

EFFECTIVE ADMINISTRATION OF THE POLICE AND THE PROSECUTION IN CRIMINAL JUSTICE IN MALAYSIA

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I. INTRODUCTION

The fundamental principle underlying the criminal justice system in Malaysia is that an accused person is innocent until proven guilty. Consonant with this principle, the criminal justice system of Malaysia provides various safeguards to protect accused persons.

Some legislation, like the Dangerous Drugs Act and the Anti Corruption Act, contains certain statutory presumptions that can be invoked against the accused. Thus, when a person is charged for an offence under these laws, the burden is shifted on to the accused to rebut the presumptions.

The criminal justice system in Malaysia also ensures that a person who is guilty of an offence is punished in accordance with the law. It is also in the public interest that the police force maintains law and order in the country.

The duty to investigate an offence is with the police, and the duty to decide whether a person ought to be charged lies with the Attorney-General, who is also the Public Prosecutor. Lawyers bears the duty to defend an accused person and the court adjudicates.

II. THE SYSTEM OF ADMINISTRATION OF CRIMINAL JUSTICE IN MALAYSIA

In the realm of administration of criminal justice in Malaysia, the approach is two pronged. They are Investigation of crimes and Prosecution of criminal cases in court. The investigation of crimes is the responsibility of the enforcement agencies, namely, the Royal Malaysian Police, Anti Corruption Agency, Royal Customs and Excise, Securities Commission, Central Bank of Malaysia etc. whilst prosecution is solely in the hands of the Attorney General, who has the power exercisable at her discretion to institute, conduct or discontinue any criminal proceedings.

The general law governing investigation is the Criminal Procedure Code [Act 593]. Apart from that there are other special laws governing investigation, namely, Anti Corruption Act 1997 [Act 575], Securities Commission Act 1993 [Act 498], Securities Industry Act 1983 [Act 280], Banking and Financial Institutions Act 1989 [Act 372], etc. The law enables investigators *inter alia*, to trace and apprehend offenders, gather oral and documentary evidence for purposes of proof of an offence in court.

In terms of prosecution, the power is bestowed upon the Attorney General. This is categorically spelt out in the Federal Constitution, which is the supreme law of Malaysia. Clause 3 of Article 145 of the Federal Constitution provides that the Attorney General shall have the power, exercisable at her discretion, to institute, conduct or discontinue any criminal prosecution. Further subsection 1 of section 376 of the Criminal Procedure Code provides that the Attorney General shall be the Public Prosecutor who shall have control and direction of all criminal prosecutions. In the exercise of her discretion, the Attorney General is empowered to act of her own accord and is not subject to any control. The general principles that the Attorney General must, in performing her duties, act in the public interest applies with particular force to her powers under clause 3 of Article 145.

Nevertheless, the discretion by the Attorney General can only be exercised based on the outcome of the investigation undertaken by the relevant enforcement agency. Upon receipt of the result of investigation from the enforcement agency, the Attorney General will decide whether to institute prosecution against a perpetrator of crime. In arriving at the said decision the Attorney General is always guided by legal principles. Public interest shall also be the paramount consideration.

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III. CURRENT LAWS, REGULATIONS AND DIRECTIVES GOVERNING THE CONDUCT OF PROSECUTORS

A. Laws And Regulations

1. The Federal Constitution of Malaysia, the Supreme Law

(i) *Clause 3 of Article 145*

- The prosecutor may institute and conduct any proceedings for a criminal offence.
- May discontinue criminal proceedings that are instituted.
- May amend a charge at any point of time during the conduct of a prosecution, if there is proper basis.
- Courts cannot compel the Attorney General to institute prosecution which he does not intend to institute or to proceed with any criminal proceedings which are to be discontinued.
- Courts cannot compel the Attorney General to enhance a charge when he is content to proceed on a lesser charge.

(ii) *Clause (1) of Article 5*

- *No person shall be deprived of his life or personal liberty save in accordance with law.*

Prosecutors are to ensure that this fundamental liberty is strictly observed.

(iii) *Article 7*

- *No person shall be punished for an act or omission which was not punishable by law when it was not done or made, and no person shall suffer greater punishment for an offence that was prescribed by law at the time it was committed.*
- *A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.*

Prosecutors are to observe the above principle against double jeopardy before making a decision to prosecute.

(iv) *Article 8*

- *All persons are equal before the law and entitled to the equal protection of the law.*

Prosecutors are to observe this principle of equality before the law before embarking on a decision to prosecute. The principle underlying Article 8 is that law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons for the purpose of legislation.

(v) *Article 121*

- A prosecutor has to ensure compliance with this Constitutional provision which caters for the judicial power vested in the various courts in the country.
- Together with this provision, a prosecutor's role in instituting criminal prosecution is regulated by the other laws made pursuant to the Federal Constitution with regards to the jurisdiction and workings of the superior and inferior courts. Examples of such legislation are Courts of Judicature Act 1964 [Act 91], Rules of the Federal Court 1980 [P.U. (A) 33], Rules of the Court of Appeal 1994 [P.U. (A) 524], Rules of the High Court 1980 [P.U. (A) 50], Subordinate Courts Act 1948 [Act 92], Subordinate Courts Rules Act 1955 [Act 55] and the Subordinate Courts Rules 1980 [P.U. (A) 328]
- The jurisdiction of the criminal courts has to be in consonance with the penal provisions providing for the particular offence.

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2. Criminal Procedure Code and other Written Law Governing the Procedure for the Manner or Place of Inquiring into or Trying of the Relevant Offences
 - A prosecutor has to be fully appraised of the provisions of these laws. These laws regulate the prosecution of offences in a court of law.
3. Evidence Act 1950 [Act 56]
 - This Act defines the law of evidence. The basic analysis of the process of criminal prosecution expresses the need for an understanding of the law of evidence.
 - Evidence may be defined as material which persuades the court of the truth or probability of some fact asserted before it.
 - Hence the need for a prosecutor to appraise of the mechanics of the law of evidence in order to convince the court to receive and admit a piece of evidence.
 - For a prosecutor evidence must be seen not only in the context of the mechanics by which it is to be presented, but first and foremost, in the context of the law which allows the evidence to be tendered/adduced.
4. Directives

Public Prosecutor's Directives made from time to time to regulate manner and conduct of prosecutions in court.

IV. THE PROSECUTION DIVISION OF THE ATTORNEY GENERAL'S CHAMBERS

In exercising the prosecutorial discretion, the Attorney-General functions *via* the Prosecution Division of his Chambers. The Division is headed by a Senior Deputy Public Prosecutor (SDPP), deputized by also another SDPP. Complementing them are Deputy Public Prosecutors (DPPs) and Assistant Public Prosecutors (APPs). They are fit and proper persons appointed by the Public Prosecutor, and at all times under the general control and direction of the Public Prosecutor. They exercise all or any of the rights or powers exercisable by the Public Prosecutor except rights and powers which are to be exercised by the Public Prosecutor personally.

The Prosecution Division comprises the Headquarters Unit and the State Prosecution Units. There are twelve (12) State Prosecution Units. The Headquarters Unit comprises the following sub units:

- Appeals
- Research and International Criminal Law
- Classified and Sexual Crimes
- Commercial Crimes
- Narcotics and Forfeiture of Property

Apart from the above, there are also Deputy Public Prosecutors assigned to the Anti Corruption Agency, Royal Customs and Excise Department, Securities Commission and Central Bank of Malaysia. The SDPPs, DPPs and APPs appear in all courts in the country to conduct prosecution. There are also prosecuting officers from *inter alia* the Royal Malaysian Police, Royal Customs and Excise Department, Ministry of Domestic Trade and Industry, Securities Commission, Central Bank of Malaysia, who appears in court to conduct prosecution. Apart from the SDPPs, DPPs and the APPs the other prosecution officers are authorized in writing by the Public Prosecutor to appear in a court to conduct prosecutions. Administratively, the Headquarters Unit of the Division monitors and supervises the various prosecution units in the country. It is also responsible for the formulation of prosecution policies nationwide.

V. POLICE INVESTIGATIONS

The police, as an investigating agency, is generally empowered under the Police Act 1967 to investigate the commission of any offence and to apprehend the suspect(s) responsible. The Criminal Procedure Code spells out in detail the procedure for investigating all offences and the manner and place of trying offences.

The preliminary investigation of any offence is carried out by the police. Such investigation may commence either as a consequence of a complaint received for an offence alleged to have been committed, or in certain circumstances as a result of information obtained by the police. Upon completion of investigation, the relevant Investigation paper is sent to the Attorney-General's Chambers. The Deputy Public Prosecutor will study the relevant investigation paper submitted by the police. If he is satisfied that sufficient evidence is available to prosecute a person for a particular offence, then he will direct prosecution. A charge is then framed against the suspect.

VI. THE ROLE OF PROSECUTORS IN CRIMINAL INVESTIGATIONS

Prosecutors are hired to represent the *rakyat* and to act as the people's advocate. But prosecutors fulfill a second, equally important function. An honest prosecutor is the strongest fortress and protection for the integrity of the Federal Constitution. The role of a prosecutor, then, serves two masters. First, the prosecutor has an obligation to attempt to present evidence to courts advocating the people's position, upholding the law, and obtaining convictions for violations of the law. Second, and no less importantly, the prosecutor has an obligation to ensure proper and candid investigation of crime. Where it appears that the investigation has violated the constitutional rights of suspects, the prosecutor then has an obligation to the public to take whatever action is necessary and appropriate to remedy those violations of individual rights. This is called prosecutorial discretion. Prosecutorial discretion may also include the power to conduct a prosecution, to prefer a charge, to proceed with multiple offences, to make submissions, to withdraw charges and powers to appeal.

The crucial decision which has to be made by prosecutors having conduct of criminal cases, is as to whether or not a charge should be preferred. Naturally the degree of importance depends to some extent on the gravity of the offence but a wrong decision either way can have disastrous consequences affecting not only the suspect but, in certain circumstances, the whole community. If a guilty man is not prosecuted, he may go on to cause untold further harm; yet if an innocent man is prosecuted, he and his family may be seriously affected even if the offence is comparatively minor and he is ultimately acquitted.

The prosecutor must not act as a private attorney on behalf of victims of crime, but rather, as an objective advocate on behalf of the interests of the society itself and all the people.

The paramount purpose of prosecution is the attainment of justice and to ensure that in the interest of justice the accused is punished for the crime he has committed.

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a judge what the prosecution considers to be credible evidence relevant to the alleged crime. Prosecutors have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly.

The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty. It is to be efficiently performed with an ingrained sense of dignity, bearing in mind the seriousness of the offence and the justness of judicial proceedings.

When a courtroom setting is adversarial, the prosecutor must ensure that the criminal justice system functions in a manner that is scrupulously fair. Justice is an ideal that requires strict adherence to the principles of fairness and impartiality. The prosecutor as the representative of the State is responsible for seeing that the system for law enforcement works fairly.

In the exercise of their prosecutorial discretion Prosecutors are expected:

- To act in the exercise of any prosecutorial function including the exercise of discretion, fairly and dispassionately;
- To act in the spirit to seek justice, not merely to obtain a conviction and to present to the court in a firm and fair manner evidence that the lawyer considers to be credible and relevant;
- Not to prevent or impede one charged with an offence or in peril of such a charge from being represented by counsel or from communicating at reasonable times with counsel;
- To ensure that the right person is prosecuted for the right offence and that all relevant and admissible evidence is tendered in court.

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- To be fair minded and independent. Decisions made must be free and not biased or tending on race, creed or religion nor affected by improper or undue pressure from any quarters.
- To review evidence and decisions from time to time, so that prosecutors can take into account any change in circumstances. Upon review prosecutors can advise on further investigations, if necessary or may decide to amend the charges or discontinue prosecution.
- To be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against an accused on a particular charge. They must consider what the defense case is/may be and how it is likely to affect the prosecution case.
- When deciding whether there is sufficient evidence to prosecute, to scrutinize the reliability and admissibility of such evidence. There may be instances in which the evidence may not be as strong as it first appears. In such instances, prosecutors must ask themselves the following questions:

Can the evidence be used in court?

- Is it likely for the evidence to be excluded by the court?
- There are certain legal rules which disallows relevant evidence to be adduced at the trial. For example, is it likely that the evidence will be excluded because of the way in which it was gathered or because of the rule against hearsay evidence?
- If so, is there other sufficient evidence for a realistic prospect of conviction?

Is the evidence credible?

- Is it likely that a confession is unreliable?
- Is the witness background likely to weaken the prosecution case? This may involve treatment of evidence of an accomplice, hostile witnesses etc.
- Having satisfied that the evidence itself can justify criminal prosecution, the prosecutor must then consider whether public interest demands prosecution. The public interest criteria that can affect the decision to prosecute depend on the seriousness of the offence or the circumstances of the offender. Regard must be had to the effect the prosecution, would have upon public morale and order, and on other matters affecting public policy. Some factors may increase the need to prosecute but others may suggest that another course of action would be more appropriate. Such a course of action may include disciplinary action.
- To ensure sufficient copies of documents such as bank statements, resolutions, and other documents should be made available to be given to the opponents and the court as and when the originals are tendered in court. This step too will avoid unnecessary delay of a criminal trial.
- Not to initiate or indulge in unilateral communications with the court concerning the matter currently before the court without the consent of all other counsel involved or the accused, if unrepresented. Delivery of pre-trial memoranda or other material to the court without contemporaneously making reasonable efforts to forward it to other counsel or the accused, if unrepresented, is a violation of this duty.
- Not to negotiate and recommend a plea agreement if the defense, by such an agreement, is obliged to plead guilty to an offence or charge not reasonably supported by the facts.
- To take extra caution when engaging in discussions with defense counsel pertaining to the prosecution at hand. This will ensure that the prosecution is not jeopardized in any way.
- To conduct themselves professionally in all their undertakings. They are required to comply with the highest standards of morality and integrity. They must comply with all laws and regulations with regard to their conduct as a public officer.

In Malaysia prosecutors are not investigators. They are not involved in criminal investigation because they cannot investigate crimes on their own. In term of the investigation the prosecutors' role only extend to the following matters:

- To hold consultative meetings with investigating officers periodically. The purpose is to manage and eventually solved any problems faced by investigating officers with regard to criminal investigation. By clarifying and analyzing the actual situation and problems, prosecutors may advise the Investigating officer on their respective investigation.
- To scrutinize the Investigation papers thoroughly and to decide whether or not to prosecute the suspect based on the evidence available.
- To give legal advice and instructions to the police to connect certain facts in issue so as to complete the chain of evidence. This is for the purpose of proof in the court of law.
- To advise on further investigation so as to ensure that the prosecution has sufficient evidence.
- Not to coach witnesses or fabricate evidence with the sole intent of procuring a conviction. Liaison with witnesses must be through the Investigating Officers. This will avoid any form of aspersions on the prosecutors. With regard to commercial fraud cases, prosecutors can seek clarification from bankers and other expert witnesses, with the sole purpose of an insight understanding of the mechanics of the system in which fraud has been perpetrated. This will facilitate prosecutors whilst examining such witnesses.

VII. COOPERATION BETWEEN THE POLICE AND THE PROSECUTORS

The police and prosecutors play an important role in the administration of criminal justice in the country. The police use their skill, largely derived from training and experience when conducting investigation of crimes. They initiate the criminal justice process when they set the investigation process in motion. The investigation process involves gathering of evidence, recording statements from witnesses and apprehending suspects.

Prosecutors rely on the evidence gathered by the police to obtain a conviction against an accused person in a court of law. Save for non-seizable offences, wherein a prosecutor may order for investigation to be carried out, investigation of crimes is not within the realm of the prosecutors.

It is at this juncture the cooperation between the police and the prosecutors is necessary. Upon completion of an investigation, the police refer the Investigation paper to the prosecutor, who is in a position to advise the police on further investigation, if necessary. This is beneficial to both the police and the prosecutor. The advice rendered may tantamount to concretizing the evidence available for purposes of proof in a court of law and ultimately to obtain a conviction. In the absence of such advice, the evidence gathered may fall short of concrete proof in a court of law, tending to an acquittal of an accused person. This may well result in a miscarriage of justice, as the accused person is purely acquitted on technical grounds, although he may have been criminally culpable. Thus cooperation in such a form of discourse is paramount to meet the ends of justice. This illustrates the bondage shared by both the police and prosecutor will the ultimate aim of securing justice.

Criminal investigation essentially involve statements from witnesses, real evidence in the form of property, document and other implements of criminal activity which may complement the statements of witnesses. It is normal for certain material and relevant witnesses not traceable. These witnesses may be essential to connect the accused with the crime. The availability of those witnesses may also ensure completion of the chain of evidence, essential for proof of the offence committed by the accused person in a court of law.

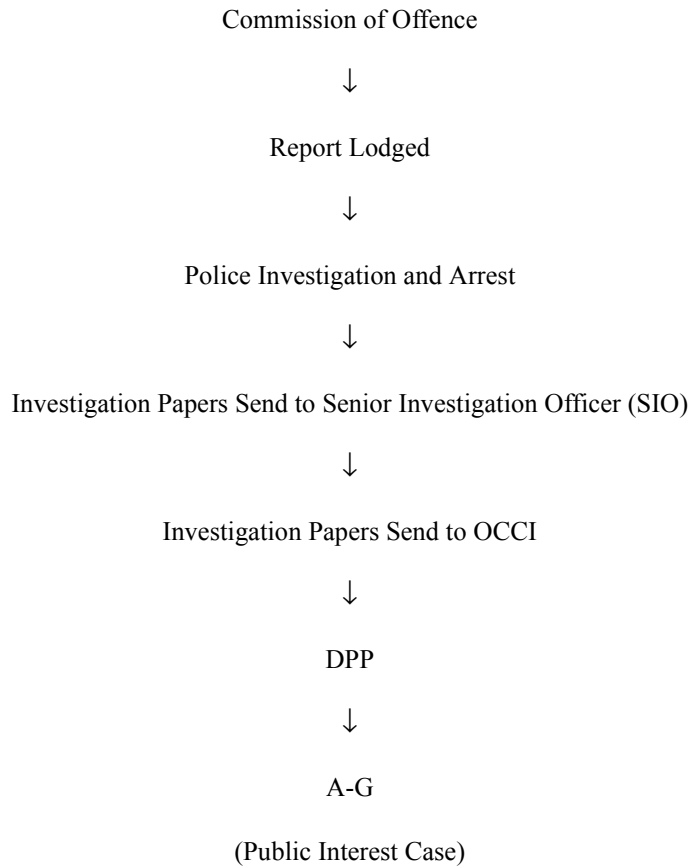
The prosecution may have to proceed with its case in the absence of those witnesses. This is consonant with the provisions of the Malaysian Evidence Act which allows the prosecution to put in statements written or verbal made by a person who is dead or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense. In receiving this evidence, the court may be circumspect, since the maker of the statements are not available for cross-examination. In this regard the cooperation of the police is necessary so as to ensure that proper attempts are made to trace the witnesses. Evidence of the attempts is necessary before the prosecutor can convince the court to have the evidence admitted as otherwise an adverse presumption may be drawn against the prosecutor for withholding evidence.

VIII. ARBITRARY POLITICAL AND EXTERNAL INFLUENCE

- (i) The Attorney General decides to prosecute based on evidence available and submitted in the form of an Investigation Paper by the relevant enforcement agency, be it by the Police or the Anti Corruption Agency. The decision is made notwithstanding the fact that the accused person may be a leader of the ruling party, opposition party, a top civil servant or even a leading corporate figure in the country.
- (ii) If the investigation reveals insufficient evidence to prosecute the suspect, the Attorney General will choose not to prosecute.
- (iii) It is a policy that a decision to prosecute is made based only the evidence available and no person enjoys any form of immunity from prosecution. The decision is also not influenced by any form of arbitrary factors be it political or any other extraneous matters. The decision to prosecute is solely legal, with public interest as the paramount consideration.

**IX. EFFECTIVE CASE SCREENING BY PROSECUTOR
OR OTHER COMPETENT AGENCIES**

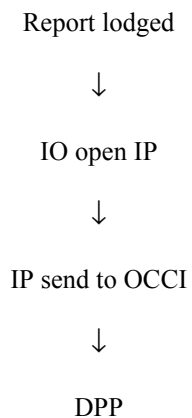
Movement of the Police Investigation Papers



Positive: To certain extent the case screening is good because no innocent person is charged.

Negative: There may be an element of delay in the decision making process.

Counter measures to improve case screening (police)



X. OTHER RELEVANT ENFORCEMENT AGENCIES

- Example: (i) Anti Corruption Agency
(ii) Royal Customs and Excise Departments
(iii) Securities Commission

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(iv) Central Bank of Malaysia

There are Deputy Public Prosecutors assigned to these four agencies. All investigation papers investigated by these agencies will be submitted to the DPP's of that particular agencies for direction or decision.