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**EDITORIAL**

**POSSIBLE RESTORATION OF MALAYSIA'S MISMANAGED ECONOMY – THE APPOINTMENT OF A COMMISSION OF ENQUIRY**

We had, in these columns in June 1986, called for the appointment of a Royal Commission to generally study and report upon the banking and financial systems as a result of one specific transaction, namely, the purchase by the Minister of Finance, Encik Daim Zainuddin, of a large portion of shares in UMBC. Three specific matters regarding Daim's purchase were considered in our June 1986 Editorial. First, Daim's ability to borrow M\$164 million from OCBC in circumstances suggesting that his official position and friendship with the Prime Minister enhanced his chances of securing the loan. Second, whether the provisions of Section 24 of the Banking Act 1973 were complied with when approval was given for the purchase. Third, the reasons for the purported failure of Pernas and Petronas to take up their respective allotments of shares issued by UMBC in May and June 1985 which resulted in a significant change in the equity structure of UMBC with Daim emerging as the major shareholder.

The thrust of that Editorial was that when law, politics and business merge with each other the result is conflict of interests. We propose to consider events which have occurred since June 1986 or events which have become public knowledge since then with a view to ascertaining if our earlier plea for the appointment of a Royal Commission was justified. Consider the following:—

1. **The Malaysian Government's involvement in the tin market**
  - (a) For five years until 18th September 1986, the Malaysian Government had denied persistent speculations that it was the mystery tin buyer in the London Metal Exchange in an attempt to corner the world tin market in late 1981 and early 1982. The Prime Minister, Dr. Mahathir Mohammed, admitted for the very first time on 18th September 1986 during the UMNO Annual General Assembly that the Government was in fact involved in the affair.
  - (b) The Asian Wall Street Journal ("AWSJ") published a detailed and comprehensive report on the affair in its 22nd September 1986 issue. To date the numerous allegations against the Malaysian Government and its senior officers have not been challenged in any way. Disturbing questions arise if the facts are as reported in that article.
  - (c) To carry out the scheme a corporate vehicle was required. The Government incorporated Maminco Sdn Bhd in June 1981. The paid-up capital was \$2/-. Two senior officers of Malaysia Mining Corporation were appointed its Directors. Maminco became the secret government vehicle to carry out the purchases. Maminco appointed David Zaidner (whose services it seems were rejected by the Indonesian authorities) and Marc Rich & Co as its commodity brokers.
  - (d) To finance the purchase of the tin, Bank Bumiputra Malaysia Berhad, in December 1981, extended credit in the sum of US\$260 million (M\$663 million) to Maminco through its off-shore branch in Bahrain.

What is unclear is whether the Government directed Bank Bumiputra to make this loan. It was so alleged by Hashim Shamsuddin's Counsel in his criminal trial in the Supreme Court of Hong Kong on 14th January 1987. This has, however, been denied by the Minister of Finance. By early 1982 Malaysia had amassed 40,000 to 50,000 tons of physical tin and faced the expensive task of holding it. The Malaysian Government's plan backfired in February 1982 when the tin market collapsed, leaving the Government with thousands of tons of tin expensively acquired. Maminco owed huge debts to Bank Bumiputra that could not be repaid. Hundreds of mines closed all over Malaysia, and indeed in other tin-producing countries. Tin prices sunk to their lowest levels since the Second World War.

- (e) The problem for the Government was how to recoup large losses without publicly acknowledging what went wrong. At the same time the Government could not allow Bank Bumiputra Malaysia Berhad to show losses in that scale in the wake of the BMF losses.
  - (f) According to the AWSJ article senior officers of the Government, including the then Secretary-General of the Ministry of Finance, Tan Sri Thong Yaw Hong, and the Deputy Governor of Bank Negara, Dr. Lee See Yen, initiated 2 rescue plans. The first was the use of secret allocations from the national budget to repay Maminco's loan to Bank Bumiputra. Thus monies from the "secret service vote" in the annual budget were transferred this way, making detection difficult. By the end of 1984 Bank Bumiputra's loan to Maminco was repaid in full. The second plan was to set up Makuwaza Securities Sdn Bhd to trade in preferential shares and to use the profits therefrom to repay the tin losses.
2. **The Employees Provident Fund Board's Investment in Shares**
- (a) Rumours started circulating in 1986 about the Employees Provident Fund Board's ("EPF") involvement in the share market which resulted in the EPF suffering tremendous losses. From the documents available for public inspection, including another detailed article which appeared in the 10th July 1986 issue of AWSJ the following story emerges.
  - (b) On 23rd June 1984 Makuwaza Securities Sdn Bhd was incorporated. The paid-up capital was \$2/-. The original subscribers and directors were 2 civil servants who had links with the Ministry of Finance. Makuwaza was ostensibly private, but was held by nominee shareholders on behalf of the Government. On 1st August 1984 the paid-up capital increased to \$10 million with each shareholder's proportion increasing to 4,999,999 shares.
  - (c) Between June 1984 and May 1985 new shares issued by 13 Companies listed in the Kuala Lumpur Stock Exchange were allocated to the EPF on the express condition that EPF transfer 70% of each allotment to Makuwaza. The objective was to ensure that Makuwaza would benefit from the quick appreciation in the value of cheaply acquired shares upon quoting for trading. A typical example was the share issue made by Sri Hartamas Corporation Bhd. EPF was allocated 2 million

shares at \$1/- each. 70% or 1.4 million shares were immediately transferred to Makuwaza at the same price. When Sri Hartamas was listed for trade, it opened at \$2.30 per share. That meant that there was an immediate gain of \$1.30 per share or \$1.82 million to Makuwaza.

- (d) It further seems that an Investment Coordination Committee was established by the Ministry of Finance under the Chairmanship of Tan Sri Thong Yaw Hong which functioned between July and December 1985. It seems that between \$60 to \$150 million was invested by this Committee on the share market through contributions from EPF, the National Savings Bank and Socso. The shares bought included "trustee stocks" and "non-trustee stocks" as defined in the Employees Provident Fund Act 1951 and the Trustee Act 1949. Apparently the investment in the latter was made on the specific authorisation of the Minister of Finance, Encik Daim Zainuddin. Among the "non-trustee stocks" in which investments were made was Raleigh Berhad which is a Company controlled by family concerns of Daim. Again issues of conflict of interests arise. Apparently EPF suffered a loss of \$11.5 million on the \$30 million invested with the said Committee in a period of 6 months.
- (e) According to a statement issued by EPF's Chairman, Zain Asraai, in July 1986, EPF suffered losses in its share investments in the sum of \$47 million in 1985 and \$141 million up to May 1986.
- (f) Could EPF, as a trustee of public funds, divest equities to a private company at preferential rates? Could Tan Sri Thong Yaw Hong who at the relevant time acted as EPF Chairman, Secretary-General of the Ministry of Finance and Chairman of Capital Issues Committee (CIC) avoid a conflict of interests in these transactions? Why were all the transactions shrouded in secrecy? Was it because they were not above board? Important issues arise if the facts are as outlined above. These issues cannot be cast aside. Instead, they have to be investigated in depth.

### 3. Problems faced by United Asian Bank Berhad

United Asian Bank Berhad, the sixth largest locally incorporated Bank, suffered considerable losses as a result of non-repayment of bad and doubtful debts and the suspension of interest on such bad debts. In consequence Bank Negara required UAB to capitalise in the sum of M\$152 million. Bank Negara bought 60% of the new capital of UAB because the other shareholders were not prepared to take up their allotments. Bank Negara now controls United Asian Bank.

### 4. Problems faced By Perwira Habib Bank Berhad

The unusual detention of Raja Khalid Harun under the Internal Security Act 1960 has highlighted the allegations of huge losses and fraud suffered by Perwira Habib Bank, the country's seventh largest locally incorporated Bank. On 13th January 1987 Raja Khalid, who was a director of the Bank from

October 1975 to August 1985, was detained under the ISA. In a failed attempt to justify the detention to the High Court, Basri bin Ismail, a Deputy Superintendent of Police, affirmed in an Affidavit that Raja Khalid was responsible for causing the Bank to suffer "substantial losses". It was further alleged that Raja Khalid was the managing director and had an interest in a consulting Company, namely, Malayan Commercial Services Sdn Bhd and that Raja Khalid had arranged large loans for customers of the Bank in consideration for commission running to "substantial sums". Raja Khalid was subsequently released by the High Court on a habeas corpus application. Raja Khalid thereafter alleged at a press conference that the police had, during his detention, accused him of "master-minding a plan" which "siphoned away" M\$600 million from the Bank through loans that were not repaid. Raja Khalid also stated at the press conference that Perwira's previously unpublicized loan losses had wiped out the Bank's capital and reserves. Sometime in late February 1987 Bank Negara injected M\$200 million into Perwira Habib Bank and took over control of it.

#### 5. Problems faced By the Cooperative Central Bank

Allegations of poor management and bad loans have also been made against the Cooperative Central Bank ("CCB"). If CCB had been a regular commercial bank it would have been the country's seventh largest locally incorporated Bank. It is not, however, a bank but a deposit-taking cooperative with banking functions. Critics of CCB allege that, as at September 1986, it was faced with as much as M\$500 million in bad or questionable loans out of its total loan portfolio of M\$1.2 billion. If this is true concern must be expressed.

#### 6. Problems faced by the Cooperative Societies

In August 1986 Bank Negara suspended the activities of 24 Cooperative Societies and froze the assets of 136 of their directors. The 24 Cooperative Societies had 588,000 members, 630 branches, total deposits exceeding M\$1.5 billion and employed more than 3,000 employees. Bank Negara later revealed that 21 of the Cooperative Societies were insolvent with a capital deficit totalling an estimated M\$630 million. Police reports alleging fraud and conflict of interests were lodged. According to Bank Negara, the Cooperative Societies had become "large and undisciplined unlicensed finance Companies". Most of these Societies are now in receivership pursuant to Orders of Court.

#### 7. Sale By Daim Zainuddin of UMBC Shares

Sometime in early October 1986 Pernas made a public announcement that it was buying Daim's controlling interest in UMBC amounting to 50.38%. Neither Pernas nor Daim have so far disclosed the price for the shares. The speculation among bankers is that the purchase has cost Pernas between M\$330 million to M\$350 million or M\$8.55 to M\$9.00 per share. The purchase would be paid for by Pernas, partly it seems through a 11 billion Yen loan from a consortium of Japanese bankers. Pernas lost control of UMBC to Daim in 1985 when Pernas did not subscribe to its allotment of a preferentially priced new share issue at M\$4.50 per share. Why it did not do so then has never been explained publicly. In the October 1986 transaction Pernas would have to pay at least M\$27 million more for the same shares than they would have cost when they were offered to Pernas in 1985.

The extent of Daim's profits, if any, from the sale has never been made public. By all accounts the sale would come within the scope of Section 24 of the Banking Act 1973 in which event approval by Daim, in his capacity as Finance Minister, is required by law. Again conflict of interests would arise. Alternatively if the discretion under Section 24 is delegated to another person or body, there may be a breach of the administrative law principle of "delegatus non potest delegare".

8. **The awarding of the M\$3.4 billion North-South Highway contract to United Engineers (M) Bhd**
- (a) Datuk Samy Vellu, the Works Minister, informed the Dewan Rakyat on 20th March 1987 that the Government had awarded the contract for the construction of the North-South Highway to United Engineers (M) Bhd because "of the Company's experience and capabilities." The Minister was asked whether he was aware (i) that United Engineers had suffered a loss of M\$90 million between 1983 and 1985 and (ii) that United Engineers' shares were suspended from trading on the Kuala Lumpur Stock Exchange from 12th May 1983, when its last quoted price was M\$1.27 per share. According to a Report of the Dewan Rakyat session which appeared in the Star newspaper in its 21st March 1987 issue Datuk Samy Vellu is reported to have replied that : "it was not in his purview whether or not the Company (United Engineers) was making profits or losses."
  - (b) One fact which may not have been brought up in Dewan Rakyat is the fact that United Engineers were responsible for the piling work of Northam Court in Penang. This building suffered stability problems which eventually resulted in it being demolished. United Engineers were sued by the owners of the property, namely, Pacific Centre Sdn Bhd, for losses suffered by the owner arising from United Engineers' negligence. United Engineers suffered the opprobrium of having Mareva Injunctions made against it by the Penang High Court in that civil suit (See [1984] 2 MLJ 143). It seems that this civil suit was eventually resolved out of Court.
  - (c) There is no evidence that United Engineers have ever carried out road construction projects. Will they sub-contract the project and collect commission as agents? The entire basis of the awarding of the contract of such magnitude to such a company calls for investigation. It is compounded by allegations that the Company has connections with the powers that be.
  - (d) According to a Report which appeared in the Star newspaper on 30th March 1987 the Government proposes to lend United Engineers a sum of M\$150 million annually to enable it to carry out this project. Again disturbing issues arise if this is correct. We find it difficult to believe that public monies are being used to enable a private Company (i) to be funded to enable it to perform a huge contract and (ii) that such a private company can make enormous profits at the expense of the tax payers.

## 9. Privatisation

The Government has to date privatised certain industries which traditionally belongs to the public sector; the most prominent being telecommunications. An attempt to privatise Lady Templer's Hospital aborted. What concerns us is the lack of public disclosure on the ways and means by which privatisation takes place. For instance how is the tendering exercise carried out? How is the private entity eventually selected? Who makes the selection? How much monies are paid to the Nation's Treasury in exchange for the public industry that is being transferred. What benefits do the public derive from such exercises?

## 10. Conduct of Public Men in Commercial Matters

It is a striking feature of public life in Malaysia in the last five years that public men have not lived up to the expectations that society demands of them. Criminal charges and civil suits involving large sums of money have been instituted against prominent public figures. Thus, the former leader of the Malaysian Chinese Association (Tan Koon Swan) pleaded guilty to a criminal charge involving his business affairs and was sentenced to 2 years imprisonment. The leader of the People's Progressive Party (Tee Eng Chuan) was charged with committing an offence relating to the management of a Cooperative Society. The leader of the Youth Wing of Malaysian Chinese Association (Kee Yong Wee) a current Deputy Minister (Wang Choon Wing) and a former Deputy Minister (Dr. Tan Tiong Hong) have been charged for committing criminal offences of a commercial nature. One could multiply the list. The offences under which these politicians have been charged share a common feature, namely, that they are all related to business. Critics of the close connection between business and politics will no doubt point to the prosecutions of these persons as evidence of the dangers of such link.

## 11. The Country's External Debt Level

According to Zain Asraai, Secretary-General of the Finance Ministry, Malaysia's external borrowings for 1987 are expected to be maintained at the level for 1986, namely, of about M\$1.4 billion. He is reported to have said that the debt level compared favourably with a peak of around M\$5.5 billion in 1982. According to a Report issued by the Development Bank of Singapore, Malaysia's external debt as at 31st December 1986 totals between M\$48 to M\$49 billion and its debt service ratio exceeds 20%. The corresponding figure as at 31st December 1981 was M\$11.34 billion. Part of the reason for the size of the national debt is the depreciation of the Malaysian dollar against the currencies of its trading partners, particularly the Japanese Yen. Yen-dominated debt accounts for roughly 29% of the external debt. What is not clear from these figures is whether the various guarantees issued by the Government have been included in the computations. It can be argued that issuing a guarantee creates a contingent debt in the hands of the guarantor, and therefore should be taken into account when compiling the statistics.

The magnitude of the national debt means three things. First, the nation has been living well beyond its means. Second, what benefits have the man in the street enjoyed as a result of such massive borrowings. Third, owing to the profligacy of a few years future generations of Malaysians are committed, for an indefinite period, to repaying the nation's foreign creditors.

Marcellus remarks in Hamlet, Prince of Denmark: "Something is rotten in the state of Denmark." (Act I, Scene IV). From the foregoing analysis of an amalgam of facts, admissions and allegations an independent observer has every reason to conclude that the financial system in Malaysia is terribly rotten. When one further takes into account the BMF/Carrian Affair, the Pan-El collapse and the liquidation of Malaysian Overseas Investment Corporation Bhd (MOIC) the extent of the crisis becomes clearer. Does it therefore come as a surprise when businessmen, both foreign and local, complain about a lack of confidence in our economy. It is no use our politicians criticising businessmen for not investing in the country when confidence is so lacking. Confidence, like respect, cannot be demanded by our leaders. It must, instead, be earned. The controllers and managers of our economy must by their deeds (and not by their promises) earn such public confidence. Government must act, and perhaps more importantly, be seen to be acting, in restoring public confidence in the economy. The gravity of the crisis demands immediate and urgent corrective action.

As a first step to restoring public confidence it is imperative that the Yang di-Pertuan Agong appoint a Commission of Enquiry. Under Section 2(1) of the Commissions of Enquiry Act 1950, the Yang di-Pertuan Agong may, where it appears to him to be expedient so to do, issue a Commission appointing one or more Commissioners and authorizing the Commissioners to enquire into :-

- (b) conduct or management of any department of the public service of the Federation;
- (d) any other matter in which the enquiry would, in the opinion of the Yang di Pertuan Agong, be for the public welfare.

In our respectful opinion the catalogue of facts discussed above, when taken together, cry out for such an enquiry to be made. In other words objectively speaking facts exist which call for an exercise of the statutory discretion provided for in Section 2(1). The departments which require an Enquiry include the Ministry of Finance and the EPF. The advantages of appointing such a Commission are that the Commissioners would have all the powers to procure and receive evidence by compulsory discovery and by the issue of a warrant of arrest to compel persons summoned to attend. The Commissioners also have power under Section 16(1) of the Act to require the Public Prosecutor to cause any matter relevant to the enquiry to be investigated.

The Commissions of Enquiry Act 1950 imposes a discretion on the Yang di-Pertuan Agong to issue a Commission. The Privy Council decision in *Teh Cheng Poh v. Public Prosecutor* [1979] 1 MLJ 50 is authority for the proposition that such discretion is not absolute but is reviewable by the Courts. In that case the Privy Council held that when statutes make reference to a discretion of the Yang di-Pertuan Agong he does not exercise any of his discretions on his own initiative (except in certain instances which do not apply here) but is required by the Federal Constitution to act in accordance with the advice of the Cabinet. So when one finds in the Commissions of Enquiry Act 1950 powers conferred upon the Yang di-Pertuan Agong that are expressed to be exercisable if it appears to him to be expedient so to do or in his opinion be for the public welfare, reference to "expedience" or "opinion" is in reality a reference to the collective opinion or satisfaction of the members of the Cabinet. The Privy

Council also held in Teh Cheng Poh's case that when the Yang di-Pertuan Agong fails to exercise a statutory discretion mandamus may not lie against him to require him to exercise that discretion; but since he is required in all executive functions to act in accordance with the advice of the Cabinet, mandamus could be sought against the members of the Cabinet requiring them to advise the Yang di-Pertuan Agong to issue a Commission of Enquiry under Section 2(1) of the Commissions of Enquiry Act 1950.

There is little doubt that a formidable body of evidence can be marshalled to establish the factual background for the exercise of the discretion conferred in Section 2(1) of the Commissions of Enquiry Act 1950. We respectfully urge the Cabinet without delay to advise the Yang di-Pertuan Agong to issue such a Commission. The Cabinet must realise that if it fails to so advise the Constitutional Monarch when the evidence of prima facie wrong doing is so overwhelming it runs the risk of having to explain its lack of action to a Court. Having regard to the principles laid down in the Teh Cheng Poh case and the liberal attitude of Courts all over the common law jurisdictions on the matter of standing in Public Law cases, who is to say that if such a challenge is mounted in our Courts, say, by a public spirited citizen or by a public interest group, that it will not succeed.

Would the Cabinet wish to dither or would it rather seize the initiative by demonstrating its willingness to combat the problem. If its desire is the latter the first step is to advise the King to issue a Commission of Enquiry. We are of the opinion that things have deteriorated so much in the economy in the last few years that there is no real alternative to the appointment of such a Commission. Its terms of reference must include the study of the manifold problems facing all sectors of the economy, the causes for such problems and the probable solutions. The Commission's recommendations ought to include whether (i) further prosecutions ought to be instituted against wrongdoers, (ii) identify such wrongdoers, (iii) whether civil proceedings ought to be launched and if so, against whom

What distinguishes a democratic government from an authoritarian one is that the former is accountable to the people it temporarily serves. Such accountability is not limited to holding general elections once in four or five years. Instead real accountability means that government must explain its actions and be held responsible for them. If the true state of our economy is as outlined above then the Executive has not so far accounted to the people the extent of Executive's role in creating the current situation. The Bar suffers no illusion that appointing a Commission of Enquiry would serve as a complete panacea to the nation's economic ills. But it would serve as an important indicator of the Executive's desire to get a grip with the massive problems confronting our economy. The Commission is a first step, and a very important first step at that. We accordingly appeal, in the strongest possible terms, for the Cabinet to advise the Yang di-Pertuan Agong to issue a Commission of Enquiry, and that this been done as expeditiously as possible. The Bar, on its part, pledges its full-hearted cooperation in every way to such a Commission, if, and when appointed.