

## THE ATTORNEY GENERAL AS PUBLIC PROSECUTOR IN MALAYSIA: FROM QUASI-JUDICIAL\* TO 'EXECUTIVE'

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### ABSTRACT

The Public Prosecutor (PP), as the chief criminal law enforcement officer, impacts directly on the public; hence the greater concern for his independence and integrity as exemplified by the security of tenure provision in the 1957 Federal Constitution. This article uncompromisingly holds that the Attorney General (AG) being 'political', as he is selected by, negotiates his contract with and may be dismissed by the Prime Minister, should be separated from the position of PP and protected from political interference. This article traces the history of the emasculation of the PP from Independence to the present. It looks at the travails of the AG/PP during the Mahathir years. One is bound to ask: how is the PP, who may be expected to enforce the criminal law against ordinary citizens, to do so against the head of government? It is based on statutory provisions and reported cases which involved the independence, powers and duties and security of tenure provisions and parliamentary debates (Hansard).

**Keywords:** attorney general, public prosecutor, quasi-judicial, independence, tenure, UK, Commonwealth and US positions

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\* It describes "a function that resembles a judicial function in that it involves deciding a dispute and ascertaining the facts and any relevant law, but differs in that it depends ultimately on the exercise of an executive discretion rather than the application of law". Oxford Dictionary of Law, 7<sup>th</sup> Edn, OUP.

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## PEGUAM NEGARA SEBAGAI PENDAKWARAYA DI MALAYSIA: DARIPADA SEPARA KEHAKIMAN KEPADA EKSEKUTIF

### ABSTRAK

Peguam Negara sebagai ketua penguatkuasa undang-undang jenayah, mempunyai kesan secara langsung kepada orang awam; maka adanya kebimbangan yang lebih ke atas kemandirian dan integritinya seperti yang difokuskan oleh peruntukan keselamatan tempoh perlantikannya dalam Perlembagaan 1957. Makalah ini tidak berkompromi dalam menyatakan bahawa Peguam Negara (AG) yang mempunyai kedudukan bersifat politik, kerana di pilih oleh, merundingkan kontraknya dengan dan boleh ditamatkan khidmatnya oleh Perdana Menteri, seharusnya diasingkan daripada kedudukan pendakwaraya dan dilindungi daripada campur tangan politik. Makalah ini mengesan sorotan sejarah tentang pengebirian pendakwaraya daripada kemerdekaan sehingga sekarang. Ia meneliti usaha AG/ Pendakwaraya di zaman Mahathir. Persoalan boleh dikemuka: bagaimana seorang pendakwaraya, yang sudah dijangka untuk menguatkuasa undang-undang jenayah terhadap rakyat biasa, boleh membuat perkara yang sama terhadap seorang ketua kerajaan? Makalah ini berteraskan peruntukan undang-undang bertulis dan kes yang telah diputuskan oleh mahkamah yang merangkumi kemandirian, kuasa dan tanggungjawab dan peruntukan keselamatan tempoh perlantikan, dan debat di Parlimen (Hansard).

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**Kata kunci:** peguam negara, pendakwaraya, separa kehakiman, kemandirian, tempoh, kedudukan di United Kingdom, Komanwel dan Amerika Syarikat

### INTRODUCTION

The Malaysian Attorney General has two capacities: he is the Public Prosecutor (AG/PP)<sup>1</sup> and is the ‘chief legal advisor’ to the government (AG/LA)<sup>2</sup>, which function he carries out with the

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<sup>1</sup> Federal Constitution Art 145 (3).

<sup>2</sup> Art 145(2).

assistance of the Solicitor General (SG).<sup>3</sup> The AG/PP and SG<sup>4</sup> are both Law Officers<sup>5</sup> with similar functions, powers, and duties<sup>6</sup> and they function without splitting their work into mutually exclusive spheres. Any division of work between them is administrative. Any distinction between them is in the AG's additional function as the PP; the SG does not have the same concurrent functions as the PP; he acts as PP only where the AG is unable to act as the PP.<sup>7</sup>

The AG as the PP wields considerable power in the criminal justice system and, thereby, over the general public:<sup>8</sup> "The Attorney-General shall have power exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence ..." This was the position under the CPC as it applies to all prosecutions under all laws, not just those under the Penal Code (CPC sec 3)<sup>9</sup> so the PP has

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<sup>3</sup> S. 40A(1): "Unless in any written law it is otherwise expressly provided, the Solicitor-General may perform any of the duties and may exercise any of the powers of the Attorney-General."

<sup>4</sup> There is a vast and wide-ranging low-profile work that the SG does for the government as seen in the book by Tan Sri Dato'Haji Mohamed Salleh bin Abas (as he then was) *Constitution, Law and Judiciary*, Malaysian Law Publishers 1984.

<sup>5</sup> Interpretation Acts 1948 and 1967, s. 66 states: "Law officers" means the persons for the time being holding the office of Attorney General and Solicitor General, respectively."

<sup>6</sup> Interpretation Acts 1948 and 1967 sec 39 "(1)Where a written law conferring powers or imposing duties on the Attorney General shall be construed as conferring those powers or imposing duties on both the Attorney General and the Solicitor General."

S. 39(2) "A delegation of functions to the Attorney General shall be deemed to be a delegation to both the Attorney General and the Solicitor General."

s. 40A Interpretation and General Clauses Ordinance 1948; "(2) Where the Yang di-Pertuan Agong or any other person has awfully delegated his powers to the Attorney General such delegation shall, unless otherwise expressly provided, be deemed to be delegation of powers to the Attorney General and the Solicitor General."

<sup>7</sup> Criminal Procedure Code (CPC), s 376(2).

<sup>8</sup> Sec. 380, CPC The right of a person to initiate a private prosecution for an offence against his person or his property is maintained.

<sup>9</sup> Sec. 3, CPC: "All offences under the Penal Code shall be inquired into and tried according to the provisions hereinafter contained, and all offences under any other law shall be inquired into and tried according to the same provisions; subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences." The Dangerous Drugs Act 1952, the Internal Security Act 1960 and the Essential (Security Cases) Regulations 1975 are examples of criminal laws with specific provisions with respect to certain aspects of criminal procedure.

exclusive control over all prosecutions; as mentioned under s.376 (1) of the CPC.

And this power has been enhanced recently. The CPC was amended<sup>10</sup> to give the AG/PP the power to certify that cases (not necessarily offences of a category) ordinarily heard by the subordinate court should be heard by the High Court.<sup>11</sup> The constitutionality of the amendment was challenged as an encroachment on ‘judicial power.’ When the decision, *Dato’ Yap Peng v PP*,<sup>12</sup> went against him, Tun Dr Mohamed Mahathir (hereafter Dr Mahathir), the Prime Minister then, moved with alacrity to amend not just the AG/PP provisions of the Constitution, which may have sufficed, but removed ‘judicial power’<sup>13</sup> altogether from the courts! This response can only be taken as a measure of how much the (political) Executive or, at any rate, Dr Mahathir, set store by the powers of the AG/PP.

## THE REID CONSTITUTION

The Reid Commission’s constitutional proposals (the Reid Constitution)<sup>14</sup> saw some serious deliberations about the office of AG. The Reid Commission explained its conception thus:<sup>15</sup>

In Commonwealth countries “the Attorney General exercises the professional functions of giving independent legal advice to the government, representing the government in the courts”, “ and perhaps<sup>16</sup> assuming responsibility for public prosecution”.

<sup>10</sup> Art.145(3A) “Federal law may confer on the Attorney General power to determine the courts in which or the venue at which any proceedings which he has power under clause (3) to institute shall be instituted or to which such proceedings shall be transferred”; and Sec418A Criminal Procedure Code.

<sup>11</sup> The accused is effectively denied one level of appeal, from the subordinate court to the High Court.

<sup>12</sup> [1987]2 MLJ 311.

<sup>13</sup> Art 121(1) now reads: “...(T) he High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.” The article, before the amendment, read: “The judicial power of the federation shall be vested in” (the two High Courts). Judicial power was unqualified.

<sup>14</sup> The Report of the Federation of Malaya Constitutional Commission 1957 General Introduction, para 3; HMSO, London, Colonial no 330.

<sup>15</sup> The tabulation is mine.

<sup>16</sup> The Reid Commission does not seem convinced about the desirability of this.

The Reid Commission noted that:

“it is significant that India, Pakistan and Ceylon have all preferred the non-political Attorney General,” while “the political functions normally exercised by a political Attorney General are exercised by a Minister of Justice or Minister of Law.”

The Commission also noted that in terms of qualifications:

the AG shall be a person who is qualified to be a judge of the Supreme Court.

Finally, the Reid Commission had a look at the UK position and made a significant comment:

In the United Kingdom the political and the professional functions of the Law Officers are conveniently kept distinct and the latter are not regarded as within the jurisdiction of the Cabinet.

What is even more significantly, as events proved soon after, the Commission added that:

“It would be difficult to keep the functions distinct in a country exercising responsible government for the first time”.

The Reid constitutional proposals were then considered again at a 1957 London Conference, resulting in a White Paper. It said:

It is essential that, in discharging his duties, the Attorney General should act in an impartial and quasi-judicial spirit. A clause has therefore been included to safeguard the Attorney General’s position by providing that he shall not be removed from office except on the like grounds and in the like manner as a judge of the Supreme Court.<sup>17</sup>

Sir Kenneth-Wrays put it as follows:

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<sup>17</sup> This was reflected in Article 145(5): “The Attorney General may at any time resign his office but shall not be removed from office except on the ground and in the manner as a judge of the Federal Court”. This article remained in force till 16 th September 1963. Authoritative text; Commissioner of Law Revision, 2002.

“Any person to whom control of public prosecutions is entrusted should, therefore, be endowed... with a status of independence, recognized as a matter of constitutional law.”<sup>18</sup>

It was considered appropriate to combine the two positions from the outset presumably because it was the pre-existing position and the AG as legal adviser needed to be protected so that he could advise the ruling party objectively according to the law and according to its interest. However the Attorney General was required to attend the House; he could be made accountable for the exercise of his prosecutorial discretion in the time-honoured British way of questions, criticisms and resolutions directed at him by the House, and his independence was to be ensured by the Judicial and Legal Service Commission.

a) Qualification<sup>19</sup>

The AG/PP is required to be “a person who is qualified to be a judge of the Federal Court.” At the least, it means the AG of Malaysia shall always be a lawyer of at least 10 years standing<sup>20</sup> (though not necessarily in the substantive sense of having practised law for at least 10 years.)<sup>21</sup> Does it also mean he should manifest the moral conduct and ethical standards of the profession as a whole?<sup>22</sup> It is submitted that given the powers exercisable by the AG - PP, his ethical standards are important.

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<sup>18</sup> Sir Kenneth-Williams, ‘*Commonwealth and Colonial Law*’ at p 350 quoted approvingly by Abdul Kadir Yusof in *The Office of Attorney General, Malaysia* (1977) 2 MLJ ms xvi at xix right column at p ms xx right column.

<sup>19</sup> Academic qualifications are not discussed because they are the same as for lawyers in private practice –as spelt out in the then law, the Advocates and Solicitors Ord. 1947- without the additional requirement, in the case of judicial and legal officers, of having to be called to the Bar.

<sup>20</sup> Art 123(b).

<sup>21</sup> *Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161; [2008] 2 MLJ 285.

<sup>22</sup> The English AG, Lord Goldsmith was referred to the Bar Council for disciplinary action for his advice to the English PM on the legality of the War on Iraq, for, among other things, failing to advise according to the law but to favour the client. *Lawless World* by Philippe Sands, QC Penquin Books 2006; Cap 8 ‘*Kicking Ass in Iraq*’; pp 174-204; Cap 12; *This Wretched Legal Advice* at 258-283, footnote 36.

b) Eligibility

The choice of candidates for the office of the AG was restricted to serving officers of the Judicial and Legal Service. As its members would have been able to observe the candidate's work over the years, and be satisfied with the candidate's experience, and intellectual and moral character.<sup>23</sup> Selection is to be done by the Judicial and Legal Service Commission<sup>24</sup> and formal appointment by the Yang di-Pertuan Agong. Most significantly, there was no scope for the Political Executive influencing the selection at any stage.

c) Accountability and Independence, Security of Tenure/ Dismissal: It is in ensuring security of tenure that we see the Working Party's concern for ensuring the independence of the AG as PP. The Attorney General may at any time resign<sup>25</sup> his office but shall not be removed from office except on the like grounds and in the like manner<sup>26</sup> as a judge of the Federal Court. (article 145(5)).

A 'Rolls Royce' tribunal of five (or a greater, uneven number) judges (serving or retired, from Malaysia or anywhere in the Commonwealth), had to be empanelled, to investigate and make its recommendation, to the Yang di-Pertuan Agong, who as the fountain of justice, could accept or reject the recommendation even if it was to dismiss.<sup>27</sup> Such a cumbersome procedure for the removal of the AG

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<sup>23</sup> Years later Tan Sri Abdul Kadir Yusof was to rationalise the removal of these criteria thus: "It is the quality and strength of character of the holder of office that would be more significant than considerations of the existence or non-existence of political affiliations." Abdul Kadir Yusof in "The Office of Attorney General, Malaysia" (1977) 2 MLJ XVI XIX.

<sup>24</sup> The Judicial and Legal Service Commission members under the Malayan Constitution were: (i) "the Chief Justice, who shall be the Chairman; ii) the Attorney General; iii) the senior puisne judge; iv) (and one non judicial member), the deputy chairman of the Public Services Commission; v) one or more members, who shall be appointed by the Yang di-Pertuan Agong, after consultation with the Chief Justice, from among judges or former judges of the Supreme Court"; Article 138 (3).

<sup>25</sup> The words '*by writing under his hand addressed to the Yang di-Pertuan Agong*' do not seem to apply to the AG resigning as they do not appear in Article 145 (4) of the Constitution. The AG is given less protection in resigning than judges. Article 125(2) Federal Constitution.

<sup>26</sup> Art. 125 (4).

<sup>27</sup> Art. 125(3) The article uses the term 'may'; "...the Yang di-Pertuan Agong and *may* on the recommendation of the tribunal remove the judge from office." It could only mean that the Yang di-Pertuan Agong is not bound by a

could only be justified by the fact that he was also the PP; a position that may be useful in disposing of enemies and excusing friends.

The Malayan Constitution provisions about the AG/PP lasted only till 1960. The 1960-63 Constitutional Amendments were principally to change the non-political AG to a political AG. As if anticipating the drastic changes which were to take place soon, the Reid Commission had cautioned while mentioning the situation in the United Kingdom:

In the United Kingdom the political and professional functions of the Law Officers are conveniently kept distinct and the latter are not regarded as within the jurisdiction of the Cabinet. It would be difficult to keep the functions (of PP and legal adviser) distinct in a country exercising responsible government for the first time:

But it had left the door open, the United Kingdom practice of having political Law Officers has not expressly been excluded.

The leaders of newly Independent Malaya were quick to fasten on it. In moving the second reading of the Bill, Tun Abdul Razak, the Deputy Prime Minister's justification was brief:

Under the present arrangement the Attorney General who is the Government's chief legal adviser, must be a permanent official in the judicial and legal service. It is not possible to have as Attorney General a political man as is the practice in several countries including the United Kingdom. The Government is of the view that with the progress of our country and of our democratic institutions, it may prove desirable at some future date to have an Attorney-General as a member of the House.<sup>28</sup> It may be convenient, and it may be desirable for the chief legal adviser to the Government to sit in this House to explain and answer legal matters. Now, this amendment makes it possible, should it prove desirable in the future, to appoint an Attorney General from outside the judicial and legal service.<sup>29</sup>

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recommendation to dismiss if for instance if he feels the AG –PP is being coerced. He may be the final protection.

<sup>29</sup> Parliamentary Debates, Official Report, House of Representatives, First Second Session Second Session Parliament, Second Session Dewan Rakyat, 309-310. Friday 22<sup>nd</sup> April 1960.

Going by the above, Tun Abdul Razak was only concerned with the function of the AG as legal adviser and had nothing to say about the 'public prosecutor' aspect. He may only have thought about how cumbersome the removal of the AG as legal adviser would be if he had to be removed simply for incompetence; and to have the widest possible choice of candidates to choose from rather than being restricted to the Judicial and Legal Service. With the amendment, the Executive favoured itself in having available to it a wide choice of lawyers for appointment as AG - he could be a member of the judicial and legal service, a lawyer in private practice or even an academic.

The change in legal character of the AG was effected by the removal of safeguards against dismissal and the manner of selection

(T)he 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 the Cabinet, shall receive such remuneration as the Yang di-Pertuan Agong may determine.<sup>30</sup>

The Constitutional Amendment Act 1960,<sup>31</sup> illogically made short-shrift of the safeguards, which were needed more for the PP than for the other law officers. However, D.R. Seenivasagam, who was also a leading criminal lawyer then and MP in the Opposition, did not touch on the implications for criminal justice in reducing the AG/PP to executive. There was no appreciation of the difficulties that may be faced by such an AG/PP in asserting his independence of the Prime Minister, with the considerable powers appropriate to the position but unprotected in its exercise.

Nearly twenty years later Tan Sri Abdul Kadir,<sup>32</sup> who had combined in him the positions of AG/PP and also Law Minister 1963-1977 offered some rationalisations<sup>33</sup> for the amendments:

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<sup>30</sup> Art. 145 (5) Federal Constitution.

<sup>31</sup> (10 of 1960) & (Act 26/1963).

<sup>32</sup> In 1962, he was appointed the Solicitor General and in 1963, he became the first Malayan Attorney General/PP and held that position until 1969. He retired in May 1969 and, shortly after that, he was made Senator and Law Minister and the first political Attorney General/PP. He retired from the Senate in 1974 and contested the General Election in the same year. On being returned unchallenged he was appointed Law Minister and political AG/PP and resigned later in 1974. The seamless ease with which he passed from one legal culture to another betrays a certain lack of seriousness about constitutional values.

<sup>33</sup> Years later Tan Sri Abdul Kadir Yusof was to rationalise the removal of these criteria thus: "It is the quality and strength of character of the holder of office

The doubts expressed by the Reid Commission on the desirability of following the practice in this matter (of) the unwritten constitution of the United Kingdom appear to have been overcome by then. If the doubts were about combining the functions of PP and legal adviser, it is not clear how the reservations of the Reid Commission were shown to be unfounded.

It was, no doubt, considered that the nation had sufficient political maturity to adopt the system and traditions which had worked with such eminent success in the United Kingdom.<sup>34</sup>

It had only been 3 years since Independence and it is not explained how our political leaders had acquired “political maturity” and by what public act they showed they had. Specifically, with respect to the need for the amendments, he said:

Two considerations tend to have weighed with the government in making this change, that is, firstly, the desirability of having in the public interest, the most suitable person available for the performance of the onerous task of that office, regardless whether he was appointed from within or outside the public service.<sup>35</sup>

As for the PP’s work, Tan Sri Abdul Kadir had this to say:

...(T)he impartial and independent performance of his functions and duties and exercise of his powers .. could be assured by conferring on him a politically untrammelled constitutional discretion in these matters.<sup>36</sup>

With this alone, he attempted to justify belatedly the removal of the safeguards which had taken place about two decades ago. And his justification did not touch on the functions of the law officers or more specifically the PP. He said:

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that would be more significant than considerations of the existence or non-existence of political affiliations.” Is he saying the holder of AG’s position needs to be politically chameleonic as he moves from professional to political as the PM of the day dictates? Abdul Kadir Yusof. The Office of the Attorney General.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

(H)is discretionary power which had hitherto existed only in ordinary law, with regard to criminal proceeding (is now) a complete constitutional discretion to institute, conduct or discontinue any proceedings for an offence.

Abdul Kadir's explanation seems to be that the Public Prosecutor's powers under the CPC now moved to the Constitution will, for that reason alone, make his powers untrammelled. Repeating in the Constitution the provisions about the PP's powers does not make the AG/PP even more independent in the absence of security of tenure. Citing that the AG will now be "...politically untrammelled," when in fact his protection has been removed, does not carry the argument any further. And it does not come anywhere near explaining the need for changing the AG's position vis-à-vis the Political Executive. Is the AG simply straining to find justification?

As for suitably-experienced candidates for PP, which Tun Abdul Razak did not complain about, the bulk of work in government legal service is prosecution, so it would not be difficult to find an experienced prosecutor to be the PP from among the officers operating at the coalface of the criminal law as deputy public prosecutors daily in the Judicial and Legal Service.

Abdul Kadir unwittingly, perhaps, let on about the attitudes actuating the recasting of the office of AG/PP and AG/LA when he said:

No hazy theories of conflict between the role of an Attorney General as the protector of the public interest and his loyalty to the legislative and executive agencies of the State be-clouded the visions of the men who filled in the contents of the constitutional set-up...<sup>37</sup>

In fact, a more scrupulous observance of the boundaries between the executive and quasi- judicial functions, and between the Public Prosecutor and the Attorney General is what is precisely needed.

Conflating the positions of AG/PP and AG/LA to the government in one person has been at the expense of the former but it was the latter that the political executive thought fell short.<sup>38</sup> The AG/PP was

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<sup>37</sup> Ibid.

<sup>38</sup> Parliamentary Debates, Official Report, House of Representatives, First Second Session Second Session Parliament, Second Session Dewan Rakyat, 309-310. Friday 22<sup>nd</sup> April 1960.

reduced from quasi-judicial to executive, and he became a contract officer, chosen and removable by the Prime Minister. It is not an unkind view to hold that the sublimated language of the article is simply intended to disabuse public disquiet about the far-reaching amendments to the Constitution as the AG had concentrated in his hands the powers of chief legal adviser to the government, PP and also Law Minister.<sup>39</sup>

### **ATTORNEY GENERAL/PUBLIC PROSECUTOR IS A POLITICIAN AND SOLICITOR GENERAL/PUBLIC PROSECUTOR IS A CIVIL SERVANT**

Under the Interpretation Acts, the AG and SG are Law Officers and have the same powers as legal advisers but as PP, the SG is subordinate to the AG. After the amendment in 1960, is it justified for the political AG/PP appointed on vastly different basis- one on contract and the other, on civil servant terms- to have the same powers particularly in terms of prosecutorial functions?

Though the Reid Commission had spent some time considering whether the AG should be political or non-political, and the government of Independent Malaya had made some fundamental changes to the nature of the office, no attempt was made to deal with the two positions distinguishably- legal adviser to the government and public prosecutor- according to the requirements peculiar to each which would have made for a more precise constitutional conceptualisation, functions, mode of selection and criteria; and security of tenure. Instead they had simply followed British practice of the times; the SG should only be deputy to the AG/PP notwithstanding other differences. The SG should not have the powers and duties of a PP; he should be replaced by a Chief Deputy Public Prosecutor.

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<sup>39</sup> The concentration does not seem to have been done to resolve any administrative bottlenecks but, on the contrary, they caused some. Salleh Abas in *Constitution, Law and Judiciary*.

## THE JUDICIAL AND LEGAL SERVICE (JLS) COMMISSION

Unlike the senior judiciary whose position is protected by specific constitutional positions,<sup>40</sup> there is no discrete provision for the junior judiciary. The constitutional position is that the Judicial and Legal Service Commission, comprising entirely of the senior judiciary would protect the junior judiciary; predicating the principle: ‘the protected shall protect the unprotected.’

The JLS Commission was essential for protecting the junior judiciary<sup>41</sup>, legal officers<sup>42</sup> (excluding the AG/PP) and the Deputy Public Prosecutors (DPPs).<sup>43</sup> The JLS Commission under the 1957 Constitution was properly constituted for the protection of the JLS. The Judicial and Legal Service Commission members under the Malayan Constitution were: (i) the Chief Justice, who was the Chairman; ii) the (non-political) Attorney General; iii) the senior puisne judge; iv) (and one non judicial member), the deputy chairman<sup>44</sup> of the Public Services Commission; v) one or more members, who shall be appointed by the Yang di-Pertuan Agong, after consultation with the Chief Justice, from among judges or former judges of the Supreme Court. (article 138 (3)).

With the change in the legal character of AG/PP the Judicial and Legal Service Commission was unnecessarily abolished, and replaced by the Public Services Commission. With the abolition of the JLS Commission, during the period 31<sup>st</sup> May, 1960 to 16<sup>th</sup> September, 1963 officers of the Judicial and Legal Service came under the

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<sup>40</sup> Articles 121 to 131A, principally art. 125.

<sup>41</sup> The junior judicial officers are Magistrates, Sessions Court Judges and Asst, Senior Assistant Registrars, Deputy Registrars and Chief Registrar of the courts; Art 132(3) (c).

<sup>42</sup> The legal officers are the Solicitor-General; state legal advisers, deputy public prosecutors, and all non-judicial officers of the AG’s Chambers; Art 132 (4)(b). The AG is not a member of the public service because he is not appointed under any provision of the Constitution; he is appointed by contract and he is not appointed from among members of the Judicial and Legal Service.

<sup>43</sup> These are the deputy public prosecutors who assist the AG/PP; sec 376 (3) CPC.

<sup>44</sup> An instance of the particularity of the Reid Commission in ensuring the independence of the junior judiciary is that the representative of the Public Service Commission to the Judicial and Legal Service Commission is not its Chairman but the deputy Chairman of the Public Service Commission and did not assume the Chairmanship of the Legal Service Commission but is an ordinary member of the Legal Service Commission, to avoid the issue of a Judicial Commission being headed by a non-judicial figure.

jurisdiction of the Public Service Commission. The distinction between the Executive and the Judiciary was effectively abolished!

When the JLS Commission was restored its 'judiciary' content was diluted. In the restored version of the Judicial and Legal Service Commission, the Chairman of the Public Service Commission became chairman of the Judicial and Legal Service Commission replacing the Chief Justice. The judiciary lost the leadership and dominance of its own Commission; the principle of the protected shall protect the unprotected was now impaired.

The only saving grace is the recognition of the fact that a political AG should not be a member and his place is taken by the SG (art 138(2) (b)). However, the AG is now appointed from outside Parliament and from outside the JL service; the position has been cleverly crafted to avoid the disqualifications,<sup>45</sup> so that he can now be a member of the JLS Commission, and as an appointee of the PM, politics may now enter the deliberations of the Commission.<sup>46</sup>

### **THE DEPUTY PUBLIC PROSECUTORS,<sup>47</sup> THE LEGAL ADVISERS TO THE GOVERNMENT AND THE JUNIOR JUDICIAL OFFICERS<sup>48</sup> VIS-A-VIS THE ATTORNEY GENERAL/PUBLIC PROSECUTER**

When the change in the nature of the office of AG/PP was made, the PP also became political and this has ramified fundamentally on the branches of government legal service which is premised on government legal service having three branches: the prosecution or more precisely, the Deputy Public prosecutors (DPPs), the legal advisers and the junior judiciary, all comprising the Judicial and Legal Service<sup>49</sup> and under the jurisdiction of the JLS

<sup>45</sup> The AG/PP is not a member of the public service because he is appointed by the PM to serve under contract and not by virtue of his membership of the Judicial and Legal Service.

<sup>46</sup> In *PP v Zainuddin* [1986] 2 MLJ 100 at p 103 Salleh Abas FJ had commented that the membership of the att-gen was "anomalous" in a body comprising of judicial persons.

<sup>47</sup> They are now appointed by the AG/PP and distinctively organised so now there is no casual interchangeability between DPPs and other legal and even judicial officers as in the past. See 376 CPC.

<sup>48</sup> See *Cheak Yoke Thong v PP*[1984] 2 MLJ 119 (FC).

<sup>49</sup> Art 132(1) (b);132 (4) (b).

Commission.<sup>50</sup>As the service is considered one, the DPPs, legal advisers and junior judicial officers are considered interchangeable within the three branches. The worrying question is the relationship with the AG/PP, as he is, rightly or wrongly, a member of the Commission and as legal adviser to the government and prosecutor seems to combine in one person all the three branches of the Judicial and Legal Service.

The CPC was amended in 1993 whereby the DPPs were appointed by the AG/PP as a distinct group. The following questions arise: Aren't they *chosen from the JLS* by the AG/PP? Or are they personal staff of the AG/PP as the words in italics are not in the statutory provision? Or does their position as staff of the AG/PP mean they have to do the bidding of the PP or only the general direction of the AG/PP without regard for professional ethics applicable to the prosecution<sup>51</sup> or the legal profession generally. And this is in addition to the fundamental question of the PP's own independence vis-vis the AG.

The question of independence and integrity, and its relationship with the AG/PP, is more important to the junior judiciary as it carries out the essentially delegated judicial function of the senior judiciary; in the same relationship as the High Court (as the most complete court of first instance) with the subordinate courts (as their delegates) where the junior judicial officers preside; and the subject matter jurisdictions and punishments have always been increased. Unlike the senior judiciary whose position is protected by specific constitutional positions,<sup>52</sup> there is no discrete provision for the junior judiciary. It should now be possible to (formally) separate the judicial service (and, to a lesser extent) the prosecution service from the AG and leave them in the care of the Judicial and Legal Service Commission. Shouldn't this be the extant position? But how effective is this?

There had been some restiveness about this arrangement among Magistrates and Sessions Court Presidents, as they were then known, and DDPs and, because they could after making decisions that may displease the AG/PP as the initiator of the proceedings where att gen as the PP may exact his revenge they were transferred to the AG's Chambers at some future date in their careers. This feeling came to a head in the criminal cases of *Malek bin Su v PP* and *Cheak Yoke*

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<sup>50</sup> Art 138.

<sup>51</sup> See for example Rule 10, Legal Profession (Practice and Etiquette) Rules 1978

<sup>52</sup> Articles 121 to 131A, principally art 125.

*Thong v PP*.<sup>53</sup> In these cases, the Magistrate and Sessions Court President were invited by defence counsel to disqualify themselves from hearing the case because, under the system they operated they could find themselves under the AG/Public Prosecutor who is head of the prosecution service and member of the JLS Commission the supervising body which looks after the judicial side as well. Apart from fearing for themselves, there was a risk of injustice to the accused as the judicial officer/DPP may out of fear of any adverse consequences to himself at the hands of the AG make a decision that would please the AG against the accused. One of them did disqualify himself on that very ground.

The court did not consider the underlying circumstances of the system but was content to read out the Constitution:

The authority which exercised jurisdiction over the officers of the service in matters of promotions and discipline is the Judicial and Legal Service Commission...of which the Attorney General is only a member.<sup>54</sup>

The court was, however, emphatic about the judicial department:

The Attorney General is *not* the head of the Judicial Department.<sup>55</sup>

But is he then head of the legal department or is it the SG? The judge's pronouncement about the Judicial and Legal Service Commission may reduce the AG's role to a titular one but in the course of the daily operations the AG exercises more control and say over them than the JLS Commission unless the position of AG is separated from that of PP and he becomes more assertive on behalf of DPPs and in all matters of criminal justice.

What the Federal Court had to say next is not very assuring. The case went on appeal-*Cheak Yoke Thong v PP(FC)*<sup>56</sup>- with no greater assurances for junior legal officers. Salleh Abas having questioned the AG's membership of the Commission, could have indicated some 'no go' areas on the relationship between the AG/PP and the judicial, prosecution and legal officers such as:-

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<sup>53</sup> [1984] 1 MLJ 311, [1984] 2 MLJ 119.

<sup>54</sup> At pp 313 C left column.

<sup>55</sup> At p 313 E left column.

<sup>56</sup> [1984] 2 MLJ 119.

- i) The AG as the PP should recuse himself from any meeting affecting a judicial officer in his conduct of criminal cases and more so where the AG - PP has made any complaints;
- ii) The prosecutor should have advance notice of complaints made against him by the PP, and should be allowed to counter it;
- iii) A judicial officer who heard mainly civil cases should have notice of any complaints made against him and be allowed to counter it; and
- iv) Legal officers in politically sensitive positions should enjoy some insulation from political repercussions.

How should the DPPs and the other legal officers who work with the political AG/PP and non-political SG, respectively to conduct themselves *vis-à-vis* the political AG in performing their professional work? The position of the law officers of Malaysia in their relationship with the political AG/PP may be analogised to the position of the political head of the Law Department in India. A leading Indian constitutional law expert and advocate general<sup>57</sup> says that the law officers of India, unlike the Minister of Justice/Law, are not political to ensure that their advice on the law is objective and not tailored to suit the political purposes of the government of the day including that the Law Minister may not ‘edit’ the opinion though he may accept or reject it.<sup>58</sup> And the reason for all this:

The theory underlying independent advice...was that Government like everyone else, must obey the Constitution and the laws; that a sense of fairness and justice in administering the law was desirable, not only for its own sake, but for maintaining confidence in the Government; that, if correct legal advice were not given by the Legal Department, government might suffer humiliating defeats when executive acts and legislative measures were challenged in the law Courts.<sup>59</sup>

With respect to a federation such as Malaysia, Seervai gives an additional reason for the protection:

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<sup>57</sup> The advocate general was a non-political legal officer of the state, and for the nation as a whole there was a non-political attorney general, much like the non-political attorney general of Malaysia.

<sup>58</sup> Seervai; “The Place of Law Officers and Ministers of Justice” 2 [MLJ] 1978 cxxvi at p cxxviii.

<sup>59</sup> Ibid.

In a federal state, the need for an independent Law Officer is even greater than in a unitary state, for legal conflicts arise between the states and the Union, and if the Attorney General were not an independent legal adviser but a political partisan, it might undermine their confidence ... and produce feelings of hostility between the Union and the States.<sup>60</sup>

With respect to the prosecutors, Seervai states that the position of criminal prosecutors was that the Law Minister and Attorney General of India had nothing to do with them. They were appointed by the states with the concurrence of the chief justices. Both the law officers and the public prosecutors were well-protected from political interference.

### **POLITICAL ATTORNEY GENERAL/PUBLIC PROSECUTOR AND LAW MINISTER**

The amendments made in 1960, and implemented in 1963 along with those needed for the formation of Malaysia, were enhanced after Independence when the political AG was appointed to the Cabinet.<sup>61</sup> This gives rise to 'separation of powers' issues the more serious of

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<sup>60</sup> Ibid. An instance, I know of personally, involved my law school classmate Idris Othman who was posted to Kelantan, as State Legal Adviser. Belonging to a federal service but appointed to an opposition-governed state, he was caught in the cross fire between the state government and Dr Mahathir's federal government when he advised the state government that if the federal government did not wish to compensate the state government for the land it had taken without compensation for the construction of the Pergau dam, the federal government could be asked to vacate the site which the government did, as a result of his objective advice he suffered some discomfiture.

<sup>61</sup> This also gave rise to ethical issues in the quasi-judicial vis-a-viz executive context. As Tun Salleh Abas says: "He (Abdul Kadir bin Yusuf) was then not only the Attorney General in so far as the law is concerned but as a Cabinet Minister he was also in charge of all legal affairs of the Government.... But being the Attorney General, the Minister of Law he cannot therefore be responsible for the courts and judicial matters. It would not be consistent with the independence of the judiciary. Thus parliamentary affairs of the court were shifted to the Prime Minister's Department to be dealt with by a Deputy Minister in this department;.."; but still executive. The arguments that may be raised against the Law Minister may also be raised against any other Minister taking charge of judicial matters. See Salleh Abas; *Constitution, Law and Judiciary in Malaysia*, Malaysian Law Publishers, 1984.

which is: if he is a Cabinet member, should he also be the Public Prosecutor? Or should he not for that would involve a trespass of the political executive on the quasi-judicial arena. With the background of the *Campbell* controversy, which had taken place a few decades before that,<sup>62</sup> with its implication of facilitating political interference in the decision to prosecute, the risk of it was now greater.<sup>63</sup>

And as Cabinet member/AG, should he be allowed to appear in court on behalf of the government in the manner of the British AG? Would that not involve a more acute violation of the 'separation of powers'<sup>64</sup> doctrine and seen as an attempt to over-awe the court? Is it to avoid such questions that the English AG enjoys Cabinet rank but not Cabinet membership?

The question is: Is there any need to go to such lengths? As proposed by the Reid Commission; he can be an un-elected, non-Cabinet member AG and PP, and be accountable for his actions in the latter capacity.<sup>65</sup>

It is clear that with the effective power to appoint the AG/PP and the power to remove him from office vesting in the Prime Minister, the AG and PP were now under his complete dominance and control and could not exercise professional discretion, in other words, no more quasi-judicial but executive. Perhaps the need for accountability of his actions as Public Prosecutor could be achieved only by a PP answering for himself as a member of the House, not by any politician.

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<sup>62</sup> See below *The Campbell Case*.

<sup>63</sup> Perhaps, even more infamous was the appointment of Robert Kennedy as Attorney General by his sibling, President Kennedy which created a sense of unease about prosecution decisions taken at the interface of crime and (party) politics. AG Robert Kennedy going after Jimmy Hoffa, a union leader suspected of corruption, for which the att gen had assembled the 'Get Hoffa' team in the Justice Dept. (the prosecution arm of the federal govt, caused public disquiet that it was a vendetta. It was widely suspected that the Kennedy brothers had a personal grudge against Hoffa from the days of the presidential campaign.

<sup>64</sup> When Tan Sri Abdul Kadir Yusof became, via the Senate, a Law Minister and Attorney General he stopped attending meetings of the Judicial and Legal Service Commission and his place was taken by the non-political Solicitor General. See Haji Mohamed Salleh bin Abas: *Constitution Law & Judiciary, Expansion of the Legal Service: Legal Service in the United Kingdom*; p175; Malaysian Law Publishers, (1984) See Art.138 (2)(b). See also *PP v Zainuddin* [1986] 2 MLJ 100 at p 103.

<sup>65</sup> According to Art 61 he can be appointed to the committees of Parliament but he cannot be made to answer for himself in that capacity.

The position of Law/Justice minister was abolished after the General Election in 1969 to all-round merriment.<sup>66</sup>

**THE NON-CABINET MEMBER EXECUTIVE ATTORNEY GENERAL/PUBLIC PROSECUTOR: DISCRETION AND IMMUNITY, NOT ACCOUNTABLE TO ANYBODY, AND NO PARLIAMENTARY ACCOUNTABILITY**

The Merdeka Constitution had provided for face-to-face accountability to Parliament by allowing the att gen-PP to be an unelected member of the House. This was the classic British mode of accountability by which they set much store:

“The purpose of all constitutions is to find ways of insisting that the government is held to account for its actions. What is unusual about the British constitution is the way it sets about accomplishing this task.”<sup>67</sup>

The weekly half-hour that the prime minister must endure...in the House of Commons is one of the most important reminders of the constitution’s core rule; that the prime minister and his government are accountable to Parliament and require its ongoing support if they are to continue in office. It is not only prime ministers who are responsible to Parliament: all government ministers are constitutionally responsible to Parliament.<sup>68</sup>

And so should the Malaysian AG. The British AG is generally accountable to Parliament for the work of the CPS.<sup>69</sup> Accountability to Parliament may take the form of answering questions, meeting criticisms and even having resolutions passed against or supporting him as the PP. Can the Malaysian AG/PP ever be held to account?<sup>70</sup>

<sup>66</sup> Salleh Abas, *Constitution, Law and Judiciary*, 165.

<sup>67</sup> Quoted in *Repairing British Politics* by Richard Gordon, Hart Publishing 2010.

<sup>68</sup> Adam Tomkins, in *Our Republican Constitution* Hart Publishing (2005) pp 3-4.

<sup>69</sup> See CPS below.

<sup>70</sup> Tun Salleh Abas has suggested a mode by which is based on the nature of the office: “If he is a Minister of the government, he is answerable to Parliament and to his cabinet colleagues, if he is not, the government will answer for him in Parliament, whilst he himself will be answerable also to the Judicial and Legal Service (Commission).”

The only way is by questions to the Prime Minister by members of Parliament.<sup>71</sup>

## NO ACCOUNTABILITY TO COURT?

In the case of *Johnson Tan Hang Seng v PP*,<sup>72</sup> the Court of Appeal considered the exercise of the prosecutorial discretion in four appeals heard together involving three pieces of legislation which dealt with a similar offence but each provided a different punishment.<sup>73</sup> How was the prosecutor to decide under which law to charge?

Firstly, Tun Suffian, dealt with the effect of the legislation: It was patent that the exercise of the discretion involved discrimination among the accused persons and the punishment depended on the Public Prosecutor's choice of the legislation under which to charge. So the question really was: what was to be the basis of the discrimination among the accused? It had to be according to their respective circumstances and manner of committing the offence.

Helpfully to the AG/PP, Tun Suffian suggested the criteria which the AG/PP could follow (or should have followed):

It would have been proper for the Attorney-general to charge *A* simply under the Arms Act. *B* on the other hand never had a licence and has a criminal record.....*C* also may not have had a licence and may have had a very black record and have killed various people and terrorized witnesses so that so that are willing to come forward to report, let alone give evidence in open in court against him. Should he also be charged only under the Arms Act simply because *A* is charged under the Arms Act or under Act 37 like *B* or under the ISA? I think that the choice is entirely the Attorney General's.<sup>74</sup>

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<sup>71</sup> It must be admitted however that in Malaysia Parliamentary accountability may be an over-rated virtue because with the Constitution allowing breaks of as long as 6 months between sessions - Art 55(1)- ( the Malaysian Parliament, unlike the UK Parliament, does not sit every day); it may be said to sit in a year for as long as the UK Parliament is in recess!

<sup>72</sup> [1977] 2 MLJ 67

<sup>73</sup> It could be said that this was a case where the AG/PP actually decided the punishment by choosing the legislation under which to charge while the court went through the motions of conducting the trial!

Can the AG's exercise of his discretion be challenged on the ground of the violation of Art 8 which promises equality and the duty of the AG to show that he has exercised his discretion to ensure equality? According to a publication:

There would appear to be no compelling reason why the attorney general's discretion should not be subject to article 8 of the Constitution guaranteeing equality before the law, which does not normally permit conferment of uncontrolled discretion on the attorney general. Conferring absolute unreviewable and uncontrolled discretionary power on the attorney general goes against the oft repeated judicial statement that an uncontrolled discretionary power is a contradiction in terms. It is submitted that there is no inconsistency between articles 145 (3) and Article 8 of the Federal Constitution and both can be harmoniously interpreted, for it only means that the wide discretion conferred on the attorney general by article 145(3) ought to be subject to Article 8. While Article 8 applies to the discretionary power conferred by a statute on any other administrative officer no reason has been advanced by the courts to treat the Attorney General's discretion under article 145(3) differently so as not to be controlled by article 8.<sup>75</sup>

The cases in question were criminal, not only that but involved the death penalty and the att gen had the constitutional responsibility for criminal matters as the public prosecutor, and the AG not being accountable to Parliament for the exercise of his discretion, the court is the only possible place to do it. Notwithstanding, Tun Suffian declined to hold that the att gen was liable to account to the court for the manner of the exercise of his discretion.

According to one authority: "The provision does not say that the attorney general shall have the 'exclusive' or 'sole' power to do so"<sup>76</sup> Notwithstanding the obviously unsatisfactory performance of the att gen-PP, Tun Suffian does not seem to have thought so:

Anyone who is dissatisfied with the Attorney General's decision not to prosecute or not to go with a prosecution or to prefer a charge for a less serious offence where there is evidence of a more serious

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<sup>75</sup> Halsbury's Laws of Malaysia (Vol 2) 20.087

<sup>76</sup> Halsbury's Laws of Malaysia 20.87 .

offence which should be tried in a higher court, should seek his remedy elsewhere but not in the courts.<sup>77</sup>

This was the position during the time of Dr. Mahathir until 2014 and it was applied to good use.

## **DR. MAHATHIR AND THE AG/PP**

By the time Dr Mahathir became Prime Minister, the Law/Justice Ministry had been done away with<sup>78</sup> but the AG/PP was still political and unprotected; what the position lacked in terms of statutory protection was sought to be made up for by the gravitas of the office bearer<sup>79</sup>. The AG was still not selected from a wide a field of heavy weights but from the same ilk: senior officers of the judicial and legal service; Malay-Muslims not known for taking any principled positions on any question of law or justice even if they were already members of the senior judiciary.

With Dr Mahathir assuming office as Prime Minister and the abolition of appeals to the Privy Council in 1985, and the creation of the Supreme Court as the court which had the ultimate responsibility to safeguard the Constitution and declare Malaysian civil law,<sup>80</sup> the judges of the short-lived<sup>81</sup> Supreme Court had to, and did become more assertive of their role. The stage was now set for the most controversial stage in the deployment of AG to deal with Dr. M's political problems occasioned not by any outbreak of crime or

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<sup>77</sup> Even after *Long bin Mat Saman v PP* [1974] MLJ152 at p 153 where Tun Suffian first made the decision repeated in *Johnson Tan Seng Heng* [1977] 2MLJ 66 at p 71 left column F, the PP had not learnt to offer his criterion but relied on Tun Suffian's decision.

<sup>78</sup> This took place in September 1980.

<sup>79</sup> Art 145(1) Tan Sri Mokhtar Abdullah was a High Court judge who resigned the position to become AG. In the substantive sense, he had already achieved the qualification before becoming AG.

<sup>80</sup> It was done by renaming the former Federal Court of Appeal as the Supreme Court. There was therefore no intermediate court of appeal.

<sup>81</sup> Shortly after the dismissal of Tun Salleh Abas and two judges of the Supreme Court, it was abolished on and re-apprised as the Federal Court and headed by a Chief Justice of the Federal Court and not chief justice of Malaysia with an intermediate court of appeal known as the Court of Appeal headed by a President of the Court of Appeal.

terrorism but his own controversial policies and questionable conduct leaving the law enforcement apparatus impaired.

***LIM KIT SIANG V U.E.M.***<sup>82</sup>

In this case, the Prime Minister 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 very favourable terms. As UMNO President, Dr Mahathir was UMNO's trustee<sup>83</sup> in two shareholding companies of UEM, the deal was to be UMNO's cash-cow.<sup>84</sup> It was a violation of section 2 of the Emergency (Essential Powers) Ordinance no 22 of 1970 which reads:

- (1) Any Member of the administration or any Member of Parliament or of the State Legislative Assembly or any public

<sup>82</sup> In the first case, *Lim Kit Siang v UEM* [1988] 1 MLJ 35, the trial judge dismissed the application for the injunction against UEM on the ground that it was in effect an attempt to get around the prohibition in the Specific Relief Act of injunctions against the government. This opposed ex-parte application for an interlocutory prohibitory injunction, went from the High Court, Penang to the Supreme Court (*unreported*) but quoted in *Lim Kit Siang v UEM* [1988] 1 MLJ 50 where it was heard as an inter partes matter, and the appeal was allowed by the Supreme Court with 'liberty to apply' on which basis it was practically heard again as *Govt. of Malaysia v Lim Kit Siang; UEM v Lim Kit Siang* - [1988] 2 MLJ 12 (*the UEM trilogy*). The Supreme Court then rejected the application.

<sup>83</sup> V. C George J had asked with seeming naivety: "Why a company should have trustee and what they are trustees of is not explained". [1988]1 MLJ52 A, right-hand column. The concept of 'trusteeship', its origins and its advantages in the Malaysian context have been succinctly described by Mehmet (1988);102: "Originally a small group of top political/bureaucratic leaders, inspired by Tun Razak, simply assumed the role of political trustees [i.e. guardians] of the Malay community. To accomplish the objective of 30% of restructuring, this leadership conceived of the institution of *Bumiputera Trust Agencies*, as special-purpose public enterprises, acquiring equity on behalf of the *rakyat*. Compared to the alternatives of nationalisation or confiscation, equity restructuring by trusteeship offered a piecemeal yet pragmatic solution to the traditional Malay state of capital underdevelopment." Quoted in *The Riddle of Malaysian Capitalism* Searle, Allen & Unwin and University of Hawaii Press, Honolulu, 255.

<sup>84</sup> The scheme was meant to make UMNO financially independent as well as to make for the 30% Malay stake in the economy by means of this purported privatisation.

officer, who while being such a Member commits any corrupt practice shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding fourteen years or to a fine not exceeding twenty thousand dollars or to both such imprisonment and fine.

- (2) For the purpose of this section ‘corrupt practice’ means any act done by a Member of Parliament or officer referred to in sub-section (1) in his capacity as such Member or officer, whereby he has used his position for his pecuniary or other advantage.

The PM’s act fell squarely within the purview of the Act. Lim Kit Siang sought an injunction against UEM receiving from the government the contract for the construction of the billion-ringgit, tolled, north-south highway. Though the proceeding and remedy were civil in nature, the basis of the complaint was that the awarding of the contract was tainted with criminality.

Lim Kit Siang’s application was for the purpose of preventing indirectly (by means of an injunction) a crime being committed by the PM, and not for him to take over from the AG/PP, but with the latter’s consent, the prosecution of the PM, in the manner of relator<sup>85</sup> proceedings but that was how our courts saw it.

Describing the prospect of the Malaysian AG/PP prosecuting the PM or letting someone else do it with the AG’s consent, Justice V C George<sup>86</sup> did not mince any words:

In Malaysia, the Attorney General’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

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<sup>85</sup> A private citizen (the relator) bringing about a suit to enforce a public right usually initiated by the government for which he needs the permission of the att-gen who has the discretion whether or not to grant permission; the suit is titled: “The AG at the relation of (name of relator).”

<sup>86</sup> Justice V.C George made these remarks in dismissing the (risible) argument on behalf of the AG that the plaintiff should have initiated relator proceedings with the consent of the att-gen instead of in the form of an interlocutory injunction to prevent the wrongful transaction being proceeded with. In *Lim Kit Siang v U.E.M.* [1988]1 MLJ 50 at p 58. The opposed ex-parte application which went from the High Court, Penang to the Supreme Court was thereafter heard by the High Court, Kuala Lumpur, with all parties represented, as an *inter partes* matter.

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.<sup>87</sup>

In other words he cannot be expected to prosecute his boss. When the matter went before the Supreme Court, the majority regarded it, as expected, as a relator matter<sup>88</sup> and it had some ready-made answers which would make the courts unnecessary:

Our system requires the public to trust the impartiality and fair-mindedness of the Attorney-General. If he fails in his duty to exhibit this sense of fairness and to protect (the) public interest of which he is the guardian, the matter can be raised in Parliament or elsewhere<sup>89</sup> though there is no means of questioning the AG personally.

How did the Supreme Court expect the people to have such implicit faith in the AG when he was the appointee of the PM; his constitutional position did not allow him any independence from the PM; he had apparently or could not be expected to advise the PM against the UEM contract let alone initiate a prosecution of the PM and, above all, not having a position in Parliament could not even be expected to suffer parliamentary scrutiny? The Malaysian AG was complicit.

Notwithstanding, the vast differences particularly in the position of the AG,<sup>90</sup> the Supreme Court relied on the House of Lords decision

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<sup>88</sup> A private citizen (the relator) bringing about a suit to enforce a public right usually initiated by the government for which he needs the permission of the AG who has the discretion whether or not to grant permission, the suit is titled: "The AG at the relation of (name of relator)."

<sup>90</sup> In *Gouriet*, the AG, forsook his earlier position that he was not bound to defend his decision in court, recognising the importance of the issue, to his credit, attended court to explain his position but it was a rehashing of authority rather expounding of the principles he had taken into account in deciding to refuse his consent to the relator.

of *Gouriet v Union of Post Office Workers*.<sup>91</sup> In that case the NUPOW had resolved not to handle South African mail to protest against that country's its apartheid system. The union's action was a crime, and potentially fraught the Govt failing its international treaty obligations. The AG could have prosecuted the union, and when he refused (presumably fearing that doing so may be seen as supporting apartheid) Gouriet applied for the AG's consent to initiate relator action; and when this was refused he applied for a declaration that he (Gouriet) could do it in his personal capacity. The application was defeated because, the House of Lords decided on authority and not on principle, relator was the only way.<sup>92</sup>

With the UEM decision, where the PM was himself alleged to have committed the incipient crime, confirming the non-justiciability of the AG/PP's discretion, the PM had achieved immunity; he had no need to fear criminal prosecution, no matter what he did, for as long as the AG-PP's conduct remained non-justiciable and the judiciary was helpful as exemplified by Tun Suffian and Tun Salleh Abas. The stage was now set for some of the most controversial of cases.

### **THE UMNO 11 CASE AND THE DISMISSAL OF TUN SALLEH ABAS**<sup>93</sup>

This case was the direct result of Dr Mahathir's controversial victory in the UMNO presidential election. It was brought by supporters of Tengku Razaleigh Hamzah against Tun Mahathir over the defeat of the former by a wafer-thin majority. In the first round, the case resulted in UMNO being declared illegal by High Court judge Tan Sri Harun Hashim under a provision of the Societies Act which declared a political party illegal if it had any unapproved branches.

One of the grievances of Tengku Razaleigh's supporters was that Dr. Mahathir had opened branches of UMNO, without the approval of the Registrar of Societies in order to increase the number of delegates who would vote in favour of Dr. Mahathir. After UMNO was

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<sup>91</sup> [1978] AC 435; [1977] 3 All ER 70.

<sup>92</sup> As formulated by Samuel Silkin QC., A-G: "If the attorney general refuses to act can the private citizen bring proceedings in his own behalf? This is the substance of the first question?" [1978] AC 441.

<sup>93</sup> See Tun Salleh Abas with K Das *May Day for Justice*, Magnus Books Kuala Lumpur 1989.

declared illegal, Mahathir quickly registered another party with the same name and members except his political enemies and took over the assets of the illegal UMNO.

Tengku Razaleigh's supporters appealed against the High Court decision asking in effect for UMNO to be restored as the decision had in fact rewarded the wrong doer. By declaring UMNO illegal, it had enabled him to turn out his enemies and put him in a stronger position as president of the revived UMNO. They wanted only the election of Dr. Mahathir as president to be declared illegal, so that there would have to be another election which improved Tengku Razaleigh's chances now that Dr. Mahathir's political manoeuvres were known.

Not wanting to be accused of loading the dice by empanelling judges who were known to be sympathetic to either candidate, Tun Salleh Abas chose 9 of the Supreme Court judges, unprecedented in Malaysia, to hear the appeal. As soon as it was known that the case was fixed for hearing before 9 judges, Dr. Mahathir saw the Yang di-Pertuan Agong and had him suspend Tun Salleh Abas, pending the formation of a Tribunal to inquire into the alleged misconduct of Tun Salleh. The alleged misconduct was in writing, together with his brother judges, a letter to the Yang di-Pertuan Agong complaining about Dr. Mahathir's attacking the judiciary as a result of several stunning defeats in court, during a campaign of vilification against the judiciary for several months before the UMNO 11 case. There were a few other matters none of them involving moral turpitude or corruption; the investigation to uncover such things turned up nothing.

The AG of the time purportedly assisted the Tribunal, not by putting all the evidence before it but by a tendentious presentation of the evidence i.e. more prosecutorial than an objective presentation of all the relevant evidence to the Tribunal in the manner of an 'inquisitorial system' investigation without aiming to achieve a pre-determined conclusion.<sup>94</sup>

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<sup>94</sup> A few days before the Tribunal proceedings were to start, Tun Salleh received a message to see the Sultan of Johor concurrently the Yang di-Pertuan Agong, to apologise to him for Tun Salleh's alleged breach of etiquette in sending the letter to the Sultan instead of seeking an audience; the purported trigger of the dismissal process, as if that was all. And after that the suspension was to be revoked. This was to be followed by lunch! The reconciliation was arranged by their Royal Highnesses, the Malay Rulers, who, as fountains of justice, were concerned to resolve the matter amicably. The AG found out about the meeting; when Tun Salleh arrived at the palace his expectations were rudely dashed to the

The result was Tun Salleh Abas was dismissed; and two more Supreme Court judges met with a similar fate, for granting an injunction against the Tribunal presenting its Report to the Yang di-Pertuan Agong.

## THE SODOMY CHARGES AGAINST ANWAR IBRAHIM

A sodomy charge<sup>95</sup> was brought against the Deputy Prime Minister Anwar Ibrahim, by the AG/PP who played a controversial role.<sup>96</sup> Other cases of sodomy were brought against the same individual and repeated the familiar pattern,<sup>97</sup> and were widely believed to be for the purpose of initially ensuring Anwar Ibrahim's dismissal ostensibly for misconduct but actually to prevent in challenging Dr Mahathir for the job, and later to ensure by his imprisonment and disqualification, he could be kept him out of the General Elections.

Among the unsatisfactory features of the case, which received wide attention in the Press, was the prosecution team's attempt to obtain evidence from an accused person against Anwar Ibrahim. Nallakaruppan, then a tennis partner of Anwar Ibrahim, was charged under the Internal Security Act<sup>98</sup> for unlicensed possession of bullets for which he had a licensed gun which he had surrendered. The charge carried the death penalty.

When Nallakaruppan's defence counsel Manjeet Singh broached the matter with the Prosecution to reduce the charge, the prosecution

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chagrin of all except perhaps, Dr Mahathir. For details, see *May Day for Justice; A Nightmare within a Nightmare* by Tun Salleh Abas and K Das.

<sup>95</sup> Pawancheek Marican, *Anwar on Trial*, Gerak Budaya Enterprise 2009.

<sup>96</sup> The AG/PP was found to have lied in a press statement about the beating up of Anwar Ibrahim by the police while he was under police custody; (Exhibit A.15 Press Statement., Report by Commission) and had to sit out the remaining trial. (See Laporan Suruhanjaya Diraja untuk Menyasat Kecederaan Dato' Seri Anwar Ibrahim Semasa dalam Tahanan Polis: Report of Royal Commission of Inquiry into the Complaint of Assault on Dato' Seri Anwar Ibrahim during Police Custody by Dato Anuar bin Zainal Abidin J.)

<sup>97</sup> Mark Trowell QC *The Trial of Anwar Ibrahim; Sodomy II* Marshall Cavendish 2012; Pawancheek Marican *Charade of Justice; Anwar's Third Trial* Gerakbudaya Enterprise 2012; and *The Prosecution of Anwar Ibrahim; the Final Play* Marshall Cavendish; 2015.

<sup>98</sup> There were other legislation — Arms Act and Firearms (Increased Penalties) Act — which carried lighter punishment for the same act; all within the discretion of the AG/PP.

team, unabashedly, required defence counsel to tell his client to provide names of witnesses prepared to testify against Anwar!<sup>99</sup>

Given the enormity of his move against Tun Salleh Abas, Dr Mahathir achieved his aim with surprising ease. He was assisted in this by the ‘Malay dilemma’;<sup>100</sup> the understandably visceral desire of Malays to maintain assert their dominance as natives, in politics and to enjoy Constitutionally-granted Special Privileges and if it could be achieved only by finessing grave principles of governance such as judicial integrity, the Malays as Muslims saved their conscience with the justification of compelling need.

*UEM v Lim Kit Siang* may be seen as carrying this attitude to caricature; the alleged wrongdoing of a Malay PM which the Malay AG refrained from prosecuting, as he was expected to, assisted by the Malay-dominated judiciary making conducive decisions to help achieve a Malay enterprise, UEM, to be operated by the dominant Malay party-UMNO and promising much benefit to it and to all Malays who looked up to it for their succour, weighed against the attempt by Lim Kit Siang to maintain legal rectitude which it could not outweigh.

The dismissal of Tun Salleh Abas cannot be easily explained away in ‘Malay dilemma’ terms; it did not involve a conflict between Malays and non-Malays, the judge was not a contestant for political power and on the contrary he had assisted the achievement of Malay objects as in the UEM decision. It was to be the same as if it was a contest between Malay leaders; disunity weakens Malays against the non-Malays. It was simply a Malay object and nothing is to be allowed to stand in its way. It is in this light that that one has to view Abdul Kadir Yusoff’s comments about the personality of the office-bearer being the determining factor in considering the structure and principles of important constitutional offices. This overarching Malay loyalty will have to be taken into account and met by any future AG and any Malay offering principled-resistance will have to fall by the wayside.

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<sup>99</sup> For the report of the proceedings to disqualify the DPPs concerned; *Re Zainur Zakaria* [1999] 2 MLJ 577; *Zainur Zakaria v PP* [2001] 3 MLJ 604.

<sup>100</sup> Title of a controversial book written by Dr Mahathir, published in 1970, and banned for several years, setting out his views on the genetic and anthropological causes of Malay backwardness, and of the weak political leadership particularly of the much-loved Tengku Abdul Rahman, the first Prime Minister, who was criticised for his soft-peddalling economic measures for the benefit of the Malays.

## THE MALAYSIAN PUBLIC PROSECUTOR'S DISCRETION AND IMMUNITY QUESTIONED

The cases of *Dato' Pahlawan Ramli bin Yusoff v Tan Sri Abdul Gani bin Patail*<sup>101</sup> and *Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail & Ors*<sup>102</sup> involved as frontal an attack as there could be on the hitherto absolute discretionary powers of the PP. The decisions are particularly significant for, as the learned judge said, it was probably the first time a court in Malaysia had to consider a case involving a challenge to the Public Prosecutor's discretion involving the tort of misfeasance in office, not as a discrete cause of action but an indicia of abuse of power.

It started from the bad relations between two senior police officers Dato Ramli Yusuff and the IGP Tan Sri Musa bin Hassan whereby the latter attempted with a coterie of other senior police officers and a Deputy Public Prosecutor (DPP) to exclude the former from the line of succession. The lawyer for Dato' Ramli Yusuff, Rosli bin Dahlan was targeted and became mired in the skullduggery of the IGP and the coterie of senior of officers to dissuade him acting for Dato' Ramli Yusuff as a result of which he was accused of crimes, some on behalf of his client<sup>103</sup>, arrested in his office, spent a night in detention, tried and acquitted of all charges.

As a result Rosli bin Dahlan and his client sued, separately, the AG as PP and the rest of the coterie. An application was made to strike out the suit on the grounds principally of the AG's non-justiciable, absolute discretion. While appreciating the reasons for the immunity, the court, giving almost identical but separate judgments, held that the discretion was not absolute but qualified where its exercise was questionable.

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<sup>101</sup> [2014] 4 MLRH 573.

<sup>102</sup> [2014] 11 MLJ.

<sup>103</sup> Rosli Dahlan's position as the lawyer for the police officer Ramli Yusof is distinctly different from the police officer client's. The expectation of the law is that lawyers have to observe a proper professional distance in acting on instructions, in protecting their client's interests; and the law protects those who do so from being implicated in their client's wrongdoings e.g. the plaintiff alleged that the defendants had required the plaintiff to declare that he held properties on behalf of the police officer. Arm-twisting lawyers to dissuade them from acting for a client is contempt of court for it interferes with the public's right to retain a lawyer of its choice as a matter of constitutional right; Article 5(3).

## THE MALAYSIAN PUBLIC PROSECUTOR IN COMPARISON WITH THE UK'S ATTORNEY GENERAL / CROWN PROSECUTION SERVICE/ DEPUTY PUBLIC PROSECUTOR

We have been warned about the inappropriateness of attempting to refer to the English position to solve our problems:

The courts have referred to the position in the United Kingdom. But it is submitted that the Malaysian Attorney General cannot be treated at par with the Attorney General in England for three basic reasons:

- (1) the English Attorney General is the product of an evolutionary historical process while the Malaysian counterpart is the product of a constitutional provision;
- (2) the United Kingdom has no written constitution while Malaysia has a written constitution guaranteeing fundamental rights which is the supreme law of the land, and therefore the powers of the Attorney General have to be derived from the Constitution as a whole and not from any other law outside the Constitution, and
- (3) the Malaysian Constitution has art (8)(1) whereas there exists no such constitutional provision in United Kingdom.<sup>104</sup>

Still, the UK position may be relevant as a guide to how the basic values that the prosecution has to serve may be achieved. The UK AG has relinquished most of his powers with respect to public prosecutions with the setting up of the Crown Prosecution Service and its head the Director of Public Prosecution (DPP). The responsibility for prosecutions of ordinary crimes against individuals is now with the Director of Public Prosecutions (DPP). The DPP<sup>105</sup> position was created under the Prosecution of Offences Act 1897. He is chosen by the AG and answerable for him to Parliament. He is a senior lawyer of at least 10 years standing.

The Crown Prosecution Service<sup>106</sup> is a dedicated, discrete, independent and professional service which carries out the majority of

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<sup>104</sup> Halsbury's Laws of Malaysia para 20.87.

<sup>105</sup> R. Jackson, *The Machinery of Justice in England*, 7<sup>th</sup> ed (Cambridge, Cambridge University Press, 1977) 219-21.

<sup>106</sup> For an account of the historic, political and common law experience that resulted in the current CPS. See *The Modern Development of the Office of Director of Public Prosecutions*, Edwards.

criminal prosecutions and is manned by salaried lawyers<sup>107</sup> much like the prosecution division of the AG/PP in Malaysia<sup>108</sup> (except that the Crown Prosecution Service was created by a discrete statute.) The annual report of the Crown Prosecution Service is to the AG which the latter is expected to table in Parliament. The DPP as non-political head of the Crown Prosecution Service, has taken over control of prosecutions from the police, and thereby acknowledges that the prosecution of criminals is a political duty hence the AG (a politician)'s superintendence of the Crown Prosecution Service; and it ensures accountability to the public by requiring the AG to answer questions in Parliament about the conduct of the DPP. The Crown Prosecution Service enjoys autonomy from the AG. However, moving on with his general, political responsibility to ensure the integrity of prosecution, the latter has formulated a Code of Conduct for Crown Prosecutors.<sup>109</sup> Among other things it provides that to carry out a prosecution the "Crown Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction and that a prosecution is needed in the public interest."

The AG being a Member of Parliament of the ruling party holds ministerial rank, although he is usually not a member of the Cabinet.<sup>110</sup> Being a Member of Parliament, he ceases to hold office if the ruling party is defeated in the General Election. He now exercises his powers only in respect of crimes with political implications: sedition (such as the Campbell case), treason, contempt of court and the like<sup>111</sup>, public order and corruption. The consent of the AG is

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<sup>107</sup> Elliott, Catherine and Quinn, Frances , *English Legal System: The Crown Prosecution Service*, 4th Edition, Longman 2002, 269.

<sup>108</sup> The CPS has practically ended the British system of private lawyers being engaged by the government to carry out prosecution work, vindicating the Malaysian Prosecution Division. As for private lawyers doing prosecution work, Malaysia would find it prohibitively expensive. See Haji Mohamed Salleh bin Abas: *Constitution Law & Judiciary, Expansion of the Legal Service: Legal Service in the United Kingdom*, Malaysian Law Publishers,(1984) , 175.

<sup>109</sup> This makes for guidance and reduces arbitrariness.

<sup>110</sup> Presumably since the Campbell case.

<sup>111</sup> For instance, a spin off episode from the War against Iraq: "A year after the war, criminal proceedings were begun against Katherine Gun, a junior translator at a British Government spy centre, was dropped. In the run-up to the war, Gun leaked to The Observer newspaper a copy of an email from the US National Security Centre to British intelligence. The email sought British assistance in bugging Chilean and Mexican diplomats on the UN Security Council whose votes were needed under Britain's Official Secrets Act, but a few months later

required for bringing certain criminal actions He has the right to terminate any criminal proceedings by entering *nolle prosequi*<sup>112</sup> which is non-justiciable. He also appears in court as an advocate in cases of exceptional importance, but he is now not allowed to engage in private practice. A political AG in Malaysia may prosecute offences with clear political underpinnings, as indicated above, in the same manner as spelt out in the Campbell case, and the other offences by a Public prosecutor and this should be indicated in the title of the case- *AG v So and so* and *PP v So and so* which is the current English practice.

In the *Campbell* case,<sup>113</sup> in 1924, John Ross Campbell, the editor of the *Workers Weekly*, the official organ of the Communist Party of Britain, wrote an article, urging British soldiers not to fight enemy soldiers because they belonged to the same economic class as themselves. Sir Patrick Hastings, the AG/PP and Cabinet member, gave his the consent, as it was required under the Incitement to Mutiny Act 1797, to prosecute Campbell for sedition. The AG/PP then consulted the Prime Minister and the case was withdrawn: was it because the AG/PP was dissuaded by the Prime Minister or was it because of extenuating circumstances? Campbell was a gallant soldier who lost his legs in war and had been decorated. The storm which broke out centred on the question of whether the AG/PP had been influenced by the PM, and the dubious constitutionality of the PM's intervention. Sir Patrick Hastings was severely criticised for not

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the matter was dropped. Over the following days the British government came under pressure to explain the circumstances in which the case had been dropped. Renewed calls were made to publish all of the Attorney General's legal advice on the war. The government refused, adding to the suspicion that any release could include embarrassing material." Quoted from Phillippe Sands QC *Lawless World* pp 201& 203.

<sup>112</sup> It means '*to be unwilling to prosecute.*' It had its origins in the need to stop some private prosecutions. See Edwards; *The Law Officers of the Crown* p234 234 The power is now used only in the case of accused persons who cannot be produced in court by reason of infirmity of the mind or body. In other words, it is not done to check any laxity in applying the Code for Crown Prosecutors (see below) or any arbitrariness.

<sup>113</sup> According to J Ll. J Edwards author of *Law Officers of the Crown*, the case had earned a lasting place in any study of the constitutional position of the Attorney-General of England. The case was also referred to in the case of *Johnson Tan* by Tun Suffian for the power exercised by the PP and it may now be considered Malaysian law [1977] 2 MLJ p66 at p 71.

asserting his independence of the Prime Minister in the discharge of his duties as AG/PP.

It was revealed by the succeeding Prime Minister Stanley Baldwin that there was a Cabinet instruction dated 6<sup>th</sup> August 1924 during the administration of Sir Ramsay MacDonald that no prosecution of any matter with political overtones could be proceeded with without Cabinet approval.<sup>114</sup>

There have been clarifications and explanations down the years, and the most modern and clearest statement on the matter, with respect to relationship of the AG/PP with the Executive was made sometime after the Campbell case, by the then Attorney General Lord Shawcross:

I think the true doctrine is that it is the duty of an Attorney General in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy.

In order so to inform himself, he may, although I do not think, he is obliged to, consult with any of his colleagues in the government, and indeed,...he would in some cases be a fool if he did not. On other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be.

The responsibility for the eventual decision rests with the Attorney General, and he is not to be put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney General shift his responsibility for making the decision on to the shoulders of his colleagues. Nor, of course, can the Attorney General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations, which in the broad sense that I have indicated, affect government in the abstract arise, it is the Attorney General, applying his judicial mind, who has to be the sole judge of those considerations.<sup>115</sup>

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<sup>114</sup> H.C debates, vol. 179, cols 354-355, December 211,1924 quoted in *Law Officers of the Crown*, Edwards.

<sup>115</sup> Quoted in Edwards pp 215-216.

The position now seems to be that the AG/PP may consult his Cabinet colleagues but must make up his own mind.<sup>116</sup> The AG's discretion to prosecute may still be said to be governed by the Campbell case.

## CONCLUSION AND PROPOSALS FOR REFORM

As stated at the outset of this article, the position of the PP is of great value to the Political Executive which seems to have fashioned it into a useful political instrument, insulating from accountability to Parliament and the Courts, and taken into the JLS Commission to ensure the cooperation of DPPs in the ring of the criminal justice system. The potential abuse is extensive.

An early brooding mind about the unhappy trend of developments-the amendment of the Constitution in 1960 with respect to the office of AG- was that of Prof Hickling:

(T)here may be something to be said for a permanent PP, existing contemporaneously with the political att-gen, and holding office upon more or less the same conditions as a judge....for what are the subtle checks, persuasions and pressures that operate here, as they do in the United Kingdom, to ensure that powers are exercised with responsibility?<sup>117</sup>

And he also seems to have anticipated the reform of the prosecutorial function in England.

The Independent Counsel and the 'concurrent attorney general' proposal of Prof. Hickling both reflect dissatisfaction with the position of the attorney general as lacking independence and merit further strengthening in the Malaysian context. The AG as PP had

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<sup>116</sup> "In performing his non-political functions, such as entering a *nolle prosequi* to stop a trial of an indictable offence, or giving leave to institute certain classes of criminal proceedings, the Attorney General is obliged by convention to exercise an independent discretion, not dictated by his colleagues in the government, though he is at liberty to consult them and obtain their views in a case with political implications: see de Smith, *Constitutional and Administrative Law* (2<sup>nd</sup> Edn 378" Halsbury's *Laws of England* vol 8, p793, *Constitutional Law*; *Political position*, 1282 footnote 1.

<sup>117</sup> See Hickling, *The First Five Years of the Federation of Malaya Constitution*, 1962. 4 *University of Malaya Law Review*, 183; and his *Essays in Malaysian Law*; Pelanduk Publications (1991) Kuala Lumpur.

become a handy instrument to control and manipulate the criminal justice process. To adapt Prof. Hickling's suggestion, there should be:

- 1 (i) A political AG who is a senior member of the Malaysian Bar; preferably with experience as a prosecutor from having belonged to the Judicial and Legal Service; and an elected member of the House (but not of the Cabinet) to ensure direct accountability to Parliament. For what it is worth, he should also qualify to be a judge of the High Court.  
ii) The AG is to vacate the office when the ruling party is defeated in the general election and where Parliament is dissolved.  
iii) The political AG's function as legal adviser to the government should be performed by the SG.
- 2 (i) There should a Public Prosecutor, who is bifurcated from the AG, a member of the Judicial and Legal Service, and a professional recommended by the political AG and appointed by the Judicial and Legal Commission, and serving till 65 years of age; he is to be the professional and permanent civil service head of the prosecution service and attend Parliament (ad hoc) to answer questions with respect to his exercise of his powers only.  
(ii) In British and current Malaysian practice, the AG's consent is necessary to bring cases that have a political element (e.g. corruption, sedition, treason, contempt of court, extradition and treason) leaving the rest to the DPP/CPS in England; and in Malaysia, to the political AG.
- 3 The AG, public prosecutor and the SG being appointed with the approval of the Judicial and Legal Service Commission should be removable by it for misconduct.
- 4 The merit of this proposal is that it removes the AG from direct control of the PM and ensures indirect control by Parliament, and ultimately is accountable to the people.