in 2007 by deleting the words "public officer" from section 55(2) so that proceedings may be commenced against persons whether in public or private sectors.

(iv) The Public Procurement and Disposal Act (PPDA), 2005 prohibits any person from engaging in corrupt practices in the procurement process and outlines the penalties for such offences. Specifically, private individuals are debarred from government tendering process on account of having been convicted by a court of law on a corruption case.

(v) The Kenya Revenue Authority (KRA) introduced Electronic Tax Register (ETR) System which has substantially reduced incidences of corruption within the tax regime.

(vi) The Centre for Corporate Governance trains private companies on proper corporate governance including development of necessary instruments.

2. Implementation Gaps

The following gaps have been experienced during implementation:

(i) Lack of laws that expressly disallow tax deductibility of expenses that may constitute bribes

(ii) CMA Act is limited to companies that are listed in NSE while strict enforcement of the Companies Act is weak by provision that directors may appoint nominees to take their places and can then trade with the same companies.

(iii) The Companies Act is outdated and does not address the emerging issues such as good governance, information technology and corruption risk management, among others.

(iv) The provisions under ACECA do not specifically tackle corruption in the private sector.

(v) Cooperation between law enforcement agencies and the private sector entities is weak.

(vi) Internal audit controls are insufficient and, at times, optional. There are no structured internal corruption reporting mechanisms in the private sector.

(vii) Enforcement of most codes of conduct lacks the backing of the law and heavily relies on the goodwill of members.

(viii) There is ineffective monitoring of public disclosure requirements in corporate entities.

(ix) Stakeholders awareness on existing anti-corruption measures like Codes of Conduct is still low in the private sector

(x) Ineffective mechanism to monitor abuse of procedures regulating private entities

(xi) There is lack of effective enforcement of the existing legislation.

3. Recommendations

(i) More efforts should be put to curb corruption in the private sector. Such measures may include development and adoption of codes of conduct and best practices.

(ii) Public sector anti-corruption measures, especially prevention, should be replicated in the private sector

(iii) Criminal sanctions should be imposed against companies and their officials found to have engaged in corruption should.

(iv) Companies should develop corruption prevention measures and internal reporting mechanisms (whistle blower system)

(v) The Companies Act should be reviewed to incorporate provisions that will prevent corruption and reflect current best practices.

(vi) The partnership between the Government and the private sector through the Public Private Partnership (PPP) should be strengthened and focused on fighting corruption.

(vii) KEPSA should establish an ethics committee to mainstream ethics and integrity in the continuous professional development and enhance transparency in the private sector to limit the sector's engagement in corruption.

(viii) The private sector should propose a regulatory mechanism to enforce ethics and integrity within its membership.

(ix) There should be no discretion by public officers in the regulation of private entities

(x) The relevant laws to address the problem of bribes and other acts of corruption treated as expenses; fraud and financial malpractices should be reviewed.

(xi) Provisions for the disclosure of accounting scandals in the private sector camouflaged in different terms are introduced as is disallowing bribes treated as tax deductible expenses.

B. Article 13 — Participation of Civil Society

Each State Party is expected to take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and

groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations (CBOs), in the prevention of and the fight. Kenya has a vibrant civil society and non-governmental organizations that operate freely without undue control by the Government. They are free to organize activities, including those that are critical to the Government as well as to participate in all public events during which they can air their views.

1. Measures to Promote the Active Participation of Civil Society and Others

(i) Civil society is one of the sectors recognized by KIF to implement the NACP

(ii) Societies Act provides for the formation and participation of civil societies to carry out various activities including public education while the NGO Act regulates the formation of Non-Governmental Organizations (NGOs).

(iii) Anti-corruption agencies have developed and implemented community based anti-corruption awareness programmes with the civil society targeting local communities to enlist their support in the fight.

(iv) The Office of Public Communication (Government Spokesman) holds weekly media briefings on matters of public interest.

(v) EACC and civil society, and academia are in the process of developing and formalizing anti-corruption curricula for schools, tertiary institutions and universities

(vi) The Public Service Week is held annually and allows members of the public to visit and interrogate various Government Ministries/Departments stands showcasing their work.

(vii) The Statute Law Miscellaneous (Amendments) Act, 2007 allowed the members of the public to access wealth declarations upon applying to the relevant Responsible Commission.

(viii) Civil society, religious organizations and non-governmental organizations have representation in NACCSC which affords them opportunity to fight corruption.

2. Implementation Gaps

During the implementation of UNCAC, a number of shortcomings have been detected. These shortcoming or gaps impact negatively on the ability of the civil society and NGOs to effectively unleash their full potential to fight corruption and check the excesses and impunity of the Government. The following are some of the gaps that have been identified:

(i) Inadequate legal framework for civil society engagement and participation in the fight against corruption in Kenya.

(ii) The Official Secrets Act curtails the release and access of information to the public.

(iii) There is no mechanism for accountability and transparency in the operations of the civil society.

(iv) There is no structured platform for collaboration between the Government and civil society.

(v) Lack of adequate funding for civil society to effectively engage in anti-corruption activities.

(vi) There is widespread corruption within the rank and file of the civil society

(vii) The electronic whistle blower system (website) for anonymous corruption reporting is only accessible to members of the public who have access to the internet and, therefore, ineffective.

3. Recommendations

Arising from the shortcomings listed in (b) above, the following are suggested possible solutions which may help address those problems and ensure that the civil society, NGOs and individuals contribute to the fight against corruption in the country:

(i) Engagement between the Government and civil society should be changed from confrontational to collaborative and cascaded to all levels of policy and decision making

(ii) There is need to intensify the community-based anti-corruption programmes

(iii) Funding the civil society groups, NGOs and CBOs from the exchequer should be considered. This will enable these groups effectively fight corruption both in and outside government and watch over the resources the Government spends on behalf of the public

(iv) Civil society should address the problem of endemic corruption within ranks by embracing the tenets of transparency, accountability and integrity in all its operations and finances

(v) The NGO Coordination Board should consider starting to publish the audited accounts of all NGOs in Kenya as the first step towards fighting corruption

(vi) The Freedom of Information bill should be enacted to facilitate the public access information including that which touches on corruption in the public service.

(vii) Public institutions should promote an open door policy and employ participatory methods in the conduct of their affairs so that the public is informed of decisions affecting them.

The recommendation on freedom of information, if implemented, will improve the corruption reporting system which currently stands at 42.2% as per National Corruption Perception Survey of 2011.

4. Article 39 Cooperation Between National Authorities and the Private Sector

(a) Measures Taken to Facilitate Cooperation with the Private Sector

(i) Legislation under section 12 (1) of ACECA provides for cooperation with other bodies.

(ii) EACC and NACCSC have, through various public education programmes, been encouraging people to report all forms of corruption.

(iii) EACC has installed an electronic system for reporting of corruption anonymously.

(b) Implementation Gaps

(i) Insufficient compliance with the obligations of this Article because of weak cooperation between the anti-corruption agencies.

(ii) Campaigns and sensitization programmes do not cover all parts of the country particularly the far removed areas

(iii) Accessibility to anti-corruption bodies by the public at the grassroots level is limited

(iv) Inadequate access and utilization of the anonymous reporting facility due to infrastructural challenges and lack of awareness.

5. Recommendations

(i) Develop rules of engagement between anti-corruption agencies and private sector entities.

(ii) Expand the awareness programmes to all parts of the country and translate IEC materials into local languages. The presence of anti-corruption bodies at the grassroots should be increased.

(iii) Undertake a campaign to enhance reporting of corruption cases.

V. ANALYSIS

The positive steps that Kenya has taken to implement UNCAC, with a measure of success, and the new Constitution provides the country with special opportunities that boost the fight. Once fully implemented, the Constitution will augment UNCAC in fighting corruption and all its manifestations. It will promote transparency and accountability in the management of public affairs and effectively reduce corruption in all sectors of the economy.

There is, however, need to develop better collaborative efforts between the public and private sectors given that the two constitute the demand and supply sides of the corruption equation. The private sector must stop shying from participating in the fight against corruption particularly in reporting corruption and it is only then that the sector will be able to increase their profits. The same can be said about the civil society, NGOs and CBOs which are expected to not only generally keep the Government on its toes but to specifically police the utilization of public funds. To this end, the sector should be encouraged to first exorcise corruption from its organizations so as to gain the moral ground to deal with corruption in the public sector.

VI. CONCLUSION

The fight against corruption in Kenya is Government driven. The Government must, of necessity, go out of its way to prompt, pursue and facilitate the participation of the private sector, and civil society in the fight against corruption. Further, it should continue to facilitate and provide leadership in the implementation of the UNCAC to achieve the desired goals, guarantee provision of resources to fight corruption and bring on board the public to actively participate in the war. Overall, Kenya has largely complied with the provision of the UNCAC articles 12, 13 and 39. There is, however, still a lot of work to be done before the fruits of the fight against corruption can be realized.

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INDIVIDUAL PRESENTATION PAPER

*Oleg Crismaru**

I. INTRODUCTION

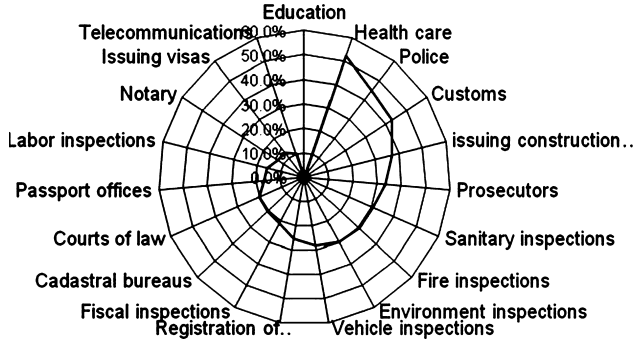
Corruption remains among the top concerns of the population of the Republic of Moldova, being fifth after the problems which follow immediately the issues related to the survival of the individual and his family.[1] According to Transparency International Moldova, the Global Corruption Barometer [2] shows that two thirds of Moldovan respondents argue that corruption is a serious problem affecting the public sector and 64% reveal that institutions are 'captured' by private interests groups.

Justice and police are considered the most corrupt institutions in Moldova, which is followed by the Parliament and political parties. 55% of respondents considered ineffective Moldovan government efforts in combating corruption, and 54% of respondents claim that ordinary people can contribute to the fight against corruption, and about half of them are willing to denounce corruption.

Recently, public awareness of the threat posed by corruption has increased. If 10 years ago the main part of respondents considered poverty as the main cause of corruption, at present two thirds of the respondents understand that corruption causes poverty. The share of households that understand the impact of corruption on poverty increased from 56.8% in 2008 to 66.9% in 2012. Among business people, their share increased from 57.1% in 2008 to 63.5% in 2012.

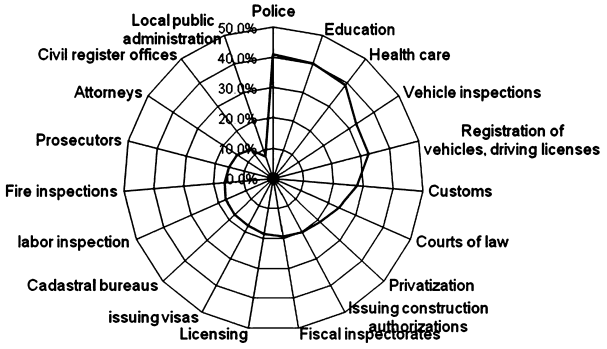
A survey conducted by Transparency International-Moldova[3] determined the institutions where unofficial payments are made most frequently.

Frequency of bribes offered by business 2012, %



Total amount of bribed estimated ~ 31,2 million USD (+49% compare to 2008)

Frequency of bribes offered by individuals 2012,%



Total amount of bribed estimated ~ 58,6 million USD (+15% compare to 2008)

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[1] National Anti-Corruption Strategy 2011-2015 approved by the Decision nr. 154 from 21 Jul. 2011 of Parliament of Republic of Moldova published in Official Monitor nr.166-169/483 from 07 Oct. 2011.

[2] <http://www.transparency.md/content/view/1825/49/lang,en/>.

[3] Sociological Study Corruption in Republic of Moldova 2012: Perceptions vs. Personal Experiences of Households and Business People conducted by Transparency International-Moldova with the support of the U.S. State Department and in collaboration with the Center for Sociological Studies and Marketing "CBS-AXA".

According to the calculations, the total amount of bribes paid by households made in 2012 was about 732.7 million Lei, increasing in absolute terms, compared to 2008, by over 15%.

Households – Evolution of Total Bribes (Mill. Lei)

	2005	2007	2008	2012
Police	81.5	79.9	97	45.4
Education	126	76.5	64	185
Health care	200	153	190	238
Other	493.6	280.6	279	264.3
TOTAL	901.1	590	630	732.7

The total amount of bribes paid by businesses in 2012 amounted to about 390 million Lei, increasing by approximately 49% compared to 2008. The main payments were made to the customs officers (75 million Lei), health care institutions (41.6 million Lei), police (41 million Lei) and fiscal inspectors (32.4 million Lei).

Estimated Total Bribes: Businesses, Mill. Lei

Customs	75
Health care system	41.6
Police	41
Fiscal inspectorates	32.4
Fire inspectors	31.8

The evolution of the estimated total amount of bribes paid by businesses shows 150% growth of this indicator compared to 2008, which cannot be explained only by inflation and, essentially, proves a worsening of the business environment in Moldova.

Businesses – Evolution of Total Bribes (Mill. Lei)

	2005	2007	2008	2012
Customs	120	66.1	33.8	75
Fiscal inspections	69.3	36	25.8	32.4
Courts of law	Z	23.3	11.2	18.1
Construction authorization authorities	14.5	26.5	8.1	13.1
Other	203	155.7	185.1	251.4
TOTAL	406.8	307.6	264	390

Conclusions of national and international reports and studies outline the following problems and sectors vulnerable to corruption: lack of a stable anti-corruption legal framework, coherent and adjusted to international standards; lack of efficient mechanisms of law enforcement; reduced use of administrative instruments of preventing and combating corruption; low level of confidence of the population in the performance of the law enforcement agencies; activity of the state and political institutions which is not sufficiently transparent; lack of transparency in public procurement; insufficient budgetary resources for proper activity of authorities entitled to protect the legal norms and the judicial system; insufficient anti-corruption education and training of public officials and population; absence of sector studies which would reveal the magnitude of the corruption phenomenon.

Paying particular attention to *Effective Measures to prevent and Combat Corruption and to encourage Cooperation between the Public and Private Sectors*, I will cover the main issues related to cooperation between these two sectors as follows.

II. ANTI-CORRUPTION LINES

Anti-corruption lines are effective tools for preventing and combating corruption and encourage cooperation between the public and private sectors as they allow population to report acts of corruption or abuse of civil servants in the time of their commission. Hotlines protect the identity of the whistle-blower if he / she does not intend to disclose it and allow civil society to be consulted on the issues faced in dealing with public authorities. Most ministries and state agencies in the Republic of Moldova have hotlines, but their names differ from one institution to another (hotline, anti-corruption line, green line). The working hours of anti-corruption hotlines, as a rule, coincide with the working hours of the institutions concerned. The hotline of main authority in the field of preventing and combating corruption is the National Anti-corruption Center's 24-hour working regime.

Most institutions provide satisfactory visibility of the phone number of anti-corruption line, either by placing it on the homepage of the institution website, or by creating a separate section "Anti-corruption" on the site. However, there are cases when the hotline numbers are difficult to be found on the site and at the Ministry of Justice anti-corruption phone number can be found only in the minister's antechamber.

Hotline activity issues are related to insufficiency of anti-corruption hotline regulations, failure in ensuring high dissemination among society regarding existence of hotlines, visibility of phone numbers of anti-corruption hotlines on web pages and information boards, lack of skilled staff in charge of communication with citizens able to ensure proper functioning of anti-corruption lines.

III. REPORTS OF FINANCIAL INTELLIGENCE UNITS

Another efficient instrument of cooperation between the public and private sectors is related to information about suspicious transaction reports from Financial Institutions to Financial Intelligence Units. This partnership is regulated through the adoption by the Republic of Moldova of the Law on preventing and combating money laundering and financing of terrorism from 26 July 2007.[4] According to this law, financial institutions are required to inform immediately the Office for Prevention and Fight Against Money Laundering of the National Anti-corruption Center on any activity or any suspicious transactions of money laundering and financing of terrorism in preparation, implementation or already completed. Also the Office for Prevention and Fight Against Money Laundering analyzes all activities or transactions in cash with a value of at least 100 thousand Lei or by transfer with an amount of 500 thousand Lei and higher made in Moldovan banks. In case of suspicious transactions, the materials are delivered to the prosecution body of the National Anti-corruption Center for further investigations.

IV. DECLARATION OF INCOME AND PROPERTY

An efficient tool for civil society monitoring of public servants integrity during their public activity serves mandatory declaration of income and property of people with public positions, judges, prosecutors, civil servants and persons with public responsibility.

According to the law, declaratory entities are required to declare on oath, income and property of income through the Declaration of income and property which shall be in writing and represent a public document. Correctness control of the declarations of income and property shall be performed by the National Integrity Commission in accordance with Commission Regulation approved by Parliament. If subjects intentionally indicated in the declaration inaccurate or incomplete data they carry liability under art. 352^1 of the Criminal Code of the Republic of Moldova.

[4] Published 07 Sep. 2007 in Official Monitor of the Republic of Moldova Nr. 141-145.

It should be mentioned that because of parliamentary debates on the appointment of the members of National Integrity Commission, the activity began only in late 2012. At present the Commission's work is seriously hampered by the existing legal framework, which limits its powers of investigation, by lack of staff and delays in submitting statements by the declaratory entities. Also the enacting of the criminal liability for illicit enrichment is hampered by different opinions among the political parties. A novelty in the legislation of the Republic of Moldova is introducing of integrity tests and lifestyle monitoring of the National Anti-corruption Center staff.

V. INSTITUTION OF WHISTLE-BLOWERS

By Law Nr. 277 of 27 December 2011[5] whistle-blower institution was established and relevant provisions of the Law on Preventing and Combating Corruption and the Code of Conduct for Civil Servants have been filled in this regard. The law defines whistle-blower as a public official who learned about acts of corruption and those related to corruption, acts of corrupt behaviour and communicates them to the criminal investigative body, Prosecutor, NGOs and the media.

The law establishes three measures to protect whistle-blowers, and failure in protection measures of public servant are punished under the Contravention Code with a fine of up to 3,000 Moldavian Lei.

At the moment the outcomes of this institution are not yet visible due to the lack of public servants information and lack of promotional campaign of this institution. Therewith, previous practice has shown that whistle-blowers reports usually caused negative consequences for those who report, some were even prosecuted started or arrests, some were dismissed or forced to resign.

VI. CRIMINAL PROCEEDINGS

Criminal proceedings consist of the activities of the criminal investigative bodies and the courts, in which parties in criminal cases and other individuals participate and that are conducted in line with the provisions of the Criminal Procedure Code. Criminal procedure of the Republic of Moldova admits the following objective data in evidence: expert's reports; material evidence; transcripts of the criminal investigation or of judicial inquiry; documents (written, audio, video); audio and video recordings and pictures; technical, scientific, medical and forensic reports; procedural documents that record the results of following special investigative measures: audio and video recording; supervising the home by using technical means providing registration; the interception and recording and images; retention, research, teaching, or lifting searching mail, monitoring telegraph connections and electronic communications; monitor and control financial transactions and access to financial information; documentation of methods and technical means and locating or tracking by global positioning system (GPS) or by other technical means; collection of information by electronic communication service providers; identifying the subscriber, the owner or user of an electronic communication system or a point of access to a computer system; visual tracking; control the transmission of money or other tangible assets extorted; undercover investigation; cross-border supervision; controlled delivery; collecting samples for comparative research; examination of objects and documents; acquisition of control; questioning; collecting information about people and events; identifying of persons.

The procedure of acquiring of evidence is strictly regulated by the Criminal Procedure Code, and it can be performed only in written form (by means of orders and transcripts of the criminal investigation or of judicial inquiry) and is strictly related to the gravity of the investigated crime and rights and freedoms of the participants of the proceedings.

Collection of evidence that intrudes on the privacy of a person or his or her domicile, the privacy of correspondence, telephone or electronic conversations, telegraphic or other communications, state, trade or banking secrets and other actions provided by law, should be authorized by the investigative judge. Other evidence should be collected by the order of the prosecutor or criminal investigative officer.

[5] Published 03 Feb. 2012 in Official Monitor of the Republic of Moldova Nr. 25-28.

The major problem that Moldavian investigative bodies have to face is the requirement of completing wiretapping or other means within a period of 48 hours. After the expiry of this term, the prosecutor must bring charges against the suspect. This situation exists from October 2012, due to the gap of legislation performed by the Parliament, and it has remained unrepaired till now. This gap of legislation put the investigative bodies specialized in combating crimes of corruption into an impossible position to collect the most important evidence necessary for solving the crimes, identifying of all crime participants, bringing charges and conviction of the defendants.

A. Acquiring Suspect Statements

According to the criminal legislation of the Republic of Moldova the suspect is a person whom certain available evidence indicates committed a crime prior to charges being brought. If according to law the suspect has immunity from criminal liability, criminal investigative body addresses to the relevant authority notifications related to the withdrawal of persons' immunity and the initiation of a criminal investigation against him. Law affords immunity from criminal liability to the President of the country, deputies, judges and members of foreign diplomatic mission and members of their families.

After his/her designation as a suspect, the suspect shall be interrogated only in the presence of a defence counsel or an attorney providing the legal assistance. The suspect has right to refuse or make statements on the incriminating suspicion. The investigative body must explain to suspect that refusing to make statements cannot be interpreted against him/her and warn that statements made by suspect may be used as evidence against him. Statements of the suspect can be obtained also under the results of special investigative measures as electronic surveillance, wiretapping, installation of appliances that monitor and record audio and video, retention, research, teaching, or lifting on searching mail, monitoring telegraph connections and electronic communications or undercover operations.

Criminal legislation of the Republic of Moldova introduced the institution of plea bargaining in 2003. In the case of plea bargaining, punishment provided in the criminal law is reduced by one third. The Republic of Moldova during the last ten years has harmonized its legislation in accordance with the international standards regarding the institution of suspects. The main problems related to the suspect are the poor conditions in prisons, abuses of police officers and prison guards.

B. Acquiring Witnesses Statements

The testimony of a witness is oral or written made during criminal proceeding regarding any circumstances to be determined in the case of including information about the suspect/accused/defendant, injured party and his/her relationship with them. The person conducting the procedural action explains to the witness his/her rights and obligations and warns him/her about his/her liability for refusing to testify or for deliberately making false testimony.

Art. 312 and 313 of Criminal Code establish punishes for false statements by a fine of up to 6,000 Lei or by community service for 180 to 240 hours or by imprisonment for up to 2 years and for the refusal or evasion of a witness or of an injured party to make statements, that is punished by a fine of up to 6,000 Lei.

The Criminal Procedure Code and law on state protection of victims, witnesses and other persons assisting in criminal proceedings provides as measures of protection of witnesses hearing by special technical means that assure the distortion of the voice; hiding or changing of identity, changing of residence or place of work or study, changing of appearance, installing a home alarm system, changing the phone number and the protection of property.

Current issues regarding the institution of witnesses are the lack of trust of witnesses in law enforcement authorities concerning the ability to protect them for their testimony made against defendants. Another problem is the mild punishment for perjury and obstruction of justice, because the prejudices caused by these crimes are more serious then the punishment.

VII. IDENTIFICATION, TRACING, FREEZING, AND CONFISCATION OF PROCEEDS AND RETURN AND DISPOSAL OF CONFISCATED ASSETS

Criminal investigative bodies of the Republic of Moldova dispose of sufficient resources for identification, tracing, freezing, confiscation of proceeds and return and disposal of confiscated assets. For the most expensive goods there are electronic registers opened for criminal investigative bodies. Law provides that a criminal investigative body *ex officio* or the court at the request of the parties may undertake during a criminal proceeding measures for securing the recovery of damages caused by the crime and for guaranteeing the execution of a punishment by fine. Measures for securing the recovery of damages consist of sequestering movable and real property. The current issues regarding these measures are related to tracing and confiscation of proceeds of crime from bank accounts of the off-shore companies and recovery of assets from dummy owners.

VIII. PREVENTIVE MEASURES

Moldovan legislative framework in the field of anti-corruption has been considerably extended and important laws have been adopted, e.g.: Law from 22.02.2008 on Conflict of Interests, Law from 22.02. 2008 on the Code of Conduct of the Public Servant, Law from 25.04.2008 on Prevention and Fight Against Corruption, Law from 13.11.2008 on Transparency in the Decision Making Process, Law from 18.12.2008 on Verification of Holders and Candidates to Public Functions, etc. Although these laws were much anticipated, they showed no effect in the first years after adoption, mainly due to the lack of a clear application mechanisms. Taking into account existence of certain old ineffective regulations, it is necessary to elaborate and adopt the mechanisms of anti-corruption legislation which would be effective in the following fields: income and property declaration, control over their origin; declaration of conflict of interests, transparency in the decision making process, gifts, etc.

Also the Republic of Moldova and its international partners provide active financing of anti-corruption campaigns (by television, internet, radio, trainings and seminars, etc.). The most known national anti-corruption campaigns for the last two years were *"You can stop Corruption", "Transparent property", "Corruption and cancer — social diseases", "Corruption kills education", "I do not give or take bribes"*, etc.

IX. EXTRADITION AND INTERNATIONAL COOPERATION

The Constitution of the Republic of Moldova provides that no citizen of the Republic of Moldova can be extradited or expelled from his/her country. Foreign or stateless citizens may be extradited only in compliance with an international agreement or under conditions of reciprocity in consequence of a decision of a court of law. In no case shall Republic of Moldova extradite a person who is accused for his political views or for actions that do not constitute a crime in the Republic of Moldova. According to the Constitution, the legal provisions on human rights and freedoms are interpreted and applied in accordance with the Universal Declaration of Human Rights, with the pacts and other treaties, to which the Republic of Moldova is a party.

Republic of Moldova has adhered to the UN Convention against Corruption, the Criminal Law Convention against Corruption, the Civil Law Convention against Corruption, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Directive 2005/60/EC of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, and other international treaties. Mutual legal assistance, extradition and information exchange between law enforcement authorities of the Republic of Moldova and other states are performed by the Division of International Cooperation of the General Prosecutors Office of the Republic of Moldova.

X. THE CURRENT SITUATIONS AND PROBLEMS OF UTILIZING THE PRIVATE SECTOR AND OF COOPERATION BETWEEN THE PUBLIC AND PRIVATE SECTORS IN PREVENTING AND COMBATING CORRUPTION; MEASURES ADDRESSING COOPERATION STIPULATED IN UNCAC ARTICLES 12, 13 AND 39

The legal framework of the Republic of Moldova contains a sufficient number of regulations designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honorable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State.

Law provides compulsory regulations related to transparency among private entities, procedures regarding subsidies and licenses granted by public authorities for commercial activities, imposes restrictions of former public officials or on the employment of public officials by the private sector after their resignation or retirement.

The tax system also is well regulated and contains sufficient regulations in preventing and detecting acts of corruption regarding the obligatory maintenance of books and records, financial statement disclosures and accounting and auditing standards. The Criminal Code punishes such doings as recording of non-existent expenditures, use of false documents; and intentional destruction of book-keeping documents earlier than foreseen by the law.

XI. CONCLUSION

The politics on cooperation between the public and private sectors in preventing and combating corruption are provided by the National Anti-Corruption Strategy[6] (2011-2015). According to this document the Republic of Moldova promotes the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. The strategy promotes enhancing the transparency of and promoting the contribution of the public to decision-making processes; ensuring that the public has effective access to information, undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption.

Despite these policies and legal framework, the cooperation between public and private sectors in preventing and combating corruption do not bring the expected results. In the Republic of Moldova, corruption is treated as a form of business, the branches of power are controlled by groups of interests, there is no transparency in recruitment of the heads of public authorities, and usually these are appointed due to the common business relationships, are in kinship or have other common interests.

Consequently, these groups of interests force the representatives of private sector, to give bribes in order to survive, because due to economic competition the fulfillment of tax obligations will increase the price for their goods and services. Consequently government revenue decreases and, hence, the state is not able to pay for the work of the public employees at a suitable level. In such a way majority of active work population have insufficient incomes and are forced for seeking a job abroad.

Taking into consideration the issues mentioned above, following the goal of improving the situation in the field of preventing and combating corruption, the following solutions are proposed: Strengthening the capacity of the National Integrity Commission (liquidation gaps in legal, digitization and processing of its electronic information, detailed verification of the candidates for public office,

[6] National Anti-Corruption Strategy 2011-2015 approved by the Decision nr. 154 from 21 Jul. 2011 of Parliament of Republic of Moldova published in Official Monitor nr.166-169/483 from 07 Oct. 2011

ensuring that information is exchanged with counterpart institutions in other countries, empower with the right to start trials for extended confiscation); Strengthening the capacity of the National Anticorruption Center for fighting against high-ranking officials; introduction of criminal liability for making decisions in situations of conflict of interest; improving the legal framework and establishing an effective control system of financing political parties and election campaigns; de-monopolization of the media and facilitating of the access to public television for new political forces; the introduction of collective responsibility for members of governmental commissions empowered to spend public finances; and increasing collaboration with civil society in order to development of intolerance towards corruption.

ANTI-CORRUPTION EFFORTS IN MYANMAR

*Myo Khaing Swe**

I. INTRODUCTION

After the Second World War, there had been poverty in Myanmar. So, the Government supplied the facilities to the public, and theft and corruption cases relating to those facilities emerged. In order to prevent such cases, the Government formed the Civil Supplies Thefts Preventive Committee on 23 December 1947. Moreover, the Public Property Protection Police (P-4) was also formed and had done investigations.

A. The Public Property Protection Police

P-4 took action on cases relating to bribery, corruption and failing to serve dutifully of public servants in accordance with the section 161 to 165 of chapter (9) of Penal Code, 1861.

1. The Provisions of the Penal Code, 1861

The provisions of section 161 to 165 of chapter (9) of the Penal Code, 1861 are as follows:

(a) **Section 161**. Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or for bearing to show, in the exercise of his official functions, favor or disfavor to any person, or for rendering or attempting to render any service or disservice to any person with the Union Parliament or the Government or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

(b) **Section 162**. Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favor or disfavor to any person, or to render or attempt to render any service or disservice to any person with the Union Parliament or the Government or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

(c) **Section 163**. Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forever to do any official act, or in the exercise of the official function of showing favor or disfavor to any person, or to render or attempt to render any service or disservice to any person with the Union Parliament or the Government or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, with both.

(d) **Section 164**. Whoever, being a public servant, in respect of whom either of the offences defined in the last two preceding sections is committed, abets the offence, shall be punished with imprisonment of either description of a term which may extend to three years, or with fine, or with both.

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(e) **Section 165**. Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be, concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

2. The Suppression of Corruption Act of 1948

The Government of Myanmar enacted the Suppression of Corruption Act of 1948 separately in order to prevent corruption effectively. There are six sections in the Act, and it had been amended four times in total. According to section 4(1) of the Anti-corruption Law, 1948:

(a) "If public servants always accept any gratifications, other than legal remuneration from any person"

(b) "If a public servant takes any valuable thing for himself or any other person from any proceeding or business to be transacted by him or his superior"

(c) "If a public servant takes any valuable thing or money for him or any other person against the law in misuse of his position"

(d) "If a public servant is guilty of fraud, harming public interest or misuses public property entrusted to him, he commits malpractices punishable by criminal law"

Such offenders shall be punished with imprisonment extending up to seven years and the proceeds of the crime shall be confiscated according to section 4(2).

B. The Bureau of Special Investigation

In 1951, the Special Investigation Administrative Board and the Bureau of Special Investigation Act were promulgated and the Bureau of Special Investigation was formed with 31 staff members The Bureau was placed under the direct control of the Prime Minister at this time.

C. The Special Investigation Department

In 1963, the Special Investigation Administrative Board was abolished and the Bureau was moved under the supervision of the Ministry of Home Affairs. The name of the Bureau was also changed to the Special Investigation Department in 1972.

II. SPECIAL LAWS RELATING TO ANTI-CORRUPTION

In Myanmar, there are 23 special laws in total which contain provisions relating to anti-corruption:

(a) Provisions relating to bribery in the Penal Code, 1861

(b) The Commercial Tax Law, 1990

(c) The Forest Law, 1992

(d) The Narcotic Drugs and Psychotropic Substances Law, 1993

(e) The Myanmar Police Force Maintenance of Discipline Law, 1995

(f) The Fire Services Law, 1997

(g) The Control of Money Laundering Law, 2002

(h) The Anti-Trafficking in Person Law, 2005

(i) The Criminal Code of Procedure, 1898

(j) The Myanmar Official Secrets Act, 1923

(k) The Public Property Protection Act, 1947

(l) The Amendment Act of the Criminal Law, 1951

(m) The Defense Services Act, 1959

(n) The Protection of Public Properties Law, 1963

(o) The Law Taking Action against the Ownership of Sale of Property

(p) Obtained by Illegal Means, 1986

(q) The Myanmar Financial Institutions Law, 1990

(r) The Saving Bank Law, 1992

(s) The Law Amending the Law Relating to the Fishing Rights of Foreign Fishing Vessels, 1993

(t) The Law Amending the Myanmar Marine Fisheries Law, 1993

(u) The Central Bank of Myanmar Law, 2013

(v) Anti-Corruption Law, 2013 (The Suppression of Corruption Act, 1948 was repealed)

III. CURRENT SITUATION OF CORRUPTION

Even though every Government in Myanmar has conducted the fight against corruption, it has not disappeared. Some of the public servants have been committing the offence by neglecting their own dignity as public servants and the State and disregarding the laws. Therefore, corruption is now expanding as a culture. Misappropriation of power and bribery are of key interest to the public. Corruption hinders administration and human rights and degenerates the economy, the political process and the dignity of countries affected by it. Moreover, it spreads to all countries. So, corruption is now a serious problem. Nowadays, the global economy is rapidly developing, and thus corruption is evolving and growing as well. It is committed as a transnational and organized crime. It is said that combating corruption is impossible by one country because it is committed not only in our country but also in other foreign countries.

According to the Corruption Perception Index (CPI) issued by Transparency International (TI), a monitoring and evaluating NGO organization, the rank of Myanmar is 170 among 176 countries. Therefore, it is now required to emphasize the fight against corruption. Moreover the new Government is now trying to develop domestic business in order to improve the national economy and also inviting foreign direct investment. So, the Government is working to improve the rank of the State in the CPI. Myanmar is now enhancing regional and international cooperation in fighting against corruption.

IV. ACTION COMMITTEE AGAINST BRIBERY

Myanmar's President's Office had formed an action committee against bribery with the following members.

(a) Dr. Sai Mauk Khan — Chairman
Vice — President

(b) Lieutenant Gen Ko Ko Union Minister For Home Affairs	Member
(c) U Thein Nyunt Union Minister for President Office (1)	Member
(d) U Soe Maung Union Minister for President Office (2)	Member
(e) U Soe Thein Union Minister for President Office (3)	Member
(f) U Tin Naing Thein Union Minister for President Office (4)	Member
(g) Dr. Tun Shin Union Attorney-General	Member
(h) U Than Kyaw Legal Advisory Board to the president	Member
(i) U Hla Tun Director-General for President Office	Secretary

A. Objectives of the Action Committee against Bribery

The Action Committee against Bribery was formed in order to eliminate bribery as national duty to strive for the eradication of bribery and corruption in public organizations, to create good governance and clean government, to upgrade integrity and accountability in public administration, to take effective action of corrupted offenders to make law enforcement and administrative sector to be transparent and to sustain economic development and to achieve economic development by domestic and foreign investments.

B. Receiving Complaints and Assigning Duty to Investigate

The bribery and corruption cases can be reported to the relevant departments by individual or group wide. After scrutinizing, the complaint letters required to take departmental actions are transferred to the relevant departments. The letters for which no action is needed are filed. The letters for which legal action is required are investigated in line with the provisions of laws with the approval of higher authority.

We have also to scrutinize accuracy of the above complaint letters by conducting preliminary investigation. According to the findings, we take legal action, if it is required. Whenever we find fraudulent complaints, the person who sent it would be taken legal action. The investigation processes are as follows:

(a) Planning the investigation process and arrangement

(b) Collection and confirmation of information

(c) Interviewing witness

(d) Interrogating the accused

(e) Search and seizure by way of evidence, including documents, money and property

(f) Taking expert opinion and taking handwriting expert opinion if required

(g) Giving advice of the legal opinion

(h) Prosecution

The bureau is always trying to recover the public properties that were lost in corruption cases and also reports vulnerabilities to relevant departments.

C. Status of Taking Action

The Ministry of Home Affairs has declared rapidly in daily newspapers that any victim can complain to the Ministry in order to be a clean Government and to eliminate the bribery and corruption of public servants by the cooperation of public. After the above announcements had been issued, the Ministry of Home Affairs has received 212 complaint letters in total. Among them, 18 are relating to civil cases, 93 are relating to administration, 2 are relating to social affairs, 47 are relating to criminal cases and 52 are relating to bribery. Also, 450 offenders have had action taken against them under the supervision of the action committee as follows:

(a) Taken action under the State Service Personal Law, 2013	(362) persons
(b) Transfer to other department	(69) persons
(c) Force to retired	(18) persons
(d) Order of the sentence of imprisonment	(1) person

V. INTERNATIONAL AND REGIONAL COOPERATION INCLUDING UNCAC

A. UNCAC

The United Nations Convention against Corruption (UNCAC) was adopted in New York by Resolution No. (58/4) of the United Nations General Assembly (UNGA) that was held on 31 October 2003 and enter into force on 14 December 2005 in accordance with article 68(1). Myanmar signed the Convention on 2 December 2005 and was the 137th member.

According to the decision done at the Workshop on Pre-Ratification of the United Nations Convention against Corruption for Myanmar sponsored by UNDP that was held at Aureum Palace Hotel from 24 to 25 September 2013, UNODC and UNDP asked the legal advice on anti-corruption bill from legal experts relating to anti-corruption. According to the records of the UNODC, Myanmar is one of the UNCAC's States Parties which performed the anti-corruption tasks immediately.

B. IAACA

The International Association of Anti-Corruption Authorities (IAACA) was formed on 22 October 2006 in order to implement the United Nations Convention against Corruption (UNCAC). The senior officials from Union Attorney-General Office and Bureau of Special Investigation have regularly attended the IAACA's annual meetings. Myanmar delegation including three members of Legal Drafting Committee of the Parliament, have attended the 6th annual meeting of the (IAACA) held from 4 to 7 October 2012 in Kuala Lumpur, Malaysia.

C. SEA-PAC

Countries of South East Asia also formed the South East Asia Parties against Corruption (SEA-PAC) on 15 December 2004 to eliminate Corruption in the region. Nine countries of the region are now members. Myanmar is now trying to join as a member in November 2013.

VI. EFFORTS TO ENACT MODERNIZED LEGISLTION

The Suppression of Corruption Act, 1948 had existed till July 2013 in Myanmar. The Government decided to draft a new law in line with international standards in order to suppress the corruption for the development of the country. Those standards are as follows:

(a) To emerge as a clean government and good governance;

(b) To prevent corruption;

(c) To provide the procedures for the public servants;

(d) To have international cooperation; and

(e) To get the technical assistance and exchange information from foreign countries.

A. The Anti-Corruption Law

The Bureau of Special Investigation started drafting an anti-corruption bill in 2005 with the intention of international standards and had submitted it to the Attorney General's Office through the Ministry of Home Affairs for legal advice. After the new Government was formed, a new anti-bribery bill drafted by the relevant legal drafting committee had been submitted to the Parliament and announced in newspapers. The Union Attorney-General's Office coordinated and informed the Ministry of Home Affairs that there would not be any action taken on the bill submitted by the Ministry of Home Affairs.

The above anti-bribery bill had been endorsed by *Amyotha Hluttaw* and sent to the *Pyithu Hluttaw,* and the *Pyithu Hluttaw* ratified the bill with amendments including the title of the bill. The bill had been submitted to the sixth regular section of first *Pyidaungsu Hluttaw* Meeting and ratified it. After that, the Speaker of the *Pyidaungsu Hluttaw* sent it to the President to enact the law in line with section 105 of the Constitution and Rules of *Pyidaungsu Hluttaw*. The President sent it back with his (12) recommendations. The *Pyidaungsu Hluttaw* had discussed it and only agreed to two recommendations and the rest were rejected, and sent it again to the President.

The President signed and enacted **the anti-corruption law** on 7 July 2013. It is included (11) Chapters and (73) Sections. The Chapters are as follows:

(a) Chapter (1) Title, come into Force, Jurisdiction and Definition

(b) Chapter (2) Objective

(c) Chapter (3) Formation of Commission, Duties and Functions thereof

(d) Chapter (4) Formation of Preliminary Scrutiny Body relating to Money and Property obtained by bribery

(e) Chapter (5) Formation of Investigation Body and Functions thereof

(f) Chapter (6) Formation of Secretariat of the Commission

(g) Chapter (7) Information relating to bribery, Performed by the President, Speakers of *Pyithu Hluttaw* and *Amyotha Hluttaw*

(h) Chapter (8) Declaration of money, properties, liability and right owned by authorized persons.

(i) Chapter (9) Confiscation the Money and Property obtained bribery

(j) Chapter (10) Offences and Penalties

(k) Chapter (11) Miscellaneous

The name of the new anti-corruption law is the anti-corruption law and the law shall have jurisdiction over any person who commits any offence cognizable under this Law in the territory of the Union of Myanmar, or over Myanmar citizens or any person residing permanently in the Union of Myanmar who commits the said offence outside the country.

B. Anti-corruption Commission

I would like to explain the new anti-corruption law briefly. According to the law, an anti-corruption commission would be formed and organized consisting of 15 members, of whom five persons are selected by the President, Speaker of the *Pyithu Hluttaw* and *Amyotha Hluttaw*. When the members of the commission are assigned, they must disclose money, property, assets and liabilities of their family headed by them including beneficial ownership, to the President. The term of the commission is like the term of the President and no member of the commission has the right to serve for two terms. The age of a member of the commission must be between 45 and 70 years old. He or she shall not be an official or servant of a government organization.

The duties and functions of the commission are forming of a preliminary scrutiny body and investigation body, forming the department by assigning the Chief Investigator, specifying the authority, cooperating with the government departments and agencies and State-owned enterprises in laying plans and programmes in order to dispel corruption, implementing the suitable programmes for public cooperation. It also has power to examine the records of banks and financial institutions, issue an order to responsible persons of banks and financial institutions to allow the seizure of evidence if necessary, issue a prohibitory order not to transfer, conceal, and disguise the accounts and money, order to do prosecution, pass and order confiscation the money and property with the recommendation of preliminary scrutiny body, give protection and set rewards for witnesses.

The president and speakers of relevant *Hluttaw* can assign the duty to investigate corruption cases, and the complaints of victims or relevant government departments and agencies those are sent to the commission or investigation bodies organized by the law will be investigate. The commission shall not investigate the cases in which there is no evidence and the repeated cases in which there is no new sound evidence. Any person who is related to the complaint case shall not be assigned as an investigation authority. The accused person has a right to defend the accusation by himself or through an agent.

The chairperson of the commission shall call a meeting to make a decision on the investigated case within 30 days from the date on which the investigation report is received. The commission can reject or prosecute the case depending on the findings of the investigation. It is required to get the prior agreement of the Government whenever prosecuting a person who has a political position. The approval of required the commission is for the prosecution on any other person except the representative of the *Hluttaw* and persons who have political post and to make a prosecution on the representative of the *Hluttaw*.

According to the investigation report or other information, the preliminary scrutiny body shall be formed to scrutinize in order to confiscate the money and property obtained by corruption. At this time, the accused person has also right to defend the accusation by himself or through an agent. The preliminary scrutiny body shall submit a report on its finding by taking the other statements and evidence. The commission revises again the report and confiscates the money and property if it was committed. If it is not, the money and property shall be paid back.

A person in a political post who commits a corruption offence shall, on conviction, be punished with imprisonment for a term which may extend to 15 years and may also be liable to a fine. An authority other than a person in a political post shall, on conviction, be punished with imprisonment for a term which may extend to 10 years and may also be liable for a fine. Other persons shall, on conviction, be punished with imprisonment for a term which may extend to 7 years and may also be liable to a fine.

The offences relating to intentional failure to submit ownership documents within the required time

frame or submitting of false documents or omissions or refusing of any bank and financial institution to grant permission to the investigation body to carry out official duty, releasing or transferring the prohibited money and property without the permission of the commission, obliterating, altering and amending the financial records or concealing or obliterating of money and property relating to any offence under the law, so that action may not be taken, making false complaints, giving false statements shall be punished on conviction with imprisonment for a term which may extend to 5 years and may also be liable to a fine.

Any person who fails to comply with any order issued by the commission shall be punished on conviction with imprisonment for a term which may extend to 6 months or with a fine or with both.

Whoever incites, attempts, conspires or administers or abets in committing any offence contained in this Law shall be liable to the punishment provided in this Law for such offence.

The offences under the law are cognizable offences and no criminal, civil, or administrative proceedings shall lie against the commission and organization formed under the commission and any other persons who performs on behalf of the commission and the organization who in good faith implements the provisions of the law.

VII. ENTER INTO FORCE OF NEW ANTI-CORRUPTION LAW

After enacting the Anti-Corruption Law, 2013, according to the law, the President has issued an order which states that law is enforced on 17 September 2013. So, other required actions including formation of the Anti-Corruption Commission are undergoing.

VIII. CONCLUSION

Corruption is frequently encountered in every sector of life including public and private circles. Corruption is a sad thing for our Myanmar Society as a rooted culture as well as ignorance of existing laws, self-dignity, dignity of the State and dignity of public servants. Corruption is spreading all over the world and is related to the fields of good governance, such as transparency, accountability, supervision, quality, law and order. Corruption is an issue not only related to the working mechanism, income, salary and gratuity, individual ethics and capacity but also related to legal and historical background. That is why the corruption problem is very wide and deep-rooted. When we look at the past events, the leading sector had been criticized that the government did not understand absolute power can deteriorate management abilities. The current government must inherit good things and bad things. After forming the new government in Myanmar, it is now decentralizing by practicing public-basedpolicy instead of centralization.

Whenever we discuss corruption, the salaries of service personnel should be considered. In the past, most of the public servants have rarely taken bribes because of salaries, prices of commodities, cost of living, gratuities after pension. Nowadays, most of the public servants have so many difficulties and deterrence to take the pride of public servant. Recently, the Union of Myanmar hosted the World Economic Forum (WEF). In this forum, most of the experts and technicians discussed that corruption plays a vital role for economic development, least Foreign Direct Investment (FDI) and standing as a Least Developed Country (LDC). The occurrence of corruption has many reasons such as freedom of expression, freedom of forming organization, freedom of media, freedom of expression by the citizens, easily access to enacted laws, rules and regulations.

Corruption cannot be rooted out by reforming only one person or group because of it has already occurred in so many decades. Every citizen has a duty to create a country in which there is no place for corruption and should try to avoid it because it can destroy the future of our country. That is why we have to be free from corruption not only in the economic sector but also in the political sector. Combating corruption has to be participated in by every strata of life such as administration, legislation, jurisdiction and participation of the public. Right now, our government has been trying to combat corruption.

As for our country, the Union of Myanmar has already tried to combat corruption since 1948, as the 137th member of UNCAC, as well as to be a member of SEA-PAC in November 2013. Our country is trying to transform to democratic process and to update our existing laws by means of renewal and amendments. As the new Anti-Corruption Law is enacted, the Union of Myanmar is ever trying to protect human rights for our citizens as well as to become the least corrupt country in our region in line with the provisions of law.

EFFECTIVE MEASURES TO PREVENT AND COMBAT CORRUPTION AND TO ENCOURAGE COOPERATION BETWEEN THE PUBLIC AND PRIVATE SECTORS

*Abraham Nikolous Ihalua**

I. INTRODUCTION

Namibia's anti-corruption legislation dates back prior to its independence in 1990 and Namibia has put in place legal measures to fight corruption. The Prevention of Corruption Ordinance, 1928 (Ordinance No. 2 of 1928), was enacted to better prevent corruption and it came into force on 12 June 1928. The Prevention of Corruption Ordinance, 1928, was enforced by the Police. In addition, the Namibian Parliament thought it fit to pass the Ombudsman Act, 1990 (Act No. 7 of 1990), that established the Ombudsman and empowered the Ombudsman to, among others, investigate corruption.

The Namibian Constitution provided for the establishment of the Anti-Corruption Commission under Article 94 A and the Prevention of Corruption Ordinance, 1928 was repealed by the Anti-Corruption Act, 2003 (Act No. 8 of 2003), that was promulgated and signed by the President in 2003 and became operative on 15 April 2005.

The Anti-Corruption Commission (hereafter referred as the ACC) is an Agency in the Public Service of Namibia as contemplated in the Public Service Act 13 of 1995. The ACC is headed by a Director who is assisted by a Deputy Director. Both the Director and Deputy Director are nominated by President and appointed by the National Assembly. Both the Director and Deputy Director have experience of legal practice as attorneys.

The ACC is an independent and impartial body, an agency within the Public Service as outlined in the Public Service Act of 1995. The Anti-Corruption Act gives the power to investigate corruption, combat and prevent corruption. The Director appoints investigating officers, staff of Public Education and Corruption Prevention and other Administrative and Auxiliary staff. The Anti-Corruption Act 8 of 2003 provides for the administrative and legislative measures to prevent and combat corruption.

In its fight against corruption the Commission embraces a three-pronged approach of law enforcement, prevention and public education. Our success in the fight against corruption is dependent on high ethical standards being maintained in all dealings and the reporting of corruption to the Commission whenever it occurs. The investigative power is vested in the Investigation and Prosecution Directorate while Public Education and Corruption Prevention are vested in the Public Education and Corruption Prevention Directorate. The Anti-Corruption Act gives the power to investigate corruption, combat and prevent corruption.

II. INVESTIGATION

The Commission receives allegations of corruption orally or in writing from whistle-blowers whether in public sector or private sector. Some whistle-blowers prefer to report anonymously or give an indication that their identities should be protected or may be disclosed. The information is normally provided via telephone, e-mail, in writing or in person to the Commission. On its part the Commission must analyse the allegation to determine if reasonable grounds exist to investigate the matter, and if it cannot, the matter will be refered to the relevant authorities such as the police, other government ministries, and stakeholders.

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The Commission may also initiate investigations. (Anti-Corruption Act, section 18). The Commission after analysing the matter may also decline to investigate if it is satisfied that the matter does not have substance, or not fall within its mandate, however referrals are made in such cases as well. The Commission may also initiate an investigation on its own motion as mentioned earlier (Anti-Corruption Act no. 8 of 2003, section 18), therefore it is not only reactive, but proactive as well.

Investigative powers are provided such as the power to arrest any person with or without a warrant who is suspected of having committed or is about to commit an offence under the Act. The person arrested must be taken to the police station to be dealt with in accordance with the Criminal Procedure Act. There are also powers to enter and search premises with a warrant and powers to seize proceeds of corruption. The investigating officers do not have the power to serve summons on person to appear before court either as witnesses or suspects, the power to take finger prints of suspects and the power to formally charge suspects before they appear in court. These are all done by the Namibian Police in accordance with Criminal Procedure Act, Act 51 of 1977.

III. PROSECUTION

The prosecution power of corruption cases is vested in the Prosecutor-General. Once the Commission has concluded an investigation into alleged corruption, it forwards the case files to the Prosecutor-General to analyse the information and to decide if prosecution is warranted or not. In such matters where the Prosecutor General decides to prosecute, the case file will be send back to the Commission with instructions to bring the accused before court by giving them summons which are in actual fact served on accused by the Police. In the contrary the Prosecutor-General shall decline to prosecute if there is no sufficient evidence to prosecute the matter.

IV. ADJUDICATION

The adjudication of corruption matters are dealt with by the Lower Courts and High Court of Namibia. The High Court deals with the interpretation and application of the Anti-Corruption Act and also hears matters on the constitutionality of any sections of the Act. The definition of corruption is not so simple because it can take on many forms; however corruption is defined as the abuse of public office for private gain, it may also be defined as wrongdoing by those in position of trust, therefore a simplified definition of corruption is; Offering or acceptance of an advantage as an inducement or reward for doing or not doing an act which amounts to abuse of one's official position whether in public or a private body.

Gratification as defined in the Act refers to money or any gifts, loans, fees, rewards, commissions, valuable security or property or interest in property of any description, whether movable or immoveable; any office, dignity, employment, contract of employment, release, discharge or liquidation of any loan, obligation or other liability, whether whole or in part; any forbearance to demand any money or money's worth or valuables thing; any right or privilege which is received in the performance of official duty. There is also a need for workshops on intensifying the understanding, application and the interpretation of the Act by the courts.

V. CONFISCATION OF THE PROCEEDS OF CORRUPTION

The Anti-Corruption Act does not make provisions for the confiscation of the proceeds of corruption, but this is done under the Prevention of Organised Crime Act no 29 of 2004 section 32 (Confiscation Order). The aim is to remove the proceeds so that the offender does not benefit from unlawfully acquired proceeds. It serves as a deterrent to the offender and members of the society that corruption does not pay at all.

VI. PREVENTATIVE MEASURES AGAINST CORRUPTION

Corruption is a threat to good governance, peace, political stability and socio-economic development. It is also a threat to any positive progress, success, nation building, unity and national prosperity therefore the Anti-Corruption Commission has adopted the following approach to prevent corruption

at all costs. The Anti-Corruption Commission has adopted strategies to prevent corruption after carefully studying and analysing existing policies and procedures at institutions, and the lack of transparency and accountability at government institutions. The lack of proper policies, rules, regulations and procedures are the root causes of corruption since it creates room for corruption to take place. Formulating policies, procedures and regulations as an initiative of the Commission has seen some decline in corruption at work places.

The Commission also embarked on public education which is aimed at sensitising the youth, churches, schools, politicians, public office bearers, community leaders, the private sector and the nation at large against the evils and the bad consequences of corruption so that they may feel free and also feel obliged to report any suspicions of corruption to the Commission without fear of victimisation.

The public play a very significant role because it exercises pressure on government to increase accountability and transparency at public institutions and also to take necessary action against corruption. The development of educative materials such as brochures and booklets have been done for distribution to mostly schools and public and private institutions to read and understand the activities of the Commission and also to sensitise the Nation at large as to the effects of corruption in the country. There is therefore a positive outcome in that corruption is reported on a daily basis to the commission because awareness has reached the majority of citizens, the business community, the youth and the public sector.

A. Media

The media is also used by the Commission to educate the nation. Seminars and workshops are conducted with community leaders and churches. The church serves as a vehicle to reach out to ordinary citizens, to raise awareness, sensitising people and instil moral values such as honesty, integrity, transparency, stewardship, respect and justice through teaching, preaching and education of their members and communities at large.

The free media in the country also contribute in fighting and preventing corruption due to the fact that corrupt practices are published and read by the society and the involved people exposed. This has a deterrent effect to future or potential corrupt public and private sector employees. The Commission is relatively new and much still needs to be done to achieve its intended goal of a free of corruption Nation.

B. Political Will

The President has launched a civic initiative, the "Zero Tolerance for Corruption Campaign" (ZTFCC). He has targeted mismanagement of public funds, poor service delivery and corruption as key government priorities, and directed the investigation of cases of alleged malfeasance. The Namibian Government has shown its commitment to combating corruption by the creation of an Ad Hoc Ministerial Committee assisted by a Technical Committee on the Promotion of Ethics and Combating of Corruption in March 1997 for the purpose of developing legislative and administrative proposals for a comprehensive ethics/anti-corruption regime in Namibia. Political will is also very crucial for Namibia's anti- corruption efforts to be successful therefore politicians at all levels of government strife to eliminate corruption and adopt necessary policies and procedures to promote accountability and transparency in public institutions.

VII. DEFINITION OF CORRUPTION

Corruption is generally defined as **an "abuse of (public) office for private (personal) gain"**. It includes: behaviour that may involve fraud, theft, misuse of position or authority or other acts that are unacceptable to an organization and which may cause loss to the organization, its clients or the general public; and dishonestly putting personal interests above those of the people and ideals one has pledged to serve. Defining corruption is not so simple, because it can take on many forms.

A. Legal Corruption Definition of Namibia Anti-Corruption Act, 2003 (Act No 8 of 2003)

The **Anti-Corruption Act, 2003 (Act No 8 of 2003)** defines "corrupt practice" as any conduct contemplated in Chapter 4 of the Act which Chapter deals with offences. In the Chapter 4 offences, the

word "corruptly" is mostly used together with the word gratification". "Corruptly" — the definition has recently been declared unconstitutional and struck down. Corruptly will thus now bear its ordinary grammatical meaning. "Gratification" has been broadly defined and includes, amongst others, *gifts, loans, fees, rewards, commissions, privileges, favours.*

1. Penalty for Offences under Chapter 4:
   Conviction leads to a fine not exceeding N$500,000 or to imprisonment for a term not exceeding 25 years, or to both (imprisonment and fine).

2. Prevalence of Corruption
   Corruption is not really rife in Namibia. Many cases received by the Commission are not related to corruption and they have to be referred either to the other institutions like Namibian Police, relevant Ministries and the Ombudsman.

3. Statistics

Year	Number of Cases Received	Referred to PG	Percentage
2006/2007	686	0	-
2007/2008	900	30	9%
2008/2009	928	93	9.28%
2009/2010	445	67	4%
2010/2011	297	55	2%
2011/2012	617	46	6.17%

4. Types of Corruption
   Bribery: Rewards in cash/kind given to change the judgment or corrupt the conduct or influence decision-making

   Embezzlement: This involves theft of resources by persons entrusted with the authority and control of such resources.

   Abuse of power: This involves a public officer using his/her vested authority to improperly benefit another public officer or entity or person. Note: Public officer is any officer who renders service to the public

   Conflict of Interest: Acquiring a position or commercial interest that is incompatible with one's official role and duties for the purpose of illegal enrichment e.g. awarding a tender to a company in which you have interest without declaring such interest and recusing yourself from the process.

   Conflict of Interest may be seen as corruption if not disclosed. Often there is a debate on whether gifts may be forms of corruption or not. The debate is based on our traditional values.

   Fraud: Behavior that involve irregularities such as false statements, evasion, manipulation of information and other illegal acts characterized by intentional deception.

   Favoritism and nepotism: This is the assignment of appointments, services or resources according to family ties, party affiliation, tribe, religion, and other preferential groupings.

   Inside trading: Involves the use of information secured during the course of duty for personal gain

5. Administrative Corruption or Maladministration
   Officers in most cases commit corruption as a result of:

- Lack of adherence to ethical standard resulting in mismanagement of offices
- Lack of code of conduct, policies and regulation or/and non-adherence thereof
- Inconsistency in applying rules
- Negligence, delay in execution of functions
- Ignoring the principle of good corporate governance
- Unnecessary travel adding to claim S&T.
- Official time used to run personal errands.
- Vehicle abuse: Research has found that about 20-30% of the cost of providing company vehicles reflects non-business use.

6. Factors/Causes Leading to Corruption

Opportunity: People get involved in corruption when systems don't work well and they need a way to get their things done regardless of the procedure and laws.

Little chance of getting caught: A **lack of accountability** comes primarily from **a lack of transparency** (No need to explain what, why and how), and **weak enforcement** (law agencies don't impose sanctions on power holders who have violated their public duties).

Bad incentives: e.g. a clerk not earning enough to live on, or not being sure that he will have a job tomorrow.

Certain attitudes or circumstances make average people disregard the law. People may try to get around laws of a government they consider illegitimate. Poverty or scarcity of goods (such as medicine) may also push people to live outside the law.

Culture: "Corruption is a matter of culture" A culture where a small reward is always paid for service rendered, special honor for the Chiefs. Can also be practiced in business arena.

Range of Discretion: If one person has too much power to exercise discretion, if there is no one to answer to, having discretion to decide how rules should be applied, it may be abused.

7. Corrosive Effects

Some factors leading to corruption have many corrosive effects. Such factors include a shortage of essential services such as schools and hospitals; insufficient public facilities; a decline in economic development; a high unemployment rate; poverty and inequality; the facilitation of organized crime such as drugs, arms trade and money laundering; the violation of human rights; the undermining of the rule of law and representative democracy; an increase in political instability; the enrichment of a few at the expense of the majority. Greed; to wish to have everything.

VIII. CASE STUDIES

A. The State versus Sackey Namugongo 2006

1. Background

The accused was a Deputy Director in the Ministry of Environment and Tourism responsible for the gambling house licences. There was a moratorium placed on the issuance of gambling licences during 2006. The accused disregarded this moratorium and continued to issue fake permits to authorise gambling machine owners to use the gambling machine until the moratorium is lifted. He received cash totalling to N$ 332 500.00.

2. Court Proceedings

The accused was arrested in 2007 and charged on 42 counts of corruption, fraud, forgery and uttering. He was granted bail of N$20 000.00.

3. Trial

The trial took about 4 years and finally the accused was convicted on 19 counts of corruption. He was sentenced to 10 years imprisonment, of which 2 years were suspended for 5 years on condition that he is not convicted of corruption during the period of suspension. He appealed against the sentence to the Supreme Court while in prison but the appeal failed. The accused started his prison term in 2010. The rest of the counts could not be proven as there was insufficient evidence. The accused was released from prison during August 2013 on a Presidential Pardon.

B. State versus Armugham Thambapilai 2005

1. Background

The accused is a prominent lawyer in the northern town of Ondangwa, Oshana region in Namibia. The accused is a practising lawyer who has admission to the lower courts and the High Courts of Namibia. He regularly acted on behalf of his clients to lodge accident benefit claims from the Motor Vehicle Accident Fund (MVA) of Namibia. The accused lodged accident benefit claims from the Motor Vehicle Accident Fund between 2000 and 2005. The Motor Vehicle Accident Fund is mandated a statutory body mandated to compensate victims of motor vehicle accidents in Namibia. The accused after receiving instructions from his clients; falsified the information and submitted fraudulent claims to the Motor Vehicle Accident Fund. Numerous fraudulent claims were paid out by the fund.

Sometimes towards the end of 2005 a whistle blower informed the Commercial Crime Unit that the accused was busy with corrupt activities at his law firm by presenting fraudulent information to the MVA Fund. The accused managed to lodge claims to the value of about 4 million Namibia dollars from the fund. The falsification of the information was mostly aimed at getting more financial benefit from the Fund, for example a certain claimant was injured in a car accident and due to this accident he lost his income. This man never worked in his life which means he never had an income as a business man. The MVA Fund pays for loss of income. This details were misrepresented and a total of 2,8 Million Namibia Dollars were paid to the lawyer and his client. An investigation was lounged, It was established that the claimant was not a businessman. It was further found that the accident details submitted to the fund to support the claim were not real, but falsified. An accident truly happened but the details of the correct accident were never revealed to the MVA Fund. The MVA Fund did not suspect any wrongdoing and accepted the claim in good faith. After the conclusion of the investigation, the lawyer together with his clients were indicted for 16 counts of fraud, 9 counts of forgery and uttering, 1 count of theft.

2. Trial

The trial started in 2007 and the accused pleaded not guilty to all the charges he faces. The State presented its case in the High court by calling witnesses and presenting the falsified claims information to the court. The accused also testified in his own defence, and put the blame on his clients saying that he only acted upon instructions from his clients and if there are any misrepresentations than it should be from his clients and not him, he stated to the court. At the end of the trial the accused lawyer asked for the discharged of his client arguing that the state witnesses contradicted themselves and that the State did not have a case against his client. That request was not granted by the presiding Judge. The submissions were already done, and now it is up to the Judge to pronounce his findings. The case is postponed to December 2013.

C. The State versus Veronika Kituna Thomas and Others 2010

1. Background

The accused was a Registry Clerk/Data Typist in the Ministry of Finance, Inland Revenue responsible for receiving Income Tax Returns, capturing of Employers Tax Reconciliation, capturing of PAYE 5 (Pay as You Earn) certificate. The allegation is that the accused stole cheques paid over by Companies to the Ministry of Finance as employee tax remittance, and value added tax. The accused then handed the cheques to a middle man who in return handed the cheques to a business man. The business man deposited the cheques into his business account with a similar name of that of the

Ministry of Finance (MFinance).The total amount of the cheques were N$ 3,329,489.64.

2. Trial Proceedings

The businessman was arrested during March 2010 and was released on bail of N$30,000.00. The main accused and the middleman were indicted before the High Court on 10 charges of corruption during November 2010.

The main accused pleaded guilty in terms of section 112(2) of Act 51 of 1977, on 5 counts of corruption and was consequently convicted on 10 February 2012 and sentenced on 27 March 2012 to 12 years imprisonment of which 4 years were suspended for a period of 5 years on condition that accused is not convicted of theft or corruption committed during the period of suspension; however she lodged an application during April 2012 for leave to appeal the sentence imposed against her, which is still pending in the High court. She is currently serving her jail sentence in Walvisbay Prison in Namibia.

The middleman and the businessman pleaded not guilty to all 10 charges of corruption and the matter is pending before the High court.

D. The State versus Gerry Munyama 2005

1. Background

The accused was a Director General, the chief executive officer and a member of the board of Namibian Broadcasting Corporation (NBC) established in line with the Namibian Broadcasting Act, Act 9 of 1991, in terms of this act the NBC is a juristic person and as government agency; is responsible for provide information and news to the public and updating in the international events.

The accused was having exercises control and supervision over officers and employees of NBC and performs the duties assigned to him by the NBC board. During October 2005, the accused forged a NBC board resolution and opened a new bank account at Standard Bank Namibia which authorized him to be a sole signatory power on the account and paid NBC cheques to the amount of N$ 480,000-00 into the fake bank account and made several withdrawals and pretending that he settled the debts of NBC by paying creditors. Two cheques totalling N$ 280,000-00 were deposited into the bank account of Cooling's CC; a CC business which was responsible of installing air conditions at NBC while the CC was already paid for the service rendered to NBC.

2. Court Proceedings

The accused was arrested during October 2005 and charged on counts of corruption, fraud, forgery and uttering and theft. He was granted bail of N$20.000.00.

3. Trial

The trial took about 5 years and finally the accused was convicted on all above counts. He was sentenced to 10 years imprisonment, of which 4 years were suspended for 5 years on condition that he is not convicted of corruption during the period of suspension. He appealed against the sentence to the Supreme Court while in prison and succeeds. The accused started his prison term in October 2010 and was released from prison during October 2012.

IX. CONCLUSION

Governments should regularly come together to revisit the effectiveness of the current laws to fight corruption and also to seek new ideas in preventing corruption.

CORRUPTION AND ITS IMPACT ON LAW ENFORCEMENT WORK

*Oris I. Jaén Fernandez**

I. CURRENT SITUATION

The National Police of Panama has as its primary objective safeguard the life, honor, property and other rights and freedoms of all persons that are under the jurisdiction of the State, as well as to maintain the peace and security of all its inhabitants.[1] To run this mission, the police must interact with the society and be observers to the accomplish of laws, according to the standard the Constitution of the Republic of Panama.

The relationship between police and citizens must be informed by the ethical and professional principles that allow for the effective development of police work. One of the challenges to community police units is to maintain the integrity and the commitment to sustain the credibility deposited by the citizens.[2] All programmes designed to improve the quality of life and the citizen's security perception within communities depends of the image projected by the police officers enforcement.

It has been found through disciplinary audiences that police officers misconducts, such as abuse of authority, misuse of force, extortion and immoral behaviours have a negative impact to the public's perception of security. Any police officer's act of corruption has a direct impact on the image of the organization, as well as on the plans and strategies that are developed for the benefit of all citizens. Corruption causes the loss of citizens' trust toward police tasks.

Police officers of lower rank are commonly breaking the disciplinary rules. New generations seems to be more involved in disciplinary behaviours, also the responsibility and the ethical values that society requires, show not to be their strength. Currently, is not easily to find in the society, the human resource with the appropriate profile that is needed to work and run the role of authority and enforce existing laws and rules with the vocation of service. This issue is now a challenge for recruiting and selection process: hire the best and high qualified individuals for law enforcement duties, even when citizens' needs are upon more police officers presence on the streets to improve their security perception.

There is no doubt, a change in strategies and in security policies to faced corruption is obviously necessary. The main purpose must be focused on man empowerment: high values, skills and commitment for law enforcement duties. This will enhance the security organization in high standards capacities to enforce the mission given by law: protect and serve society. This means not be empowered as an authority to incurred in abuses and corruption and be served through illegal profits from society.

When a police officer is implicated in acts of corruption, the elements of proof become one of the main limitations for the disciplinary punishment. For the prosecution of acts of corruption committed by police officers, was created the Department of Professional Responsibility, as an office of internal affairs. This department is responsible for investigating violations of police procedures and the acts of corruption in accordance with the provisions of Article 119 of the Organic Law of the National Police.[3] These investigations may be initiated in the following manner:

*Commissioner, National Police, Panama.

[1] Executive Decree No. 204, Disciplinary Rules of the National Police, September 3, 1997

[2] United Nations Office on Drugs and Crime, policing: The integrity and accountability of the Police, New York 2006

[3] Executive Decree No. 204, Disciplinary Rules of the National Police (2012).

- *Ex officio,* public complaint through a social media.
- Denunciation, complaint or telephone indictment, previous identification.
- Complaint through a signed letter
- Indictment or complaint of any member of the National Police

Sometimes the investigations are constrained by the need of information and evidences under the responsibility of the private sector and the judicial agencies, making it difficult the collection of information and evidence of the fact, and will therefore take a long time, thus leading to a long waiting period between the act of indiscipline and the punish that impose the Disciplinary Superior Board to this misconduct. This situation makes security strategies of the National Police more vulnerable to corruption, by the broad period for the exemplary disciplinary action to correct the action, which is a threat to the task of enforcing the law at all levels: organization, community and citizenship.[4]

II. EFFECTS OF CORRUPTION

Corruption is one of the most convincing threats to security organizations, because it is a problem related to ethical. Corruption is usually generated from outside by the action of people that from their own perspectives, recruit and corrupt public servants to serve for their purposes and in many cases these activities are done in secrecy and cannot be easily detected.[5]

Currently the National Police is conducting retraining to different hierarchical levels in order to strengthen the ethical principles and values of all its members, to ensure the high degree of competitiveness and professionalism during the performance of their duties. Corruption not only breaks the moral principles and the institutional image but it promotes the feeling of fear and insecurity among the citizens.[6]

A. Organized Crime

Each day the organized crime is looking for a way to penetrate the security institutions. Public servants who work in the judicial departments and law enforcement officers are more vulnerable by the organized crime through their bribes and extortion, even death threats, in order to obtain benefits and to continue their illicit activities. According to Americas Barometer (2008), police corruption is considered a critical problem in Latin America, known through the media news about the police collaboration and protection of persons from organized crime.

According to report conducted by the research organization, on results obtained through survey in 21 countries of Latin America and the Caribbean, 44% of the respondents said that their local police are involved in crime. Thirty-eight percent (38%) said that the police were protecting the citizens and 18% said that the police did not protect the people but was not involved in criminal activities.

The fight against organized crime has its center of gravity in the institutional legitimacy. No matter how greater the challenge is, terrorist or drug trafficker, the behaviour of those who enforce the law must be committed to the respect for the law and human rights. Otherwise, each time that a public servant is diverted from its performance, it is legitimizing the crime, putting in proof the capacity of moral integrity, dignity and ethics of law enforcement workers and all the security institutions of the nation.[7]

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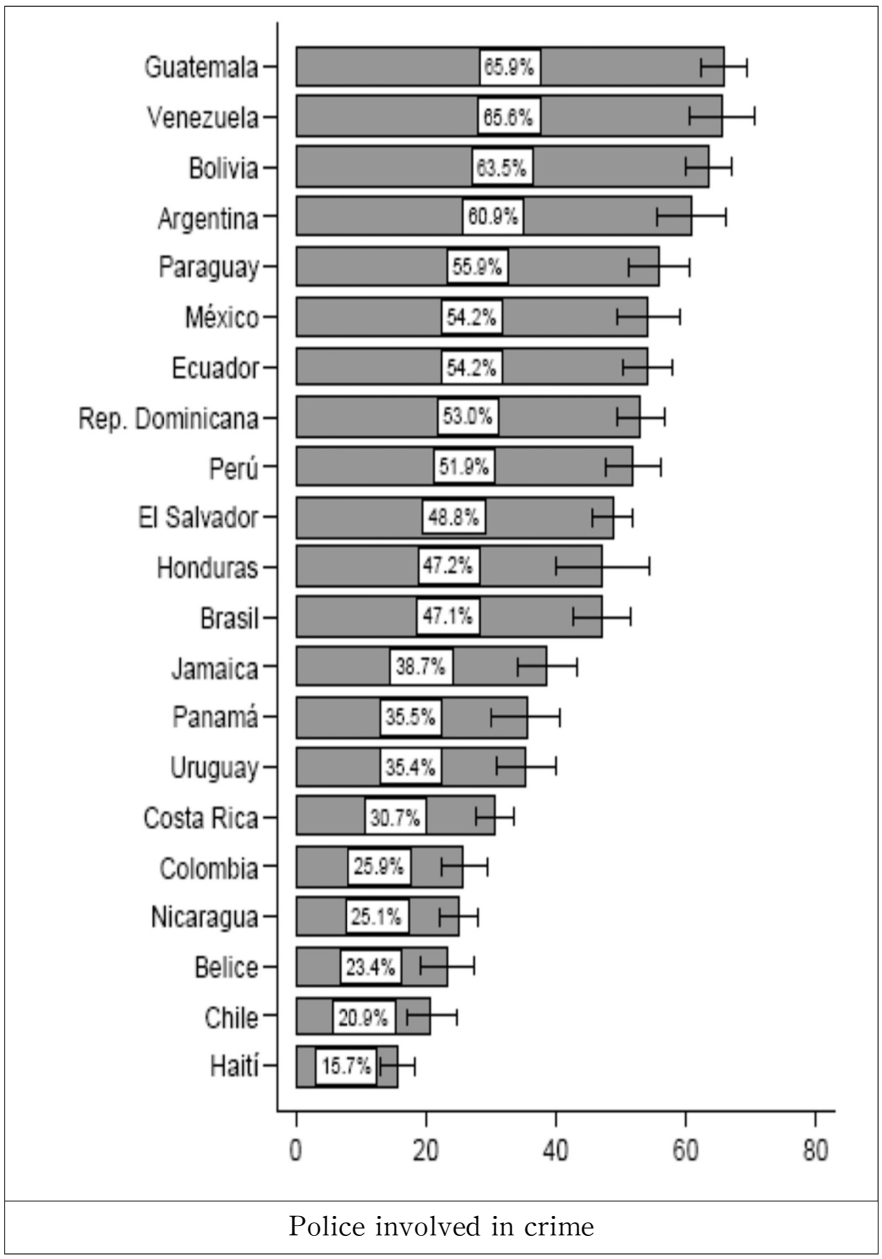
[4] United Nations Office on Drugs and Crime, policing: The integrity and accountability of the Police, New York 2006
[5] Lynch, Omar. Características de la corrupción administrativa en Panamá, actividades realizadas en la lucha contra la corrupción, resultados y perspectivas. Retrieved from http://www.clad.org/documentos/otros-documentos/caracteristicas-de-la-corrupcion-administrativa-en-panama-actividades-realizadas-en-la-lucha-contra-la-corrupcion-resultados-y-perspectiva, October 12, 2013
[6] Transparencia Policial en Colombia (2008). Retrieved from <http://www.policia.edu.co/documentos/ascensos/tematicas_ascenso_pt_2013/Guia%20Policia%20Nacional%20por%20el%20Camino%20de%20la%20Eficiencia,%20la%20Transparencia%20y%20el%20Buen%20uso%20de%20la%20Fuerza.pdf> 12 October 12 2013.
[7] Deontologia Policial, Retrieved from http://www.policia.cl/cidepol/biblioteca/deontologiapolicial.pdf, October 12, 2013.

Perception that the Police are involved in crime, Latin America and Caribbean, 2008



Source: http://www.americasbarometer.org

Any police officer of the National Police detected having any relation with people of organized crime or of dubious reputation, denigrates the institutional image and is severely punished with the dismissed of the police career, previous investigation done by the Department of Professional Responsibility. This is important because if the citizenship notes the repetition of negative behaviours that are not sanctioned, concludes will be wrong, that all cops are well and that, in addition, are protected by their superiors, which reaffirms the perception of impunity and complicity.

B. Perception of Security (Citizens feel secure during daily activities)

According to the Public Security Ministry, the National Strategy for Citizen Security, whose cost is about of US$37 million provided by the European Union until 2017, is based on enhancing the training of individuals from the Public Security Ministry, Education, Social Development, Labor and the National Police. This tends to exchange information between law enforcement agencies and to

implement more prevention at the family level and in schools that are located in areas with high rates of youth violence, drug and alcohol use.[8]

Nowadays, the perception of security of the citizens must be the primary interest when a security strategy is designed. Indicators should be directed to the perceptions and expectations of quality of service the society and the country need. Moreover, indicators should evaluate the law enforcement work and its impact on the relationship police-community-authority.

In these times, the common citizen is not interested in knowing if their security depends on the community policing or investigation tasks of law enforcement officers, or the police relation with the prosecutor or the judge to ensure the security of them. The matter is now who cares of them during their daily activities and through its work can make them feel secure. The world today demands a high level of competitiveness, in the case of the National Police, the respect for the law, Human Rights, the effectiveness of their work and transparency in the activities of each of their members. It is necessary significant changes in the profile of police officers required to achieve law enforcement duties. It implies substantial changes for a contemporary police culture of transformations toward the respect for the rights and dignity of all individuals. And also, with the surveillance of the citizens, observing their police officers is honest, reliable, transparent and responsible for their actions in the community he/she serves. If this does not exist and are obvious acts of corruption during police duty, citizen will mistrust their police and will not collaborate or participate in any programme to reduce crime rates and improve perception of security in their communities.

Recent citizen's surveys pointed out the confidence and acceptance of the National Police. In January 2013 almost 1,201 people surveyed by the Borges and Associated Company declared having 55.8% good opinion of the National Police, placing it in fifth place in comparison with other organizations such as the Canal Authority (63.3%), Electoral Tribunal (61%), Social Communication (57.7%) and the Catholic Church (57%).

The corruption scandals related to drug trafficking, abuses of authority and high crime rates directly affect the mistrust that perceive the citizens on the National Police. On the other hand, in recent years, immediate actions of depuration and police reform carried out have improved levels of confidence.

C. Increase in Crime

The police presence on the streets is closely linked with the perception of security of the citizens and the prevention for the actions of crime. It is thus that each police action in the operational or administrative area has a significant impact on the development of criminal activities.

One of the most questioned police actions in the internal administrative process are the absence to the service. In the last nine months, 52 police officers were destitute because they were absent from work more than three consecutive days without justification (desertion). In occasions from this situation, emerges the commission of other misconduct to the disciplinary regulations, as it is the counterfeiting or alteration of signatures or documents, when police officers try to justify the absence to the service through "questionable" documents that certify their inability for health reasons. During 2013, six police officers have been removed because of these practices. Additional, these cases were sent to the Anticorruption Prosecutors, to investigate this act of corruption.

The quality of service provided by the National Police is directly related to the results of the police presence for the prevention of criminal acts. Each time that a police officer is absent from the service with a medical justification, we should not think in the first instance that is an act of corruption but a right. But, so long as they comply with the procedures for reporting on time the absence from work and in such way, it allows adjusting security needs in relation to the human resources available. It is in this way that its responsibility for its absence is not in doubt.

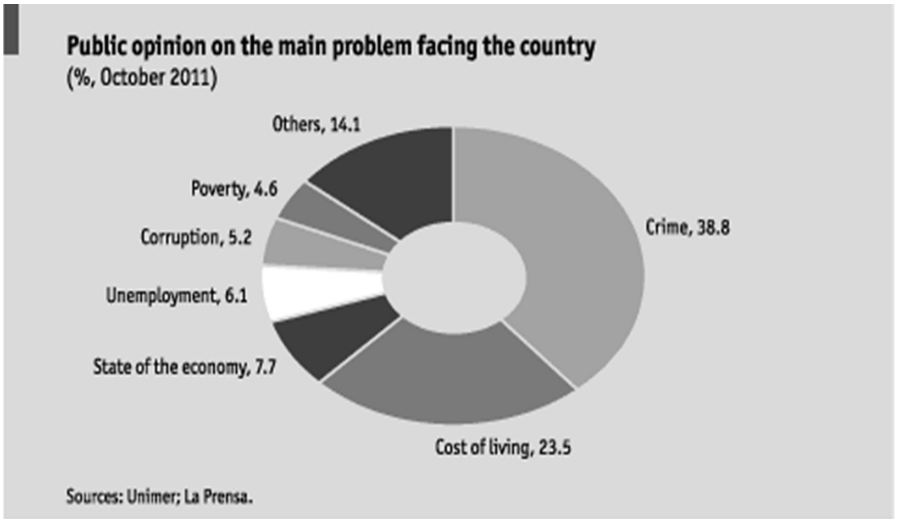
[8] Córdoba, Maria G. Panamá: Nueva estrategia de seguridad busca reducir homicidios. Retrieved from http://www.infosur.com, October 12, 2013.

In some cases, it has been detected that police officers were involved in criminal acts, performing other tasks for personal remuneration, which are absent to its service justifiably. These facts are the one to pay attention to, because it's linked to acts of corruption.

On the other hand, every action, decision and omission in law enforcement duties, the police officer has significant responsibility according to the results. In this year, 44 police officers were destitute due to denigrate the image of the institution. The majority of them were involved direct and indirect with criminal operations, omitting significant information for the persecution of the offenders and even subtracting evidence from the crime scene. The current risk of law enforcement work is more ethical than physical.

Whenever a police officer goes out to the street to fight crime, the challenges will be greater due to the factors internal and external determinants that encourage the development of the acts of corruption, which facilitates the increase in crime and the perception of insecurity. This feeling of insecurity not only applies to criminal acts but also to others that low the level of confidence because of the dissatisfaction of the system of justice, especially in cases of corruption.

Graphic 1 Panamanian Public Opinion about the problems facing the country



Source: The Economist Intelligence Unit. Country Report, November 2011

III. MEASURES TO CONTROL CORRUPTION

According to the Article 18 of the Constitution, public servants are responsible for breaches of the Constitution and the law and also by overstepping of functions or by omission in the exercise of these. On the other hand, the Article 1996 of the current Judicial Code, says that every public employee who, in the exercise of their functions discover in any way that a crime has been committed to those where they are to be on its own motion, will promote to pass all data that are conducive and denounced to the competent authority, to proceed with the prosecution of the offender or offenders.

Police officers are public servants, and must reported to their superiors or to the corresponding authorities, those acts of those who had knowledge with reason or on the occasion of the exercise of their functions and that could cause harm to the State or constitute a criminal offense or violations of any of the provisions contained in the Code of Ethics (Executive Decree No. 246, September 15, 2004).

The members of the National Police should behave at all times in accordance with the highest principles of honesty, morality in the exercise of their functions. Police officers, in their professional and personal life, will be honest and respectful of human dignity and give the example in compliance with the laws and regulations of the law enforcement institution.[9]

[9] Executive Decree No. 204

Some measures that can control the acts of corruption within the police force, are the following:

- Accountability to the community
- Implementation of strategies and clear policies against corruption
- Strengthen a culture of transparency
- Efficiency for the recruitment of police officers
- Improving accounting and auditing standards of staff, goods and services
- Develop training and ability of the police officer
- Implement and monitor appropriate manuals and procedures
- Promote and comply the rules of law
- Prosecution based on accurate facts and evidences that are needed by law
- Promote activities to encourage coordination between private sectors
- Punishments for corruption will be more severe. Sanctions will increase for corrupt acts.
- Use of a special telephone number. This line will provide legal aid to people who have been exposed to corrupt behaviour. A specialized police section will therefore be established.[10]
- Promote anticorruption campaign through a culture of integrity against corruption in the public service
- Enforce rule of law to fight corruption behaviour

IV. CONCLUSION

Police officers have as their primary mission to protect and serve society, while respecting human rights, equity and justice, as well as all the constitutional rights of the people living in Panama. But to comply this important task, always act in accordance to what is established by law, ensuring the security of citizens without accepting gifts or rewards for reasons related to the exercise of their functions.

To meet the cases related to corruption, the treatment must be encased, directing exemplary disciplinary punishment toward the misconduct and not toward those who committed it. This will help in making objective decisions, based on the laws and codes of conduct and ethics that govern the duties of all those officials who serve society and does not been served by it.

On the other hand, it is important to the training of police officers to strengthen their competitiveness in values and ethical to achieve his/her organization with absolute impartiality, without engaging in acts of corruption that denigrate the image of the institution and it is the duty of each one of them to keep a constant surveillance to combat corruption.

[10] Anti-corruption measures. Retrieved from <http://icv.vlada.cz/en/anti-corruption-measures-91528/>. 13 July 2013.

EFFECTIVE MEASURES TO PREVENT AND COMBAT CORRUPTION AND TO ENCOURAGE COOPERATION BETWEEN THE PUBLIC AND PRIVATE SECTORS

*Rosito Amaral**

I. INTRODUCTION

Timor-Leste is a new country that restored its independence in 2002. Timor-Leste is a nation facing many problems to develop various aspects of life, particularly justice and the legal system. However, slowly but surely the nation has made some progress in the criminal justice system as a key element to support the development of a democratic state based on the rule of law including to generate clean a government devoid of nepotism, and collusion, and to establish the necessary framework for preventing and combating corruption in Timor-Leste.

> Timor-Leste has taken significant steps against corruption issues since the restoration of the independence (2002). The first Constitutional Government established the Office of the Inspector General (OIG) under the Office of the Prime Minister with the tasks of inspection, auditing and investigation.[1]

To generate clean government, in May 2004, Timor-Leste established the office of the *Provedor* for Human Rights and Justice (*Ombudsman*) which effectively functioned in 2005.[2] "The *Provedor* was responsible for promoting and monitoring good governance, human rights and justice, and combating corruption."[3]

With the phenomenon of corruption that exists, on 2008 the National Parliament of the Democratic Republic of Timor-Leste ratified the United Nations Convention against Corruption (*UNCAC*). Timor-Leste ratified the UNCAC in 2008. As new country, with so many competing priorities, the ratification of UNCAC marked an important step in assuring good governance, and represented Timor-Leste's serious efforts to prevent and combating corruption.

II. ANTI-CORRUPTION COMMISSION TIMOR-LESTE (ACC-TL)

Corruption is widely acknowledged as a complex and multi-dimensional phenomena with negative consequences that extend beyond the sphere of ethics and moral. Corruption has an impact on the social and economic life and threatens the basis of democratic states under the rule of law. In 2009, the National Parliament of Timor-Leste in accordance with Law No. 8/2009 established the Anti-Corruption Commission body with an expanded mandate on preventing and fighting corruption. Criminal Investigation of corruption cases is supervised by the Office of Prosecutor General.[4] The nature of the Commission in according to article 3 is technically independent and administratively and financially autonomous. The Commission is given the status of specialized and Independent Criminal Police authority and its action is governed exclusively by statute and, in its capacity as criminal police authority, the Commission acts under the authorities of competent jurisdictions.

In its fight against corruption the commission embraces a three-pronged approach including as corruption prevention, and public education. The success in fight against corruption is dependent on

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[1]Implementation Review Group, Third Session. *Executive Summary*, CAC/COSP/IP/2012/CRP.8, 1 (22 Jun. 2012).

[2]Ibid.

[3]Ibid.

[4]Decree-Law no. 8/2009, Establishment of Anti Corruption Commission (CAC).

high ethical standards being maintained in all dealing and reporting of corruption cases to commission whenever it occur.

A. Investigation

The Commissions used two ways of starting an investigation such as through the dispatch of a Prosecutor, and it can start its own investigation, but needs to inform the Prosecutor in 72 hours in order to get a formal dispatch from Prosecutor. As a Special Criminal Police body, the Commission has the power to receive records of any cases of corruption reported by the public such as written or unwritten reports. Incoming information reports, either written or oral reports, are required to be recorded manually or electronically. All reports are categorized as corruption. In accordance with article 49 paragraph 3 of the Criminal Procedure Code, the investigator will notify the office of the Prosecutor General (OPG) as the penal prosecution.

The Commission not only receives reporting cases from the public, but accepts other cases recommended by other government agencies such as the Inspectorate General of the State and recommendation cases from Ombudsmen as well as cases reported by the Civil Service Commission Office.

All reported cases by the agencies will be analyzed by the Criminal Investigation Division. If the analysis discovers sufficient evidence of corruption, then the Anti-Corruption Commission immediately reports to the Prosecutor's Office which has the legal power to enforce the Corruption Act.

On the other hand, the Commission may also use its own initiative to proactively gather all the information from reliable sources that voluntarily want to cooperate with the CAC in fighting corruption in Timor-Leste. Starting from the year 2010 until 2012, the Criminal Investigation Division is to investigate corruption cases of both passive and active corruption, such as abuse of power, embezzlement, economic participation and business.

B. Public Education

In order to prevent corruption, the Commission uses public education and campaigns to share information and knowledge as well as provided education to the public about the impact of corruption itself through training programmes or workshops to the youth, community leaders, private sector and academics from primary school up to university, and delivers messages to the public through print media, electronic television, radio, etc. The activities are carried out at the national level and the districts levels. Also the commission provides education in order to monitor use or movement in order to save government facilities.

C. Prevention of Corruption

The Prevention of Corruption Division plays an important role to collect and analyse all the information related to the prevention of criminal acts of corruption which advises all government authorities in order to find the solution about corruption in the public sector, especially the use of state finances.

In the prevention of corruption, the Commission gets closer to the public sector in the fight against corruption, by making formal contacts and holding intensive meetings with government officials through seminars or workshops in order to distance themselves from the practice of corruption. Essentially the purpose of the meeting and the workshop is how each individual is a public servant, starting from the top leadership to subordinates and to know how to control both procedures relating to tendering or bidding any project — whether it is done by the private sector of national and international companies.

In addition to workshops, the Prevention of Corruption Division also approaches the authorities and carries out monitoring and inspection of projects at the district level. The Prevention of Corruption Division also conducts unannounced inspections of the implementation of projects in the field in order to see the implementation of these projects physically and assures that the quality of materials used on the project is in line with what has been planned.

Besides providing training to government officials, the Commission is also working with the

electoral commission (CNE) and held a workshop to all parties participating in the elections that will follow the election in order to produce the transparency and creating a condition of a democracy and to avoid corruption in the election, based on the article 11 law no. 6/2008 the legal regime of financial of the political parties.

The public and private sectors are important to the programmes of the Commission; therefore, in addition to cooperating with government authorities and society in general, the prevention division approach is to collect and analyze information related to corruption prevention measures in order to ensure effectiveness in the public sector, particularly the implementation of the State budget.

III. INTERNATIONAL COOPERATION[5]

The International Cooperation framework is established by the Constitution and the recent Law no. 15/2011 on International Judicial Cooperation in Criminal Matters. The Penal Code and the Criminal Procedure Code also contain provisions applicable to international cooperation.

A. Extradition; Transfer of Sentenced Persons; Transfer of Criminal Proceedings (Articles 44, 45, 47)

Timor-Leste is a party to the Extradition Convention among the Portuguese Speaking Countries. Timor-Leste has not concluded any bilateral extradition agreements. Preliminary discussions have been started with several neighbouring countries. It appears that, according to the Constitution and Law No. 15/2011, the Convention could be used as the legal basis for extradition by Timor-Leste on the condition of reciprocity.

B. Mutual Legal Assistance (Article 46)

Timor-Leste has not concluded bilateral agreements on mutual legal assistance. Law 15/2011 allows Timor-Leste to give and ask for assistance, including search for and seizure of objects or property, persons in transit, warrant service and to interview the suspect, the accused person, witness or expert, the procurement of evidence, notice of the action and service of documents, and communication of information about the law or the laws of the foreign Timor, as well as the communication of information relating to judicial records of the suspect, accused or convicted. Mutual assistance can be made through the Department of Justice and the Office of General Prosecutor appropriate existing international agreements.

C. Law Enforcement Cooperation; Joint Investigations; Special Investigative Techniques (Articles 48, 49, 50)

The police have cooperated with other police forces of the region, either directly or through the Interpol network, both spontaneously and upon request, only regarding organized crime matters. Cooperation includes the establishment of joint investigation teams and transmission of information which may be useful for foreign police forces. Special investigative techniques may be used by the police, CAC, and the future Financial Intelligence Unit (FIU) if allowed by a court decision. Such measures include wiretapping, interception of telecommunications, undercover operations, and controlled deliveries. Taking into account the legal and institutional context, the reviewers were confident that law enforcement cooperation would be significantly enhanced in the coming years.

D. Challenges

The Anti-Corruption Commission has been facing several challenges in the performance of its functions during the past three years because the Government and National Parliament are not serious about approving the Anti-Corruption legislation draft that has been sent to the National Parliament several years ago. Timor-Leste has a Witness Protection law to protect the witnesses; however, in reality, the law has still not been implemented yet. It is important that all public officials declare their income and assets (asset declaration) and to establish a registry system accessible by the public. Furthermore, according to research and evaluation by the Anti-Corruption Commission, 45 percent of society still lacks sufficient knowledge to form an understanding about corruption matters; however,

[5] *See* Executive Summary, *supra*, at n. 2.

the public's expectation to punish the corrupt actors is high.

E. The Way Forward

Cooperation and coordination among the Anti-Corruption Commission and other state institutions are improving, and also the Commission has a very good relationship with the Public Prosecutor's Office, the General Inspectorate of the State, the National Police, and the Ombudsman's Office. The Commission has explored cooperation with civil society so as to grow a culture of anti-corruption at the grassroots level. In addition, the Commission is strengthening its institutional capacity and legal framework (i.e., capacity building for investigators). Finally, the Commission is always looking for opportunities to engage in international cooperation.

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Internal Standard Operation procedure (SOP) Investigation Division 2011.

REPORTS OF THE PROGRAMME

GROUP 1
EFFECTIVE MEASURES TO INVESTIGATE CORRUPTION CASES

Chairperson	Mr. Vladimir Aras	(Brazil)
Co-Chairperson	Mr. Hironori Sato	(Japan)
Rapporteur	Mr. Abraham Kemboi	(Kenya)
Co-Rapporteur	Ms. Justine Namukwambi	(Namibia)
Members	Mr. Faycal Touti	(Algeria)
	Mr. Md Golam Rabbani	(Bangladesh)
	Mr. Nuon Norith	(Cambodia)
	Ms. Evah Thingini	(Kenya)
	Mr. Oleg Crismaru	(Moldova)
	Mr. Rosito Amaral	(Timor-Leste)
	Mr. Kenichi Ito	(Japan)
	Mr. Mutsuo Nakabayashi	(Japan)
	Mr. Shotaro Yamada	(Japan)
Adviser	Prof. Kazuhiko Moriya	(UNAFEI)

I. INTRODUCTION

Group 1 started its discussion on 25 October 2013. The group elected Mr. Vladimir Aras as its Chairperson, Mr. Hironori Sato as its Co-Chairperson, Mr. Abraham Kemboi as its Rapporteur and Ms. Justine Namukwambi as its Co-Rapporteur. The group which was assigned to discuss "Effective Measures to Investigate Corruption Cases" agreed to conduct its business in accordance with the following agenda: 1) Measures to investigate corruption; 2) International cooperation in investigation of corruption cases; and 3) Procedures for trial of corruption suspects/accused/defendants in order to conclude the Case Study. Of these agenda items, we agreed to focus on 1) Measures to investigate corruption.

II. CASE STUDY

Anti-corruption organization B in A country has received an anonymous report (assume that this information is accurate and reliable): Public official C in charge of a project to build bridge D has accepted a bribe from Construction Company E. In exchange for the bribe, the public official C has agreed to award the construction contract to Construction Company E. The bidding is scheduled to take place soon. Additionally, Construction Company F was awarded a construction contract to build bridge G three years ago after the public official was bribed by Construction Company F.

Based on the Case Study provided, the group decided to examine the three broad topics of discussion by country and agreed to conduct its discussion with following format:

III. MEASURES TO INVESTIGATE CORRUPTION

A. Measures to Generate Leads (Intelligence Steps) in Each Country

The questions/points on the said topic to be discussed by the group as agreed and the prevailing situation in each country regarding these matters in the participating countries are summarized as follows:

1. Whether Corruption Cases are Investigated by an Anti-Corruption Agency, Police, or Prosecutors

Almost all the countries, except for Japan and Brazil, stated that they had established independent anti-corruption agencies (ACA) dedicated to investigate corruption cases. In Brazil and Japan corruption cases are investigated by police or prosecutors. In these two countries, their practice is that if corruption cases are to be handled by the police, supervision by a prosecutor is necessary because the cases are considered complex.

Establishment of the independent ACA is in line with UNCAC Article 36, which requires States Parties to ensure the existence of a body or bodies specialized in combating corruption through law enforcement. The participants observed that the ACAs had been granted necessary independence, in accordance with fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without undue influence.

2. Whether Reporting through Anonymous Letters is Acceptable

All the participants stated that anonymous reports/letters were accepted in their countries as a means of generating information that can assist in identifying acts of corruption. This method is considered safe and convenient for informants whose lives and relationships with the perpetrators would greatly be affected if it was found out that they reported such cases to law enforcement agencies.

3. Anonymous Email

All the countries indicated that they had established dedicated email accounts for use by informants/complainants when reporting alleged corruption practices to the anti-corruption agencies/police/prosecutors. It was observed by the participants that it is necessary and always important to protect the source of the report to guard against any harm.

4. Means to Identify the Source

Except for Cambodia, all the countries stated that they had in place mechanisms to identify the source of the anonymous reports. Identification of the source would be done through deployment of intelligence techniques such as recruitment of reliable informants within the target organization who will provide information for covert identification of the source. Identification of the source is usually crucial for clarification of the issues touching on the case beforehand. Members agreed that the identification of the source is not mandatory if information is reliable. Members consider that resources of identification of the author of an anonymous report can be used more successfully in verification of the information about the crime.

5. 24-Hour Telephone Hotlines

Japan, Algeria and Timor-Leste were the countries which indicated that they did not have 24-hour telephone hotlines; the rest of the countries in the group have such lines in place. The said lines are manned at all times and allow people who witness acts of corruption to report the same to authorities as and when they happen.

6. Suspicious Transaction Reporting from FIU

The participant from Timor-Leste stated that at the moment, they did not have a Financial Intelligence Unit for reporting of suspicious transactions. It was the considered opinion of all the participants that such a unit was very crucial in generating leads on laundering of proceeds of corruption; and therefore recommended the establishment of an FIU in Timor-Leste.

7. Whistle-Blower Programmes

These are programmes to ensure the safety of whistle-blowers when they expose mega scandals touching on persons or group of persons considered dangerous to the whistle-blowers. Each participant was requested to share the situation in their countries as regards programmes for protecting whistle-blowers. The group was informed that Algeria, Cambodia and Timor-Leste had no whistle-blower programmes in place.

8. Public Databases (Property, Work, Movements, Criminal Records, Etc.)

These are databases which are accessed by law enforcement agencies for information that may be useful in informing the direction of the case. Such information includes but is not limited to assets owned by the suspect, past criminal record(s) and personal details. Algeria, Bangladesh, Japan and Timor-Leste do not have such arrangements in place.

9. Human Intelligence

Except for Algeria, all the other countries use human intelligence to discover more facts about corruption reports.

10. Collection of Relevant Documents

All the participants agreed that collection of documents touching on the report was necessary. It was observed that this step needed to be done covertly to avoid arousing the suspicion of those involved, which could lead to destruction or concealment of the documentary evidence.

11. Surveillance (Visual, Trailing or Physical Tracking)

Except Moldova, in the remaining 8 countries, surveillance would be used monitor the activities of the suspects. According to the participant from Moldova, surveillance at this early stage before investigation is considered too intrusive to fundamental rights of the suspects as per the Universal Declaration of Human Rights. Surveillance firms up the report by confirming the associations of various players and movement of proceeds of corruption.

12. Formalization

This is the stage of arriving at a decision that full investigation should commence; and it occurs upon acquisition of sufficient information and documents necessary to support such investigation. All the information and documents acquired are put together in an orderly manner. Formalization requires sanctioning by an authorized official.

13. Problems Faced by the Countries in Relation to the Intelligence Phase of Investigation

1) Participants from some countries cited slow progress in passing legislation that establishes key institutions such as FIUs

2) Participants from some countries stated that they had challenges in generation of leads, especially by use of surveillance techniques because of lack of professional training. Lack of modern surveillance equipment was also cited as a contributor to this problem.

3) Some participants stated that bribery in the private sector is not criminalized.

B. Measures to Detect Corruption Cases (Investigation Step)

The issues on this topic were discussed by the group as agreed, and the prevailing situations in in the participating countries are summarized as follows:

1. Interception of Electronic Communications (Voice, Voice over IP, Etc.)

Bangladesh, Japan and Timor-Leste stated that they do not intercept communication of suspects engaged in corrupt activities; the rest of the participating countries do. The justification for this according to Japanese participants is that the country's legal framework does not permit interception of communication in corruption cases. Warrants are required in some jurisdictions such as Brazil and Moldova so as to intercept communications.

2. Computer Tracking and Phone Call Tracking (IP, Metadata, GMT/UTC, Etc.)

Cambodia, Japan and Timor-Leste do carry out computer and phone call tracking during investigation of corruption cases. According to participants from Japan, financial institutions are very strict in their dealings and therefore there is no likelihood of illegal financial transactions. As such it may not be necessary to monitor computers for any possible illegal transaction. The other participating countries consider this a rich source of evidentiary materials on the associations and movement of suspects as well as procurement details and money trail. Warrants to track calls and computers are required in Moldova and Brazil.

3. Electronic Surveillance (Inside and Outside, GPS, Drones, Etc.)

Algeria, Bangladesh, Cambodia, Japan and Timor-Leste are the countries which do not use electronic surveillance during the investigation of corruption cases; the other four participating countries employ such techniques in investigation.

4. Physical Tracking

All the participating countries use physical tracking as a technique for investigating corruption, especially in tracing suspects' movements and possible exchange. In all the participating countries no

warrant is required to use this technique of investigation.

5. Eavesdropping (Video, Photo, Voice Recording)

Except for Bangladesh and Timor-Leste the other seven participating countries use eavesdropping as an investigation technique. Participants from Brazil and Moldova stated that a warrant is required to carry out video and voice eavesdropping.

6. Postal Interception

Involves clandestine access to a suspect's mailbox; upon which information contained in the suspect's letter(s) is extracted for use in investigation. Brazil and Moldova are the only countries that use postal interception as an investigation technique, the rest of the participating countries do not.

7. Covert Investigation

All the participating countries use this technique to investigate corruption cases. In Brazil, a warrant from the court and approval of a prosecutor are required for the police to conduct covert investigation.

8. Undercover Operations (Agents)

All the participating countries except Japan conduct undercover operations while investigating corruption.

9. Controlled Delivery

Bangladesh, Cambodia, Japan and Timor-Leste do not use controlled delivery as a means of investigating corruption, but the other participating countries use this technique. The participant from Moldova observed that this technique is very useful and relevant for the case study because it can be used to confirm the delivery of a bribe.

10. Trash Can/Bin Collection

This involves physical surveillance on the suspect and collecting banking slips dropped in trash cans/bin collection. This may contain account details of the suspect, which can now be handed over to the FIU to monitor any suspicious transactions. Participants from Bangladesh and Moldova stated that this technique is not regulated in their countries; whereas the rest of the participants observed that it was in use for investigations in their countries.

11. Access and Monitoring of Financial Activities

Except for Algeria, Japan and Timor-Leste, all the other participating countries monitored the financial transaction of suspects in real time, with the assistance of the respective country's FIUs. It was observed that if the investigative agency was interested in real-time monitoring of the account, it would simply forward the details to the FIU which would carry out the monitoring and share the same information with the agency.

12. Informants (Plea Bargains)

Algeria, Bangladesh, Brazil, Japan, Namibia and Timor-Leste participants informed the group that there are no plea bargain arrangements for informants in their countries. On the other hand, plea bargain arrangements are practised in countries such as Cambodia, Kenya and Moldova.

13. Leniency Programmes

The participants from Algeria, Bangladesh, Japan and Timor-Leste reported that there are no leniency programmes for suspects who commit corruption offences in their jurisdictions. Cases are investigated and processed to logical conclusions whether or not suspects request leniency.

14. Problems Faced by the Countries in Relation to Investigation of Corruption

- The participant from Bangladesh stated that they do not use evidence obtained through wiretapping as there is no enabling legislation.
- The participants from Japan stated that their legal framework does not allow wiretapping

during corruption investigations.

C. Acquiring and Analyzing Objective Evidence

Discussions on this topic were approached by the group following the agreed items as follows:

1. Acquiring and Analyzing Bank Records

All the participating countries stated that in order to obtain objective evidence, it was necessary to acquire bank records of the suspect(s). As a legal requirement, warrants to search the bank records of the suspect(s) would be obtained in all the participating countries except Algeria, Cambodia, Japan and Namibia. The participant from Brazil stated that in cases where public money is involved, no warrant is required to access bank records.

2. Acquiring and Analyzing Other Documents

All the documents relevant to the investigations being carried out are acquired and analyzed as stated by all the participating countries. Relevant expertise would be necessary for each particular set of documents; for example if the documents involved touch on the procurement process, they are better analyzed by procurement experts.

3. Search and Seizure

Participants from Moldova, Kenya, Timor-Leste, Brazil and Japan stated that searches and seizures are carried out using warrants. In Kenya and Timor-Leste, the ACA applies for the warrants while, in Brazil, the police or the prosecutor can apply for warrants. The participant from Cambodia stated that the ACA can search premises with the permission from the prosecutor, whereas, the participants from Namibia stated that an authorized officer of the ACC can search premises, other than a private dwelling, without a warrant, while the participant from Cambodia stated that they can search premises without warrants.

4. Acquiring and Analyzing Account Details

All the participants agreed that acquiring and analyzing account details was necessary, with the help of accounting experts.

5. Analyzing Electronic Data

Participants from Japan stated that electronic evidence is analyzed with the input from industry experts. The other participants stated that they had in-house experts, and in case certain expertise was missing, they would outsource.

6. Expert Opinions

Except Timor-Leste, which does not have experts in document examination, all the other participants stated that an expert's opinion was always sought on documents and other evidentiary materials which required such input.

7. Problems Faced by the Countries in Relation to Acquiring and Analyzing Objective Evidence

- Except Algeria, Namibia and Japan, the rest of the participating countries stated that access to bank records is a challenge because they cannot access the bank details of suspects directly.
- In Bangladesh, the ACA cannot acquire tax details of suspects without a warrant. This is considered a challenge to investigation of corruption cases.
- Participants from Kenya stated that they faced challenges in analyzing electronic data because of lack of technical capacity.

D. Acquiring Suspect, Accomplice and Witness Statements

The issues on the said topic were discussed by the group as agreed, and the prevailing situations in the participating countries are summarized as follows:

1. Interviewing Witnesses, Including Company Employees and Bank Officials

All the participants declared that it was the practice in their respective countries that, given the scenario presented by the case study, it would be necessary to interview all witnesses considered useful to the investigations, including company employees and bank officials. This would help build up a strong case against the suspects by sealing all the loopholes that may be exploited during trial.

2. Interviewing Suspects (Natural Persons and Legal Entities)

All participants stated that the suspect should be interviewed so as to establish his/her line of defence. Interviewing a suspect may also lead to a confession, in which case, it will be registered before a magistrate/judge. Some suspects may request leniency during the interview. The suspect may be accompanied by their defence lawyers at the interview in all the participating countries except in Cambodia where the defence attorney is not allowed at all; and in Japan where the defence attorney sits around the interview area for any possible consultation with the client (suspect). In all nine participating countries, the right to silence is allowed apart from interviewing the natural suspects; all the other countries except Brazil would interview the legal entities which may be represented by their defence.

3. Compel Suspects to Appear

In all the participating countries, if the suspect fails to appear for an interview, he/she will be compelled by way of summons obtained from court. The participant from Brazil stated that in their jurisdiction the prosecutor and the judge can compel appearance. The participant from Namibia stated that if a witness/suspect fails to appear for an interview, he/she will be compelled to furnish the information under oath or on affirmation by way of summons issued by the Director of the ACA.

4. Harsh Interrogation

Participants from Bangladesh and Cambodia stated that they sometimes use interrogation in place of interviews when dealing with difficult suspects. In the other seven participating countries, interrogation is not practised.

5. Plea Bargaining

The participants from Japan and Namibia stated that there are no plea bargaining arrangements in their respective countries. The other seven participating countries have plea bargaining arrangements in place.

6. Leniency

Leniency is allowed in all the participating countries.

7. Problems Faced by the Countries in Relation to Acquiring Witness, Accomplice or Suspect Statements

- Participants from Cambodia, Namibia, Brazil, Japan and Bangladesh lack plea bargaining frameworks.
- Participants from Moldova and Brazil stated that their legal systems do not take legal persons to task over acts of corruption

E. Domestic Cooperation

The issues on the said topic were discussed by the group as agreed, and the prevailing situations in the participating countries are summarized as follows:

1. Prosecutors (Supervision and Approval)

All participants stated that the investigative agencies cooperate with the prosecution in the investigation of corruption cases.

2. Investigating Agencies (ACA/Police/Prosecutors)

Except for Brazil and Japan which do not have ACAs, the rest of the participating countries have established ACAs to investigate corruption cases.

3. Examining Judges
Only Algeria has examining judges undertake investigations on corruption.

4. Supervising Judge (Warrants and Orders)
All the participating countries except for Algeria stated that they need to cooperate with a supervising judge for the purpose of obtaining warrants or other court orders.

5. Financial Intelligence Units
All the participating countries stated that they cooperate with their respective countries' FIUs.

6. Revenue and Tax Authorities
Algeria has no tax authority, but the rest of the eight participating countries have tax authorities which they cooperate with in investigation of corruption cases.

7. Customs
All the participating countries stated that they cooperate with their respective countries' customs offices.

8. Task Forces
All the countries except Algeria stated that they cooperate by way of task forces to investigate corruption cases.

9. Private Sector Organizations
All the participating countries stated that they cooperate with the private sector in investigating corruption.

10. Government Regulatory Agencies
All the participating countries stated that they cooperate with government regulatory agencies in investigating corruption.

11. Problems Faced by the Countries in Relation to Domestic Cooperation

- Bangladesh lacks access to tax authority systems to acquire necessary evidence
- Poor working relationships between examining judges and prosecutors in Algeria.

F. Identifying, Tracing and Freezing Proceeds of Crime

To prevent flight and concealment of assets already identified and associated with the suspect and accomplices, it is necessary that they are frozen, according to all the participants. Participants from Bangladesh, Kenya and Timor-Leste stated that the ACA is empowered by law to freeze assets by way of a court order. The participant from Namibia stated that the Prosecutor General is charged with the responsibility of freezing suspects' assets. In Cambodia, the ACA can freeze the assets with permission from the Prosecutor. In Algeria, Brazil and Japan, freezing of assets is the responsibility of the prosecutor through court orders. Asset recovery represents an important issue of anti-corruption authorities, because the proceeds of crime are often very hard to identify and trace.

A majority of participants stated that proceeds of crime that consist of immovable or movable goods can be identified by accessing information from public databases or by gathering information through intelligence. Some participants mentioned the importance of property databases in preventing leakage of information about the investigation. Most of the participants stated that anti-corruption authorities need a warrant to access suspects' bank information.

The participants agreed that FIUs, MOUs or Interpol channels can ensure rapid tracking of the proceeds of corruption if the proceeds were deposited in bank accounts. In addition, the participants highlighted the importance of international collaboration and specified that the majority of countries have different means of mutual legal assistance in order to trace and freeze proceeds of corruption such as: treaties and agreements, MOUs, law enforcement cooperation (Interpol, JIT, FIU-FIU information

sharing, etc.), informal channels, etc. The participants found that Algeria conducts non-conviction-based repatriation of frozen proceeds of corruption.

Most of the countries can freeze assets of an individual before bringing charges against a suspect, as well if the property over the assets related to crime was transmitted to third parties. In Brazil, the freezing of assets can be performed based on civil cases of corruption against legal entities.

All the participants mentioned that, in their respective countries, law provides measures for securing the recovery of damages caused by the crime and for guaranteeing the execution of a punishment by fine. Measures for securing the recovery of damages consist of freezing the movable and immovable assets.

A majority of the participants agreed that their countries should follow the example of Bangladesh, when the burden of proof is shifted to the defendant with respect to the origin of ill-gotten assets. Participants consider that criminalization of illegal enrichment should be enacted in their countries.

IV. RECOMMENDATIONS TO IMPROVE/DEVELOP INVESTIGATION MEASURES IN EACH COUNTRY

The measures to improve/develop investigation in each country were recommended as follows:

1. All the participants agreed that the plea bargaining system should be considered in countries where possible due to its advantages.

2. All the participants agreed that legislation on corruption should be reviewed so as to enable holding legal persons accountable for acts of corruption.

3. All participants agreed that ACAs, police and prosecutors should be able to directly access banking institutions without warrant.

4. All the participants agreed that ACAs should develop technical and technological skills so as to enable them to analyse technical evidence including electronic evidence.

5. All the participants agreed on establishing an inclusive approach between the ACAs, police, prosecutors and other agencies that play roles in the justice system.

6. All the participants agreed that the ACAs should be connected to all government ministries and departments/agencies to enable easy access of any relevant information.

7. All participants agreed that cooperation between law enforcement agencies and private companies was very crucial in aiding law enforcement and, therefore, should be encourage and sustained.

8. All the participants agreed on the importance of legislation to establish FIUs.

9. All participants agreed that the law should enable the use of evidence obtained through eavesdropping to prove a case.

10. All participants agreed that anti-corruption agencies should pay special attention to asset recovery.

11. All participants agreed that governments should encourage international collaboration for tracing, freezing and repatriation of frozen proceeds of corruption.

12. All participants agreed that countries should consider the possibility of freezing of assets based on civil cases of corruption against legal entities.

13. All participants agreed that insurance of anti-corruption authorities with on-line free access to all the public property databases without any restrictions as well as establishment of databases should be

done.

V. QUESTION

1-a) What steps should Anti-Corruption Agency B take, and in what order, to collect sufficient evidence to take this case to court?

All the participants stated that in order to investigate the case adequately, it was important that covert techniques were used initially so as to avoid leakage and concealment of evidence. The covert methods that can be used are wiretapping, computer tracking, surveillance, and communication interception for the ongoing case (company E bribe); FIU, MOU, and Interpol report, for the past case (company F bribe). After sufficient information has been acquired then the investigative agencies should employ overt methods of investigation, such as search warrants, freezing suspect assets, and interview of witnesses and suspects.

The participants observed that both crimes required priority attention; therefore they should be handled simultaneously. The participants noted that securing of evidence, suspects and assets was of great importance. However, the participants noted that in the event of limited resources which usually happens in practice, it is better to focus on one case. The participants from Namibia, Kenya, Brazil and Japan stated that they would pursue the past crime, whereas the participants from other countries would pursue the ongoing crime.

1-b) How should Anti-Corruption Agency B cooperate with prosecutors or the examining court judge in the collection of evidence?

The participants stated that formation of a task force was the best way of ensuring cooperation between the ACA, the prosecution and the examining court judge. In the participating countries where there are no ACAs, the police, prosecution and all the other agencies which have valuable input to law enforcement should cooperate. Cooperation between agencies enables sharing of resources and enables speedy acquisition.

VI. CONCLUSION

The group thoroughly deliberated and discussed the current issues and problems of each participating country relating to effective measures to investigate corruption cases. Following thorough discussion, the group concluded certain recommendations and necessary measures to be implemented in the participants' countries for the development and improvement of the criminal justice system focusing mainly on investigation of corruption cases. However, it is noted that the measures and recommendations in this report may be adopted in each of the respective countries based on the necessity and suitability for the ultimate achievement of an effective and efficient criminal justice system.

GROUP 2
EFFECTIVE MEASURES TO ESTABLISH SYSTEMS TO PREVENT AND COMBAT CORRUPTION

Chairperson	Ms. Oris Idalmis JAEN FERNANDEZ	(Panama)
Co-Chairperson	Mr. David Gathii WAMBUGU	(Kenya)
Rapporteur	Mr. Alexandru DONCIU	(Moldova, Rep. of)
Co-Rapporteur	Ms. Shizu KOYAMA	(Japan)
Members	Mr. Mohammad Saidur RAHMAN	(Bangladesh)
	Mr. Hideyuki INUKAI	(Japan)
	Mr. Takayuki SAKAI	(Japan)
	Mr. Martin Otieno OBUO	(Kenya)
	Ms. Khin Myat TAR	(Myanmar)
	Mr. Myo Khaing SWE	(Myanmar)
	Mr. Abraham Nikolous IHALUA	(Namibia)
	Mr. Apichai THONGPRASOM	(Thailand)
Adviser	Prof. Yusuke HIROSE	(UNAFEI)

I. INTRODUCTION

The group started its discussions on 25 October 2013. The group, in its first meeting, elected by consensus Ms. Oris Idalmis JAEN FERNANDEZ (Panama) as its Chairperson, Mr. David Gathii WAMBUGU (Kenya) as co-Chairperson, Mr. Alexandru DONCIU (Moldova) as Rapporteur and Ms. Shizu KOYAMA (Japan) as co-Rapporteur.

Corruption continues to be a major challenge to a majority of developed and developing countries, with the latter being hardest hit. All countries represented in the group had put in place various measures to prevent and combat corruption. The countries had signed the United Nations Convention Against Corruption (UNCAC) and, with the exception of Japan, ratified it. Implementation of the UNCAC was at various but advanced stages of implementation with regular reviews and reporting on progress. Apart from the establishment of robust criminal justice systems through which cases of corruption were processed and enactment of anti-corruption laws, a majority of the countries, with the exception of Japan, had also established anti-corruption agencies charged with enforcement through investigations and asset tracing, prevention and education.

The group's aim was to establish : effective measures to prevent and combat corruption in regard to the current situation of corruption in each country, effective systems to prevent corruption, effective systems of capacity building in each country, and problems and countermeasures related to establishing systems to prevent and combat corruption in each country.

II. SUMMARY OF DISCUSSION

A. Current Situation of Corruption in Each Country

In order to have a clear picture of the current situation of corruption in each country, members considered the report by Transparency International (TI) regarding the Corruption Perception Index 2012 (CPI). According to this index, the countries represented in the group fared as follows:

JAPAN

Japan was ranked 17th among 176 evaluated countries. Participants from Japan noted that corruption mainly spreads in local administrative authorities, particularly in the field of public procurement. For example, a public official of local government gets a kickback from the construction company and leaks cost estimates for construction projects coming up for bidding.

NAMIBIA

Namibia was ranked 58th in the world. Most of the corruption happens in law enforcement agencies,

the judiciary and government ministries such as customs and immigration control.

PANAMA
Panama was ranked 83rd out of 176 countries. The majority of the corruption cases relate to embezzlement, abuse of authority and public procurement, among others. Most of these cases are highlighted in the media, hence the higher perception of corruption in the country.

THAILAND
Thailand was ranked 88th out of 176 countries. Corruption in the public administration system has taken place for a long time in Thailand. The Thai people somehow accept the reality that corruption is inevitably part of the system and when an ordinary citizen or honest business people seek the services from governmental authorities or politicians, a small fee or reward may be given to officials in exchange of convenience and speedy services. In the eyes of the public, this does not count as corruption.

REPUBLIC OF MOLDOVA
Republic of Moldova was ranked 94th among 176 countries. Corruption is mostly prevalent in the judicial system, health sector, law enforcement and other public authorities. As an ex-Soviet country, Moldova inherited the soviet way of life which tolerates bribes and other corrupt acts. Moreover, political patronage in all public authorities allows corruption to thrive.

KENYA
Kenya was ranked 139th out of 176 countries. Corruption is endemic in Kenya and has eaten into the socio-economic and political fabric of the country. Corruption mostly thrives in politics, administrative authorities: police, immigration, revenue and lands departments, and criminal justice authorities. Corruption spreads in Kenya mainly in the following fields: public procurement, the criminal justice system, immigration and tax collection. Corruption is therefore an existential threat to the economy and national security in Kenya.

BANGLADESH
Bangladesh was ranked 144th out of 176 countries. The people of Bangladesh are engaged in corruption due to poverty, over-population and inadequate resource. Public servants, non-state actors, political leaders are also engaged in corruption. Corruption is rampant in the service sector. The entrepreneurs face problems in obtaining loan facilities and administrative facilitation without illegal payments. Public officials and politicians misappropriate funds set aside for development.

MYANMAR
Myanmar was ranked 170th out of 176 countries. Most corrupt activities take place within administrative and criminal justice authorities. Corruption is rampant due to the fact that salary of public servants is lower than in other countries. However, it is difficult to determine the exact fields of corruption for want of credible data.

In light of the foregoing, it is imperative to put in place effective systems to prevent and combat corruption in countries represented in the group.

B. Effective System to Prevent Corruption

1. Establishment of Authorities to Prevent Corruption

Group members noted that in their countries, there are established authorities charged with responsibility of preventing and combating corruption. In the case of Japan, there is no specialized authority to prevent corruption. However, there are effective mechanisms to prevent corruption put in place in each public authority.

All members stated that they have Anti-Corruption Agencies (ACA) in their respective countries with the exception of Japan. For example, in Moldova the National Anti-corruption Centre has power to prevent corruption. In Thailand, many government authorities are set up to monitor, prevent and efficiently suppress corruption cases. These include the National Anti-Corruption Commission (NACC) and the Office of Public Sector Anti-Corruption Commission. NACC is mandated to deal with declara-

tion and inspection of assets and liabilities, prevention of corruption and suppression of corruption.

The participants from Kenya stated that the Ethics and Anti-Corruption Commission has been established which is mandated to prevent corruption in line with the UNCAC requirements. Furthermore, the Constitution of Kenya 2010 requires the National Police Service to prevent corruption. The National Land Commission is also charged with the responsibility of stamping out corruption in the land sector. Moreover, the National Anti-Corruption Campaign Steering Committee was established to prevent corruption through sensitization and awareness creation to the public.

The members pointed out that though most of the countries have ACA, there is a need to define their powers and functions in order to make them more effective in preventing corruption. These include proper governance structures, accountability, declaring conflicts of interest and having enough powers to ensure that their recommendations after audit of public entities are implemented. In addition, the ACA should be well resourced in order to fully support their operations.

The functions of these authorities should include corruption risk assessment, systems, policies and procedures audits, education, sensitization, awareness creation, developing codes of conduct in private and public sectors and development of strategies to prevent corruption.

2. Establishment of Independent Authorities to Investigate Corruption

The members were of the view that the afore-mentioned preventive measures would not be effective unless independent authorities to investigate corruption are established. All the participants stated that they have in their countries independent authorities that investigate corruption cases. Such authorities should be independent, well resourced with the capability to initiate their own investigation and have special investigative powers such as eavesdropping, wiretapping, surveillance, and search and seizure, among others.

The members strongly felt that both investigation and prosecution should be conducted under the same roof to effectively combat corruption cases. Members concluded that there should be robust and adequate legal framework to anchor the above measures.

3. Systems to Ensure the Independence of Criminal Justice Authorities

For corruption to be effectively dealt with, the members agreed that systems must be put in place to ensure the independence of the criminal justice authorities as follows:

(a) Independence of the judiciary

Independence of the judiciary must be guaranteed in the constitutions of the respective countries. This will enable the adjudication of corruption cases without undue interference. Members suggested that the appointment of judicial officers should be fair, transparent, competitive and insulated from political interference and other vested interests. Judges should have security of tenure and should be only removed from office by an independent tribunal. They should have a fixed retirement age, be well remunerated and that the pay should not be reduced during their term of service. Members agreed that judicial officers should be transferred after a fix period of time according to a transfer policy formulated by the judiciary itself.

(b) Prosecutorial independence

All participants agreed that prosecutorial independence should also be guaranteed in the constitution, and the Public Prosecutor should not be under the direction or control of any authority.

(c) Investigative independence

Members agreed that investigative agencies should be independent and this must be guaranteed in the constitution. The recruitment and selection of personnel in these agencies must be competitive, transparent and fair.

(d) Codes of conduct for public officials

Members were unanimous that there should be one code of conduct for public servants, as is the case in Japan and Panama. The code of conduct should provide for sanctions in cases of breach by public

servants as well as declaration of income, assets and liabilities for the official, spouse and dependent children. The declarations should be submitted periodically and also upon appointment, promotion and exit from service. These declarations should be easily accessible to the law enforcement agencies.

(e) Systems to Manage Public Procurement

During group discussions, it was agreed that the management of public procurement is an important and critical problem in many countries. A case in point is Japan which faces the problem of public procurement and has adopted the Overall Evaluation System. This system enables the prevention of dumping and bid-rigging and expulsion of delinquent, disqualified companies etc., by allowing only qualified contractors to participate in public procurement. It also enables the prevention of bid-rigging by considering non-pricing factors.

Finally, group members came to a consensus on the following principles to manage public procurement: open tendering, sufficient time to prepare and submit tenders, transparent evaluation and award process; and avenues for appeal.

(f) Measures to prevent corruption by encouraging cooperation between public and private sectors

Members noted that there is a need for cooperation and involvement of the citizens and the private sectors in supporting measures to prevent corruption. It is important to encourage the spirit of cooperation between both sectors. Corruption in the private sector has an impact on the public sector. Measures to prevent corruption in the private sector may include signing corporate integrity pledges, establishing risk and compliance units and promoting corruption reporting within corporations.

Members agreed that it is important to ensure active public participation in anti-corruption initiatives. Their participation may include refusing to give/receive bribes, reporting corruption, recording statements and testifying in courts of law and other forums.

Participants from Japan stated that in each organization, public and private, employees are educated to obey the relevant laws. The group members suggested the following measures to encourage the participation of private and public sectors: active participation of civilians in the fight against corruption, trust in institutions and processes to deliver results, public education, sensitization and awareness creation, public campaigns, enactment of law to address corruption in the private sector, media advertising, civil society involvement and access to relevant information.

C. Effective Systems of Capacity Building in Each Country

1. Necessary Expertise and Abilities

Members were of the view that in order to effectively prevent and fight corruption it is necessary to build capacity in each country. For example in Namibia there is a huge backlog of cases in the Courts. The Magistrates, Judges and Prosecutors are also not enough to deal with the cases. In Myanmar, for financial, accounting and fiscal expertise, officers from the Office of Auditor General are requested to check financial affairs and where necessary, private accountant firms are engaged by investigators. Further, experts from the Information and Communication Ministry may perform computer forensics to assist the investigations.

Members agreed that the main expertise and abilities necessary for effective systems of capacity building in each country include: financial, accounting and fiscal expertise, analysing financial evidence and computer forensics. Where necessary, specialized divisions to perform fiscal expertise within ACA may be established.

The participants agreed that for a better case management, it would be advisable to have these types of expertise within ACAs. Participants stated that it was necessary to build capacity to ensure fair, speedy and organized investigation and trial of corruption cases. It was also recognized that lack of timeframe for trying corruption cases, as is the case in Thailand and Moldova, hinders proper case management.

Further, members agreed there was a need to build capacity of public officials to enable them conduct official business in an ethical manner. Consequently, newly hired public officials should be

instilled with public ethics while at the same time, establishing systems of reward and punishment for unethical conduct.

2. Measures to Ensure Expertise

As a measure to ensure expertise, members stated that ACAs must competitively recruit specialists in different areas. These specialists must be trained continuously to be up to date with emerging trends in corruption. The training should encompass short and long courses, exchange programmes and study tours, on the job training, mentoring and partnership with academic institutions to promote excellence.

Since it is not possible to have all the expertise required to investigate corruption under one roof, members stated that is was necessary to outsource to the private sector. Outsourcing also supplements the expertise available within ACAs. Outsourcing can also be used as a means of technology transfer.

It is important to have a pool of highly specialized bodies of investigators, prosecutors and judges in the investigation, prosecution and hearing of corruption cases respectively. This is a highly specialized area that requires specialized personnel.

D. Problems and Countermeasures Related to Establishing Systems to Prevent and Combat Corruption in Each Country

Members appreciated that preventing and combating corruption is faced with many challenges, and there is a need to identify them and suggest countermeasures to establish effective systems. Therefore, it was unanimously agreed to identify problems and countermeasures related to the establishment of systems to prevent and combat corruption in each country, as follows:

1. Lack of Political Will

Commitment of the top political leadership to the goal of eradicating corruption in countries is weak, as has been the case in many of the group members' countries. Most governments only pay lip service to the fight against corruption. Anti-corruption reforms, in this regard, are therefore bound to fail.

Members proposed the following countermeasures: political party manifestos should contain pledges to prevent and combat corruption as a priority. The citizens should hold their leaders to account in this regard.

2. Political Influence and Interference

The participants felt political influence and interference is a threat to the establishment of effective systems to prevent and combat corruption. The budgetary allocation process, which is controlled by politicians, was cited. Interference in the appointment of the heads and staff of ACAs, among others, was also cited. The group agreed that it is necessary to guarantee independence in the constitution and develop well-defined policies to avoid political influence.

3. Lack of Adequate Legal Framework

All members agreed that though the UN Convention Against Corruption (UNCAC) provides a powerful tool to strengthen anti-corruption programmes, ACAs continue to be denied adequate legal frameworks to fight corruption. Some participants stated that in their countries, ACAs do not have powers to investigate corruption in the private sector, while in others, ACAs are denied special investigative powers such as wiretapping, etc.

As a countermeasure, members were of the view that the legal framework should be strengthened. In this regard ACAs should have powers to prevent corruption through laws that allow improvement in collection of evidence, investigation, prosecution, asset tracing and seizure, intervention in the private sector and mutual legal assistance.

4. Mind-set of the Citizens and Public Officials

All participants agreed that the mind-set of the citizens is a threat to establishment of effective systems. They noted the culture of "giving" gifts promoted corrupt practices. In some countries the citizens think that they have no responsibility in the fight against corruption, yet they are on the supply

side of the corruption equation. Citizens also don't view corruption as a crime, but as mutual obligations and mutual benefits.

Members proposed extensive public education, sensitization and awareness of citizens to promote moral and ethical behaviour. This will enhance the public officials' integrity in the society. Engaging citizens in fighting corruption through providing information/feedback (change the public perception and expectations), involvement of mass-media, positive engagement, call-in programmes, debate competitions, establishment of local civilian oversight committees, establishment of a system to empower people to report incidences of corruption without reprisal.

5. Lack of Equipment (Advanced Technology, Transport, Etc.)

All participants agreed that a lack of appropriate equipment and advanced technology could hamper the development of effective measures to prevent and combat corruption. Persons engaged in corrupt activities have embraced new technology making it hard to detect and collect evidence. Lack of modern equipment and technology makes it difficult for investigators to deal with corruption cases effectively. The same applies to the delivery of the public education programmes. The group, therefore, recommended acquisition of modern technology and equipment.

6. Human Resources

The group noted that human resources are an important factor in the establishment of effective systems. Mismanagement of human resources through unfair recruitment, appointment without transparent policy, lack of motivation and low salaries was cited.

Participants stated that it is necessary to develop clear policies as far as recruitment, appointment, management and development of human resource are concerned. There is also the need for establishment of an independent body for recruiting and selection as well as enhancing salaries according to living standards and competitiveness and developing reward programmes.

7. Insufficient Funds

The participants agreed that the lack of reasonably adequate funds undermines the efficacy of the anti-corruption systems. The members were of the view that funding policies should be developed and implemented. ACAs should be allowed to receive support from NGOs, foreign authorities for campaigns training and advertisements.

8. Bureaucracy (Process Length, Inefficiency)

Members identified bureaucracy as a threat to the establishment of effective systems. Lengthy and complex processes frustrate the service delivery and provide opportunities to extort and offer bribes. Members recommended the development and promotion of service delivery charters, automation of the manual processes and review of policies, procedures and processes.

9. Lack of Interagency Cooperation

All participants agreed that lack of mutual trust and working at cross purposes by law enforcement agencies pose a threat to the establishment of systems to prevent and combat corruption. Members noted that there is need to foster cooperation between the agencies, develop better communication mechanisms and demonstrate unity of purpose. Agencies are encouraged to sign Memoranda of Understanding (MOUs) and build synergies.

10. Lack of Supervision

The participants noted that lack of supervision is a threat to establishment of effective systems as the staff may lose its sense of direction and focus. Members, therefore, recommended the following countermeasures: open-space office policy, hands-on management, visiting and inspecting subordinates' workplaces.

III. CONCLUSION

Members appreciated that fighting corruption through investigation and prosecution of the corruption cases was very expensive. Corrupt individuals who had illegally acquired public resources would

not hesitate to deploy such resources to circumvent legal processes. The group was therefore of the view that establishing effective systems to prevent and combat corruption should be government's primary concern. Consequently sufficient resources, political will and support should be fostered by all stakeholders.

The participants unanimously agreed that creating awareness of the people and engaging the civil society, mass-media, private and public sector cooperation in preventing and combating corruption is the ultimate goal for zero tolerance of corruption.

APPENDIX

COMMEMORATIVE PHOTOGRAPHS

- *155th International Training Course*
- *16th UNAFEI UNCAC Training Programme*

The 155th International Training Course and the Comparative Study on Criminal Justice Systems of Japan and Nepal

Left to Right:

Above
Mr. Strang (United States)

4th Row
Ms. Nishi (Staff), Ms. Kita (JICA), Ms. Suzuki (Staff), Ms. Yamada (JICA), Mr. Bhattarai (Nepal), Mr. Paudel (Nepal), Mr. Harnyk (Ukraine), Mr. Gray (Vanuatu), Mr. Borges de Mendonça (Brazil), Mr. Rai (Nepal), Mr. Sharma (Nepal), Ms. Hichiguro (Staff)

3rd Row
Mr. Furuhashi (Staff), Mr. Hayasaka (Staff), Mr. Fukuta (Staff), Ms. Kondo (Japan), Mr. Shrestha (Nepal), Mr. Fukushima (Japan), Mr. Bejenaru (Moldova), Mr. Snegirov (Ukraine), Ms. Oliinyk (Ukraine), Ms. Suzuki (Japan), Mr. Saleem (Maldives), Ms. Kongsrisook (Thailand), Ms. Adhikari (Nepal), Mr. Regmi (Nepal), Ms. Iwakata (Staff)

2nd Row
Mr. Toyoda (Staff), Mr. Honda (Staff), Mr. Kiyota (Japan), Mr. Kodama (Japan), Mr. Dorji (Bhutan), Ms. Sudti-Autasilp (Thailand), Mr. Tashi (Bhutan), Mr. Kinlay (Bhutan), Mr. Parajuli (Nepal), Mr. Kawata (Japan), Ms. Namekata (Japan), Mr. Shatheeh (Maldives), Mr. Taghiyev (Azerbaijan), Mr. Moussa (Guinea), Mr. Dhungana (Nepal), Ms. Yamada (Staff), Ms. Sakai (Chef)

1st Row
Mr. Tada (Staff), Mr. Ando (Staff), Prof. Moriya, Prof. Tsunoda, Prof. Mio, Prof. Iwashita, Mr. Curtis (United Kingdom), Director Akane, Deputy Director Kiyono, Prof. Hirose, Prof. Yokomaku (Japan), Prof. Tashiro, Prof. Nagai, Mr. Sugiyama (Staff), Mr. Schmid (LA)

The 16th UNAFEI UNCAC Training Programme

Left to Right:

Above
Mr. Dato' Abdul Wahab Bin Abdul Aziz (Malaysia)
Ms. Rebecca Li (Hong Kong)

4th Row
Ms. Nishi (Staff), Mr. Hayasaka (Staff), Mr. Toyoda (Staff), Ms. Yamada (Staff), Ms. Suzuki (Staff), Mr. Fukuta (Staff), Ms. Hichiguro (Staff), Ms. Iwakata (Staff)

3rd Row
Ms. Sakai (Chef), Mr. Honda (Staff), Mr. Rahman (Bangladesh), Mr. Yamada (Japan), Mr. Thongprasom (Thailand), Mr. Crismaru (Moldova), Mr. Nakabayashi (Japan), Mr. Rabbani (Bangladesh), Mr. Ihalua (Namibia), Mr. Nuon (Cambodia), Mr. Sato (Japan), Mr. Inukai (Japan), Mr. Aras (Brazil)

2nd Row
Mr. Furuhashi (Staff), Ms. Yamamoto (JICA), Mr. Kemboi (Kenya), Ms. Koyama (Japan), Ms. Thingini (Kenya), Ms. Namukwambi (Namibia), Ms. Khin (Myanmar), Ms. Fernandez (Panama), Mr. Amral (Timor-Leste), Mr. Touti (Algeria), Mr. Myo (Myanmar), Mr. Sakai (Japan), Mr. Ito (Japan), Mr. Obuo (Kenya), Mr. Wambugu (Kenya), Mr. Donciu (Moldova)

1st Row
Mr. Schmid (LA), Mr. Sugiyama (Staff), Prof. Nagai, Prof. Tashiro, Prof. Iwashita, Prof. Hirose, Deputy Director Kiyono, Director Akane, Mr. Green (United Kingdom), Prof. Moriya, Prof. Tsunoda, Prof. Yoshimura, Prof. Mio, Mr. Ando (Staff), Mr. Tada (Staff)