

**DISCRETIONARY POWERS OF THE ATTORNEY-
GENERAL : IS THE ATTORNEY-GENERAL ANSWERABLE
TO THE PUBLIC?**

Ainur Nadhrah binti Roslan*

Muhammad Zaim Nur bin Zaini**

Anis Shafeeqah Mohd Shariffudin***

Nur Nabilah binti Azman****

Piriya A/P Subramaniam*****.

ABSTRACT

This article examines the nature and extent of discretionary powers of the Attorney-General. Through legal doctrinal methodology, the article explores the question of whether the execution of such powers can be subject to public scrutiny. With reference to provisions of the Federal Constitution and several decided cases, the article finds that the Attorney-General's discretion cannot be completely unrestrained and can be called to question by the courts when such discretion is employed improperly. Additionally, it is recommended that the Attorney-General must be accountable to Parliament and not the Executive.

Keywords: Attorney-General, discretionary powers, accountability

* Associate, EzriLaw Firm, Email : ainurnadhrah.work@gmail.com

** Associate, EzriLaw Firm

*** Pupil in Chambers at EzriLaw Firm

**** Associate, EzriLaw Firm

***** Pupil in Chambers at EzriLaw Firm

INTRODUCTION

Years have passed and the issue remains unsolved, causing public uproar. The question of whether the Attorney-General ('AG') is answerable to the public has already been brought up before when the AG issued a directive to the MACC to close investigations on the 1MDB affair back in 2016.¹ The public at large had demanded reasons and accountability for the decision made by the former AG, Tan Sri Abdul Gani Patail who subsequently retired abruptly during mid-investigations. Transparency International Malaysia has called for greater independence of the judiciary in Malaysia by separating the power of the Attorney General and the Public Prosecutor.² Today the same person holds both posts and is accountable mainly to the prime minister. This is why there have not been serious investigations into the corruption allegations surrounding the former Prime Minister. Transparency International Malaysia's (TI-M) understanding of the appointment of the Attorney General is under Article 145 of the Federal Constitution whereby the AG is appointed by the Yang di-Pertuan Agong, on the advice of the Prime Minister.³

The question was raised again in the Serba Dinamik Holdings Bhd criminal proceedings in 2022.⁴ In December 2021, Tan Sri Idrus Harun, the AG at the time, consented for the Securities Commission Malaysia to prosecute Serba Dinamik and four top executives for

¹ Rozana Latif, 2018, "Exclusive: Evidence that Malaysia's Najib received 1MDB funds was ignored, probe panellists say", Reuters, <https://www.reuters.com/article/cnews-us-malaysia-politics-scandal-exclusive/CAKCN1IG0GL-OCATP> (20 February 2023).

² (n.a), 2016, Separate Powers Of Attorney General and Public Prosecutor To Restore Trust In Malaysian Judiciary, Transparency International 2023, <https://www.transparency.org/en/press/separate-powers-of-attorney-general-and-public-prosecutor-to-restore-trust> (20 February 2023).

³ Dato' Akhbar Satar, Dr. KM Loi, "Ti-M Wants MACC To Be Independent And Have Prosecutorial Powers", Transparency International Malaysia, Press Release, (n.d), <https://transparency.org.my/pages/news-and-events/press-releases/ti-m-wants-macc-to-be-independent-and-have-prosecutorial-powers> (20 February 2023).

⁴ Securities Commission Malaysia, (n.d), Updates On Criminal Prosecution In 2022, <https://www.sc.com.my/regulation/enforcement/actions/criminal-prosecution/updates-on-criminal-prosecution-in-2022#:~:text=On%2013%20May%202022%2C%20the,in%20the%20KL%20Sessions%20Court.&text=Mohd%20Karim%20was%20charged%20in,to%20Bursa%20Malaysia%20Securities%20Berhad.> (20 February 2023).

allegedly issuing a false statement to Bursa Malaysia, and then switched his consent to a compound in March 2022, following a letter of representation from the accused.⁵ Although the accused parties paid the compound totalling RM16 million after some delays, they were given a discharge and acquittal. However, even though the AG had written a three-page statement, the statement did not elaborate on the acquittal.⁶

The AG's decision to compound *Serba Dinamik* in the face of multiple non-compliances has raised more questions than answers and has been a subject of contention by both industry specialists and laypeople. Furthermore, such a decision derogates the spirit of transparency and the integrity of the capital market's governance and regulatory framework.⁷ Therefore, this article tries to describe the legal course of action(s) in pursuing remedies available under the law, among others, to call on the AG to provide a thorough justification for his decisions, as well as any other options that may present themselves.

TO WHAT EXTENT IS THE DISCRETION OF THE AG BEYOND QUESTION?

In the early formative years of Malaysia, the position of the AG has been controversial, claimed to be smeared and influenced by politics. In the case of *Lim Kit Siang v U.E.M.*,⁸ Justice VC George mentioned that the AG is a civil servant appointed by the YDPA on the advice of the Prime Minister. The AG is not answerable to anyone, including the Prime Minister, the Parliament, or the public. He is also not accountable to any Ministers or Ministries. In short, the appointment

⁵ Izzul Ikram, 2022, "Serba Dinamik: MUDA claims AG's reasons trigger more questions than answers", The Edge Malaysia, <https://theedgemaalaysia.com/article/serba-dinamik-muda-claims-ags-reasons-trigger-more-questions-answers> (20 February 2023).

⁶ Attorney General, Press Release, 13 May 2022, Attorney General's Chambers, Malaysia (AGC), https://www.agc.gov.my/agcportal/common/uploads/publication/487/2022_05_13_AGC%20PRESS%20RELEASE_13May2022%20BI.pdf (20 February 2023).

⁷ Mohamad Ezri Abdul Wahab, Press Release, 6 May 2022, "Mere Issuance of Compounds towards *Serba Dinamik* Sets a Dangerous Precedent", Malaysian Bar, <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-mere-issuance-of-compounds-towards-serba-dinamik-sets-a-dangerous-precedent> (20 February 2023).

⁸ [1988] 2 MLJ 12

of the AG has been challenged by the same authority or individual who appointed him because he is not liable to anyone, thus demonstrating his immunity from the law.

However, in the case of *Long bin Samat & Ors. v. Public Prosecutor*,⁹ Tun Mohamed Suffian, former Lord President, interpreted the scope and wide discretionary powers of the AG under Article 145(3) of the Federal Constitution. In brief, the former Supreme Court judge stated that the Courts had no right to intervene in any decision made by the AG to prosecute and vice versa. In the following case of *RepcO Holdings Bhd v Public Prosecutor*,¹⁰ the former High Court judge Datuk Seri Gopal Sri Ram, echoed the interpretation in the previous case and added as follows:

“ *The Federal Constitution has committed to the hands of the AG the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings*”.

Furthermore, Tun Suffian in the case of *Johnson Tan Han Seng v Public Prosecutor*¹¹ stated that the provision of Article 145 of the Federal Constitution is not subjected to Article 8 which guarantees equality before the law and freedom from discrimination by any public authority. The former Lord President interpreted the language set out in Article 145 to be very wide. His Lordship defined the word “discretion” as the liberty to decide accordingly by considering that the intention of the makers of the Federal Constitution is for Article 145 to not be read with Article 8.

The question of whether the discretion of an AG is beyond question is simply incorrect. Quoting Raja Azlan Shah in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd*¹²,

“*Unfettered discretion is a contradiction in terms ... Every legal power must have legal limits, otherwise, there is dictatorship ... In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the court to intervene. The courts are the only defence of the liberty of the subject against departmental aggression.*”

⁹ (1974) 2 MLJ 152

¹⁰ (1997) 3 MLJ 681

¹¹ [1977] 2 MLJ 66

¹² [1979] 1 MLJ 135, FC at 148,

Although His Lordship referred to the powers of the State Authority in land decision making in that case, it is made applicable to the discretion exercised by the high constitutional office such as the AG himself where Raja Azlan Shah emphasised the nonsensical term of absolute discretion; more popularly known as a dictatorship. The power given to the AG by the Federal Constitution to institute any proceedings for an offence is “exercisable at his discretion”. This power is not absolute. The trust given by the people must be exercised in good faith, in a neutral, detached manner, following the existing law and with the public interest in mind. Words such as “absolute” and “unfettered” to describe the power of a constitutional agency are old-fashioned and must be discouraged.¹³

The judgement by Raja Azlan Shah became a precedent in developing the courage to question the power of the AG and was further echoed in the case of *Dato’ Pahlawan Ramli bin Yusuff v. Tan Sri Abdul Gani bin Patail & Ors.*¹⁴ In this case, the judgement by Judicial Commissioner Vazeer Alam Mydin, as he then was, emphasised that absolute immunity for the Public Prosecutor who is a public officer, has no place in a progressive democratic society and is contrary to the rule of law. He further added that the law is central to the legal system, hence no one is above the law.

Tun Salleh Abas in *Public Prosecutor v Zainuddin & Anor.*¹⁵ stated that the Constitution gave the AG “an exclusive power respecting direction and control over criminal matters” and “his decision is not open to any judicial review”. The AG’s powers over prosecution are prescribed under section 376 of the Criminal Procedure Code and the Article 145 of the Federal Constitution:

Public Prosecutor

¹³ Summary judgement of *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lembah Enterprise Sdn. Bhd.* [1979] 1 MLJ 135 by Suffian LP, Raja Azlan Shah AG CJ (Malaya), Chang Min Tat FJ, Federal Court, Kuala Lumpur, 12 September and 21 October 1978, “His Royal Highness: A Tribute, Judgement of Sultan Azlan Shah”, <https://www.sultanazlanshah.com/pdf/Judgments%20PDF/Pengarah-Tanah-Galian.pdf> (21 February 2023).

¹⁴ [2015] 7 MLJ 763

¹⁵ [1986] 2 MLJ 100

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.

145. Attorney General

(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.

On 31st December 2019, former director of the Asian International Arbitration Centre (AIAC), Datuk Prof Dr N. Sundra Rajoo (“Sundra Rajoo”) succeeded in his judicial review¹⁶ application against the decision of the Attorney General’s Chambers (“AGC”) to charge him with three counts of criminal breach of trust involving over RM1 million belonging to AIAC. Previously, the High Court dismissed the leave application on finding that the Appellant had not raised a prima facie arguable case for judicial review and that the leave application was frivolous and vexatious mainly because it sought to review the AG’s ‘unfettered’ prosecutorial discretion under Article 145(3) of the Federal Constitution. The High Court ruled that there was no material to show the AG had abused his prosecutorial power or that the decision to charge the Appellant contravened any constitutional protection or rights. Yang Arif Dato’ Seri Mariana Yahya held that the AG’s discretionary power under Article 145 (3) of the Federal Constitution to institute, conduct or discontinue any proceedings for a criminal offence is subject to judicial review. It is trite that the Attorney General’s discretion under Article 145(3) of the Federal Constitution, to “institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial,” is unfettered and is thereby not amenable to judicial review.¹⁷

WHAT DOES THE ATTORNEY GENERAL ENTAIL?

Despite all the discretion that an AG holds, it is to be noted that in addition to his constitutionally mandated duties, the AG is the defender

¹⁶ [2020] 3 MLJ 788

¹⁷ Joshua Wu Kai-Ming, “Commentary on Sundra Rajoo’s Judicial Review Application”, 1 January 2020, <https://joshuawu.my/commentary-on-sundra-rajoos-judicial-review-application/> (9 December 2023)

of the public interest, a right granted to him by common law and made applicable by Article 160 of the constitution. Written law, common law, and custom or usage with the force of law in the force federation are all included by Article 160¹⁸ insofar as they are in the operation of the federation or any portion thereof. This idea makes a distinction between issues that may have legal repercussions and those that do not. In other words, the AG's discretion cannot be completely unrestrained by the law; if it is improperly employed, the courts must intervene.¹⁹

Article 2.1 of the International Association of Prosecutor's "Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors" reads:

*"The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference".*²⁰

Article 3(b) states that:

*"Prosecutors shall perform their duties without fear, favour, or prejudice. In particular, they shall remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest".*²¹

Considering Article 145(3) of the Federal Constitution, the AG is deemed to have wide and unfettered discretion and powers in both civil and criminal proceedings. In the case of *Nadarajah v PP [2000]*,²² the Court held that the power to institute proceedings extends to a choice of forum. The AG has the discretion to institute proceedings in any court that has jurisdiction to hear it, be it a higher or a lower court. This decision further advocates the discretionary power of the AG.

¹⁸ Article 160 Federal Constitution of Malaysia 1957

¹⁹ Prof. Dr. Shad Saleem Faruqi, 2005, "Constitutional Interpretation In A Globalised World", Malaysian Bar, <https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/constitutional-interpretation-in-a-globalised-world> (22 February 2023).

²⁰ Lim Wei Jiet, (n.d), "Australasia / AG: Independent Guardian of Public Interest, Not Government Puppet", Commonwealth Lawyers Association, <https://www.commonwealthlawyers.com/australasia/ag-independent-guardian-of-public-interest-not-government-puppet/#:~:text=It%20is%20an%20established%20constitutional,particular%20acts%20of%20a%20case> (21 February 2023).

²¹ Ibid

²² 4 MLJ 373

In *Chin Chee Kow v Peguam Negara Malaysia*,²³ the court is compelled not to muddle the AG'S decision, but the Court's role is very much supervisory and should be decided based on whether there has been a lawful exercise of the power provided to the AG under the statute. If appropriate considerations have been taken in arriving at a decision made by the AG, then the Court should refrain from interfering with the discretion exercised. It is undeniable that both the *Serba Dinamik* and *IMDB* cases involved the exercise of power by a minister in the exercise of administrative functions rather than his constitutional powers.

Given that various definitions support the Public Prosecutor is also the AG under section 3 of the Interpretations Act 1948 and 1967 and section 376(1) of the Criminal Procedure Code, therefore, following the decision by the Court in 2015,²⁴ the Federal Constitution's (FC) grant of total immunity and discretionary powers to the AG is not applicable. Further, In the *Raja Azlan Shah* ruling, His Lordship provides that any legal power must have legal boundaries and that it can be construed by court intervention despite the lack of express mention of the limitation of the AG's power in the Federal Constitution. However, it is crucial to note that the particular line of action to choose in contesting the authority of the AG has not been explicitly indicated in these case laws.

Following the 2015 decision, in general, it provides the locus for the parties who are affected by the decision of the Attorney General to seek legal remedy by challenging the decision in court commonly being done by way of Judicial Review at the High Court under Order 53 of the Rules of Court 2012.

SUGGESTIONS

To put it simply, the Attorney General's discretion is not limited. It cannot be exercised for an improper purpose and unreasonably or based on an irrelevant or wrong consideration. If it is so exercised, then it could be subject to challenge through the courts. Chief Justice Tengku Maimun Tuan Mat, who presided over a seven-member Federal Court

²³ [2019] MLJU 1453

²⁴ *Dato' Pahlawan Ramli bin Yusuff v. Tan Sri Abdul Gani bin Patail & Ors* [2015] 7 MLJ 763

bench noted that in the right situations, the Attorney General's prosecutorial authority might be subject to judicial review.²⁵ Following that, in 2016, the former AG, Tan Sri Abdul Gani Patail challenged anyone unhappy with his decision to the limits of his powers to pursue the matter for the Federal Court to determine. However, for this to work, he must give his decision for the court to evaluate the legal propriety of his decision properly. Thus, there is no such thing as his power is not up for questioning, especially after causing a public outcry. It is imminent for the AG to explain his decision or else it could be assumed that there was no good reason. If all prima facie reasons point towards one course of action and the minister takes another without giving a reason, the court may infer he has no good reason for the decision and is using his discretion for an improper purpose.

A suggestion that was given by local media shows great potential where the government should adopt an agreement with all government officials including the high constitutional offices to be extended to matters that would likely cause public outcry.²⁶ It requires each party to adopt or maintain “measures to promote transparency in the behaviour of public officials in the exercise of public functions” as one implemented in the Trans-Pacific Partnership (TPP) agreement concerning international trade and investment matters. Why not start a similar agreement to promote government accountability and transparency?

CONCLUSION

In conclusion, the AG should be made accountable to Parliament rather than the Executive branch of government. Since the AG is a public

²⁵ (n.a), 2021, “AG’s powers not absolute, can be judicially reviewed, says Federal Court”, FMT Media Sdn. Bhd., <https://www.freemalaysiatoday.com/category/nation/2021/04/30/ags-powers-not-absolute-can-be-judicially-reviewed-says-federal-court/> (22 February 2023).

²⁶ Official Portal Ministry of Economy, (n.d), Mid-Term Review of the Eleventh Malaysia Plan, Chapter 10: “Reforming Governance towards Greater Transparency and Enhancing Efficiency of Public Service”, p19, <https://www.epu.gov.my/sites/default/files/2020-08/14.%20Chapter%2010%20Reforming%20Governance%20towards%20Greater%20Transparency%20and%20Enhancing%20Efficiency%20of%20Public%20Service.pdf> (23 February 2023).

servant, any decision he makes must be seen to be independent, transparent, impartial, and fair. His role should be apolitical, and no one should be able to question his decisions when they are made in the best interests of the nation provided that a reasonable explanation is given. To be fair, with many political affairs going on, public trust in government officials is slowly fading. Thus, transparency coming from one person holding such power in an office would have restored the public's confidence and faith in the government. Regardless of who's sitting on that chair, power should never be accumulated by a single person or body of government as this has always been the greatest threat to liberty and the life of a nation for a very long time.