



5TH MEETING

**“DEVELOPING JUDICIAL CAPABILITIES TO
ENHANCE PUBLIC AND INTERNATIONAL
CONFIDENCE IN LEGAL SYSTEM”**

**CORRUPTION IN LEGAL SYSTEM
(MALAYSIAN PERSPECTIVE ON CORRUPTION IN
LEGAL SYSTEM)**

**TUN ARIFIN BIN ZAKARIA
CHIEF JUSTICE OF MALAYSIA**

1ST NOVEMBER 2013

SINGAPORE

**CORRUPTION IN LEGAL SYSTEMS:
Impact On Public And International Confidence;
Judicial Capabilities Needed To Deal With It
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ABSTRACT

Corruption, specifically judicial corruption, appears to be a negative world phenomenon. It is one of the main obstacles to peace, stability, sustainable development, democracy, and human rights around the globe. The causes of judicial corruption may vary significantly from State to State. But the effect of corruption is no different. It hampers good governance. Therefore, in order to uphold judicial integrity and public confidence, the judiciary must be ever ready with a mechanism to combat this scourge. The best mechanism to fight judicial corruption is to imbue our judicial members with honesty and integrity, and with knowledge of the ills of corruption. Thus, it is the objective of this paper to throw some light on what is corruption, more specifically judicial corruption, on the types of judicial corruption, on the factors leading to judicial corruption, on the impact of judicial corruption, and on the mechanism to combat judicial corruption in Malaysia. It is my earnest hope that this paper may benefit the judicial fraternity in its combat against

judicial corruption and hence enhance public confidence in the judiciary.

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1.0 INTRODUCTION

Good governance is one of the key elements underpinning the positive development of a country. The key elements in ensuring such success demand a combination of a good relationship and trust between State and people, integrity, transparency, rule of law, checks and balances, co-ordination amongst agencies, and increased involvement of all other key stakeholders¹. However, corruption could hamper the ultimate result of achieving good governance.

It is generally acknowledged that corruption is a negative world phenomenon. Corruption is one of the main obstacles to peace, stability, sustainable development, democracy, and human rights

¹ Petter Langseth, 2000, Strengthening Judicial Integrity Against Corruption, Global Programme Against Corruption Conference, March, Vienna, pp.3

around the globe². It hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment³. In fact, corruption is a key element in economic under-performance and a major obstacle to poverty alleviation and development.

In the case of judicial corruption, it undermines justice in many parts of the world, in that it denies both victims and accused of the basic human right to a fair and impartial trial⁴. Judicial corruption compromises fair judicial process. It results in improper access to the justice system and influences the outcome of judicial decisions.. The decisions will remain unfair and unpredictable and consequently the rule of law will not prevail.

A judge who has taken a bribe cannot be independent, impartial or fair. When a party to judicial proceedings offers a bribe to a judge or other officials, and the bribe is accepted, that party immediately acquires a privileged status in relation to other parties who have not offered, or are not in a position to offer, a bribe or inducement. The preferential treatment secured and the resulting discrimination, then, obliterates objectivity and neutrality from the

² Lima Declaration Against Corruption, 1997, 8th International Conference Against Corruption, 7-11 September, Lima, Peru

³ Kofi A. Annan, 2004, United Nations Convention Against Corruption, United Nations Office On Drugs And Crime, Vienna, UNITED NATIONS, New York, pp. iii

⁴ Transparency International, 2007, Global Corruption Report 2007 Corruption In Judicial Systems, Cambridge University Press, pp. xxi

judicial process. The fundamental precepts of human rights are violated rather than upheld⁵.

In acknowledging the worrying effects of judicial corruption to the society at large, we have to admit that there is a need for all judicial members to really understand the purport and effect of judicial corruption, the understanding of which by its members would help the judiciary to cure the disease. Thus, this paper will discuss on judicial corruption with specific reference to a few areas, including the definition of judicial corruption, types of judicial corruption, the effect of judicial corruption, public perception towards judicial corruption in Malaysia and the applicable tools to combat judicial corruption.

2.0 DEFINITION OF CORRUPTION

Corruption take many forms that vary in degree from the minor use of influence to institutionalized bribery⁶. Transparency International's ("TI") defines corruption as "the abuse of entrusted power for private gain". TI further classified corruption as grand, petty and political, depending on the amounts of money lost and the sector where it occurs.

Grand corruption refers to an act committed at a high level of government that distorts policies or the central functioning of the

⁵ Buscaglia/ Dakolias, 1999, An Analysis of the Causes of Corruption in the Judiciary, Legal and Judicial Reform Unit, Legal Department, The World Bank, pp 2, in Petter Langseth, 2000, Strengthening Judicial Integrity Against Corruption, Global Programme Against Corruption Conference, March, Vienna, pp.3

⁶ United Nation Global Compact,
<http://www.unglobalcompact.org/aboutthegc/thetenprinciples/principle10.html>

state, enabling leaders to benefit at the expense of the public good. On the other hand, petty corruption refers to everyday abuse of entrusted power by low and mid-level public officials in their interaction with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies.

Political corruption is a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth.

In Malaysia, the conceptual definition of corruption adopted by Malaysian Anti-Corruption Commission defines corruption as an act of giving or receiving of any gratification or reward in the form of cash or in-kind of high value for performing a task in relation to his/her job description⁷.

The legal definition of corruption under Section 3 of Malaysian Anti-Corruption Commission Act 2009 ('Act 2009') specifically used the term "gratification" in referring to any act of corruption. The provision defined "gratification" as—

(a) money, donation, gift, loan, fee, reward, valuable security, property or interest in property being property of any description whether movable or immovable, financial benefit, or any other similar advantage;

⁷ Malaysian Anti-Corruption Commission <http://www.sprm.gov.my/apa-itu-rasuah.html>

(b) any office, dignity, employment, contract of employment or services, and agreement to give employment or render services in any capacity;

(c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(d) any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;

(e) any forbearance to demand any money or money's worth or valuable thing;

(f) any other service or favour of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and

(g) any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs (a) to (f)⁸.

In short, the Malaysian legal definition on gratification is consistent with the acceptable definition on corruption which conceives not only financial gain but also non-financial advantage.

⁸ Malaysian Anti-Corruption Commission Act 2009, Section 3

3.0 DEFINITION ON JUDICIAL CORRUPTION

There is no legal definition on judicial corruption. Universally, judicial corruption is commonly viewed as an act through which workers in the justice system are negatively influenced that affects the impartiality of judicial proceedings for the purpose of obtaining an illegitimate benefit for themselves or other persons⁹. Judicial corruption takes many forms and may be influenced by many factors, whether legal, social, cultural, economic or political¹⁰.

For example, a judge may allow or exclude evidence with the aim of justifying the acquittal of a guilty defendant of high political or social status. Judges or court staff may manipulate court dates to favour one party. In countries where there are no verbatim transcripts, judges may inaccurately summarise court proceedings or distort witness testimony before delivering a verdict that has been 'purchased' by one of the parties in the case. Junior court personnel may 'lose' a file – for a price¹¹.

Other constituents in the justice system may influence judicial corruption. Criminal cases can be corrupted even before they reach the courts if the police were to tamper with the evidence supporting a criminal indictment, or prosecutors fail to apply a uniform criteria to evidence secured by the police¹².

⁹ Cristi Danileț , 2009, Corruption And Anti-Corruption In The Justice System, Bucharest pp.11

¹⁰ Transparency International, 2007, Global Corruption Report 2007 Corruption In Judicial Systems, Cambridge University Press, pp.xxiv

¹¹ ibid

¹² ibid

Judicial corruption includes the misuse of scarce public funds that governments allocate to the administration of justice, which may not be of a high priority in political terms. For example, judges may hire family members to staff their courts or offices, and manipulate contracts for court buildings and equipment. Judicial corruption may extend throughout the system, right from pre-trial activities to the trial proceedings and to the ultimate enforcement of decisions by court bailiffs¹³.

The appeal process, ostensibly an important avenue for redress of faulty verdicts, may presents further opportunity for judicial corruption. When political forces control the appointment of senior judges, the expectation of redress by appeal to an impartial authority may be no more than a mirage. Even where judicial appointments are beyond reproach, the effectiveness of the appeal process is dented if the screening of requests for hearings is not transparent, or when the backlog of cases translates into years spent awaiting the appeal to be heard. Prolonged appeals tend to favour the party with the deepest pocket, but a legitimate complainant may not be able to pursue his case beyond the first instance¹⁴.

4.0 TYPES OF JUDICIAL CORRUPTION

A study on the global trend on judicial corruption concluded that judicial corruption may be grouped into two types namely, political interference in judicial processes and bribery.

¹³ ibid

¹⁴ ibid

Political interference comes about not only by threat, intimidation and simple bribery to judges, but also by the manipulation of judicial appointments, salaries and conditions of service.

For example, judges could be pressured to step down without being informed of the allegations against them in an anti-corruption campaign that is politically expedient. Judges perceived as problematic by the powerful could be reassigned from sensitive positions or the control of sensitive cases could be transferred to pliable judges.

Bribery can occur at every point of interaction in the judicial system: court officials may extort money for work they should execute in the normal course of their duty; lawyers may charge additional 'fees' to expedite or delay cases, or to direct cases to judges who could be influenced. On their part, judges may accept bribes to delay or accelerate cases, accept or deny appeals, influence other judges or simply decide a case in a certain way¹⁵.

5.0 FACTORS LEADING TO JUDICIAL CORRUPTION

The few studies conducted suggest that the causes of judicial corruption vary significantly from State to State¹⁶. The 10th International Anti-Corruption Conference (IACC) held in Prague in 2001 identified the ten causes of judicial corruption as follows-

¹⁵ Ibid, pp. xxiv

¹⁶ Petter Langseth, 2000, Strengthening Judicial Integrity Against Corruption, Global Programme Against Corruption Conference, March, Vienna, pp.6

- (a) Inadequate ethical, moral, professional and jurisdictional formation of magistrates and judicial functionaries;
- (b) Lack of knowledge of the objectives and extent of the judiciary's proper role;
- (c) Lack of pattern, model or profile for the ideal judge in judicial and social culture;
- (d) Access by many magistrates to a judicial career as a resource of steady income;
- (e) Low pay (later, during the discussion, this issue turned out to be controversial);
- (f) Corrupting tendency of groups with political, social and economic power, individuals and their lawyers;
- (g) Lack of adequate systems for monitoring the professional behaviour of judges and prosecutors, and the public perception that they are ineffective;
- (h) Tendency of judicial functionaries to abuse their power in authoritarian culture that lends itself to the hegemony of the powerful over the masses;
- (i) Lack of a system for rewarding good conduct by public officials as many people feel that it makes no difference if one is corrupt or honest, because corruption is not denounced and honesty is not publicly valued;
- (j) Tendency by officials of the system, whether corrupt or not, to deny that corruption exists because they feel insulted when the problem is discussed in the academic media or the press

(more common in developing countries and the countries in transition)¹⁷.

In Malaysia, the Malaysian Anti Corruption Commission grouped the judiciary under the low risk corruption attitude, due to the minimal number of corruption charges against members of the judiciary¹⁸. Thus, the only plausible factor that could lead to judicial corruption lies essentially in the judges themselves.

6.0 THE IMPACT OF JUDICIAL CORRUPTION

Judicial corruption is a threat to good governance and the rule of law. Therefore, it is important that the judiciary be committed to eradicate corruption. The state of judicial corruption in Malaysia is far from being alarming. This is supported by statistics issued by Malaysian Anti-Corruption Commissions (MACC) for the year 2009 -2013 which are as follows:

YEAR	INFORMATION	Investigation	Arrest	Charge
2009	39	6	2	1
2010	35	0	0	1
2011	18	4	1	0
2012	19	0	0	0
2013	10	3	0	0
TOTAL	121	13	3	2

* The statistic shows the number of complaints, investigation, arrest and charge recorded against judges, judicial officers and deputy public prosecutors.

¹⁷ 10th International Anti Corruption Conference (IACC), 2001
http://webcache.googleusercontent.com/search?q=cache:Gc0YRJddcJUU:iacconference.org/documents/10th_iacc_workshop_Judicial_corruption.doc+&cd=9&hl=en&ct=clnk

¹⁸ Briefing by Puan Hashima, MACC Research Unit, 23rd October 2013

According to the MACC statistics, from January 2013 to September 2013, MACC received only 10 complaints on gratification involving judges, judicial officers as well as deputy public prosecutors. This figure has significantly decreased as compared to 39 complaints in 2009, 35 complaints in 2010, 18 complaints in 2011 and 19 complaints in 2012.

Out of 121 complaints (for years 2009-2013), 13 were considered as valid complaints and were investigated under Section 16(a)(B) of Act 2009 for offences of accepting gratification¹⁹, 8 were investigated under Section 17(a) of Act 2009 for offences of giving or accepting gratification by agent²⁰ and 3 complaints were under Section 4(1)(a) of Anti-Money Laundering Act 2001²¹ Out of the 121 complaints mentioned above, only 2 culminated in prosecutions.

The impact of judicial corruption in Malaysia on public and international confidence is not a serious issue as the degree of judicial corruption in Malaysia is at the very minimal. If at all, the issue of judicial corruption in Malaysia is only one of public perception. I

¹⁹ Malaysian Anti Corruption Commission Act 2009, Section 16()(B) provides that -

Any person who by himself, or by or in conjunction with any other person—

(a) corruptly solicits or receives or agrees to receive for himself or for any other person;

any gratification as an inducement to or a reward for, or otherwise on account of—

(B) any officer of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place, in which the public body is concerned, commit an offence.

²⁰ Malaysian Anti Corruption Commission Act 2009, Section 17(a) provides that -

A person commits an offence if—

(a) being an agent, he corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or a reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business

²¹ Anti-Money Laundering Act 200, Section4 provides that -

(1) Any person who—

(a) engages in, or attempts to engage in money laundering, commits an offence and shall on conviction be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or to both.

am certain that the public perception of judicial corruption in Malaysia was not as a result of the public's first-hand experience, but was arrived at from an unfortunate combination of circumstances which were all too readily interpreted as corrupt behaviour rather than the lack of professional skills and coherent organisation in the administration of justice. The major challenge of the Malaysian judiciary is to endeavour to eradicate whatever negative public perception of the judiciary.

7.0 INSTRUMENT TO COMBAT JUDICIAL CORRUPTION

Article 5 of United Nations Convention against Corruption urges States who are parties to the convention to develop and implement or maintain effective, coordinated anti-corruption 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 accountability²². Policy makers should ensure that anti-corruption policies are made in accordance with the fundamental principles of its legal system²³. In addition, the judiciary should ensure that there be a proper balance between judicial accountability and judicial independence, so as to achieve success in enforcing laws against judicial corruption²⁴.

²² United Nations Convention against Corruption. Article 5

²³ *ibid*

²⁴ Edgardo Buscaglia, 2997, *The Broader Justice System*, Global Corruption Report 2007, Corruption In Judicial Systems, Transparency International, Cambridge University Press, pp.75

Based on this spirit, the Malaysian judiciary initiated a number of mechanisms to prevent judicial corruption. Amongst the mechanisms includes:-

(a) The establishment of Judicial Appointment Commission (JAC) on the 2 February 2009²⁵.

The main role of the Commission is to uphold independence of the judiciary through a proper selection of superior court judges. JAC has the responsibility to ensure that the selection and appointment of Superior Court Judges is conducted efficiently, effectively and fairly.

The appointment of judges is based on the evaluation criteria set out by JAC. The evaluation criteria are grounded on the consideration that public interest in improving the quality of our judicial system is best served by a merit based selection of judges and judicial commissioners²⁶.

The criteria are designed to ensure that nominees have the intellectual capacity, the efficiency and personal qualities which would enable them to resolve disputes impartially and decide cases solely upon the facts of the case and the law. Among the criteria are integrity, legal knowledge and ability, professional experience, judicial temperament, diligence, health, financial responsibility, public service, views on public issues and other desirable special qualities.

²⁵ Official Website of Judicial Appointment Commissioners, <http://www.jac.gov.my>

²⁶ *ibid*

(b) Superior court judges are subjected to Article 3 of Judges' Code of Ethics 1994.

Article 3 prohibits judges from :-

- (i) subordinating his judicial duties to his private interests;
- (ii) conducting himself in such manner as is likely to bring his private interests into conflict with his judicial duties;
- (iii) conducting himself in any manner likely to cause a reasonable suspicion that—
 - (a) he has allowed his private interests to come into conflict with his judicial duties so as to impair his usefulness as a judge; or
 - (b) he has used his judicial position for his personal advantage;
- (iv) conducting himself dishonestly or in such manner as to bring the Judiciary into disrepute or to bring discredit thereto;

(c) A judge is required to declare their assets

Article 3(3) of Judges' Code of Ethics 1994 provides that a judge shall, on his appointment or at any time thereafter as may be required by Chief Justice, declare in writing all his assets to the Chief Justice. This is again emphasised by the Chief Justice Direction No 1 of 2012.

(d) A lawyer-appointed to be a judge shall cease connection with his firm;

Article 4 of Judges' Code of Ethics 1994 require a judge, on his appointment, to cease from having any connection with

the firm where he was practising as an advocate and solicitor prior to his appointment. For this purpose, the judge shall take the following steps:

- (a) to ensure that his name is removed from the firm's name;
- (b) to ensure that his name does not appear in the firm's letterheads; and
- (c) to ensure that he has no dealing with the firm or any member of the firm.

(e) Participating and Attending Local or International Conferences²⁷;

A judge who wish to participate or attend any local or international conference organise by political parties or NGOs or any body or party need to obtain approval from the Chief Justice.

(f) Prohibition For Judges To Hear An Application Made By Their Family Members For An Admission As Advocate And Solicitor²⁸;

Judges are prohibited from hearing any application by his family members for an admission as advocate and solicitor. This act is inconsistent with the provision in Article 3 of Judges Code of Ethic 1998.

In ensuring its firmness in preventing judicial corruption and upheld the judicial integrity, the code of ethics firmly

²⁷ Chief Justice Administrative Directive No. 1/2003

²⁸ Chief Justice Instruction Letter dated 10th August 1998

provides that breach of any provision of the said Code of Ethics may constitute a ground for the removal of a judge from his office . In addition, the move by Malaysian Anti Corruption Commission (MACC) in offering a public access to its corruption offender database also helps the judiciary in strengthening the public confidence.

(g) The Use of Information and Communication Technology (ICT) in the Judiciary

The Malaysian judiciary has initiated structural improvements with the common aim to achieve greater transparency, efficiency and judicial accountability as one of the tool to prevent judicial corruption. The use of ICT is one of the key component in the structural improvement towards good governance. A transparent and efficient justice system will overcome the negative public perception on the judiciary.

Allowing public to have greater access to judicial records encourages judges to act fairly and impartially. ICT contributes to public trust and confidence as well as judicial independence and accountability. ICT promotes and facilitates accessibility to justice.

The Malaysian Judiciary has also established its official website to allow public to access information relating the judicial administration.

The Malaysian Judiciary has also held regular discussions with judges to identify the causes of corruption and the manner to overcome the public perception of judicial corruption. Our judges resolved as follows²⁹:

- i) Maintain the integrity of the judiciary and conduct themselves appropriately;
- ii) Sparingly grant postponements, and not to grant postponements on flimsy grounds, especially where a prominent person is involved including lawyers;
- iii) Keep the confidentiality of decisions prior to pronouncement
- iv) To be consistent in the management and disposal of all cases irrespective of the status of the parties;
- v) Early recusal to avoid potential or actual conflict of interest situation;
- vi) No display of bias, maintain judicial temperament, avoid unnecessary comments/statements, to be selective of the company you keep, regular assets declaration, moderate lifestyle and must be transparent. No honorifics in courts-to minimise negative perception by our conduct;
- vii) Write good judgments, justify findings and give reasons in making decisions;
- viii) General statements of corruption in the judiciary without basis should be avoided;
- ix) Where there is a complaint of corruption, the Attorney General should lodge a report and not to go to the press but let the MACC to pursue the matter. Immediate action must be taken on any allegation of corruption;

²⁹ Judicial Appointments Commission Malaysia (JAC) Report on Judicial Administration: Challenges and the way Forward, at p. 1-3.

- x) Regular interaction and good rapport between BAR and Bench. Trust within the legal fraternity must be preserved;
- xi) Judges must not show any personal, political and religious inclination or take part in partisan politics;
- xii) A moratorium of 2 years after retirement not to receive jobs that can be perceived or interpreted as a reward to be incorporated in the Code of Ethics;
- xiii) More publicity of the Code of Ethics; and
- xiv) Review and improve judges' remuneration and pension from time to time to ensure that the retired judges can maintain a reasonable standard of living.

8.0 CONCLUSION

Corruption generally, including judicial corruption, is found in all countries, with the difference being only in the matter of degree. Judicial corruption affects public and international confidence in the judicial system. Therefore, effective measures must be taken to maintain public confidence in the judiciary.