

## ❁ Constitutional conventions



“ The executive itself cannot just act as it pleases, for its own powers are also subject to precise restrictions. Even where limits do not appear to be sufficiently clear, there are rules of unwritten law which dictate the courses of action that may be followed.

These rules are called constitutional conventions. They serve to ensure that actions undertaken are not just lawful according to the letter of the supreme law, but are also practical, viable and have the support of society in general. ”



—HRH Sultan Azlan Shah  
*Supremacy of Law in Malaysia*

## ❁ Interpretation of the Constitution



“ In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation.

Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way—‘with less rigidity and more generosity than other Acts’.

A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. ”



—**Raja Azlan Shah Acting LP (as he then was)**  
*Dato Menteri Othman bin Baginda & Anor v*  
*Datuk Ombi Syed Alwi bin Shed Idrus*  
[1981] 1 MLJ 29, FC at 32

# HERI Sultan Azlan Shah



## Sultan Azlan Shah Scholarships and Awards

*A* number of prizes and scholarships awarded by several institutions of higher learning in Malaysia and England have been named after His Royal Highness Sultan Azlan Shah. Amongst these are the Sultan Azlan Shah Scholarship awarded by Davies College; the Sultan Azlan Shah-HLT Bar Finals Scholarship awarded by the Holborn Law Tutors Group, London; and the Sultan Azlan Shah Book Prize awarded by the Faculty of Law, University of Nottingham.



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—**HRH Sultan Azlan Shah**  
*Corporate Misconduct:  
Crime and Accountability*

# Corporate Misconduct: Crime and Accountability

# 7



Harvard Business School Alumni Club of Malaysia

*Kuala Lumpur, 7 April 1987*

I am greatly honoured to be asked to address you on the occasion of the Gold Medal Award of the Harvard Business School Alumni Club of Malaysia.

I understand that this is one of the major events organised by your Club every year for the purpose of providing encouragement and giving due recognition to the student from among the three universities—Universiti Pertanian Malaysia, University of Malaya and Universiti Kebangsaan Malaysia—who has achieved outstanding excellence in the pursuit of business studies. It would appear that this award has generated intense rivalry between the universities.

While I compliment the winner of this year's Gold Medal Award and wish him further glory and achievements in his future sphere of activities, I must also congratulate your Club for taking the

initiative in providing this excellent incentive to students of business studies to high performance both in their final examinations and during the course of their studies, also taking into account the extra mural activities of these students. This is most becoming and worthy of an alumni of the oldest institution of higher learning in the United States of America.

When I was conferred the Honorary Fellowship of the Malaysian Institute of Management last August, I intended to include some aspects of white collar crime in my acceptance speech, but the subject being an exhaustive one, I thought it wiser to leave it to some other occasion when I would deal with it in some length. The occasion is at hand and I am pleased to have this opportunity of addressing you on this subject of great current interest.

First of all, I shall attempt to deal with the intricate task of defining crime, both the white-collared variety as well as the other common type that is generally known to us.

Put simply, a crime is an act committed or omitted in isolation of a law forbidding or commanding it, and for which punishment is imposed upon conviction.

Within each society or culture, the line between normal and criminal, or merely deviant behaviour, differs by varying codes or bodies of criminal law. Hence in any society or culture, a criminal act would depend, by and large, on two sets of related norms: the legal and moral codes prevailing within that society or culture. For example, what is normally an act of social misconduct leading, at worst, to a matrimonial dislocation, an act of adultery committed in some of the inherently conservative Muslim countries of the Middle East would be regarded as a crime of such magnitude as

to warrant the extreme penalty executed under most humiliating circumstances, as such conduct transgresses their moral code of ethics.

Hence, a person's behaviour and sense of ethics play a crucial role in avoiding acts of crime. As Marshall Clinard and Peter Yeager state in their publication *Corporate Crime*<sup>1</sup> in 1980:

The inculcation of ethical principles forms the basis of crime prevention and control, whether we are discussing ordinary crime or white collar crime.

Although it was comparatively unknown in earlier times until the infamous South Sea Bubble burst upon the otherwise quiet English scene in 1720, it was really at the beginning of this century that white collar crime reared its ugly head with some prominence and society was made sufficiently aware to pay serious attention to it. Various sociologists began publishing on the subject beginning with Edward Ross in *The Criminaloid*<sup>2</sup> in 1907. Matthew Josephson followed with a publication known as *The Robber Barons*<sup>3</sup> in 1934 and Albert Morris with *Criminology*<sup>4</sup> in 1940, generally emphasising that not only were these "crimes of the other world" a social problem, but they do fall within the confines of criminology.

It was in 1940 when Edwin H Sutherland published *White Collar Criminality*,<sup>5</sup> that catchy and apt phrases like "white collar crime", "white collar criminality" and "white collar criminal" were used. Today, white collar crime is also given other appellations like "occupational crime", "business crime" and "corporate crime".

But how does one really define white collar crime? Because it was never properly defined, it was given various names and terms.

1  
Free Press, 1980.

2  
Chapter 3 in *Sin and Society: An Analysis of Latter-Day Iniquity*, Houghton Mifflin Company, 1907.

3  
Now published by Harvest/Harcourt Brace & Co, 1995.

4  
Longmans & Green, 1934

5  
American Sociological Review, 5:1–12, 1940.

What appears to be the simplest, yet authentic, definition is given by Edwin Sutherland in *White Collar Criminality*. He defines it as:

“crime in the upper or white collar class, composed of respectable or at least respected business and professional men” as compared with “crime in the lower class, composed of persons of low socio economic status”.

The Presidential Commission on Law Enforcement and Administration of Justice in 1967 came out with a publication called *The Challenge of Crime in a Free Society* and it defines white collar crime as:

those occupational crimes committed in the course of their work by persons of high status and social repute.

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Here in this country in recent times, it has become all too familiar that professional and ostensibly “highly successful” business men with respectable handles to their names have been exposed for their predilection to white collar crimes.

### ***Impact of white collar crimes on society***

White collar crime covers every facet of our economy and society; neither rich nor poor is able to escape its clutches as it does not



discriminate among its victims. Regretfully, I have to refer again to recent cases in Malaysia.

White collar crime covers every facet of our economy and society; neither rich nor poor is able to escape its clutches as it does not discriminate among its victims.

Thousands of people from the lower income group became victims to 24 deposit-taking co-operatives as a result of fraud, executive incompetence or mismanagement.<sup>6</sup> The managing director of one such co-operative was recently sentenced to 12 years' imprisonment. Hearings of many cases of similar nature are pending in our law courts and, therefore, cannot be the subject of discussion here.

White collar crime differs from traditional crimes in two aspects: (i) impact; and (ii) modus operandi.

August Bequai in his book *White Collar Crime: A Twentieth Century Crisis*,<sup>7</sup> published in 1978, says:

In terms of injury, white collar crime affects more individuals. In terms of money or lost property, these crimes are costlier than traditional offences.

It is understandable that there is a limit to what robbers can physically carry away when they hold up a bank, but perpetrators of white collar crimes can cause the loss of unlimited sums running into hundreds of millions of dollars, as the recent co-operative scandal in this country indicates.

<sup>6</sup> See for example the case of *Ng Chin Swee v Koperasi Belia Bersatu Bhd* [1987] 2 MLJ 510, HC.

<sup>7</sup> Lexington Books, 1978.

White collar criminals rely on deceit and concealment; they play on the naïvety of their victims and the near universal greed of the individual. It is a common feature of fraud in this country that victims fall easy prey to it because of the greed of the individual for highly usurious rates of interests on money lent. Often, when the borrower absconds with huge sums of money, many of the victims are too scared even to report their losses to the police for the obvious reason that they will be victimised a second time—only this time, they have to answer the grueling queries of the Income Tax Department. The gullibility of depositors in a recent case in Kedah is a case in point.

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In 1974, the US Chamber of Commerce, in its *Handbook on White Collar Crime*, estimated that white collar crime in North America alone exceeded US\$41 billion falling in these categories:

Bankruptcy fraud, bribery kickbacks, computer related fraud, consumer fraud on private, business and government victims, credit cards and cheques fraud, embezzlement, pilferage, receiving stolen property, insurance fraud, securities fraud.

Michael Comer in *Corporate Fraud*,<sup>8</sup> published recently states that:

Losses from fraud in most organisations are estimated at between 2–5% of gross turnover and approximately 50% of the workforce

<sup>8</sup> McGraw-Hill Books Co Ltd, 1986.

is regularly engaged in fraudulent activity against the employer. Thirty per cent of US companies' liquidation is the result of fraud or embezzlements. However, less than 15% of discovered cases are reported to the police.

The October 1985 issue of *The Executive* states that the number of white collar crime cases reported to the Commercial Crime Bureau, Hong Kong increased from 826 in 1980 to 1,552 in 1984 involving HK\$108 million in 1980 to HK\$620 million in 1984.

The greatest fraud ever perpetrated in our history was the loss incurred over the BMF affair which cost the nation RM2.1 billion. The deposit taking co-operatives scandal came a close second, affecting the interests of well over 500,000 depositors.

In Malaysia, figures given by Bank Negara show that the number of fraud cases rose progressively from 36 cases in 1984 involving US\$1.7 million to 202 cases in 1986 involving RM146.1 million. However, the greatest fraud ever perpetrated in our history was the loss incurred over the BMF affair which cost the nation RM2.1 billion. The deposit taking co-operatives scandal came a close second, affecting the interests of well over 500,000 depositors, not to mention the severe adverse effect on the nation's economy at a time when we could least afford such reverses.

The publication of the US Department of Commerce *Crime in Service Industries* issued in 1977 states as follows:

There is little doubt that white collar crime will continue to rob society as it has in the past, that modern technology has aggravated an already serious situation.

### *Overcoming white collar crime*

There is no doubt whatsoever that white collar crime is growing at an alarming rate and threatens the foundations of society. It is of utmost importance that we, as loyal employees and citizens, act now to put a stop to the perfidious growth of white collar crime. Thomas Kauper, Assistant Attorney-General, made a clarion call to the business community in a address to the American Bar Association. He said:

In these times, when important and far-reaching questions are being raised about the ethics of the business community, strong and eloquent voices urging responsible business behaviour are vitally needed.

White collar crime is growing at an alarming rate and threatens the foundations of society. It is of utmost importance that we, as loyal employees and citizens, act now to put a stop to the perfidious growth of white collar crime.

The importance of morals, ethics and discipline in overcoming white collar crime must not be scoffed at. Clarence Walton in his book, *The Ethics of Corporate Conduct*<sup>9</sup> published in 1977 emphasised:

<sup>9</sup>  
Prentice Hall Direct,  
1977.

In any field, ethics is a discipline that deals with what is good or bad, right or wrong and the principles of what constitutes a moral duty or an obligation. Ethics in business stress the importance of truth and justice in all spheres of business activity.

In our efforts to eradicate white collar crime, it is vitally important that we are disciplined and hold true to the values emphasised by our religion. Volume 5 of the 1978 edition of *Encyclopaedia Britannica* has a message for us:

It is a well established canon among many social scientists that one's values may influence an individual's tendency towards criminal acts. In America, research has suggested that unsound discipline may be related to about 70% of criminal men.

Yet another suggestion that religion influences ethics is emphasised by Geoffrey Lantos, Assistant Professor of Marketing, Stonehill College, Massachusetts in a letter which was published in the 5 January 1987 issue of *Fortune Magazine*. He wrote:

Traditional religion holds the key to ethical decision making ... Only with a focus on absolute traditional values will the forces of light prevail. Without it, all that remains is a moral vacuum.

In 1973, J Paul Getty gave this piece of valuable advice in *How to be a Successful Executive*:<sup>10</sup>

Be scrupulously honest. An honest man will scorn any dubious scheme, no matter how great the promised profit. In short, the person who is himself open and honest and takes time to examine all proposals made to him in the bright light of day, will never fall prey to the gyps that pass in the night.

10  
WH Allen, 1973.

Aristotle in *The Nicomachean Ethics*<sup>11</sup> stated that, “Moral virtue comes about as a result of habit. Men become builders by building, lyre players by playing the lyre; so do we become just by doing just acts.”

### *Ills of banking*

Confining ourselves, for the moment, to matters that are local, I observe that commercial banks in this country were confronted with the growing problem of non-performing loans last year.

The country’s economic slump has triggered off many financial problems and it has caused borrowers to default and has slashed values of stock and property held as collateral. In some instances, there is also the problem of poor credit evaluation and loan documentation which should never have happened in the first place if strict compliance of the guidelines was observed.

However, increasing attention and resources of the commercial banks were devoted to intensive monitoring of loans, credit supervision and the rehabilitation of ailing clients.

The more disturbing aspect of our financial world is the propensity in recent times of banks and financial institutions going bust, a tendency which neither augurs well nor inspires confidence in the minds of the public.

It is my observation that Bank Negara has taken the right and laudable step of preventing the near collapse of two banks in this country and has confirmed that it is closely monitoring the situation of another bank, Sabah Bank Berhad. Datuk Jaffar

<sup>11</sup> Clarendon Press edition, 1908.

Hussein, the Governor of Bank Negara, is reported to have said that the Central Bank is in fact also looking at the health of all the 38 banks as well as the 47 finance institutions. The two banks whose shares were bought over by Bank Negara are United Asian Bank and Perwira Habib Bank. Another bank, Bank Bumiputra, was taken over by Petronas, the national oil company, because of the BMF fiasco. If Bank Negara had not acted in this manner, then the banks' depositors and shareholders would have faced severe losses, and there would have been a disastrous loss of confidence in the nation's banking system.

One of the ways to prevent the further collapse of banks and financial institutions in this country is to expose such institutions, especially smaller local commercial banks, to a greater degree of public shareholding, so that shareholder pressure on management could be maintained.

One of the ways to prevent the further collapse of banks and financial institutions in this country is to expose such institutions, especially smaller local commercial banks, to a greater degree of public shareholding, so that shareholder pressure on management could be maintained. At the present moment, only three of such banks are public listed but when the present economic climate changes for the better and as soon as circumstances permit it, more banks and financial institutions with good profit records should go public. Banks that are restructured or going public are subjected to the rule of the 20% limit on bank equity for any single group and this is also likely to intensify stockholder vigilance. With new and more shareholders to answer to, management should shape up. Sole

owners or majority owners answerable only to themselves will be forced to share control and run the banks on less secretive lines.

The business section of *The Star*<sup>12</sup> gave a commendable synopsis of the current difficulties facing commercial banks in Malaysia and offered some suggestions which I now quote:

Placing money in the hands of irresponsible managers is a sure formula for disaster. Good laws alone cannot make honest bankers. There must be a system of check and balances.

The problems faced by some banks clearly demonstrate that attention must be paid to raising the question of managers.

Thirty years of banking history has shown that no matter how perfect banking laws may be, good behaviour cannot be legislated. Honesty must be given a premium in the social value system. All staff in the banking industry should remember two fundamental principles—they are custodians of other people's money and they must safeguard the integrity of all money entrusted to them. Lending money for speculation, however well intended, is speculating money held in trust.

The article goes on to say:

The complexity of the banking world has given rise to many opportunities for insider trading and fraud, and white collar crime can cost society much more than petty theft and armed robbery. Criminal breach of trust and fraud poses a real threat to the integrity of financial markets. All the regulatory authorities, including the police and the courts, will need to act quickly to stamp out CBT and fraud within the system.

Bank Negara has sought to put in place time-tested internal checks and balances into the system, including more frequent



inspections, controls over lending limits by bank staff, lending to directors and self-interested companies and the establishment of internal audit units, and audit and examination committees.

Another lesson learnt is that over-exposure to any single sector, however attractive at the time, is always risky. There is no substitute for down-to-earth banking, where funds are made available to honest, hard-working entrepreneurs who carry out genuine projects which add value to products and provide jobs.

Over the longer term, there remains the urgent need to instil still a greater sense of discipline, responsibility and ethics into all bank staff.

### *Conclusion*

White collar crime is not exclusive to any nation and, like a virulent disease, it is widespread in many countries. Malaysia is not immune to the infection. On the contrary, our recent times were characterised with an inordinate spate of white collar crimes, too numerous and close for our liking. The commercial crime branch of the police is coping well under the circumstances, but one must not be naïve as to think that they have licked the system.

*White collar crime is not exclusive to any nation. Our recent times were characterised with an inordinate spate of white collar crimes, too numerous and close for our liking.*

First of all, I would like to suggest, if I may, that in the light of the recent phenomenon, the Police Department should send more

talented officers abroad for specialised training in the detection of white collar crime. In this aspect, it is gratifying to note that Tan Sri Haniff Omar, the Inspector-General of Police, has already indicated in his recent Police Day message that this step is being contemplated by his department.

Secondly, it seems to me that it would not be an absolutely bad idea if the Police Department were to recruit experts like qualified accountants or even business graduates, including some with a Masters degree, into their ranks so that they could tackle all aspects of commercial crime in a more professional and sophisticated manner, and be able to match cunning with skill, slyness with intelligence and wily deceit with astute strategy. This step, no doubt Bank Negara has already adopted. We cannot afford to lose the war against the invidious white collar crime and allow it to ruin or set back our national economy.

It is also perhaps time that the Government put into effect its much vaunted policy of adopting moral education in our schools. This must be regarded as one of its sound measures to instil a strong sense of discipline and comprehensive values in our efforts to build a fair and honest society. Let there not be too long an interval between the conception of a good idea and its implementation and allow it to fall by the wayside.

If there is much concern shown in high quarters of the Government about the prevalence of dishonesty and irresponsibility in the country, then firm and drastic measures against corruption in all ranks from the top to the lowest in the public, private and the corporate sectors should be taken relentlessly. I quote from the remarks of a letter which recently appeared in a publication of *The Star*:<sup>13</sup>

13  
24 March 1987.

Too many people are rushing to jump aboard the bandwagon to take a quick buck by hook or by crook, prepared to sacrifice principles, honour and integrity. However, with a high standard of moral values, with genuine steps to reduce corruption and a bold change to a meritocratic system, we should be on the right path to stopping the rising trend of fraud.

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Here, I must not omit to mention that insider trading is perhaps the most invidious form of fraud perpetrated in the labyrinths of stock exchanges and it has provoked fresh concern in both the United States as well as in Britain about the spreading abuse of inside information, which now appears to be virtually a way of life in a growing list of financial institutions. The Securities and Exchange Commission took such a serious view of the Ivan Boesky case for insider trading that it imposed the inordinately high penalty of a US\$100 million fine on him. The recent crop of such cases included Merrill Lynch's merger specialist Nahum Vaskevitch and his frontman David Sofer. The Securities and Exchange Commission hopes to force the suspects to disgorge their profits and pay triple damages, all of which could amount to US\$16 million.<sup>14</sup>

The exponents of white collar crime will still be losers even if they are lucky to escape conviction in a court of law, for their

14  
*Time* magazine, 23  
March 1987.

careers will be shattered, their employers scandalised and their friends will shun them. I cannot see how they can ever hope to regain their self respect under such circumstances.

### *Editor's note*

See also chapter 6, *Corporate Activity: Law and Ethics*, above.



## Written constitution

“In my opinion, the purpose of enacting a written Constitution is partly to entrench the most important constitutional provisions against repeal and amendment in any way other than by a specially prescribed procedure. ”

—Raja Azlan Shah FJ (as he then was)  
*Loh Kooi Choon v Government of Malaysia*  
[1977] 2 MLJ 187, FC at 189