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FINANCIAL CRIMES AND PROSECUTION OF CORRUPTION AND RELATED CRIMES

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I thank the organizers for inviting me to this conference and, more so, for giving me the honor to speak at its inaugural session.

It appears that in developing countries, financial crimes and corruption cases grow, in size and number, with a country's development and prosperity. When I first became a Magistrate 38 years ago, corruption cases were almost unheard of. Not that there was no corruption but they were petty ones. Even the Anti-Corruption Agency was not in existence yet. The same may be said about financial crime cases. With few banks and companies which were usually family-owned, criminal breach of trust cases were rare. "Capital market offences" were completely unknown.

Over the years, with development, economic growth, development of capital market, a taste for expensive lifestyle, business competition and so on, the nature of the cases changes. With independence, comes power, an important ingredient for high-profile corruption. What used to be a "gift" for a small favor becomes a percentage in a multi-million dollar international contract. The receiver is no longer a low-ranking, lowly-paid officer but may be a politician, a high ranking officer or an army General with a Swiss bank account. The giver is no longer the shopkeeper wanting his business license to be processed quickly, but may be, a multinational selling sophisticated equipments. Investigation and prosecution become more difficult, not merely because the transactions are complicated and executed at various parts of the world, but because, both the giver and the receiver are powerful, politically or otherwise, and they can also afford expensive "consultants" and lawyers. What is more important is that, as in most cases of corruption, both the giver and the receiver may be willing parties, not as in the case of theft, for example, where one is the thief and the other is the victim. The crime may not even be reported.

In Malaysia, partly to overcome this problem, the law created certain offences and procedures that simplify both investigation and prosecution. First, there is an offence called "corrupt practice". The law makes it an offence for a member of the administration or a member of Parliament or of the State Legislative Assembly or any public officer who, in his capacity as such a member or officer, has used his public position or office for his pecuniary or other advantage – section 2(2), Emergency (Essential Powers) Ordinance 1970.

There had been a number of cases where State Executive Officers, who were politicians, were charged and convicted because they were present at the meeting of the Executive Council (State Cabinet) when it approved an application, usually for land, in which the member had an interest, the applicant being his close relative or, as in one case, his prospective second wife. Of course it would not be an offence if he were to declare his interest and leave the meeting during the deliberation. But, if such things happen too often, in a democracy, the government may be "judged" by the voters.

To give another example, if the Public Prosecutor has reasonable ground to believe, based on the investigation carried out by an officer of the Anti-Corruption Agency that any offence under the Anti-Corruption Act has been committed, the Public Prosecutor may, by a written notice, require the person suspected of having committed such an offence to furnish a statement on oath or affirmation, inter alia, setting out all his sources of income, earnings or assets. If the Public Prosecutor has reason to believe that the officer owns, possess, controls or holds any interest in any property which is excessive having compared to his emoluments, the Public Prosecutor may direct him to furnish a statement on oath or affirmation explaining how he was able to own etc. such property. If he fails to explain satisfactorily such excess, he may be prosecuted and, if found guilty, convicted.

In corruption cases of receiving corrupt money, the real problem for the prosecution is to prove the purpose for which the money was demanded and received. To facilitate prosecution, the law provides that upon proof of receipt of the money, a presumption is raised that the money is received for corrupt purposes –section 42, Anti-Corruption Act 1997. It is then for the accused person to rebut the presumption.

Similarly, in cases of criminal breach of trust, the law provides a presumption of "dishonest intention" in the event the breach of trust is proved – section 409B Penal Code. Again, once the presumption is raised, it is for the accused person to rebut it, may be by showing that he did it in good faith for the benefit of the company and that such is an accepted commercial practice.

For "capital market offences", including share price manipulation in the stock exchange and short selling, the prosecution has to lead complicated and technical evidence as to the activities in the share market and the prosecution can rarely prove their case without the help of an expert. However, although the evidence of the expert does help the Court in arriving at a decision, the experts seldom commit themselves to a specific finding. The most that they would say is that there were unusual activities in the share market but whether the activities amounted to manipulation of the share market is left to Judge to decide. A Judge has to have sufficient knowledge of the subject to be able to decide such cases.

Another difficulty faced by the prosecution in commercial crime cases is that the main witnesses are officers, employees or ex-officers and ex-employees of the organization and they are reluctant to give evidence incriminating their bosses or ex-bosses. In such

a situation the prosecution is always left with a dilemma of whether to call those witnesses or not.

Everyone knows and agrees about the evils of corruption, including the people who commit the offence. Yet, like cancer, it is most difficult to eradicate. But, it does not mean that we should give up. Any effort to eradicate corruption must begin from the top. First and foremost, there must be the political will. Without it, it is only empty slogan shouting.

Secondly, we should not only focus on the poorly-paid receivers in developing countries. It is equally important to focus on the rich givers in developed countries.

Thirdly, there must be co-operation between similar agencies in every country in the world to facilitate and assist each other in the investigation and the prosecution of such cases.

Fourthly, in every institution, there must be leadership by example. It is said that in every institution, 10% of the members are incorruptible, 10% are corrupt anyway, but the remaining 80% would, to a large extent, depend on the leadership. So, it is important the leaders provide good examples to influence the 80% the right way.

Fifthly, the law, both substantive and procedural, should be updated so as to facilitate the investigation and prosecution and to ensure that effective and fair justice is achieved.

Sixthly, those agencies entrusted with the responsibility to combat corruption and financial crimes must be provided with sufficient manpower and facilities to enable them to carry out their work effectively and efficiently and without any interference from those in power.

Seventhly, they themselves must carry out their work diligently and honestly.

Lastly and most important of all (the list is by no means exhaustive), Judges hearing those cases must be incorruptible.

Thank you.