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**REDEFINING INTEGRITY: BUILDING TRUST THROUGH THE  
SEPARATION OF ATTORNEY GENERAL'S AND PUBLIC  
PROSECUTOR'S ROLES IN MALAYSIA\***

*by*

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The Malaysian Government's recent decision to establish a task force to draft a Cabinet paper on separating the roles of Attorney General (AG) and Public Prosecutor (PP) marks a transformative step in prosecutorial legal reform.

To ensure the proposed reforms are effective and sustainable, the draft paper should comprehensively address constitutional amendments, operational frameworks, and international best practices. These considerations are critical to aligning Malaysia's legal framework with global standards while accommodating the unique complexities of its justice system.

This article delves into the key areas the draft paper could explore, such as constitutional amendments, clear delineation of roles, transparent appointment processes, oversight mechanisms, and practical strategies for implementation. By addressing these aspects, Malaysia can pave the way for a more independent and robust prosecutorial system that upholds public trust and the rule of law.

**THE NEED FOR REFORM**

Malaysia's dual-role Attorney General (AG) system, inherited from its colonial past, has combined the functions of government legal advisor and head of prosecutions in a single office. While this arrangement may have been functional in earlier governance systems, it has increasingly faced criticism for creating conflicts of interest, particularly in high-profile cases involving political figures. Notable cases, such as the 1MDB scandal and the SRC International case, have exposed vulnerabilities and amplified calls for reform. Separating prosecutorial powers is crucial to restoring

public confidence and ensuring that justice is served without the perception of political interference.

### **THE BENEFITS OF THE SEPARATION OF ROLES**

- **Independence:** A clear division of roles removes any perceived conflicts of interest.
- **Public confidence:** A transparent prosecution process fosters trust in the justice system.
- There must be no room for questions or concerns regarding political interference in any prosecution.
- **Global reputation:** Adopting internationally recognised standards positions Malaysia as a leader in judicial reform.

### **INTERNATIONAL COMPARISONS AND BEST PRACTICES**

#### **England**

The AG acts as a political appointee advising the government but does not interfere in prosecutions. The DPP, leading the CPS, ensures prosecutorial independence.

#### **Australia**

The Commonwealth DPP operates under a statutory framework, separate from the AG, ensuring a clear division of powers.

#### **Hong Kong**

The **Secretary for Justice** oversees legal affairs and is the head of the Department of Justice. The DPP, who is part of the Department of Justice, handles criminal cases and prosecutions.

#### **Canada**

The DPP operates under the Director of Public Prosecution Service Act, ensuring prosecutorial independence with oversight mechanisms in place.

## **Mauritius**

Mauritius has a hybrid legal system that combines elements of both civil law (influenced by the French Napoleonic Code) and common law (influenced by British law). The roles of AG and DPP are distinct, ensuring clear separation of powers.

## **PROPOSED SEPARATION AND CONSTITUTIONAL AMENDMENTS**

### **Key Articles Requiring Amendment**

- **Article 145 of the Federal Constitution** currently vests prosecutorial powers solely with the Attorney General (AG). The proposed amendment should create a distinct role for the Public Prosecutor (PP), thereby establishing the PP as an independent constitutional office.
- **Article 132:** To formalise the Public Prosecution Service (PPS) as part of the Federal Constitution, including the PPS as a recognised institution.
- **Article 43:** To clarify the Attorney General's (AG) advisory role to the Executive branch without prosecutorial functions. This amendment aims to clearly delineate the AG's role as the government's legal advisor, distinct from prosecutorial duties.
- New provisions to deal with the criteria for appointments, accountability structures, and removal procedures for both AG and PP.

## **DELINEATION OF ROLES AND RESPONSIBILITIES**

### **Attorney General:**

- Serve as chief legal advisor to the government.
- Represent the government in civil and constitutional matters.
- Oversee legislative drafting and interpretation of statutes.

**Public Prosecutor:**

- Head the PPS, which will oversee criminal prosecutions.
- Ensure compliance with legal standards and prosecutorial ethics.
- Maintain independence from the Executive branch.

**COMPARATIVE EXAMPLE**

In **England and Wales**, the AG serves as the government's legal advisor, while the Director of Public Prosecutions (**DPP**), through the Crown Prosecution Service (**CPS**), independently handles criminal prosecutions. This model ensures checks and balances while preserving impartiality.

**CRITERIA FOR APPOINTMENTS IN MALAYSIA: TRANSPARENT APPOINTMENT PROCESSES****Attorney General:**

- Must possess extensive experience in constitutional and administrative law.
- Appointed by a bipartisan parliamentary committee.
- Safeguards against political appointments to ensure impartiality.

**Public Prosecutor:**

- Applications would be made through an open competition and selection by an independent Judicial Appointments Commission (JAC) based on experience.

**International Comparisons**

- In **Australia**, the Commonwealth DPP undergoes a merit-based appointment process. The appointment is made by the Federal Attorney-General, following a rigorous evaluation of candidates' legal expertise and experience. This process ensures that the appointee has

the necessary qualifications and independence to perform the role effectively.

- In **England and Wales**, the Director of Public Prosecutions (DPP) is appointed by the Attorney General on the recommendation of independent panels that include the Civil Service Commission. The selection process is open and competitive, designed to identify candidates with exceptional legal expertise and leadership qualities. The DPP is responsible for leading the Crown Prosecution Service (CPS) and ensuring that prosecutions are conducted independently and fairly.

*Key Steps in the Appointment Process in England and Wales:*

(1) Open Competition:

- The position is advertised publicly, inviting applications from qualified candidates. This ensures a wide pool of applicants and promotes transparency.

(2) Independent Panels:

- An independent panel, including representatives from the Civil Service Commission, reviews the applications and conducts interviews. This panel assesses candidates based on their legal expertise, experience, and suitability for the role.

(3) Recommendation to the Attorney General:

- The panel makes a recommendation to the Attorney General, who then appoints the DPP. This process ensures that the appointment is based on merit and not influenced by political considerations.

(4) Term of Appointment:

- The DPP is appointed for a fixed term, typically five years, which can be renewed. This fixed tenure helps maintain the

independence of the office by protecting the DPP from undue influence.

By adopting similar merit-based and transparent appointment processes, Malaysia can ensure that its Public Prosecutor (PP) and the head of the prosecution unit of the Malaysian Anti-Corruption Commission (see below) are selected based on their qualifications and independence. This will enhance the credibility and effectiveness of the legal system, ensuring that prosecutorial decisions are made fairly and without political interference.

### **EMPOWERING THE MALAYSIAN ANTI-CORRUPTION COMMISSION WITH PROSECUTORIAL INDEPENDENCE**

Empowering the Malaysian Anti-Corruption Commission (MACC) to prosecute corruption cases independently can streamline the process, reduce delays, and improve the overall effectiveness of anti-corruption efforts.

- **Increased Public Trust:**

An independent MACC can enhance public confidence in the integrity of corruption investigations and prosecutions, as it would be perceived as free from political influence.

- **Reduced Conflicts of Interest:**

By separating the prosecutorial functions from the AG's and PP's office, potential conflicts of interest can be minimised, ensuring that corruption cases are handled impartially.

### **Comparative Perspective**

In the UK, the **Serious Fraud Office (SFO)** operates independently from the CPS and is responsible for investigating and prosecuting serious or complex fraud, bribery, and corruption. This model ensures that the SFO can pursue high-profile corruption cases without needing to approach the CPS.

The Malaysian Anti-Corruption Commission (MACC) should be granted the flexibility to appoint counsel from private practice to prosecute their complex cases. The current model, which relies solely on prosecutors employed by the Attorney General's Chambers, may not be the most suitable for handling these serious and exceptionally complex cases due to limited experience.

Bringing in experienced counsel from private practice would enhance public confidence and ensure that these cases are prosecuted effectively and thoroughly.

- Allowing the MACC the flexibility to appoint counsel from private practice could indeed bring several advantages:
  - **Expertise in Complex Cases:** Private practitioners, especially those with experience in white-collar crime and anti-corruption laws, can bring a level of specialised knowledge and courtroom expertise that might not always be readily available within the Attorney General's Chambers.
  - **Enhanced Public Confidence:** The inclusion of independent counsel from private practice could mitigate perceptions of bias or undue influence, fostering greater trust in the prosecution process.
  - **Resource Augmentation:** Prosecutors from the Attorney General's Chambers may be overburdened with a variety of cases. Engaging private counsel could help address resource constraints, allowing more focus on high-profile and complex corruption cases.
  - **Global Precedents:** Other jurisdictions, such as the United Kingdom and Australia, have successfully used private practitioners to prosecute cases on behalf of government agencies, particularly when dealing with intricate legal issues.

- **Specialised Training Opportunities:** Collaboration between the MACC and private counsel could serve as a knowledge-sharing platform, enhancing the skillset of in-house prosecutors.

### **Implementation in Malaysia**

- **Constitutional Amendments:** Amend the Federal Constitution to establish the MACC as an independent prosecutorial body. The MACC currently operates under the Malaysian Anti-Corruption Commission Act 2009, which grants it investigative powers but not prosecutorial independence.
- **Legislative Framework:** Enact legislation to define the prosecutorial powers, functions, and accountability mechanisms for the MACC.
- **Appointment Process:** Ensure that the head of the MACC is appointed through a transparent, open competition, merit-based process to guarantee independence. **The Malaysian Anti-Corruption Commission Act 2009 need to be amended.**
- **Oversight Mechanisms:** Establish independent oversight bodies to review the MACC's prosecutorial decisions and ensure accountability.

### **Oversight and Accountability Mechanisms of AG, PP and MACC**

The following mechanisms are essential for ensuring the transparency and accountability of the three roles:

- **Judicial Oversight:** A Prosecution Oversight Panel to review significant prosecutorial decisions.
- **Parliamentary Reporting:** Annual reports by the AG, PP and head of MACC to Parliament.
- **Ethics Committees:** Independent audits to ensure legal and ethical compliance.



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## **Global Models to Consider**

- **England and Wales**

In England and Wales, the Crown Prosecution Service (CPS) is headed by the Director of Public Prosecutions (DPP), who operates independently of the government. The CPS is subject to oversight by the Attorney General, who can issue guidelines and intervene in cases of significant public interest. Additionally, the CPS Inspectorate conducts regular reviews to ensure compliance with legal standards and prosecutorial ethics.

- **Singapore**

In Singapore, the Attorney-General's Chambers (AGC) is responsible for providing legal advice to the government and handling public prosecutions. The Attorney-General, who serves as the Public Prosecutor, operates within the AGC and has the authority to initiate, conduct, or discontinue prosecutions. While the Public Prosecutor is accountable to the Attorney-General, the Corrupt Practices Investigation Bureau (CPIB) independently investigates corruption cases to ensure integrity in prosecutorial decisions.

- **Canada**

In Canada, the Director of Public Prosecutions (DPP) operates under the Public Prosecution Service Act, which ensures prosecutorial independence while maintaining oversight. The DPP is accountable to the Attorney General, who can issue directives on specific prosecutions, but these directives must be published in the Canada Gazette, ensuring transparency.

- **Australia**

Australia's Commonwealth Director of Public Prosecutions (CDPP) operates independently of the Attorney General. The CDPP is accountable to the Parliament through annual reports and is subject to

scrutiny by the Parliamentary Joint Committee on Law Enforcement. This committee reviews the CDPP's operations and ensures that prosecutorial decisions are made without political interference.

- **New Zealand**

In New Zealand, the Solicitor-General acts as the chief legal adviser to the government and oversees criminal prosecutions through the Crown Law Office. The Solicitor-General can issue guidelines and intervene in cases of significant public interest. The Office of the Auditor-General conducts regular audits of public sector organisations to ensure compliance with legal standards and ethical practices.

- **South Africa**

In South Africa, the National Prosecuting Authority (NPA) is headed by the National Director of Public Prosecutions (NDPP), who operates independently of the government. The NDPP is accountable to the Parliament through annual reports and is subject to scrutiny by the Parliamentary Portfolio Committee on Justice and Correctional Services. This committee reviews the NPA's operations and ensures that prosecutorial decisions are made without political interference.

- **Germany**

In Germany, the Public Prosecutor's Office operates under the supervision of the Federal Ministry of Justice. The Federal Prosecutor General is accountable to the Ministry, which can issue guidelines and intervene in cases of significant public interest. Additionally, the Federal Court of Auditors conducts regular audits of federal financial management to ensure compliance with legal standards and ethical practices.

- **Japan**

In Japan, the Public Prosecutor's Office operates under the Ministry of Justice. The Prosecutor General is accountable to the Minister of

Justice, who can issue guidelines and intervene in specific cases of significant public interest. The Ministry of Justice oversees the Public Prosecutor's Office to ensure compliance with legal standards and prosecutorial ethics.

- **United States**

In the United States, the Department of Justice (DOJ) oversees federal prosecutions, with the Attorney General serving as the head. The DOJ's Office of the Inspector General (OIG) conducts regular audits and investigations to ensure compliance with legal standards and prosecutorial ethics. Additionally, the DOJ is accountable to Congress through regular reports and hearings.

The examples above illustrate the various oversight and accountability mechanisms that can be implemented to ensure the independence and integrity of the Attorney General, Public Prosecutor, and the Head of MACC. By adopting similar mechanisms, Malaysia can enhance public confidence in its legal system and ensure that prosecutorial decisions are made without political interference.

## **VICTIMS' RIGHT TO CHALLENGE PROSECUTION DECISIONS NOT TO PROSECUTE**

To ensure that the decisions of prosecutors not to prosecute can be challenged in Malaysia, specific sections of the Criminal Procedure Code (CPC) and articles of the Federal Constitution need to be amended.

### **(1) Criminal Procedure Code ('CPC')**

#### *Section 376(1) of the CPC*

- This section states that the Attorney General shall be the Public Prosecutor and shall have control and direction of all criminal prosecutions and proceedings under this Code.

Proposed Amendment: Amend section 376(1) of the CPC

- Remove the Attorney General from this section and substitute with the Public Prosecutor (PP) and the Head of the Malaysian Anti-Corruption Commission (MACC).
- Introduce a provision that allows for the review of decisions not to prosecute by an independent oversight body and through judicial review.

**(2) Article 145(3) of the Federal Constitution of Malaysia**

- This article grants the Attorney General the power to institute, conduct, or discontinue any proceedings for an offence other than proceedings before a Syariah court, a native court, or a court-martial. To enable challenges to prosecutorial decisions, this Article would need to be amended to include provisions for judicial review or other forms of oversight over prosecutorial discretion.

Proposed Amendments: Amend Article 145(3) of the Federal Constitution

- Remove the Attorney General's exclusive authority and substitute it with the Public Prosecutor (PP) and the Head of the Malaysian Anti-Corruption Commission (MACC).
- Introduce a clause that subjects prosecutorial decisions to oversight by an independent body and judicial review to ensure accountability and transparency.

**Implications of Amending the Criminal Procedure Code ('CPC') and Federal Constitution**

Amending the CPC and the Federal Constitution to allow for the review of prosecutorial decisions not to prosecute will have significant implications for Malaysia's legal and judicial system. Below are the key implications:

### (1) Enhanced Judicial Oversight

- **Implication:** Judicial review of prosecutorial decisions will enhance judicial oversight over the executive branch. This ensures that decisions made by prosecutors are subject to scrutiny and are not arbitrary or influenced by improper considerations.
- **Impact:** Promotes fairness and accountability in the legal system, ensuring prosecutorial decisions are made based on legal principles and evidence.

### (2) Increased Public Confidence

- **Implication:** Allowing victims and other interested parties to challenge prosecutorial decisions will increase transparency and accountability, thereby boosting public confidence in the legal system.
- **Impact:** Greater public trust in the legal system can lead to increased cooperation with law enforcement and a stronger commitment to upholding the rule of law.

### (3) Reduction of Conflicts of Interest

- **Implication:** By amending Article 145(3) and Section 376(1), the dual role of the Attorney General as both legal advisor to the government and head of prosecutions can be effectively separated.
- **Impact:** Ensures prosecutorial decisions are made independently, reducing undue influence from the executive branch and leading to impartial outcomes.

#### (4) **Alignment with International Best Practices**

- **Implication:** Implementing these changes aligns Malaysia's legal framework with international best practices, such as those seen in the United Kingdom and other common law jurisdictions.
- **Impact:** Enhances Malaysia's reputation globally, demonstrating a commitment to high standards of justice and governance.

#### (5) **Empowerment of Victims**

- **Implication:** Establishing a formal mechanism for victims to challenge decisions not to prosecute empowers them by giving them a voice in the legal process.
- **Impact:** This leads to greater satisfaction with the legal system and ensures victims feel their concerns are taken seriously.

#### (6) **Operational and Resource Considerations**

- **Implication:** Implementing these changes will require significant resources, including funding for oversight bodies, training for legal professionals, and public awareness campaigns.
- **Impact:** While initially straining resources, the long-term benefits of a more transparent and accountable legal system outweigh the costs. Effective planning and phased implementation can mitigate challenges.

#### (7) **Potential for Increased Litigation**

- **Implication:** Allowing judicial review of prosecutorial decisions may increase litigation as more parties' challenge decisions not to prosecute.
- **Impact:** Though this could initially burden courts, it ensures prosecutorial decisions are thoroughly vetted, leading to more robust and just outcomes over time.

## **COMPARATIVE PERSPECTIVE: UNITED KINGDOM**

In the UK, the **Victims' Right to Review (VRR)** scheme allows victims to request a review of certain decisions made by the police or the Crown Prosecution Service (CPS) not to prosecute a suspect. This ensures transparency and accountability in prosecutorial decisions, providing victims with a mechanism to challenge decisions they believe are incorrect or unjust.

### **How the VRR Scheme Works:**

#### **(1) Eligibility:**

- Victims can request a review if the police decide not to charge a suspect or if the CPS decides that the case does not meet the test for prosecution. The request must be made within three months of being informed of the decision.

#### **(2) Process:**

- The initial review is conducted by a different officer or prosecutor not involved in the original decision. If the review concludes the original decision was correct, the decision stands. Otherwise, the case may be reopened, potentially leading to prosecution.

#### **(3) Further Review:**

- If unsatisfied with the outcome of the initial review, victims may request a further review by a higher authority within the CPS or police force. Additionally, there is a route available to seek judicial review of the decision not to prosecute.

Way Forward for Malaysia: Adopting a similar approach to the UK's VRR scheme would provide victims with a clear and accessible mechanism to challenge prosecutorial decisions, thereby enhancing fairness and accountability in the legal system.

## CONCLUDING THOUGHTS

The Malaysian government's decision to separate the roles of the Attorney General (AG) and Public Prosecutor (PP) represents a transformative milestone in the nation's legal and judicial landscape. This historic reform aims to enhance prosecutorial independence, increase public confidence, and eliminate potential conflicts of interest within the legal system. By carefully considering constitutional amendments, operational mechanisms, and international best practices, Malaysia can successfully implement this significant change.

### **Key Points:**

#### **(1) Background and Need for Reform**

The dual role of Malaysia's AG has historically combined the responsibilities of a government legal advisor and the head of prosecutions, leading to perceptions of conflicts of interest, particularly in high-profile cases such as the 1MDB scandal.

#### **(2) Proposed Separation and Constitutional Amendments**

Amendments to key Articles of the Federal Constitution are required to create distinct roles for the AG, the Head of MACC and the PP, to establish the Public Prosecution Service (PPS) as an independent entity.

#### **(3) Delineation of Roles and Responsibilities**

The AG will serve as the chief legal advisor to the government, while the PP will head the PPS and oversee all criminal prosecutions independently.

#### **(4) Benefits of MACC Independence in Prosecuting**

Granting the Malaysian Anti-Corruption Commission (MACC) the independence to prosecute corruption cases will improve efficiency, increase public trust, and reduce conflicts of interest. The UK's



Serious Fraud Office (SFO) provides a comparative model for such a system.

**(5) Criteria for Appointments**

Transparent and impartial appointment processes for both roles, with safeguards against political influence, are essential to ensure the integrity of the legal system.

**(6) Oversight and Accountability Mechanisms**

Judicial oversight, parliamentary scrutiny, and ethics committees will be crucial to ensuring transparency and accountability in prosecutorial decisions. International examples from Canada, the UK, Australia, and Hong Kong demonstrate the effectiveness of these mechanisms.

**(7) Implementation Challenges and Solutions:**

Addressing operational adjustments, resistance from stakeholders, will be critical to ensure a smooth transition to the new system. The UK's CPS implementation provides a valuable case study.

**(8) International Comparisons and Best Practices:**

Learning from models in England, Australia, Hong Kong, Canada, Mauritius, and New Zealand will allow Malaysia to tailor solutions that suit its unique context.

**(9) Criteria for Parties to Challenge the Decision Not to Prosecute:**

Establishing a formal mechanism for victims to challenge prosecutorial decisions, akin to the UK's Victims' Right to Review (VRR) scheme, will enhance accountability and transparency.

The Malaysian government's acceptance of the need for proposed reform marks a significant milestone in modernising its legal framework. By creating a system that is transparent, accountable, and effective in delivering justice, Malaysia can redefine its prosecutorial and judicial systems to align with global standards of fairness, impartiality, and

accountability. This reform is not merely about separating functions but about building a robust and trustworthy prosecutorial system that serves the interests of justice and the public.

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