

Judicial Oversight and Institutional Reform: The Attorney General and Public Prosecutor in Malaysia

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Abstract

Unlike most Commonwealth countries, Malaysia has a unique office of the Attorney General (AG) which fuses with that of the Public Prosecutor (PP).

This article seeks to discuss the wide discretionary powers of the AG/PP with reference to *Article 145(3) of the Federal Constitution*, in relation to:

- i. Considerations of the judicial viewpoints and developments of the applicability of the doctrine of judicial review.
- ii. The conflict of interest with the fusion of roles of the AG and PP, with emphasis on the importance of the AG/PP exercising his powers without being affected by politics.
- iii. The paradoxical position of the PP which ideally should be independent of the Prime Minister and the Government of the day.
- iv. Most importantly, the ongoing movement of separating the powers between the AG and the PP in Malaysia.

This article aims to address and review the potential issues arising from the current position concerning the fusion of roles in Malaysia, and to support the separation of the AG/PP's roles.

Overall, by the use of doctrinal legal research, this article analyses the AG/PP's position and concludes with a commendation of the positive developments resulting from the judicial decision in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors*, and the expectation of the much-needed reform, which shall take place at the end of 2024 by way of a Bill, separating the powers between the AG and the PP which would promote and strengthen the rule of law.

Keywords: Attorney General, Public Prosecutor, Federal Constitution, judicial review, separation of powers.

1. Introduction

Vested with great powers, the Attorney General (AG) holds a crucial role in Malaysia, especially while also holding the role as the Public Prosecutor (PP). *Article 145 of the Federal Constitution* reflects the advisory and prosecutorial powers of the AG/PP, allowing for the fusion of roles. Furthermore, it is also stated in *Section 376 of the Criminal Procedure Code* and the Interpretation Acts 1948 and 1967 that the same person holds both roles of the AG and PP. In essence, the role of the AG is set out in the Federal Constitution, whereas the role of the PP is laid down by the Criminal Procedure Code.

Unlike other Commonwealth countries such as Australia and the UK, there is no separate office for the functions of the PP in Malaysia. Instead, it is fused with the role of the AG, and therefore the AG/PP exercises both the powers of advising the Government and prosecuting alleged criminals.¹ The fusion between the two roles has existed ever since the drafting of the Malaysian Constitution, although the reasoning for doing so seems to be unclear, especially when referring to the Reid Commission Report 1957, which states that the AG/PP ‘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’.²

This article primarily focuses on existing issues arising from the wide discretionary powers of the AG/PP, as well as the current plans to separate the powers between the AG and the PP. This has been done through doctrinal legal research, utilising its descriptive and prescriptive nature, by analysing existing legal sources which explain the current position of the AG/PP, with references made to key statutes and case laws of Malaysia. It is truly crucial to consider the unique role the AG/PP holds in Malaysia, taking into account its limitations, as it is ideal for the PP to be independent, and free from interference while carrying out the duties of both the AG and the PP.³

This article aims to critically examine and analyse the powers, roles, and potential reforms regarding the AG/PP. It also discusses the anticipation of further development concerning the roles of the AG and PP in Malaysia, especially through the expectations of a Bill separating both roles to be tabled by the end of 2024.⁴ Through the discussions made in this article, implications supporting the separation of the two differing roles shall be present.

2. The Attorney General’s Discretionary Powers

As it stands, the AG/PP enjoys broad discretionary powers as conferred by *Article 145(3) of the Federal Constitution*, especially where the AG leads the instigation of all criminal prosecutions on behalf of the state. By the interpretation of the said article in the case of *Long bin Samat & Ors v Public Prosecutor*⁵, the AG/PP retains wide discretion, and so-called ‘absolute power’, over these proceedings. Furthermore, regulation and review of the AG/PP’s powers used to be wholly out of the court’s supervisory jurisdiction, notwithstanding the doctrine of judicial review.⁶ The PP’s unfettered discretionary powers allowed him to make

¹ Saravana Kumar Segaran, *Upholding the Federal Constitution: The Judicial Thoughts of Dato’ Seri Hishamudin Yunus* (Rosli Dahlan Saravana Partnership 2022) 39-40.

² Aira Nur Ariana Azhari and Lim Wei Jiet, ‘Separating the Attorney-General and Public Prosecutor: Enhancing Rule of Law in Malaysia’ (2016) 34 IDEAS <<https://www.ideas.org.my/publications-item/policy-paper-no-34-separating-the-attorney-general-and-public-prosecutor-enhancing-rule-of-law-in-malaysia/>> accessed 31 March 2024.

³ Martin Carvalho, ‘Separation of powers: First steps afoot in splitting Public Prosecutor from AG, says Azalina’ *The Star* (Petaling Jaya, 7 December 2022) <<https://www.thestar.com.my/news/nation/2022/12/07/separation-of-powers-first-steps-afoot-in-splitting-public-prosecutor-from-ag-says-azalina>> accessed 23 August 2024.

⁴ Ivan Loh, ‘Bill on separation of AG-PP powers could be tabled by year’s end’ *The Star* (Ipoh, 23 January 2024) <<https://www.thestar.com.my/news/nation/2024/01/23/bill-on-separation-of-ag-pp-powers-could-be-tabled-by-year039s-end>> accessed 31 March 2024.

⁵ [1974] 2 MLJ 152.

⁶ *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681.

all decisions regarding criminal prosecutions, and the courts were to refrain from exercising the powers under *Article 145(3) of the Federal Constitution*. This was a shared judicial viewpoint, where complaints against the PP's decision should not be directed to the courts.⁷ Even so, the AG/PP's 'unfettered discretion' could be considered a contradiction in terms, especially since 'every legal power must have legal limits, otherwise there is dictatorship'.⁸

It is therefore noteworthy to consider the following development in the case of *Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail & Ors*⁹, where a passage from the Canadian Supreme Court in the case of *Nelles v Ontario*¹⁰ was referenced, allowing the accused to seek civil court reliefs against the PP for maliciously pressing charges – judicial scrutiny of the PP's decisions was allowed.¹¹ Further development of the powers of the PP occurred in the recent case of *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors*¹² with the decision that the PP's discretionary powers were amenable to judicial review, under 'appropriate, rare and exceptional' circumstances, especially when the litigant does not have any other available method of redress.

The AG/PP, as a result, does not enjoy 'absolute or unfettered discretion' under *Article 145(3) of the Federal Constitution* anymore.¹³ It is vital to note that there is a stringent two-step threshold during the leave stage to commence a judicial review application challenging the AG/PP's exercise of discretionary powers, as confirmed by the case of *Public Prosecutor v Ahmad Syameer bin Ahman Taufek*¹⁴. Hence, only in certain circumstances, the discretionary powers of the AG/PP are justiciable, and susceptible to a private right of action.¹⁵ This development is a positive one, as absolute immunity for the PP 'has no place in a progressive democratic society and is contrary to the rule of law'.¹⁶

Moving on, this fusion of roles of the AG/PP causes a conflict of interest between both roles, notably during the circumstances of members of the Executive or those linked to the Government of the day being criminally investigated.¹⁷ The AG's close working relationship with the Prime Minister and Cabinet members creates a conflict of interest when the PP is required to prosecute a member of the Government. The well-known decision of AG Tan Sri Mohamed Apandi Ali dropping charges against the former Prime Minister, Datuk Seri Najib Tun Razak, was widely criticised by the public. With the fusion of the roles of the AG/PP, it is inevitable that public suspicion of political bias would arise, even when the AG/PP's decisions are unerring. Such criticisms could have been avoided, if the roles of the AG and PP were kept separate.

⁷ *Johnson Tan Han Seng v Public Prosecutor; Soon Seng Sia Heng v Public Prosecutor; Public Prosecutor v Chea Soon Hoong; Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66.

⁸ *Pengaruh Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1978] 1 MLRA 132.

⁹ [2014] 11 MLJ 481.

¹⁰ [1989] SCJ 86.

¹¹ Tan Jun Yu, 'Judicial Review: Bringing the Rule of Law to Life' [2024] 1 MLJ 131, 137.

¹² [2021] MLJU 943.

¹³ *ibid.*

¹⁴ [2024] 2 MLJ 272.

¹⁵ Tan (n 11) 139.

¹⁶ *Dato' Pahlawan Ramli bin Yusuff v Tan Sri Abdul Gani bin Patail & Ors* [2015] 7 MLJ 763.

¹⁷ Karen Cheah Yee Lynn, 'Opening of the Legal Year Speech 2023: Speech by President of the Malaysian Bar' [2023] 1 MLJ 18, 30-31.

Nevertheless, the judiciary still plays an important role of overseeing the PP's execution of powers, as shown in the case of *PP v Mahathir Muhammad*¹⁸, where Justice Hishamudin Yunus resolutely maintained the standpoint of ensuring the PP's office did not act beyond their respective extent of powers.¹⁹ It is of utmost importance that the judiciary balances the PP's powers with the principles of equity and fairness.²⁰

It is crucial to understand that the AG's position requires him to uphold the rule of law, being the guardian of public interest. He should only advise the Government on the legal aspects of policies, and not maintain any particular political stance. Similarly, he is also independent of political considerations when making prosecutorial decisions as the PP.²¹ Therefore, it is clear that the exercise of powers of the AG/PP must not be affected by politics, while exercising his powers which are of a quasi-judicial nature.

3. The Powers of Appointing and Dismissing the Attorney General

It may be true that the fused role of the AG/PP could be considered a contradiction to the rule of law. Covered by *Article 145(1) of the Federal Constitution*, the Yang di-Pertuan Agong (YDPA), on the advice of the Prime Minister, is in charge of appointing the AG. This causes the issue where the YDPA and Prime Minister have powers to appoint the AG, yet the AG is not answerable to the Prime Minister nor the Parliament. Furthermore, the fact that the AG remains in office at the pleasure of the YDPA shows that it is the Prime Minister who determines the status of the AG's position and retains the power to remove the AG from office at any time.²² The AG does not possess security of tenure. This is extremely problematic, while taking the fused role of the AG/PP into consideration. It is against public interest for the PP's quasi-judicial role to be controlled by the Government, with concerns regarding political interference of his functions.

Article 145(5) of the Federal Constitution states that the 'AG shall hold office during the pleasure of the YDPA', and *Article 40 of the Federal Constitution* is to be referred to, determining that the YDPA is to make decisions after having been advised by the Prime Minister or Cabinet members. With the AG lacking security of tenure, he could be removed anytime according to the Prime Minister's wishes. A prime example is the early removal of the former AG/PP, Tan Sri Abdul Gani Patail, due to his alleged health issues. It is interesting to note that the removal occurred when Tan Sri Abdul Gani Patail was a central member of the Special Task Force which investigated the 1MDB scandal, and also the fact that he barely had 69 days left in office before his official retirement.²³ This Special Task Force was disbanded by the succeeding AG, Tan Sri Mohamed Apandi Ali, and replaced by the National

¹⁸ [2013] 2 CLJ 50.

¹⁹ Segaran (n 1) 38-39.

²⁰ *ibid* 39.

²¹ *ibid* 39-40.

²² Azhari and Lim (n 2).

²³ Malaysian Bar, 'Resolution Adopted at the Extraordinary General Meeting of the Malaysian Bar Held at Renaissance Kuala Lumpur Hotel' (12 September 2015) <<https://www.malaysianbar.org.my/article/news/agms-and-egms/resolutions/resolution-adopted-at-the-extraordinary-general-meeting-of-the-malaysian-bar-held-at-renaissance-kuala-lumpur-hotel-saturday-12-sept-2015>> accessed 31 March 2024.

Revenue Recovery Enforcement Team (NRRET) which took no part in any investigations relating to the 1MDB scandal.²⁴

Here lies the question—was Tan Sri Abdul Gani Patail’s removal truly constitutional? There were conflicting views regarding this issue. The Malaysian Bar Council president, Steven Thiru, claimed that the removal of Tan Sri Abdul Gani Patail’s position as the AG was unconstitutional, with the reason being non-compliance with *Articles 135(2) and 145(5) of the Federal Constitution*.²⁵ In response, Tan Sri Mohamed Apandi Ali cited *Article 145(6) of the Federal Constitution*, stating that it did not apply to AGs appointed after the date of 16 September 1963.²⁶ He continued to express that *Article 135 of the Federal Constitution* did not apply to the AG, due to *Part X of the Federal Constitution* being inapplicable to the AG’s office.²⁷

Either way, the main concerns do not arise from the powers of the Prime Minister to appoint and remove the AG, as the AG’s main role is to legally advise the Government. It is the Malaysian position regarding the fused roles of the AG/PP that stand to be paradoxical. The PP should, ideally, be independent of the Prime Minister and the Government of the day, as practised by many other Commonwealth countries. Essentially, there is a conflict with the rule of law by allowing the Prime Minister to retain powers of selecting and dismissing the PP.

4. Separation of Powers Between the Attorney General and the Public Prosecutor

While considering separating the powers between the AG and the PP, it is important that practices of other Commonwealth countries are considered and compared with the current position of the AG/PP in Malaysia.

An ideal practice is carried out by the UK, where the role of the Attorney General and the Director of Public Prosecutions are not held by the same person. In the UK, the Attorney General superintends the Crown Prosecution Office, which is headed by the Director of Public Prosecutions.²⁸ The Attorney General is the chief legal advisor to the Crown and has a number of independent public interest functions²⁹ that are generally political in nature, unlike the role of the Director of Public Prosecutions which is generally non-political, following the Code for Crown Prosecutors.³⁰ Although the Attorney General is accountable to the UK Parliament concerning the Director of Public Prosecutions, and these two roles do work together to ensure the proper function of the UK legal system, there is no conflict of interest since the

²⁴ Attorney General’s Chambers Malaysia, ‘National Revenue Recovery Enforcement Team (NRRET)’ (25 August 2015) <<https://agc.gov.my/agcportal/common/uploads/publication/63/KENYATAAN%20MEDIA%20National%20Revenue%20Recovery%20Enforcement%20Team%20NRRET.pdf>> accessed 31 March 2024.

²⁵ Hanis Zainal, ‘Bar Council: Removal of Gani Patail as A-G unconstitutional’ *The Star* (Petaling Jaya, 28 July 2015) <<https://www.thestar.com.my/news/nation/2015/07/28/bar-council-removal-ag-unconstitutional/>> accessed 31 March 2024.

²⁶ Malay Mail, ‘Gani Patail’s termination according to law, new AG says’ *Malay Mail* (Kuala Lumpur, 29 July 2015) <<https://www.malaymail.com/news/malaysia/2015/07/29/gani-patails-termination-according-to-law-new-ag-says/942141>> accessed 31 March 2024.

²⁷ Federal Constitution (Malaysia), art 132(4)(b).

²⁸ Azhari and Lim (n 2); Attorney General’s Office, ‘Ministerial role: Attorney General’ (2024) <<https://www.gov.uk/government/ministers/attorney-general>> accessed 23 August 2024.

²⁹ *ibid*.

³⁰ Crown Prosecution Service, ‘The Code for Crown Prosecutors’ (26 October 2018) <<https://www.cps.gov.uk/publication/code-crown-prosecutors>> accessed 23 August 2024.

roles are separate, especially considering the independent nature of the role of the Director of Public Prosecutions and the limited powers of intervening in prosecutions held by the Attorney General.³¹

Australia also carries out a similar system to the UK, although there is a clearer separation between the two roles, with the Office of the Commonwealth Director of Public Prosecutions (CDPP) being an independent prosecution established by the Australian Parliament.³² The Australian Attorney-General has limited oversight over the Office of the CDPP, serving as a check on abuse without threatening its independence. This, like the UK, also allows for the independent nature of both roles and ensures public confidence. With such considerations of the separation of roles carried out by the UK, Australia and other countries, it may be seen that there are possibilities that the current fusion of the AG/PP role in Malaysia may give rise to certain issues and public concerns relating to independence, accountability and transparency of the roles.

Currently, the Government is working on a Bill on the separation of powers between the AG and the PP. It is presumed that this Bill shall be tabled by the end of 2024.³³ The drafting of this Bill takes into consideration the practices of other countries, mainly the UK, Australia and Canada, which do not fuse the two roles together, and it is expected that the most suitable practices for Malaysia will be implemented and adopted. Amendments to the Federal Constitution and existing laws shall be made after thorough and careful consideration. Nevertheless, the separation of powers between the AG and the PP shall be a lengthy process, through three different phases.³⁴

An empirical study on this process of separating the powers of the AG and PP began in March 2024, with the approval of the Cabinet.³⁵ The Special Task Force for Comparative Studies and the Technical Task Force have been established to speed up this process, consisting of Datuk Seri Azalina Othman Said, who is the Minister in the Prime Minister's Department (Law and Institutional Reform), and many others.³⁶ This institutional reform is prioritised by the Government, especially when urged by the All-Party Parliamentary Group Malaysia (APPGM) on Integrity, Governance and Anti-Corruption to expedite its commitment towards it.³⁷

³¹ Azhari and Lim (n 2).

³² Commonwealth Director of Public Prosecutions, 'About Us' (2024) <<https://www.cdpp.gov.au/about-us>> accessed 23 August 2024.

³³ Loh (n 4).

³⁴ The Star, 'Separation of AG-PP powers a lengthy process, says Azalina' *The Star* (Kuala Lumpur, 4 December 2023) <<https://www.thestar.com.my/news/nation/2023/12/04/separation-of-ag-pp-powers-a-lengthy-process-says-azalina>> accessed 31 March 2024.

³⁵ Arfa Yunus, Martin Carvalho and Benjamin Lee, 'Empirical study on separation of AG-PP powers has started, says Azalina' *The Star* (Kuala Lumpur, 11 March 2024) <<https://www.thestar.com.my/news/nation/2024/03/11/empirical-study-on-separation-of-ag-pp-powers-has-started-says-azalina>> accessed 31 March 2024.

³⁶ *ibid*; Ilyia Marsya Iskandar, 'Task forces set up to expedite separation of powers of AGC and public prosecutor's office' *New Straits Times* (Kuala Lumpur, 12 September 2023) <<https://www.nst.com.my/news/nation/2023/09/954467/task-forces-set-expedite-separation-powers-agc-and-public-prosecutors>> accessed 31 March 2024.

³⁷ Junaid Ibrahim, Rahimy Rahim and Allison Lai, 'All-party group urges government to commit to institutional reforms' *The Star* (Kuala Lumpur, 21 March 2024).

Apart from separating the powers between the AG and PP, it is vital to consider other factors, such as whether the AG and PP should enjoy security of tenure. Since the AG's role is to advise and represent the Government, it is in good sense to conclude that the AG's position depends on the Prime Minister, and should not be protected by security of tenure. The AG should be accountable to the Government which receives his legal advice, and this can be reflected when he is a member of the Parliament and the Cabinet. In contrast, the independent PP should be able to enjoy security of tenure, so that he can freely carry out prosecutions without political pressure, fear nor favour. Naturally, the PP also has to remain accountable for his decisions, and this can be done through judicial review.³⁸

Such a move is much anticipated, since the division in responsibility between the AG and the PP shall provide for prosecutorial independence and transparency. Institutional independence shall be ensured, and there shall be less risk of political interference in Malaysia's legal process. It is true that the separation of powers between those of the AG and PP would promote and strengthen the rule of law.³⁹ This development in Malaysia will increase public confidence in the transparency of legal actions, especially in criminal prosecutions involving Government officials. Furthermore, negative perceptions of the Government's interference in judiciary matters may dissipate following the change.⁴⁰ The integrity of the institution shall be maintained, boding well even when scrutinised by the public.⁴¹

However, it is arguable that the mere separation of the roles of the AG and the PP may be insufficient.⁴² This is due to how 'inextricably interwoven' the branches of Malaysia's Government are, and such practice is clearly distinct from other countries that follow the separation of powers doctrine in a stricter manner, such as the UK and India. It has been suggested that changes of the Government structure are also required to better uphold the separation of powers doctrine in Malaysia.⁴³ Nevertheless, these positive developments of allowing judicial review over the PP's decisions and the separation of powers between the AG and PP are truly desirable.⁴⁴

5. Conclusion

Overall, it is instrumental that the powers of the AG/PP be regulated and separated, in order to uphold and strengthen the rule of law. It is generally expected that amendments will be made to the Federal Constitution, the Criminal Procedure Code, as well as the Interpretation

<<https://www.thestar.com.my/news/nation/2024/03/21/all-party-group-urges-government-to-commit-to-institutional-reforms>> accessed 31 March 2024.

³⁸ Azhari and Lim (n 2).

³⁹ Cheah (n 17).

⁴⁰ Bernama, 'Separating roles of AG, public prosecutor will increase public confidence in judiciary, say experts' *The Edge Malaysia* (Kuala Lumpur, 1 April 2023) <<https://theedgemaalaysia.com/node/661732>> accessed 31 March 2024.

⁴¹ Cheah (n 17).

⁴² Segaran (n 1) 52.

⁴³ Hamid Sultan Abu Backer, 'Absolute prosecutorial discretion anathema to criminal justice system' *Free Malaysia Today* (14 October 2023)

<<https://www.freemalaysiatoday.com/category/opinion/2023/10/14/absolute-prosecutorial-discretion-anathema-to-criminal-justice-system/>> accessed 31 March 2024.

⁴⁴ Segaran (n 1) 55.

Acts 1948 and 1967, since it is 'the strongest path to reform' as claimed by Dr Tricia Yeoh, the CEO of Ideas.⁴⁵ In essence, the direction solidified by the case of *Sundra Rajoo* has been long-awaited, positively developing the laws regulating the powers held by the AG/PP. The separation of powers between the AG and the PP is a much-needed reform, and it is expected that such a change will definitely contribute to the constructive growth of Malaysia's legal system.

⁴⁵ R Sekaran, 'Talks on separation of AG-Public Prosecutor powers heartening, says think tank' *The Star* (Petaling Jaya, 4 November 2023) <<https://www.thestar.com.my/news/nation/2023/11/04/talks-on-separation-of-ag-public-prosecutor-powers-heartening-says-think-tank>> accessed 31 March 2024.

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