

Executive Summary

Separating the Attorney General and Public Prosecutor: Enhancing Rule of Law in Malaysia

The removal of the former Attorney General Tan Sri Abdul Gani Patail at the height of investigations on 1Malaysia Development Berhad (1MDB) and its accumulated debt of RM42 billion raises concerns over the fragility of the Attorney General's position and his ability to prosecute cases independently. More importantly, the incident demonstrates a serious need to separate the office of the Attorney General and that of the Public Prosecutor - so that each party can act freely without fear or favour.

Unlike many other countries, the Attorney General (AG) has long held the dual role of acting as both the legal adviser to the Government in his capacity as the AG as well as the Public Prosecutor, the principal authority in deciding whether or not to initiate legal proceedings against someone who has committed a crime. When these two roles are fused as in the case of Malaysia, serious conflicts of interest occur, especially when the person prosecuted is a powerful figure in Government. In this paper, authors Aira Azhari and Lim Wei Jiet explain why separating the role of the Attorney General (AG) and that of the Public Prosecutor (PP) is a necessary step towards enhancing the rule of law in Malaysia.

The paper first examines the historical background and legal framework, namely Article 145 of the Federal Constitution, Section 376 of the Criminal Procedure Code (CPC) and Interpretation Acts, that forms the basis for the fused roles of the AG and Public Prosecutor.

The authors then demonstrate the problems with the current legal framework. They are:

- **The AG's wide discretionary powers** - although this has been challenged by the courts in recent times, previous rulings have given the AG absolute power over the decision to prosecute cases including the authority over Article 8 in the Constitution, which guarantees equality before the law and freedom from discrimination by any public authority.
- **Conflict of interest between the AG and PP** - the AG as the legal adviser to the Government must act in the interest of the Government, whereas the PP must prosecute anyone who commits a crime, regardless of who that person is. When the two roles are held by the same person, it presents a clear conflict of interest especially when the person that needs to be prosecuted is a member of the Government.
- **Lack of Independence in the Appointment and Removal of the Attorney General** - the appointment and the removal of the AG and consequently the PP is not free from executive interference. Although the AG holds office at the pleasure of the Yang

di-Pertuan Agong (YdP), the YdP is constitutionally obligated to follow the Prime Minister's advice on the matter.

Following this, the authors also highlight best practices in the United States, United Kingdom, India, Kenya and the Maldives. Taking several factors into consideration when choosing the structure that would best fit Malaysia the authors make the following recommendations:

- **Amendments to current laws** (Article 145 of the Federal Constitution, Criminal Procedure Code, Interpretation Acts 1948 and 1967) to separate the role of the PP from that of the AG
- **The appointment of an independent Public Prosecutor** including an independent appointment process in which Selection Committee (comprising of representatives from the Bar Council, Advocates' Association of Sarawak and the Sabah Lawyer's Association) vets through candidates submitted by the AG and Parliament votes in the PP byway of a simple majority
- **The Public Prosecutor's security of tenure**, it is recommended that the PP can only be removed by a two-thirds majority in the Dewan Rakyat, similar to an impeachment process in the US.
- **The AG should be a Minister** and member of the Cabinet to ensure his/her accountability to Parliament which also means that he can be removed by the Prime Minister like any other Cabinet minister. Further, if he loses in the elections, he will also lose his position as the AG.
- **The AG should oversee the Public Prosecutor**, the AG should be accountable for the prosecutorial decisions of the Public Prosecutor in Parliament as in the case of the UK. However, the AG can only intervene in prosecutorial decisions in cases involving national security or international affairs

Separating the Public Prosecutor's role from the AG, in actual terms and perception wise, is a crucial step in shielding the prosecutorial decisionmaking process from political influence and conflicts of interest. A separate Public Prosecutor detached from the Executive is less likely to be prejudiced by political considerations. With the roles of the AG and the Director clearly defined, and with the necessary safeguards

in place to ensure conflicts of interest are minimised, efforts to combat corruption can be strengthened and rule of law enhanced in Malaysia.

About the Authors

Aira Nur Ariana Azhari is a Researcher at the Institute for Democracy and Economic Affairs (IDEAS). She holds a Bachelor of Laws (LLB) from the University of Liverpool, United Kingdom and a Master of Laws (LLM) in Public International Law from the London School of Economics and Political Science.

Lim Wei Jiet graduated with an LLB (Hons) from the University of Malaya in 2015. He was admitted as an Advocate & Solicitor at the High Court of Malaya in 2016 and currently handles civil litigation as a Legal Associate at Messrs Sreenevasan. He is also a member of the Bar Council's Constitutional Law Committee.