# Discussion in Session II

## Administration of the Lower Courts

The issue of the administration of justice in the lower courts was raised in the discussion of Session II. Some countries in the region are in the course of shifting supervisory powers from the Government to the Supreme Court, and the experiences of some countries were provided.

In the case of the Philippines, supervisory power was shifted from the Ministry of the Local Governments to the Supreme Court under the 1977 Constitution. Before that, all courts below the Supreme Court were administered by the Ministry of Justice and the Attorney General, who had control over judges and prosecutors, respectively. To be faithful to the principle of the separation of powers, the administration of lower courts was transferred to the Supreme Court, and a Court Administrator was created like that in the U.S. The Court Administrator must be a retired Judge or Justice. This has made the independence of the judicial branch genuine. The career of all judges, from trial court level, is not dependent upon the President.

Indonesia has plans to shift the responsibility from the government (Ministry of Justice) to the Supreme Court. However, there are questions regarding how to ensure that the Justices of the Supreme Court are honest.

In China, justice is administered in two ways. One is financially. The budget for each court is given from the central government to the local government. The second way is in terms of personnel. All officials are appointed by the local government. Generally speaking, these matters are governed by different party committees. The mass media is generally a very useful instrument for supervising the judiciary, but in China, its role is very limited. Journalists cannot criticize judges. This is why media law is being given much attention in China at present. The problem of corruption is very serious. When important persons or officials are concerned, there are sometimes interventions from the government or communist party at different levels.

In India's judiciary, court are not strictly speaking constitutional organs, so there is no question of exerting control over them except in cases where there is

misconduct; they can then be impeached by the parliament, and there is a procedure for this. The Attorney-General (or Advocate-General in the case of state courts) is a constitutional attorney, and can be appointed by the president of the country. However, other positions such as the Solicitor General and additional Solicitor Generals, are appointed through the Ministry of Law, and ultimately confirmed by the President. In the lower judiciary where the correction is entered, it is within the purview of the states concerned; the civil procedure codes prescribe the qualities and other matters. State laws are also applicable. The governor of the State generally has the power of appointment, but mainly where the high courts are concerned high courts, this power is shared by the state government and the state public service commission. Sometimes corruption arises in regard to the appointments of judges by the public service commission. The Supreme Court has been asking to be given total control over the finances of the courts.

## The Activeness of Judges in Public Interest Litigation (PIL) in India

The matter of the activeness of judges was raised in relation to public interest litigation (PIL) in India.

Additional information was given, as follows: In India, the judge's role is different in criminal cases and in the PIL. The court procedure is very strict, particularly in criminal cases. Thus judges cannot be very active in that realm. They have to strictly follow the parameters of the law. In the area of PIL, however, the action or inaction of the government can affect the welfare of the public or a section of the public who have been deprived of their rights in a certain situation. In such cases, the court can act on the mere writing of a letter. This power is not given to or exercised by the lower courts. It is exercised only by the High Courts and the Supreme Court under Section 32 (the Supreme Court) and Section 226 (High Courts) of the Constitution. The court does not require that a letter be written to become active. It can also become active in response to a rumor. If there are newspaper reports that something wrong is being done because of government inaction, the court may become very active, issue notices, and ask the parties to appear before it. The Government and officials also may be called to appear before the court and submit their replies and the actions which they are taking. The court can monitor whether the directions it has issued have been implemented or not. In

the PIL cases involving the Government's water battle of the Government, the Court took the government's water authority to be a sort of legislation, found that the government was not acting and would take some time to implement legislation, and found that irreparable damages would be done to the public in that period. In this case, the court did not specifically define whether this authority was under the Ministry of Water Resources or Ministry of Environment. So both Ministries will go to the court to review its judgment and receive further directions. This was a case where the Court itself found that immediate remedy or action was required. If the court acts on a petition submitted by particular parties, they will be summoned.

On the matter of judicial review, the following comments were raised. The issue can be responded to at two levels: the level of procedure and the level of substance. In order to stop a government action, plaintiffs must ask for an injunction. In order to compel a government to perform an act, a writ of mandamus must be received. To stop a lower judicial body, a prohibition is used. However, the nature of a petition is a certiorari. The test is whether there was a grave abuse of discretion. These are the standards, or a sort of sacred incantation. The grave abuse of discretion can amount to a lack of jurisdiction. The scope of judicial review was expanded not in a procedural way but rather through the definition of judicial power. There is a second paragraph under the provision of the Supreme Court stating that judicial power shall include the power of the court to adjudicate well-defined rights. This is a settled definition. This is where they expanded it with the phrase, "and to review grave abuse of discretion committed by any government agency."

## Alternative Dispute Resolution (ADR)

Additional information on ADR in some countries was provided as follows.

In Thailand, ADR started from arbitration about 20 years ago, before the economic boom. There were many investments from abroad, and most of the commercial contracts had arbitration clauses. These clauses invariably used the International Chamber of Commerce in Paris, or the AAA in New York or London. Thus it was nearly always a form of one-way traffic when there was an arbitration clause. Most countries are members of the New York Convention for Recognition and Enforcement of Foreign Arbitration Award of 1958, and as an obligation under this Convention, are required to implement foreign arbitration awards. Every country of the

region has established an arbitration center of its own. It started from the establishment of the Kuala Lumpur Commercial Arbitration Center, which was connected to the Asia African Legal Consultative Committee (AALCC). The possession of an arbitration center may be important for the national prestige of the legal professions. It may be possible to go to an arbitration center in a neutral country in Asia for resolution of disputes on commerce or industry, instead of going to Paris or elsewhere in Europe.

In Vietnam, there is an arbitration center under the Chamber of Commerce in Hanoi. China has the China International and Economic Arbitration Commission (CPAC) which has been very active. Because of the economic boom there, most transactions carried out under contracts have to go under the CPAC.

India also has ADR courts. The importance of having a center for arbitration is well known. It was in 1984 that the model law on arbitration was made by AALCC, and after that in almost every country in the region, laws on arbitration were drafted. India enacted the Arbitration and Conciliation Act of 1996. It was conceived as part of the judicial system. The court stands on an agreement between the parties. In certain cases, the courts will ask the parties whether they would like to select arbitration. Under the draft amendment clause of the Civil Procedure Code, if a contract includes an arbitration clause, the parties must accept arbitration. On the other hand, conciliation has not yet been but at par with arbitration, although it is a part of the Act. If, during the conciliation proceedings, there is some difficulty that needs some clarification on a legal point or procedures, the courts will not intervene and certainly will not issue a decree unless a lawsuit is filed, Whereas in the case of arbitration, an appeal can be filed to the high court or to the Supreme Court as the case requires. However, there is no appeal in conciliation. It is entirely up to the parties. The parties must register the conclusion with the court. This means that the case has been settled finally according to ADR. It is not clear whether the *res judicata* rule is applicable in any particular case. It should be noted that according to information from the Arbitration Center in Malaysia, in international arbitration cases, even the member countries of AALCC do not invoke the jurisdiction of the facilities of the Center. Instead, they go to international arbitration centers such as ICC in London or other bodies. Even if they invoke the procedure of the ALCC, they go to Western arbitrators and not to the arbitrators in the region.