SHOULD THE POSTS OF ATTORNEY GENERAL AND PUBLIC PROSECUTOR BE SEPARATED?

By
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Clause (1) of Article 145 of the Federal Constitution provides that:

(1) The Yang di-Pertuan Agong (YDPA) is required to appoint an Attorney General (AG) on the advice of the Prime Minister (PM);

(2) The appointee must be *"a person qualified to be judge of the Federal Court."*

As a matter of interest, under the repealed Article 145(1) of the 1957 Constitution of Malaya:

(1) The YDPA is required to consult to Judicial and Legal Service Commission before making the appointment of the AG;

(2) The appointee must be *"a person qualified to be judge of the Federal Court…from among the members of the Judicial and Legal Service (JLS)".*

Clause (2) provides for the functions of the AG. They are:

(1) to advise the YDPA or the Cabinet or any Minister upon such legal matters,

(2) to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the YDPA or the Cabinet,

(3) to discharge the functions conferred on him by or under this Constitution or any other written law.

These functions are normally referred to as "to advise the government".

That is followed by clause (3) which provides that the AG *"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."*

That is the power to prosecute, which belongs to the Public Prosecutor (PP). However, in Malaysia the AG is also vested with the power of the PP. Indeed, section 376 of the Criminal Procedure Code cannot be clearer than what is says:

"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, in Malaysia, the AG is also the PP. I do not know why the Reid Commission, consisting of eminent judges from England and Commonwealth countries, preferred that arrangement. Could it be because that was the arrangement prior to Merdeka day and the volume of work was manageable by one person? Whatever the reason, I am quite sure that they must have considered whether there would be a conflict of interest and if there would be, they would not have adopted it.

It is argued that since the PP must act independently in deciding whether to institute, conduct or discontinue any criminal proceedings, if he is also the AG, he will be biased in favour of the Government and justice is not seen to be done. Following that argument, if the power is separated, we will have an independent PP.

Let us see how valid this argument is.

First, let us look at the appointment of the PP if the post is separated from the AG. Most likely, the procedure for his appointment is the same as that of the AG. I would go further and say that the PP, like the AG, "*shall hold office during the pleasure of the Yang di-Pertuan Agong."*

In other words, whether the two functions are vested in one or two persons, the procedure for the appointment and dismissal would be the same. In both cases, the part played by the PM is the same. We cannot run away from his influence.

It is said that a PP must act independently when deciding whether to institute, conduct or discontinue any proceedings for an offence. Of course, it is incumbent upon him to do so. But, is it not the same with the AG when advising the government or PM? If both the AG and the PP, whether the same or different persons, must act independently, what difference does it make whether the two posts are held by one or two persons?

For these reasons, I submit that it is not a valid argument that if we separate the two posts, we will get an independent PP (while the AG is not). It all depends on the person: whether he is strong enough to stand up against the PM and the government that appoints him or is he prepared to do anything to please the PM and the government in order to keep his job.

On the other hand, it also depends on the PM. Having appointed him, is he prepared to allow the PP to do his work as he should, i.e. independently or, having appointed him, does the PM demand the PP to return his favour.

I think the strongest argument in favour of splitting the two posts is that the volume of work now is too much for one person to handle and the area of law involved is far too wide for one person to master. By splitting the two posts, both the AG and the PP with be able to concentrate on their respective areas of work.

It is also said that when the two posts are separated, the government may appoint a Member of Parliament (MP) to be the AG so that he will be subjected

to questions in Parliament while, at the same time, he could defend himself and the government, in Parliament.

It sounds good but, let us look at it more closely.

I am pretty sure that the qualification required for the appointment of the PP would be the same as that of the AG i.e. a person qualified to be a Federal Court judge.

Actually, the qualification for a Federal Court Judge is the same as the qualification for a High Court Judge. i.e. 10 years as an officer of the Judicial and Legal Service (JLS) or as an advocate.

Even though the Constitution uses the word “advocate” and not “advocate and solicitor”, but since the Practising Certificate (PC) issued by the Bar Council covers both, it is generally accepted that a person holding a PC for ten years is qualified to be a Judge of the Federal Court. For the purpose of this article, I’ll simply use the term “lawyer”.

In practice, nowadays, an officer of JLS has to serve for not less than 25 years before he is considered for the post of Judicial Commissioner. If he performs well, in two years or more, he will be considered for the post of a Judge of the High Court.

The point is, when he is in the JLS, he does legal and/or judicial work, full time. During the period, he had served in various capacities that, by the time he is considered for the post of AG (as at present), he would usually be either the most senior or among the few most senior in the service who has put in about 35 years of service.

The case of a lawyer may be different. If he is a full time practising lawyer, he too could have put in that number of years doing legal work (but not judicial) full time, even though he certainly does not do prosecution and, most probably, his practice does not cover international law or even criminal cases.

But if you are looking for a lawyer who is an MP, you may end up with someone with a PC but does very little actual legal work.

I have to explain it here. For a lawyer to qualify to be a Federal Court judge and, therefore AG, all he need have (theoretically) is a PC tor ten years. All he has to do is to get admitted, pay the dues and take out a PC every year for ten years. He need not appear in court or do legal work. He may be involved in business or politics or whatever. So, his legal knowledge required for the job of AG may be minimal. He may know people, the PM, Ministers and Judges, but not law. He may be a popular political figure but he does not have the necessary legal knowledge for the job of an AG.

The reality is that, if a person is really good and successful as a professional, whatever it may be, it is very unlikely that he will have no time for politics. Usually, it is those who cannot make it professionally who will try their luck in politics. Besides, pure professionals would not be interested in politics and, quite likely, will not survive as a politician. A politician belongs to a different species. Such people may

accidently jump over the top professionals to become their Minister and, I would not be surprised, AG.

If you think that by separating the two posts there will be no political appointments; that there will be less political influence; that there will be less politicking and that you will get a more independent PP, with respect, I do not agree.

In fact, if you separate the two posts and you are looking for a lawyer-MP to be an AG (not to mention PP), there will be more politicking. Not only MPs with paper qualifications will push themselves for consideration, their political parties too will press for their candidate to be appointed AG. When the PM makes his choice, there will be grouses and dissatisfaction aired publicly.

However, if the two posts are separated, I believe that lawyers will aim at becoming an AG rather than PP. That is because, AG's post is more senior protocol-wise, more glamorous, more familiar to them as it mainly involved in giving legal advice rather the tedious and laborious prosecution.

To be a candidate they have to be seen by the PM. We can expect to see what some of them will do in order to be seen and heard.

In the final analysis, there may be a case for separation of powers between the two posts, but not for the reason that by doing so, we will get an independent PP. But, it is because of the sheer volume of work that one person may not able to handle and involving a vast area of law that one person my find it impossible to master.

Even if we separate the two posts, in my view, generally speaking, for the post of PP, an officer of the JLS is a more suitable candidate. I have no second choice. For the post of AG, my first preference is an officer of the JLS. Next comes a full-time practising lawyer with as wide an experience as possible. A lawyer-MP comes as a very low third.

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