

IS THE NEW AG CHOOSING HIS BRIEFS LIKE A PRIVATE LAWYER?

By
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In my article "*Pelantikan Tommy Thomas Sebagai Peguam Negara: Salah Siapa?*" (07 06 08) – see my websites, I said:

(It (Tommy Thomas' appointment as Attorney General (AG)) has become a reality. So, I will not argue about it. On the contrary, I will wait and see what he will do regarding certain issues and, if it is necessary, comment on it and even support or oppose it.) (My own translation).

Separation of powers between AG and PP

I refer to his statement that his position is the same as that of the Bar Council i.e. the AG should not, at the same time, be the Public Prosecutor.

I am not arguing for or against the separation of powers between the AG and the Public Prosecutor (PP). However, until the Constitution and the Criminal Procedure Code (CPC) are amended, in Malaysia, the AG is also the PP.

To refresh our memory, Article 145, *inter alia*, provides:

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

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

Section 376 of the Criminal Procedure Code (CPC), *inter alia*, provides:

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

So, when Tommy Thomas accepted the post of AG, like it or not, by law, he is also the PP. He cannot say "I only want to be AG but not PP." He cannot say "I only want to advise the Government but I do not want to do prosecution". He cannot pick and choose his briefs as if he is still in private practice. After all he receives the full pay as AG.

Power to institute, conduct or discontinue any proceedings for an offence is exercisable at his discretion. To make the decision, he has to study the

investigation files to satisfy himself that the decision is correctly, fairly and properly made.

There are also provisions that require him to act personally, e.g. section 68 (c) and 376(3) of the CPC.

If he did not agree that by becoming an AG he will also be the PP, why did he accept the post?

For the benefit of politicians and the public who think that lawyers in private practice are great experts or even “kings” in all fields of law and that legal officers in the government service are “second class” lawyers, if not stupid, let me say that all lawyers in private practice had never seen a criminal investigation file, what more studying them in detail in order to make a decision to prosecute or otherwise and they have no experience in prosecution at all. Tommy Thomas is no exception.

Defending a criminal case is much easier as you can win a case merely on a mistake made by the prosecution which, even if you do not see it, the judge will see it, anyway. Even then, I wonder whether Tommy Thomas had ever acted as a defence counsel in a criminal trial.

Prosecution is the most difficult, laborious, time consuming and tiring of all legal works. Tommy Thomas has never experienced it. Is that the reason why he is shying away from it?

AGs from the Judicial and Legal Service like Tan Sri Ghani Patail, Tan Sri Mokhtar Abdullah and Tan Sri Abu Talib spent a lot of their time doing prosecution, all of them during the period when Tun Dr. Mahathir was Prime Minister while Tan Sri Ghani Patail continued to be AG until he was relieved of his job by Dato’ Seri Najib. Whenever there was a high profile case, they would lead the prosecution team. We expect Tommy Thomas to do the same.

Since he is not going to do prosecution, I believe he will leave it to his DPPs. Or, is he going to appoint members of the Bar, on a larger scale than what the BN Government did when it appointed Shafee Abdullah to represent the PP in Dato’ Sri Anwar Ibrahim's second sodomy case, which the PH so strongly condemned? The Minister of Finance should be aware of this.

I say that an officer from the Judicial and Legal Service has a better all-round experience and understands how the government machinery works which will make him more suitable for the job of the AG in this country.

I am sure many people would be surprised to read the same Article in the 1957 Federation of Malaya Constitution:

“145. (1) The Yang di-Pertuan Agong shall, after consultation with the Judicial and Legal Service Commission, appoint from among the members of the Judicial and Legal Service an Attorney General, who shall be a person qualified to be judge of the Federal Court.

Note that the AG must come from the Judicial and Legal Service. There must be a reason for it.

If Dr Mahathir knew that Tommy Thomas would not do prosecution, would he have submitted Tommy Thomas' name for appointment as AG?

AGC will not represent EC

Now, I refer to his decision that officers of the Attorney General Chambers (AGC) will no longer represent the Election Commission (EC) in Election Petition (EP) cases.

It was reported:

"The Attorney-General's Chambers will not represent any party in any election petition and the Election Commission (EC) must appoint members of the Malaysian Bar of its choice to represent it in the legal proceedings, said Attorney-General (AG), Tommy Thomas.

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"As the neutral arbiter in the conduct of elections, the EC should not be represented by members of this Chambers because of any potential conflict of interest and the perception that justice must be seen to be done," he said in a statement today.

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"Because members of the government are invariably parties to such election petitions, whether as members of parliament, state assemblymen or defeated candidates, it is invidious for the Chambers to also act for the EC," he added. (The Sun Daily, 22 June 2018)

Before going any further, let me state that in an Election Petition (EP), in a straight fight between two candidates, there will be three parties, the Petitioner, that is, the losing party, the Respondents consisting of the winning party and the EC.

The grounds for the petition could be a complaint against the winning party or a complaint against the EC, or both. An example of the complaint against the winning party is the allegation of corruption, i.e. voters were paid by the winning party or its agents to vote for its candidate.

Even though the allegation is only against the other candidate, EC is made a party to the petition so that whatever order is made by the court, will bind the EC.

Bear in mind that each party involved will engage his own lawyers, except the EC which will be represented by the AGC.

The reason why the AGC represents the EC is because it is a government agency, established by the Constitution, fully financed by the government; its officers are public officers subject to the laws and regulations applicable to civil servants, in the discharge of their official duties. They cannot be expected to pay from their own pockets. Neither the EC has an allocation for employment of private lawyers when sued because the AGC is there to represent it. That is part of the AGC's job. It does

not cost the government anything extra and that has been the arrangement ever since the EC was established.

I spent forty years in the Judicial and Legal Service and the Judiciary. Not even once did I hear any complaint of conflict of interest, otherwise, I am sure, it would have been made a ground of such petitions.

Regarding public perception, how does it arise? What prejudice or injustice does it cause to the petitioner? I did not hear any such complaint as a ground of petition or otherwise.

In the example above, the legal officer would not be actively defending the petition as the allegation is not made against the EC.

Let me give another example i.e. where the allegation is made against the EC, say, it is alleged that the Returning Officer had wrongly refused a request for a recount. Here, the legal officer from the AGC who represents the EC will take an active part to defend it. He acts as counsel to present the case and the arguments on behalf of the EC for the court to decide.

Again, how does the conflict of interest or the perception arise? It had never been an issue all these years. I just cannot foresee how it can arise.

It is said that it may give rise to the perception that justice is not seen to be done, because the party involved may be a government member of Parliament, or, I would add, the PM himself.

With respect, I do not understand the logic of it.

Take the example that the allegation is made against the EC above. The winning party may be a government or an opposition member of Parliament. The legal officer's duty is merely to prove to the court what was done by the Returning Officer was in accordance with the law. In doing so, he may be arguing in favour of the government or the opposition member of Parliament.

That is not his concern. He is a professional. So is the Judge. It is the judge who will decide. I myself have decided in favour of opposition and government members of Parliament. In one case, I decided against a BN Chief Minister causing him to lose his job.

The question is how does the perception arise? It looks as if it is an imagination of the AG of the perception of the public that does not exist, in other words, his unfounded imagination.

It is true that the EC is established as an independent commission by the Constitution. So are the Judicial Appointments Commission, the Public Services Commission, the Police Force Commission and the Education Commission. Others like the Malaysian Anti-Corruption Commission (MACC), Enforcement Agency Integrity Commission (EAIC), The Human Rights Commission of Malaysia (SUHAKAM), Malaysian Communications and Multimedia Commission (MCMC) are

established by federal laws. Even government departments, like the Audit Department are required to act independently. (To avoid complications, I will not include the courts).

Based on the reasoning given by the AG, from now on the AGC will not be giving them any legal advice or represent them in any suit, civil claims included, nor represent their officers sued in respect of their official duties.

For sure, it will drastically reduce the volume of work of the AGC. Is that the way to reduce the number of legal officers at the AGC by half to fulfil PH election promise?

On the other hand, all those commissions, including the Audit Department, will have to hire private lawyers for their legal work, which may run into millions. Where are they going to get the money from?

Bear in mind that all those commissions are financed by the government. Applying the same reasoning, the Treasury should not allocate funds to them as it will give rise to public perception that they are not independent!

Of course, the members of the Bar will be happy as a lot of work will go to them, provided those commissions have funds to pay their bills.

That is the problem when you pick a lawyer, experienced only in running a law firm consisting of a few partners and a handful of staffs, to head a huge legal department which services numerous government ministries, departments and agencies.

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