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Corruption in the Healthcare Sector in Malaysia: The legal perspective

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Abstract

It is no doubt that corruption has enormous effects on the efficiency of the healthcare sector. Henceforth, the healthcare sector is a very complex and challenging sector for preventing corruption. Unpacking this issue leads us to the efforts made by the Malaysian government through the Malaysian Anti-Corruption Commission (MACC) and Cabinet Special Committee on Anti-Corruption (JKKMAR) by attempting to control corruption in a variety of ways, such as through general accountability frameworks and broader inclusion of transparency in its operations. Therefore, this research aims to present a legal framework, policy and good practice to guide policymakers in examining corruption in the health sector and to identify possible ways to intervene towards achieving a corrupt-free nation as echoed in the National Anti-Corruption Plan (NACP) 2019-2023.

Keywords: Corruption; risks; laws; healthcare

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1.0 Introduction

In the medical and dental healthcare sector, corruption has been reported to have caused a loss of approximately USD455 billion worldwide every year (National Academies Press, 2018). Corruption in the healthcare system has been related to inadequate funding, lack of regulation and/or enforcement, and insufficient transparency in the administration and management of the governing body. Forms of corruption that may exist within this system may be in the form of bribery, aimed at intentionally influencing someone's action through the act of giving or receiving a reward. It was found that 45% of people worldwide believed that corruption exists in the healthcare sector, indicating the possibility of such an issue being highly prevalent amongst the society (National Academies Press, 2018).

2.0 Literature Review

The Malaysian initiatives to control corruption dated back to 1961 with the introduction of the Prevention of Corruption Act 1961 and the passing of the Anti-Corruption Act in 1997. The Malaysian Anti-Corruption Commission (MACC) describes corruption as an act of providing or accepting any gratification or return in the form of money or similar valuable benefit for completing an undertaking concerning his or her employment (Malaysian Anti-Corruption Commission, 2020).

The MACCA specifies four primary offences. First, the offence of accepting gratification or bribery under section 16 and obtaining gratification by an agent in light of section 17(a). Section 16 states that a provider or a receiver or an offeror of any gratification as an

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inducement to or a reward for any person or any officer of a public body doing or forbearing to do anything in the future, actual time or in the past, in which the public body is concerned commits an offence. The healthcare institutions, in particular, the public hospitals, fall under the definition of a public body, and any officer of the public hospitals are likely to match the phrase 'officer of a public body' described in section 3 of the MACCA in which include any person who is a member, an officer, an employee or a servant of a public body. This position is further strengthened under section 17(a) of the MACCA if an agent or an officer receives or agrees to receive or attempt to acquire, from any person, for himself or any other person, any gratification as a bribe for doing or forbearing to do, any act in relation to his principal's affairs or business.

Second, the offence of offering or providing bribery under section 17(b) of the MACCA. This section describes a person commits the offence if he provides or agrees to provide or offers any gratification to any agent as a bribe for doing or forbearing to do presently or in the past, any act concerning his principal's affairs or business. The term agent is stated under section 3 of the MACCA as any person employed by or acting for another and includes an officer of a public body or an officer serving in or under any public body, a trustee, an administrator or executor of the estate of a deceased person, a subcontractor and person employed by or acting for such trustee, administrator or executor, or subcontractor. In the context of public hospitals, a contractor involved in building any blocks of the hospital and a supplier of medical or dental equipment is likely to be in the position of the potential persons described under section 17(b) of the MACCA dealing with an agent.

Third, the offence of intending to deceive principal by an agent using the false claim as provided under section 18 of the MACCA 2009. The section explains that a person commits an offence if he gives to an agent or being an agent, he uses with intent to deceive his principal, any receipt, account or other documents in respect of which the principal is interested, and which he has reason to believe contains any statement which is false or erroneous in any material particular and is intended to mislead the principal.

Fourth, the abuse of power using office or position for gratification under section 23 of the MACCA deals with any public body officer who uses his office or position for any gratification. The doer of the act is not confined to the officer himself or herself but extended to include relative or associate. The presumption in this provision until the contrary is proven is the use of office or position in deciding any matter related to the officer or any relative or associate, if there is an existence of interest, whether directly or indirectly. The risk of nepotism dan favouritism is likely to be challenged under this section. In public hospitals, this provision is the most relevant section controlling the offence of using office or position for gratification by a government servant or cronies. The typical scenario commences with a request by a suspect to the respective government officials. A favour is proposed in a meeting by the government officer, i.e., a superior and declared the interest on that matter to allow the superior to leave the meeting room while other members obediently approved the suggested request. On record, the superior was absent during the meeting, and no act of soliciting or accepting was committed. In addition, no member of the meeting is willing to testify, admitting the special request. This leads to the failure in establishing a prima facie case with no direct involvement of the superior. A strategic measure or formula is needed to create a rebuttable presumption. Perhaps the approach of section 214(2) of the Companies Act, 2016 in determining a director makes a business judgment to meet the duty requirement can be an example in drafting conditions of a presumption.

There are a few other offences that may be engaged by those in the healthcare environment. Procuring withdrawal of tender under section 20 of the MACCA explains a crime of offering any gratification or soliciting or accepting any gratification as an inducement or a reward for his withdrawing of tender. Section 21 of the MACCA highlights multiple ways bribery of officer of a public body may be conducted either by offering to an officer, or the officer solicits or accepts any gratification as an inducement or a reward in voting or abstaining from voting at any meeting of the public body in favour of or against any measure, resolution or question submitted to the public body; in performing or abstaining from performing or aiding in procuring, expediting, delaying, hindering or preventing the performance of, any official act; in aiding in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or in showing or forbearing to show any favour or disfavour in his capacity as such officer. The section also states that the offence is committed regardless of the position of the officer who has no power, right or opportunity so to do.

3.0 Methodology

Our research uses doctrinal analysis to synthesise various sources, including statutory provisions, regulatory principles, interpretive guidelines, and framework (Hutchinson & Duncan, 2012), all of which are relevant to anti-corruption, accountability, and transparency in Malaysia's healthcare system. Examining the legislation and policies that contribute to accountability and transparency in the health sector is part of the doctrinal analysis. Since this method is primarily characterised by the study of legal writings, it is commonly referred to as "black-letter law" (Chynoweth, 2008). Furthermore, secondary data was examined to evaluate the theories, concepts, and legal commentaries that underpin the study on the risk factors for corruption in the healthcare industry. Articles that merely made references to corruption in other industries or did not suggest theoretical legal structures or provide empirical data were removed. The data analysis methods used in this study emphasise an interpretive approach. This analysis corroborates this strategy in terms of creating recommendations for improving Malaysia's current legal position on the risks of corruption in the healthcare sector, as well as the importance of doctrinal research in the formulation of legal doctrines based on the evaluation of relevant legislation.

4.0 Findings and Discussion on Case Law

Bearing in mind the development of law on corruption in Malaysia, there are other statutes that may or may not be familiar to the general public, which set out the "serious offences" envisaged under AMLA. These are not only limited to the Malaysian Anti-Corruption Commission Act 2009 but also include other Acts such as the Penal Code (Act 574), Dangerous Drugs Act 1952, Child Act 2001, Anti-Trafficking in

Persons and Anti-Smuggling of Migrants Act 2007 and others (Buang, 2018). These various statutes are playing against the backdrop of the "serious offences" that give AMLA power to charge any person if he commits the crimes such as criminal breach of trust, accepting gratification, falsifying documents, offering and receiving bribes, theft and others.

In 2012, regarding the case of *Hamimah Idruss v PP* [2020] 6 MLJ 407, it was reported that a medical practitioner had been charged for transferring RM42 million into her account as a consequence of false financial documents under section 4(1) of the AMLA and section 109 of the Penal Code. She was later found guilty and received the punishment of imprisonment for 38 years and a fine amounting to RM639 million. She became the first person in the country to be charged under this Act (The Malay Mail, 2020).

The next case was the Port Klang Free Zone (PKFZ) scandal dealing with a private entity (KDSB) majority-owned by a member of Parliament. The KDSB sold the land to the Port Klang Authority (PKA) and managed to issue bonds and collected funds above RM4 billion with the assistance of the Ministry of Transport (Buang, 2018). This case was jointly handled by the Malaysian police and the MACC dealing with a few arrests of the senior political leaders from the National Front or Barisan Nasional (BN). The BN was the most extended political coalition in power since Malaysian independence in 1957 until it lost the majority support to form a ruling government to the Pakatan Rakyat in the 2018 general election. The irony of the success of the arrest and prosecution was the release of the culprits through acquittal basis on political grounds and reflected the ugly truth of political intervention (H. B. Lee & Lee, 2012)

Another public official case that has also attracted the Malaysian spotlight was the case of Mohd Khir Toyo (2015). Khir Toyo was the Chief Minister of Selangor and Chairman of Selangor State Development Corporation (PKNS). This case was handled under section 165 of the Penal Code under the older Anti-Corruption Act 1997 that stipulated the criminal offence under the former where a public official was committing an offence by accepting a valuable gift for himself in exchange for inadequate consideration connected to his official work (Nasruddin). *Mohd Khir Toyo v PP* [2015] 8 CLJ 769 was a 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 whom he knew had connections with his official work." The price of the property involved was RM6.5m. In 2004, the accused wanted to buy it for RM3.5m, which was well below the market price. The accused realised 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. The owner had agreed to sell the said property at RM3.5m to the accused out of apprehension that his position in Selangor would otherwise be adversely affected if he were to insist on RM5 - 5.5m. The owner of the house had official business with the accused. The relationship between the owner and the accused in his capacity as Chairman of PKNS was also proved by the joint-venture between PKNS and the company of the owner of the house. The trial court found that the owner of the house, through his companies, had dealings with the accused in his official capacity. 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 Anti-Corruption Act 1997, provided for forfeiture of the subject property. The conviction, sentence and forfeiture order of the trial court were later affirmed by two other appellate courts (Court of Appeal and Federal Court).

5.0 Conclusion

In conclusion, it can be submitted that some of the literature sheds light on the fact that corruption in the healthcare industry has major repercussions on the five pillars of health system performance: access, quality, equity, efficiency, and efficacy of healthcare services. Cases show that when it comes to licencing and accrediting health facilities, providers, services, and products, government officials utilise discretion, putting them at risk of abusing their power and misusing resources. It is also rather apparent that the resulting corruption issues include, among other things, improper ordering of tests and procedures for financial benefit, under-the-table payments for care, absenteeism, and the exploitation of government resources for private practice. Accordingly, the establishment of the Anti-Bribery Management System (ABMS) and Organisational Anti-Corruption Plan (OACP) is strongly recommended to help promote transparency and integrity in all agencies. A rotation system of the management can also be introduced operating at three different levels such as department, district, and state to provide flexibility and practicality.

Nonetheless, it is hoped that some of the issues that this paper suggested and recommended here will have ongoing relevance. The conclusion that this research has reached and the recommendations that have been made importantly offer one potential route for improvements in law and policies that we have, pertaining to the corruption in the healthcare sector in Malaysia, and thus, will instil public confidence in the law.

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