

BEST PRACTICES IN ANTI-CORRUPTION: A DECADE OF INSTITUTIONAL AND PRACTICAL DEVELOPMENT IN SOUTHEAST ASIA

*Amir bin Nasruddin**

I. INTRODUCTION

Corruption as we all know is a “crime without boundaries.” International cooperation plays a vital role in combating corruption when the crime exceeds its boundaries. One of the tools in combating corruption is through legislation. The Malaysian anti-graft legislation has itself gone through phases and changes. Malaysia’s first specific law on anti-graft was legislated in 1961,¹ and was followed by another which was legislated in 1997.² In 2009, Malaysia’s latest anti-graft law was legislated³, which came into effect on 1 January 2009.

II. CRIMINALIZATION OF SPECIFIC OFFENCES — MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009 [ACT 694]

Criminalization of specific offences is stipulated under Part IV of the Malaysian Anti-Corruption Commission Act 2009 [Act 694]. In Malaysia, the following conduct has been criminalized:

- The offence of soliciting and receiving or giving and offering gratification by a person himself, or by or in conjunction with any other person as an inducement to or reward for, or otherwise on account of any person doing or forbearing to do in respect of any matter or transaction, actual or proposed or likely to take place.⁴
- Any agent who corruptly accepts or obtains or gives or offers any gratification as an inducement for doing or forbearing to do any act in relation to his principal’s affairs.⁵
- Any person who gives to an agent, or being an agent uses with intent to deceive his principal, any receipt, account or other document which contains any statement which is false in material particulars with intent to mislead the principal.⁶
- Any person who, with intent to obtain from any public body a contract for performing any work, offers any gratification to any person who has made a tender for the contract

* Deputy Public Prosecutor, Legal and Prosecution Division, Malaysian Anti-Corruption Commission.

¹ Prevention of Corruption Act, 1961 [Act 57].

² Anti-Corruption Act 1997 [Act 575].

³ Malaysian Anti-Corruption Commission Act 2009 [Act 694].

⁴ *Offence of accepting gratification*, section 16 Malaysian Anti-Corruption Commission Act 2009.

⁵ *Offence of giving or accepting gratification by agent*, section 17 Malaysian Anti-Corruption Commission Act 2009.

⁶ *Offence of intending to deceive principal by agent*, section 18 Malaysian Anti-Corruption Commission Act 2009.

as an inducement for his withdrawing the tender or anyone who solicits or accepts any gratification as an inducement for his withdrawing a tender made by him for such contract.⁷

- Any person who offers to an officer of the public body, or being an officer of the public body, solicits or accepts any gratification as a reward for:
 - The officer voting or abstaining from voting at any meeting of the public body in favour or against any measure, resolution or question submitted to the public body;
 - The officer performing or abstaining from performing or aiding in procuring, expediting, delaying, hindering or preventing the performance of any official act;
 - The officer aiding in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or
 - The officer showing or forbearing to show any favour or disfavour in his capacity as such officer.⁸
- Any officer of the public body who uses his office or position for gratification when he makes any decision or takes any action whether for himself, his relative or associate in relation to any matter in which such officer or any relative or his associate, has interest whether directly or indirectly.⁹
- Any person to whom gratification is given, promised or offered shall report such gift, promise or offer and any person who fails to report.¹⁰
- Any person who enters into any dealing (e.g. used, holds, receives or conceals) any property of the corrupt person.¹¹
- Any person making false statement which is intended to mislead the officer of the Commission or the Public Prosecutor.¹²

Criminalization of the foreign public officials has been incorporated into the Malaysian Anti-Corruption Commission Act 2009 [Act 694].¹³

Section 22 of Act 694 provides, any person who by himself, or by or in conjunction with any other person gives, promises or offers, or agrees to give or offer, to any foreign public official, or being a foreign public official, solicits, accepts or obtains, or agrees to accept or attempts to obtain, whether for the benefit of that foreign public official or of another person, any gratification as an inducement or reward for, or otherwise on account of—

⁷ *Corruptly procuring withdrawal of tender*, section 20 Malaysian Anti-Corruption Commission Act 2009.

⁸ *Bribery of officer of public body*, section 21 Malaysian Anti-Corruption Commission Act 2009.

⁹ *Offence of using office or position for gratification*, section 23 Malaysian Anti-Corruption Commission Act 2009.

¹⁰ *Duty to report bribery transaction*, section 25 Malaysian Anti-Corruption Commission Act 2009.

¹¹ *Dealing with, using, holding, receiving or concealing gratification or advantage in relation to any offence*, section 26 Malaysian Anti-Corruption Commission Act 2009.

¹² *Making of statement which is false or intended to mislead, etc., to an officer of the Commission or the Public Prosecutor*, section 27 of the Malaysian Anti-Corruption Commission Act 2009.

¹³ *Bribery of foreign public officials*, section 22 of the Malaysian Anti-Corruption Commission Act 2009.

- (a) the foreign public official using his position to influence any act or decision of the foreign state or public international organization for which the official performs any official duties;
- (b) the foreign public official performing, having done or forborne to do, or abstaining from performing or aiding in contribution to the international's effort to criminalize the conduct. procuring, expediting, delaying, hindering or preventing the performance of, any of his official duties; or
- (c) the foreign public official aiding in procuring or preventing the granting of any contract for the benefit of any person.

In addition, the Act also covers aiding and abetting in committing the offence, conspiring to commit the offence or attempting to commit the offence.¹⁴

Section 3 of the Act interprets "prescribed offence" as an offence under the Act which includes any offence under any written law as specified under the schedule,¹⁵ an offence punishable under section 137 of the Customs Act 1967 [Act 235] and an offence under Part III of the Election Offences Act 1954 [Act 5]. It also covers attempt to commit¹⁶ or abetment of or a criminal conspiracy to commit¹⁷ the offences of the above mentioned (prescribed offence) as an additional offence.

The Act provides that the evidence of Accomplices and Agent Provocateurs could be used as admissible evidence in the prosecution of offences of bribery.¹⁸

This provision would be of invaluable assistance, as one is only too aware that corruption is sometimes regarded as *silent crime* between consenting adults. Having said this, if there is other compelling independent and corroborative evidence, the "giver and taker" of the bribe could be prosecuted, respectively. *Plea-bargaining* is being introduced into the Criminal Procedure Code which came into force on 1 June 2012¹⁹. This facility would enable the cooperation of co-offenders in the prosecution of bribery offences.

¹⁴ *Attempts, preparations, abetments and criminal conspiracies punishable as offence*, section 28 Malaysian Anti-Corruption Commission Act 2009.

¹⁵ *Offences punishable under sections 161, 162, 163, 164, 165, 213, 214, 215, 384, 385, 386, 387, 388, 389, 403, 404, 405, 406, 407, 408, 409, 417, 418, 419, 420, 465, 466, 467, 468, 469, 471, 472, 473, 474, 475, 476 and 477A of the Penal Code*.

¹⁶ Section 3 Interpretation of 'prescribed offence' paragraph (d).

¹⁷ Section 3 Interpretation of 'prescribed offence' paragraph (e).

¹⁸ *Evidence of accomplice and agent provocateur*, section 52 Malaysian Anti-Corruption Commission Act 2009.

¹⁹ *Plea bargaining*, section 172C of Criminal Procedure Code [Act 593].

III. ASSET RECOVERY

The MACC also within the Act has well-defined powers of freezing of assets and powers of forfeiture. This is apart from the additional powers provided for in the Anti-Money Laundering Legislation.²⁰ Asset recovery is an important component of forfeiture of property. The field of asset recovery encompasses all of the steps necessary for a successful asset recovery in order that it be liable for forfeiture. Asset recovery would include asset tracing, freezing, confiscating and resolving competing claims from bona fide parties. Apart from provisions within the Act, invoking Mutual Legal Assistance and Anti-Money Laundering provisions, would be inevitable, in this regard.

In tandem with this Act, we have recourse to the Mutual Assistance in Criminal Matters Act 2002²¹ and various mutual legal assistance treaties and memoranda of understanding entered into by our country with foreign countries and counterparts, to assist in providing for mutual legal assistance in criminal matters.

IV. POWERS OF FORFEITURE

Forfeiture is the permanent deprivation by an order of a court or other competent authority. In this respect, the provisions of section 40 and 41 of the Act provides the power of forfeiture.²² The term property under the Act means real or personal property of every description, including money of property whether situated in Malaysia or elsewhere, whether tangible or intangible and includes an interest in any such real or personal property.

Where the offence is proved against the accused but the property that is proved to be the subject matter of the offence cannot be traced or is disposed, the court can order the accused to pay a penalty that is equivalent to the amount of the gratification. This penalty is over and above the punishments provided for under the Act.

V. MOHD KHIR TOYO'S CASE²³ [CASE AGAINST A PUBLIC OFFICIAL AND FORFEITURE OF PROPERTY WHICH IS THE SUBJECT OF THE OFFENCE]

The accused was the Chief Minister (Menteri Besar) of Selangor, also holding the post of Chairman of Selangor State Development Cooperation (PKNS), at that material time and was charged under section 165 of the Penal Code for, as a public servant, the offence of accepting a valuable thing for himself in exchange for consideration which he knew to be inadequate from SP2 whom he knew had connections with his official work." Section 165 of the Penal Code is a prescribed offence under the Anti-Corruption Act 1997 by virtue of section 2 of the latter Act.

²⁰ Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 [Act 613].

²¹ Mutual Assistance in Criminal Matters Act 2002 [Act 621].

²² Section 40 of MACC Act 2009 provides that in any prosecution under the MACC Act 2009, the court can make any order for the forfeiture of any property which is proved to be the subject matter of the offence. Section 41 of the Act provides that where any property seized under the MACC Act and where there is no prosecution or convictions, the Public Prosecutor may apply to a Sessions Court Judge an order of forfeiture if he is satisfied that the property had been obtained in connection with an offence under the Act.

²³ Mohd Khir Toyo v. PP [2015] 8 CLJ 769.

A. Brief Facts of the Case

SP2 bought a property from SP1 for the price of RM6.5m. In 2004, the accused wanted to buy a house from SP2. SP2 asked for the price between RM5m – RM5.5m. The accused counteroffered for RM3.5m, which was well below market price. The accused came to know that the property was well below market price as he wanted to renovate the house and appointed a renovation contractor even before he was registered as the owner.

SP2 had agreed to sell the said property at RM3.5m to the accused, out of apprehension that his (SP2) position in Selangor would otherwise be adversely affected if he were to insist on RM5 - 5.5m.

SP2 had official business with the accused by the application of Roniaga that bore the endorsement of the accused. The relationship between SP2 and the accused in his capacity as Chairman of PKNS was also proved by the joint-venture between PKNS and Roniaga dated 9.5.2002. Although the seller was Ditamas, SP2 was the director of Ditamas who sold the said land to the accused. The trial court found that SP2, through his companies, had dealings with the accused in his official capacity.

B. Finding of the Trial Court (High Court)

The accused was found guilty and sentenced to 1-year's imprisonment. The property was also being ordered to be forfeited under section 36(1) which, read together with section 56 of the ACA 1997, provided for forfeiture of the subject property. The conviction, sentence and the forfeiture order of the trial court was later affirmed by two other appellate courts (Court of Appeal and Federal Court).

VI. PROTECTION OF WITNESSES/INFORMERS

There is within the Act, protection for informers and their identities.²⁴ Equally, we have a Whistle Blower's Legislation²⁵ and Witness Protection Legislation²⁶ to enhance the protection given to informants in relation to corruption or bribery offences.

VII. LIABILITY FOR OFFENCES OUTSIDE MALAYSIA

Extraterritorial jurisdiction to prosecute bribery exists if there is sufficient basis for jurisdiction where there is a real and substantial risk between the offence and Malaysia. In making this assessment, the court will consider all relevant facts that happened in Malaysia that gave Malaysia an interest in prosecuting the offence.²⁷

²⁴ *Protection of informers and information*, section 65, Malaysian Anti-Corruption Commission Act 2009.

²⁵ Whistleblower Protection Act 2010 [Act 711].

²⁶ Witness Protection Act 2009 [Act 696].

²⁷ Section 66 of the Malaysian Anti-Corruption Commission Act 2009.

VIII. POWERS OF INVESTIGATION

The MACC's tools of investigation for the offence of bribery are enshrined in Part V of the Act.²⁸ A glimpse of these powers would indicate that there are explicit provisions overriding banking secrecy laws and professional legal privilege. Further, the Act provides that officers of the Commission have the power to obtain information in the course of investigation for an offence under the Act, about property that they reasonably have grounds to believe have been acquired through proceeds of the bribery. This information may be secured from the suspect himself, his relatives or associates, or any other person whom the officer has reasonable grounds to believe can assist in the investigations. Failure by any party to provide the information required is a criminal offence.²⁹ Interception of communications³⁰ and surrender of travel documents of persons subject to investigations³¹ are incorporated into the Act as tools of investigation.

IX. CONCLUSION

In combating "*crime without boundaries*", international cooperation is imperative in any country's strategy towards it. International cooperation cannot be more forcefully required than in the investigations into bribery. Cross-border investigations and joint investigations would be vital in this area. Strengthening the ability of countries to recover assets that are regarded as proceeds of bribery and are concealed in foreign jurisdictions is now a key part of the worldwide campaign against corruption. Many countries, Malaysia included, seem committed in taking important steps to facilitate rightful recoveries.

The informal assistance of the international cooperation is at the law enforcement level from counterparts in other countries to render assistance in obtaining publicly available information, i.e. land title records, company registration, locating a person, premises, arrangement to interview a person and verifying information if they have direct contact at the law enforcement level, which has been proven to hasten the process of investigation.³² However, these informal measures cannot be done where compulsive measures are required or where a witness is reluctant to cooperate, e.g. the issue of subpoenas to witnesses to record statements before a judicial authority and production orders to financial institutions or companies.³³ The challenges of formal requests through Mutual Legal Assistance normally will be understanding the laws and procedures, knowing the mandatory or discretionary grounds of refusal and undertaking and languages to be used.

Maintaining a good relationship between the person in charge of the Central Authorities or between law enforcement agencies will nurture and ensure the success of international cooperation either through formal or informal requests.

²⁸ Section 29-49 Malaysian Anti-Corruption Commission Act 2009.

²⁹ Section 36 Malaysian Anti-Corruption Commission Act 2009.

³⁰ Section 43 Malaysian Anti-Corruption Commission Act 2009.

³¹ Section 44 Malaysian Anti-Corruption Commission Act 2009.

³² Dato' Umar Saifuddin bin Jaafar, "Informal Measures In Mutual Legal Assistance – Success Stories; Public-Private Partnership To Prevent And Detect Corruption".

http://www.unafei.or.jp/english/pdf/PDF_GG9_Seminar/19_GG9_IP_Malaysia2.pdf.

³³ Baizura Kamal, "International Cooperation: Mutual Legal Assistance and Extradition".

http://www.unafei.or.jp/english/pdf/PDF_GG6_Seminar/05-4_Malaysia.pdf.

To that end, unless countries are prepared to set aside the obstacles of differing legal regimes, political chauvinism, suspicions and cultural differences and adopt a common stand on the eradication of corruption, the offence of bribery will remain unabated and the recovery of assets will be thwarted.