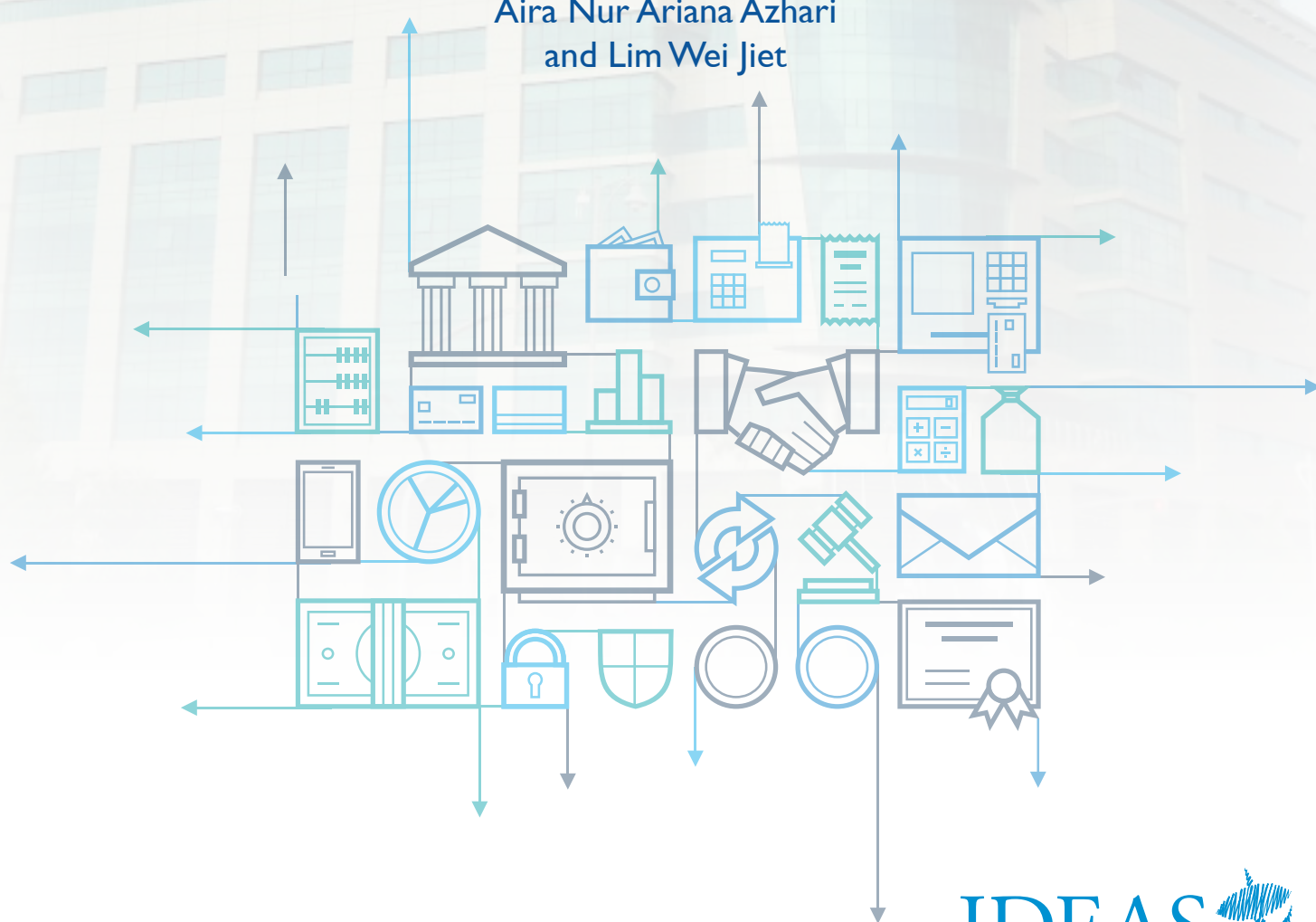


Separating the Attorney-General and Public Prosecutor: Enhancing Rule of Law in Malaysia

Aira Nur Ariana Azhari
and Lim Wei Jiet



Abstract

The roles of the Attorney General (AG) and the Public Prosecutor in Malaysia are fused into one person. It is extremely important for the two roles to be separated because of the different nature that the two roles play in upholding the rule of law. The AG is the legal advisor of the government of the day. The Public Prosecutor, on the other hand, is the principal prosecuting authority in the country, acting as an independent lawyer in criminal cases.

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. An independent AG and Public Prosecutor is one of the hallmarks in ensuring that justice is not only done, but also seen to be done. An independent AG is able to serve the Government of the day effectively, ensuring that they act within the law. An independent Public Prosecutor will be able to prosecute criminals, no matter who they are, without fear or favour.

This paper focuses on Article 145 of the Federal Constitution of Malaysia, and on Section 376 of the Criminal Procedure Code which form the legal basis for the AG's and public prosecutor's fused roles. We look into the problems with the current setup that have to do with the AG's wide discretionary powers and the fragility of the Public Prosecutor's position as the Attorney General given that he can be removed at any time.

Finally, we make a case for separating the two roles and make recommendations to improve rule of law in the country with regards to the AG and public prosecutor based on best practices abroad. The recommendations detail the appointment and removal process of the AG and Public Prosecutor as well as the scope of duties of each individual respectively.

Introduction

The central role of the Attorney General (AG) is to be the chief legal adviser to the Government of the day. The Public Prosecutor, on the other hand, acts as the principal prosecuting authority of the country, acting independently in criminal cases. Together, the AG and Public Prosecutor play an important dual role in upholding the law. The AG ensures that the Government's action adheres to the rule of law, and the Public Prosecutor, as an independent prosecutor of crimes, ensures that criminals are prosecuted regardless of who they are.

In Malaysia, the roles of the AG and the Public Prosecutor are not independent of each other. Essentially, this means that the AG and the Public Prosecutor are the same person. This fusion of roles that was established pre-independence goes against the spirit of rule of law and has since created numerous problems in terms of accountability, transparency and anti-corruption efforts. This paper's main argument is that it is absolutely crucial for the roles of the AG and the Public Prosecutor to be separated in order to give independence to the Public Prosecutor.

The paper focuses on Article 145 of the Federal Constitution and Section 376 of the Criminal Procedure Code (CPC). Firstly, it describes why the roles of the AG and the Public Prosecutor were fused in the first place. This is followed by the legal framework of the current setup of the AG's office. The paper then shifts focus to the problems plaguing the current office and makes an argument for the separation of the two roles. We then look at various best practices around the world and finally propose recommendations on how the separation can be carried out.

Ultimately, this paper aims to show that only with an AG and Public Prosecutor that are independent of each other, can we strengthen rule of law in our country.



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**The contents of this paper represent the views of the author and do not necessarily reflect the views of IDEAS or any one individual at the organisation.*

Why the Roles of the Attorney General and Public Prosecutor are Fused



Historical Framework

Tommy Thomas, *The Attorney General – The most powerful person in Malaysia?*
INSAF, August 1983;

“

The powers of the Attorney General make nonsense the doctrine of separation of powers. Power corrupts and absolute power corrupts absolutely. The power of the Attorney General has increased since Merdeka, is increasing and ought to be diminished.

”

The current framework, where the roles of the AG and the Public Prosecutor are fused, can be traced back to the drafting of the Malaysian Constitution. The Reid Commission Report 1957 stated the following regarding the role of the AG,



*In some Commonwealth countries the Attorney General holds a political office. In others the political functions normally exercised by a political Attorney-General are exercised by a Minister of Justice or Minister of Law, while the Attorney-General (or Advocate-General) exercises the more professional functions of giving independent legal advice to the government, representing the government in the courts, **and perhaps assuming responsibility for public prosecution**. On the whole we prefer the latter.*

This paragraph shows that the Reid Commission did not have a problem with the AG carrying out the responsibilities of a Public Prosecutor. The reasoning behind this is unclear. Constitutional lawyer Datuk Malik Imtiaz Sarwar suggested that the framers of our Constitution felt that we had a high standard of governance in the nation at the time, and did not foresee that the fusion of the two roles would cause problems in the future. Dato' Zaid Ibrahim¹, who was Minister in the Prime Minister's Department cum de facto Law Minister, emphasised that although the two offices were never separate in theory, at least previously in practice, the roles were carried out independently with the Solicitor General acting as the de facto Public Prosecutor.

¹ The researchers interviewed Datuk Malik Imtiaz Sarwar, Constitutional Lawyer and Dato' Zaid Ibrahim, former de facto Law Minister on 18 March 2016

Zaid mentioned how political influence over the AG began during Tun Dr. Mahathir's tenure as Prime Minister. One instance that demonstrated this influence was the case of *Lim Kit Siang v U.E.M [1988] 2 MLJ 12*. In this case, Mahathir was alleged to have “negotiated, directly and in secret and to the exclusion of competitors, the granting of the contract to build the tolled North-South highway to UEM on favourable terms” (Abu Bakar B, 2015). Lim Kit Siang, then Secretary-General of the Democratic Action Party (DAP) applied to the court to prevent Mahathir from granting this contract, and to prosecute the Prime Minister. The judge in the case, Justice VC George, mentioned the following regarding the position of the AG,

“ In Malaysia, the AG's position is very different from that of his British counterpart. He is a civil servant appointed by His Majesty the Yang Di Pertuan Agong on the advice of the Prime Minister. **He is not answerable to anybody, neither to any Minister nor to any Ministry, not even to the Prime Minister, not to Parliament and to the people (in that his is not a political appointment).** However, he holds office during the pleasure of the Yang di Pertuan Agong which in effect means during the pleasure of the Executive.

Justice George's remarks show the contradiction in the position of the AG. He is appointed by the Agong on the advice of the Prime Minister, yet he is not answerable to either the Prime Minister or Parliament. Not being answerable to the Prime Minister, the AG should be free to prosecute the Prime Minister should he commit a crime. However, the fact that the AG remains in office at the pleasure of the Agong, essentially means that his position is determined by the Prime Minister. This subjects the AG's position to much fragility. He can be removed at any time, as was seen in the removal of former Attorney General Tan Sri Abdul Gani Patail in July 2015. Tan Sri Abdul Gani's removal was problematic for several reasons which we will discuss in more detail later on.

“ He is appointed by the Agong on the advice of the Prime Minister, yet he is not answerable to either the Prime Minister or Parliament.

Constitutional and Legal Provisions Outlining the Role of the Attorney General

The position and role of the AG is enshrined in the Federal Constitution of Malaysia. The Public Prosecutor's role, on the other hand, is defined in the Criminal Procedure Code. These two documents are key towards understanding how the roles of the AG and Public Prosecutor are fused.

Article 145 of the Federal Constitution of Malaysia outlines the role and scope of duties of the AG. Of particular interest are Articles 145(2) and (3) which read as follows:

“ (2) It shall be the duty of the Attorney General to advise the Yang di-Pertuan Agong or the Cabinet or any Minister upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Yang di-Pertuan Agong or the Cabinet, and to discharge the functions conferred on him by or under this Constitution or any other written law.

(3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

According to Article 145 as cited above, the AG acts as the legal adviser to the Government and ensures that their actions do not contravene the law. He is also responsible for the prosecution of individuals barring cases involving Syariah, native or military laws and can even stop any moves to initiate criminal proceedings. Article 145 sets the tone for the fused roles of the AG and the Public Prosecutor. The role of the AG as the Public Prosecutor is further defined in Section 376(1) of the Criminal Procedure Code (CPC) which states:

“ (1) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.

The Interpretation Acts 1948 and 1967 also defines the role of the Public Prosecutor:

“Public Prosecutor” means the Attorney General, and includes (within the scope of his authority) a Deputy Public Prosecutor appointed under any written law relating to criminal procedure and a person authorised by any such law to act as or exercise all or any of the powers of the Public Prosecutor or a Deputy Public Prosecutor;

Problems surrounding the position of the Attorney General

Wide Discretionary Powers

Article 145(3) provides wide discretionary powers to the AG that are open to abuse. These powers seem to be absolute and cannot be questioned in any court of law. In the case of *Long bin Samat & Ors. v. Public Prosecutor* (1974) 2 MLJ 152, Tun Mohamed Suffian, then Lord President of the Federal Court interpreted the scope and extent of this power and said:

“ (In our view, this clause [Article 145(3)] from the supreme law clearly gives the AG very wide discretion over the control and discretion of all criminal prosecutions. **Not only may he institute and conduct any proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue** ... Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature. Anyone who is dissatisfied with the AG's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts.

This interpretation meant that the courts had no right to intervene on any decision made by the AG to either prosecute or not prosecute a case. Thereby giving the AG the sole power in the country to prosecute cases with no means of redress.

Twenty-three years later, Datuk Seri Gopal Sri Ram, then High Court Judge, in the case of *Repco Holdings Bhd v Public Prosecutor* (1997) 3 MLJ 681 further echoed Tun Suffian's views and said this of Article 145(3):

“ It will be seen at once, from a reading of the plain language of art 145(3), that the Supreme Law, namely the Federal Constitution, has committed to the hands of the AG the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings.

¹⁹ The MACC certainly is not the only casualty to the shake-up exercise as the Attorney General who was first involved in the investigation was also sacked. 'Major shake-up in MACC, top two men to leave', Malaysiakini, June 23, 2016.

The powers of the AG are also not subjected to Article 8 of the Constitution, which guarantees equality before the law and freedom from discrimination by any public authority. This decision was made in the case of *Johnson Tan Han Seng v Public Prosecutor* [1977] 2 MLJ 66, where Tun Suffian said:

“**The language of this provision is very wide, for it includes the word “discretion” which means liberty of deciding as one thinks fit.** In view of the deliberate decision of our constitution-makers to write this provision into our constitution I do not think that it can be said that it must be read subject to article 8. Rather, in my view, the contrary: article 8 it is that must be read subject to article 145(3).

These cases show that the absolute discretionary powers of the AG is not a matter that has emerged recently. Over the years, the courts have deliberated on the scope of these powers and arrived at different conclusions. In more recent times, we see the courts questioning the AG's wide scope of powers.

In the case of *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1978] 1 MLRA 132, however, Raja Tun Azlan Shah, then Chief Justice of the High Court of Malaya took the opposite view. He held that:

“**Unfettered discretion is a contradiction in terms ... Every legal power must have legal limits, otherwise there is dictatorship.** In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the court to intervene ...

Where Tun Suffian's interpretation established an unquestioning view of the AG's powers, Raja Tun Azlan held that the courts had the right to intervene and that there should be limitations to the AG's powers. In this case, the AG's discretion to prosecute or not prosecute can be questioned in the courts.

Most recently, Raja Azlan's judgment has been strengthened in the 2015 case of *Dato' Pahlawan Ramli bin Yusuff v. Tan Sri Abdul Gani bin Patail & Ors* [2015] 7 MLJ 763. Judicial Commissioner Vazeer Alam Mydin in his judgment, emphasised that absolute immunity for Public Prosecutors, who are public officers, “has no place in a progressive democratic society and is contrary to the rule of law.” He then goes on to say that “in a legal system where the rule of law is central, no one is above the law.”

As can be seen, the latest position of the courts is that there should be limits on the AG's powers.

Conflict of Interest Between the Attorney General and Public Prosecutor

A closer look at Article 145(3) shows that the phrase “power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence” is in fact describing the role of the Public Prosecutor. This Article, read together with Section 376(1) of the CPC are inherently problematic.

Section 376(1) explicitly specifies that the AG is also the Public Prosecutor, and has “the control and direction of all criminal prosecutions under this Code.” Herein lies the cause of the conflict of interest that occurs in the functions of the AG. The damaging effects of this conflict will be explored as we proceed through this paper.

Lack of Independence in the Appointment and Removal of the Attorney General

Article 145(5) of the Federal Constitution refers to the appointment and removal of the AG. It reads as follows:

“ (5) Subject to Clause (6), the Attorney General shall hold office during the pleasure of the Yang di-Pertuan Agong and may at any time resign his office and, unless he is a member of Cabinet, shall receive such remuneration as the Yang di-Pertuan Agong might determine.

The phrase “shall hold office during the pleasure of the Yang di-Pertuan Agong” in Article 145(5) is also problematic. Article 40 of the Constitution explains the meaning of this phrase:

Yang di-Pertuan Agong to act on advice

40. (1) In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution; but shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet.

(1A) In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in accordance with such advice.

This means that the Agong is required, by Constitution, to make decisions with the advice of the Prime Minister or members of the Cabinet. Thus, if the Prime Minister decides to replace the AG, for example, he then may 'advise' the Agong, who is constitutionally required to heed this advice. This shows that the position of the AG does not have security of tenure, and is subject to the whims and fancies of the Prime Minister and his Cabinet.

The issue is especially important when considering former AG Tan Sri Abdul Gani's replacement, which raises several questions. Firstly, he was part of a special task force investigating 1Malaysia Development Berhad (1MDB), a state investment fund in which Prime Minister Dato' Seri Najib Tun Razak sits as Chairman of the Advisory Board. 1MDB was under investigation because of its accumulated debts amounting to RM42 billion, and has since missed various deadlines to repay loans to creditor banks (Chiou P, Chandran N, 2016). The United States Department of Justice has also filed a civil forfeiture complaint seeking the forfeiture and recovery of more than \$1 billion in assets illegally obtained from 1MDB's funds (United States Department of Justice, 2016). These funds are allegedly traced back to Najib himself.

Secondly, Abdul Gani's removal was seen as unconstitutional by legal experts. The Malaysian Bar Council President, Steven Thiru, commented that "[h]is removal and reduction in rank are unconstitutional, inasmuch as there appears to be non-compliance with Articles 135(2) and 145(5) of the Federal Constitution, which include the requirement for reasonable opportunity to be heard" (Zainal H, 2015). Furthermore, Steven added that the position of the AG is constitutionally mandated and any removal must be in accordance with stringent standards of due process (Zainal H, 2015).

There are of course other views that see Abdul Gani's removal as constitutional. His replacement, Tan Sri Dato' Sri Haji Mohamed Apandi bin Haji Ali argued that the termination of Abdul Gani's services was carried out in accordance with the Constitution as Article 145(5) explicitly states that "the Attorney General shall hold office during the pleasure of the Yang di-Pertuan Agong." Lawyer Shanmuga Kanesalingam echoed this statement stating that the Prime Minister can terminate the AG's appointment without convening a tribunal similar to the one required to sack a judge, as defined in Article 145(6) of the Constitution.

As the AG's main role is to be the legal adviser of the Government of the day, there is nothing inherently wrong in the Prime Minister having the power to replace him. This authority that the Prime Minister has can be viewed as a normal lawyer-client relationship.

In Malaysia however, this issue becomes problematic because the AG is also the Public Prosecutor. As the chief prosecuting officer in the country, it is crucial that the Public Prosecutor can make decisions independently of the Prime Minister and Government as a whole.

“
As the AG's main role is to be the legal adviser of the government of the day, there is nothing inherently wrong in the Prime Minister having the power to replace him. This authority that the Prime Minister has can be viewed as a normal lawyer-client relationship.

Why the two offices should be separated and independent

This section will explore arguments as to why the offices of the AG and Public Prosecutor should be independent.

To Prevent Conflict of Interest

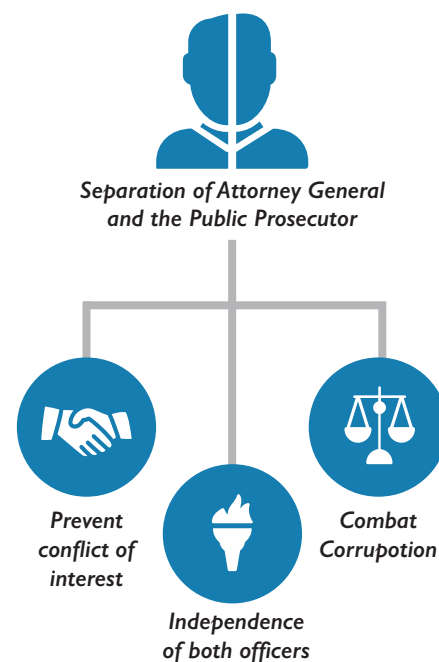
A direct effect of the fusion of the roles of the AG and Public Prosecutor is a conflict of interest in their duties. Article 145(2) states that the AG's role is "to advise to the Yang di-Pertuan Agong or the Cabinet or any Minister upon such legal matters..." Essentially, the AG's job is to be the government's legal adviser. He works for the government of the day to make sure that all government actions are in accordance with the law, and a good legal adviser will put his or her foot down when the government transgresses the law (Zaid Ibrahim, 2011).

The Public Prosecutor, on the other hand, has the duty to prosecute criminal cases on behalf of the Crown. This means that, the Public Prosecutor has the power to prosecute anyone who commits a crime, regardless of who that person is. To carry out this duty effectively, the Public Prosecutor's integrity and independence cannot be compromised.

The current framework in Malaysia, where the offices of the AG and Public Prosecutor are combined, presents a clear conflict of interest especially when the person that needs to be prosecuted is a member of the government.

To Ensure the Independence of Both Officers

A separation of the roles of the AG and the Public Prosecutor will help ensure that each person can conduct his duties independently and free from the perception of political influence. An independent Public Prosecutor will be able to prosecute anyone, including those in government and the corridors of power. An independent AG, on the other hand, is able to ensure that the government acts according to the law, be a guardian of the rule of law, and act as a superintendent of the prosecuting departments (Lai Chee Hoe, 2010).



To Combat Corruption

“

It is best that the investigators investigate, prosecutors prosecute and the trying and sentencing be left to the courts.

Bertrand de Speville, former head of Hong Kong's Independent Commission Against Corruption

”

The independence of the AG and Public Prosecutor is of paramount importance when it comes to the issue of anti-corruption. This is because, the way in which the MACC is structured only grants the body investigative, not prosecutorial powers. Section 7 of the MACC Act 2009 states that:

“ Functions of the officers of the Commission

7. The officers of the Commission shall have the following functions:

- (a) to receive and consider any report of the commission of an offence under this Act and investigate such of the reports as the Chief Commissioner or the officers consider practicable;*
- (b) to detect and investigate -*
 - (i) any suspected offence under this Act;*
 - (ii) any suspected attempt to commit any offence under this Act; and*
 - (iii) any suspected conspiracy to commit any offence under this Act; ...*

As for prosecutorial powers:

“ 58. A prosecution for an offence under this Act shall not be instituted except by or with the consent of the Public Prosecutor.

Giving the MACC prosecutorial powers is not the most effective solution to the current problems plaguing the nation's anti-corruption body.² Former Minister in the Prime Minister's Department in charge of Law and Parliamentary Affairs, Dato' Seri Nazri Aziz reasoned that keeping investigative powers separate from prosecutorial powers is to ensure a check and balance between the investigation side and the prosecution (Teoh E.S., 2012). There is also a fear that if the MACC is granted prosecutorial powers, this might lead to a slippery slope where other institutions such as the police and immigration demanding for such powers as well (Vohrah K.C., 2010).

Hence, as the decision whether or not to prosecute in cases of corruption lies solely with the Public Prosecutor, it becomes clear that for the MACC to be effective in its efforts to combat corruption, the Public Prosecutor needs to carry out his duties with no interference from any other party whatsoever. He must be able to judge each case that comes before him solely based on the investigation that was carried out by officers of the MACC, and decide whether or not to prosecute from there.

² Some of these problems include: the MACC being an entity under the Prime Minister's Office and the absence of security of tenure for the Commissioners.

Best Practices from Around the World

There are many examples from around the world that Malaysia can emulate in order to establish a strong AG's and Public Prosecutor's office. For the purpose of this paper, we have selected these best practices as examples:

The United States of America³:

In the US, the AG acts as the head of the Department of Justice and chief law enforcement officer of the Federal Government. He represents the US in legal matters generally and gives advice and opinions to the President and to the heads of the executive departments of the Government on areas of law when so requested.

How is the US AG Appointed?

The President submits his candidate for the AG's post to the US Senate Committee on the Judiciary. The candidate goes through a confirmation hearing by the Committee, and members of the Senate will then vote on whether or not the candidate should be appointed as AG.

The US is a good example of how the appointment process of the AG can be transparent, accountable and merit-based. The Senate confirmation process is a demonstration of how the different branches of government keep each other in check. The Senate, the legislative branch of government, ensures that the AG, a member of the executive branch, is the best person for the job. This process also ensures that the President cannot choose whoever he pleases to be AG.



³ While the US system does not follow the Westminster model, there are some good practices that can be adopted in Malaysia.

The United Kingdom:

In the UK, the AG superintends the Crown Prosecution Service (CPS), which is the office of the Director of Public Prosecutions (DPP). This 'dotted line' relationship serves several purposes. As the AG is a member of Cabinet, he is accountable to Parliament. This allows him to answer to Parliament regarding the decisions of the DPP. This ensures accountability on the part of the DPP. The AG can only direct prosecutorial decisions in cases where he is satisfied that it is necessary to do so for the purpose of safeguarding national security. This aspect of the AG's role is important in protecting public interest.

Apart from national security, the AG does not play a role in prosecutorial decisions. Furthermore, the AG is not to be consulted in cases relating to Members of Parliament or Ministers, as well as cases relating to political parties or the conduct of elections.

The UK is an example of best practice for two reasons. Firstly, the AG's superintendence of the DPP ensures accountability and transparency in the DPP's decision-making. It also allows for parliamentary scrutiny, ensuring at least some democratic participation in the prosecutorial process. Secondly, the AG as a member of the Executive cannot intervene in cases involving MPs or Ministers. This is an ideal safeguard as it ensures no conflict of interest.

India:

The AG's and Public Prosecutor's roles in India are completely separate and independent. There is no constitutional or legal provision that allows the AG to be a Public Prosecutor, nor does he have any power to influence the prosecutorial decision-making process by central governments or state governments.

The AG is not a member of the Executive. That role is played by the Law Minister of India.



Accountable to Parliament
(AG is a minister)



Only directs prosecution
in cases of national
security



Law Minister
plays role as
the Attorney
General



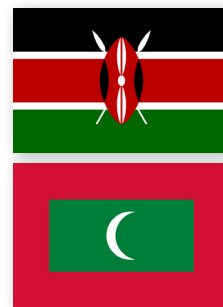
Public
Prosecutor is
separate

While the Indian system is highly decentralised, the completely separate role of the AG and the Public Prosecutor is an example of good practice that is worth considering. Besides that, the separation between the legal and political role of the AG is also ideal as it ensures that the AG is not influenced by politics when he makes his decisions.

Kenya and The Maldives:

In these two countries, the role of the Public Prosecutor is explicitly described in the Federal Constitution. Procedures for the appointment, qualifications, responsibilities and resignation of the Public Prosecutor are also constitutionally mandated.

Having the Public Prosecutor's role prescribed in the Constitution means that his position is more secure. This is because, it is more difficult for Parliament to make changes to the Constitution as compared to an Act.



Public Prosecutor's role is prescribed in the constitution.

Questions to Consider

The systems in the above mentioned countries are by no means perfect. In the UK system particularly, problems have arisen over the years that stem from the multiple roles of the AG. Tension exists between the AG's function as a minister and member of the Government, and being an independent guardian of the public interest and performing superintendence functions (for example decisions relating to sensitive prosecutions). Secondly, tension also exists between his role as a party politician and a member of the Government, and the giving of independent and impartial legal advice.



The Legality of the Invasion of Iraq

Two notable controversies emerged as a result of this conflict in the UK AG's role. The first one occurred prior to the UK's invasion of Iraq in 2003. The key question at the time was whether or not it would be legal to invade Iraq without a United Nations Security Council resolution to supplement resolution 1441, which had given Iraq "a final opportunity to comply with its disarmament obligations." The AG then, Lord Goldsmith, provided his advice to the Government on 7 March 2003, and as per convention, the advice was not made public. However, on 17 March, Lord Goldsmith delivered a public summary of his position in the form of a parliamentary written answer, in which he explained why he believed that an invasion would be legal. The invasion of Iraq then commenced on 20 March 2003.

Over two years later, after continuing pressure on the Government, the AG's original full advice of 7 March 2003 was made public. It turned out that the advice was different from the position in the written answer of 17 March 2003. The actual advice concluded that "the safest legal course would be to secure the adoption of a further resolution to authorise the use of force..." The differences between the original advice and the written answer gave rise to speculation that the AG was under political pressure to tailor his opinion to align it with the Government's intentions. This in turn led to questions of whether it is appropriate for the Government's chief legal adviser to also be a politician and a member of that Government.



The BAE Systems Controversy

The 'BAE Systems' controversy brought to light the conflict that arises when the AG has the power to interfere in prosecutorial decision-making. The UK's Serious Fraud Office (SFO) is the body in charge of investigating and prosecuting complex fraud, bribery or corruption. The SFO was investigating a case where BAE Systems, a British defence company, had paid bribes to Saudi Arabian officials in order to secure a lucrative defence contract.

Lord Goldsmith had told the House of Lords that the Director of the SFO, after close consultation with the British ambassador in Saudi Arabia, decided to drop investigations into the case, saying that "there is no guarantee that this investigation would lead to prosecution" and there would be "potential damage to the public interest." The media did not perceive it this way, however, and the Government as well as Lord Goldsmith were accused by some of intervening in response to pressure from Saudi Arabia.

When deciding the kind of structure that would best suit Malaysia, it is important to consider the pitfalls of the different practices from around the world and foresee what might be a problem for our system. After careful consideration, we noted four concerns for Malaysia when it comes to the positions of the AG and Public Prosecutor. These are:

Should the AG be a Member of Parliament, the Executive and the Cabinet?

In order to give strength to the AG's position as the Government's legal adviser, the AG should be a Member of Parliament, part of the Cabinet and hence a member of the Executive.

We acknowledge that there will be situations when the AG's decision-making is compromised, as shown in the UK examples previously. These were complex, politically-charged scenarios, and it came down to the personal integrity of the individuals involved to carry out their duties without fear or favour.

However, recommending measures to ensure that personal integrity of public officials remain intact is not the purpose of this paper. Instead, this paper argues that the legal adviser to the Government should be accountable to the Government it serves, and this is best done when he is a member of Parliament and the Cabinet.

Should the AG's office superintend the Office of the Public Prosecutor?

For accountability purposes, it is important that the Office of the Public Prosecutor should be under the superintendence of the AG. As per the practice in the UK, the AG lays the Public Prosecutor's report before Parliament, and Members of Parliament can then scrutinise the report.

Should the AG and the Public Prosecutor's positions have security of tenure?

As a member of the Cabinet, the AG's position, as is any other Minister's, is dependent upon the Prime Minister. He should not have security of tenure. The Public Prosecutor, on the other hand, should have security of tenure. This is to ensure that he carries out his duties independently without fear or favour.

What is the relationship between the AG and the Public Prosecutor?

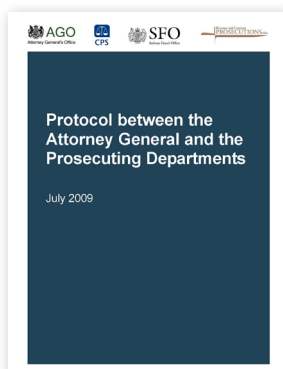
- *Informing and Consulting the Attorney General*

In general, the AG should not be involved in prosecution. Nonetheless, it is important that the AG be kept abreast of prosecutorial decisions so he can provide public and Parliamentary assurance that all relevant considerations have been taken into account.

- *Intervention of the Attorney General in Special Circumstances*

In the UK, the AG's consent to prosecute is required in offences relating to national security.

We agree that there must be some residual control so that the Director would carry out its duties with some accountability to the AG. After all, the AG is ultimately accountable to Parliament, especially on matters of grave national concern. Yet, there is the danger that the AG will force the Director to make a decision favourable to the Government.



It is therefore imperative that a balance be struck between the two positions. On one hand, the Public Prosecutor should be able to carry out his duties independently, and on the other hand, it is important that he remain accountable for his decisions. This is why in the UK, for example, the 'Protocol between the Attorney General and Prosecuting Departments' exists. This document describes the 'relationship' between the AG and Director, and serves as a guideline as to the dos and don'ts between the two offices. Furthermore, Public Prosecutors in the UK are also subject to 'The Code for Crown Prosecutors', a document which describes in detail all the considerations that need to be taken when making decisions relating to prosecutions.

Recommendations for Malaysia

Learning from the above, we advocate for the separation of the roles of the AG and the Public Prosecutor. The Public Prosecutor will head the Office of Public Prosecutions and be in charge of all prosecutorial decision-making functions whereas the AG will be a Minister who is accountable in Parliament for the actions of the Public Prosecutor – securing both prosecutorial independence and transparency.

The strongest path to reform is by amending the Federal Constitution, the CPC and the Interpretation Acts. Although this is the most challenging method to achieve change, it is by far the strongest and surest way of separating both roles.

The Office of Public Prosecutions: A Separate & Independent Public Prosecutor

Scope of Duties of the Public Prosecutor

We recommend that the Public Prosecutor should head the Office of Public Prosecutions. He should be the principal prosecuting authority in charge of prosecuting criminal cases. Additionally, the Public Prosecutor must not be a member of any political party and is qualified to be a judge of the Federal Court.⁴

⁴ It is imperative that the Director is not involved in any political activities whatsoever. In the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, it was decided that disqualifying a Member of Parliament from serving on the Bar Council did not violate a person's right of association as guaranteed by Article 10(1)(c) of the Federal Constitution. This principle could apply to the Director as well.



Amendments to Laws

Article 145(3)

We recommend Article 145(3) of the Federal Constitution to be amended to read: "*The Public Prosecutor shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence ...*". The Attorney General's limitation from the prosecutorial process should also be amended accordingly in Article 145(3A), 145(4) and 183.

Section 376(1)

We recommend Section 376(1) of the Criminal Procedure Code be amended to read: "*The Public Prosecutor shall have the control and direction of all criminal prosecutions and proceedings under this Code.*"

Interpretation Acts

We recommend that the definition of Public Prosecutor in the Interpretation Acts 1948 and 1967 be amended. The phrase "*means the Attorney General*" should be deleted.

Appointment Process

The Public Prosecutor is appointed as follows (adopted from Canada & the United States):



01 The Attorney General will submit not more than 10 candidates to a Selection Committee comprised of representatives from the Bar Council, Advocates' Association of Sarawak, and the Sabah Lawyers Association.



02 The Selection Committee selects 3 names and submits them to the Attorney General.



03 The Attorney General selects one whom he or she considers suitable for the office.



04 That candidate will then be put through a hearing and voted by a bipartisan Parliamentary Select Committee (similar to the nomination of the Attorney General in the United States Senate Committee on the Judiciary).



05 If he obtains a simple majority, that candidate will then be put to a vote in the Dewan Rakyat, whereby he will be appointed as Director upon obtaining a simple majority (similar to the confirmation process by the United States Senate).



06 If the candidate does not receive a simple majority of votes in Parliament, another candidate will go through the same process of being voted in (step 3 to step 5). The subsequent candidate must also be a candidate chosen by the Selection Committee (see step 2).

Removal Process

The Public Prosecutor is removed as follows (adopted from Canada & the United States):

01 The Director shall hold office until compulsory retirement age. Having security of tenure means that the Public Prosecutor cannot be easily removed before compulsory retirement. He can choose to retire, or be subjected to an impeachment if he has committed any misconduct.

02 To remove a Director, he has to go through an impeachment process in the Dewan Rakyat (adopted from the United States) where the Director is tried before the House and can only be removed by a 2/3 majority. Alternatively, the Director can resign at his or her own will.

The Attorney General as Minister: Pushing for Accountability in Parliament

Scope of Duties of the Attorney General

We recommend that the AG should be the chief legal adviser to the Government. He should be a Minister and member of Cabinet who is accountable for the prosecutorial decisions of the Public Prosecutor in Parliament.

We also recommend that the only time the AG can direct prosecutorial decisions is in cases involving national security or international affairs.

Appointment & Removal of the Attorney General

We recommend that the AG should be a Member of Parliament. This legitimises his presence in Cabinet meetings and is in accordance with his role as chief legal adviser to the Government.

As he is an MP, he can be removed by the Prime Minister like any other Cabinet minister. If he loses in the elections, he will also lose his position as the AG.

Conclusion

Separating the Public Prosecutor role from the AG, in actual terms and perception wise, is a crucial step to shield the prosecutorial decision-making process from political influence and conflicts of interest. A separate Director detached from the Executive will less likely to be prejudiced by political considerations and preserve the prosecutorial integrity of corruption cases of this nature.

A rigorous appointment process which combines stakeholder engagement and a transparent public examination of candidates will ensure the selection of a qualified and independent Public Prosecutor.

The security of tenure granted to the Director enables the post holder to tackle corruption best – without political pressure, fear or favour.

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 in Malaysia can be strengthened.

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