

## CHAPTER FOUR

### OTHER BODIES AND INSTITUTIONS THAT ARE RELATED TO THE JUDICIARY

#### **Introduction**

The function of dispensing justice is with the courts and other bodies having quasi-judicial powers. These courts and quasi-judicial bodies are set up according to the law which provides for their establishment, powers and procedures. Thus, there are other institutions which have important role in establishing these courts and bodies and in ensuring the proper running of the judicial process and the administration of justice in the country. In this chapter, the functions of these institutions in the judicial process will be examined.

#### **1. Yang di-Pertuan Agong**

As the Supreme Head of the Federation, the Yang di-Pertuan Agong performs various important functions in the administration of the country. In respect of the judicial process, the Federal Constitution has laid down provisions specifying the functions to be performed by the Yang diPertuan Agong.

#### **Appointment of Judges**

All judges of the superior courts are appointed by the Yang di-Pertuan Agong acting on the advice of the Prime Minister after consulting the Conference of Rulers(1). Once appointed, a judge shall hold office until the age of 65 unless he is removed

according to the provisions of the Constitution(2). However, the Yang di-Pertuan Agong has the power to extend the term of service of a judge who has attained the age of 65, to a term not later than six months(3). The Yang di-Pertuan Agong, on the advice of the Chief Justice of the Federal Court, may appoint for a specified purpose or for a specified period any person who has held high judicial office in Malaysia to be an additional judge of the Federal Court. In this case, the age limit of 65 years does not apply (4).

Apart from the appointment of the judges of the Superior Courts, the Yang di-Pertuan Agong also appoints the judges of the Sessions Courts, the President and the Chairmen of the Industrial Court and Magistrates.

### **Removal of Judges**

A judge may be removed from office before he attains the retirement age of 65 and this can only be done in accordance with the provisions of the Federal Constitution. Here again, the Yang di-Pertuan Agong plays a very significant role. Article 125(3) of the Federal Constitution provides that, where the Prime Minister or the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts after consulting the Prime Minister represents to the Yang di-Pertuan Agong that a judge ought to be dismissed, the Yang di-Pertuan Agong shall appoint a tribunal to consider the matter. On the recommendation of such tribunal the Yang di-Pertuan Agong may dismiss the judge. Such a tribunal was set up in 1988 and 1989 when the then Lord President and two judges of the Federal Court were dismissed.

## **Power to Grant Pardons**

A person who has been convicted by a court may appeal against his conviction to a higher court if the appeal procedure is provided for under the law. When all avenues of appeals have been exhausted and failed, the conviction becomes final as far as the courts are concerned. The only other avenue left is to apply for pardons from the respective Pardons Boards.

Under Article 42, of the Federal Constitution, the Yang di-Pertuan Agong is vested with the power to grant pardons, reprieves and respites in respect of offences tried by the court-martial and all offences committed in the Federal Territories of Kuala Lumpur and Labuan. In the exercise of this power, the Yang di-Pertuan Agong shall act on the advice of the Pardons Board of the Federal Territories of Kuala Lumpur and Labuan. In *Sim Kie Chon V Superintendent of Pudu Prison(S)*, when commenting on the powers of the Yang di-Pertuan Agong to grant pardons Abdul Hamid CJ (Malaya), said :

"..... the power of mercy is a high prerogative power exercisable by the yang di-Pertuan Agong or the Ruler of a State or the Yang di-Pertua Negeri, as the Case may be, who acts with the greatest conscience and care without fear of influence from any quarter."

This power to grant pardons is a special power under the Constitution which is not subject to judicial review and cannot be questioned in any court.

## **2. The Conference of Rulers**

The Conference of Rulers is a body consisting of the Rulers of

the nine Malay States and the Yang di-Peretua Negeri of the four States of Malacca, Pulau Pinang, Sabah and Sarawak. Under the Federal Constitution the Conference of Rulers performs many important functions and among these functions are those that relate to the judicial process and administration in the country.

The Federal Constitution provides that the Conference of Rulers must be consulted for the appointment of the judges of the Federal Court, the Court of appeal and the High Courts. The Conference of Rulers must also be consulted for the appointment of the Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts. The purpose of this consultation is to get the consent of the Conference of Rulers over such appointments. The Constitution also provides that in the exercise of this function, the members of the Conference of Rulers may act in their discretion(6).

#### **Appointment of the Members of the Special Court**

Article 182, of the Federal Constitution provides for the establishment of the Special Court to hear and try cases brought by or against the Yang di Pertuan Agong or the Ruler of a State. On the membership of the Special Court, it is provided that the Court shall consist of the Chief Justice of the Federal Court, who shall be the Chairman, the Chief Judges of the High Courts and two other persons to be appointed by the Conference of Rulers. For this purpose, the two members to be appointed by the Conference of Rulers must be persons who hold or have held office as judge of the Federal Court or a High Court.

## **Power to Grant Pardons**

The Ruler of a State and each Yang di-Pertua Negeri of Malacca, Pulau Pinang, Sabah and Sarawak has power to grant pardons for offences committed in their respective States. In the exercise of this function, the Ruler or the Yang di-Pertua Negeri acts on the advice of the State Pardons Boards.

## **3. The Prime Minister**

The Prime Minister also has an important part to play in the process of judicial administration in the country.

## **Appointment of Judges**

Under Article 122B, of the Federal Constitution, the Chief Justice Of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and other judges of the Federal Court, of the Court of Appeal and of the High Courts are appointed by the Yang diPertuan Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers. However, before tendering his advice as to the appointment of any judge other than the Chief Justice of the Federal Court, the Prime Minister must consult the Chief Justice. For the appointment of the Chief Judge of a High Court, the Prime Minister must consult the Chief Judge of each of the High Courts. In the case of the appointment of the Chief Judge of the High Court for Sabah and Sarawak, the Prime Minister must first-consult the Chief Minister of each of the states of Sabah and Sarawak.

Before tendering his advice as to the appointment of a judge other than the Chief Justice, President of the Court of Appeal or a Chief Judge, the Prime Minister must consult the Chief Justice if the appointment is to the Federal Court. If the appointment is to the Court of Appeal, the Prime Minister must consult the President of the Court of appeal. If the appointment is to one of the High Courts, he must consult the Chief Judge of that High Court.

### **The Advice of the Prime Minister**

It is important to consider the meaning of the phrase 'acting on the advice of the Prime Minister' in relation to the power of the Yang diPertuan Agong in the appointment of judges. Before 1994, the Federal Constitution was silent as to the effects of these words and it was not clear whether the Yang di-Pertuan Agong could disregard the advice given by the Prime Minister.

In 1994, Article 40, of the Federal Constitution was amended by inserting Clause 1A, which now states:

In the exercise of his functions under this Constitution or Federal law, where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in accordance with such advice.

Therefore, in relation to the appointment of judges, although the Prime Minister's function is stated as to advice the Yang di-Pertuan Agong, in actual fact, that advice has to be acted upon by the Yang di-Pertuan Agong.

## **Removal of Judges**

The Prime Minister has an important role to play in the process of removal of judges from office. Although a judge may only be removed by a special tribunal set up in accordance with Article 125(4) of the Federal Constitution, the Prime Minister is given the power to initiate the process for such removal.

Article 125(3) of the Federal Constitution states that if the Prime Minister, or the Chief Justice after consulting the Prime Minister, represents to the Yang di-Pertuan Agong that a judge ought to be removed from office, the Yang di-Pertuan Agong shall appoint a tribunal in accordance with Clause 4 of that Article and shall refer the representation to the said tribunal.

## **4. The Attorney General**

The Attorney General plays a significant role in the judicial process and in the administration of justice. Under the law, the Attorney General is vested with wide powers and discretions especially where it concerns criminal prosecutions and public interests. Article 145, of the Federal Constitution provides for the appointment, duties and powers of the Attorney General.

### **Appointment of the Attorney General**

The Attorney General is appointed by the Yang di-Pertuan Agong acting on the advice of the Prime Minister. The Yang di-Pertuan

Agong may appoint any person who is qualified to be appointed as a Federal Court judge as the Attorney General. Once appointed the Attorney General shall hold office at the pleasure of the Yang di-Pertuan Agong and may, at any time, resign from office. The power of the Yang di-Pertuan Agong in the appointment of the Attorney General is not a power which the Yang di-Pertuan Agong can act at his own discretion. The Yang di Pertuan Agong has to act in accordance with the advice of the Prime Minister. Effectively, therefore, it is the Prime Minister who has the power to appoint and dismiss the Attorney General.

#### **Duties of the Attorney General**

Generally, the duty of the Attorney General is to advise the Yang diPertuan Agong or the cabinet or any minister upon such legal matters, and to perform such other duties of a legal character, as may be referred or assigned to him by the Yang di-Pertuan Agong or the cabinet. It is also the duty of the Attorney General to discharge all other functions conferred on him under the Federal Constitution or under any other written law. It can be seen that the Attorney General is in fact the principal legal adviser to the Executive and forms part of the Government. He advises on legal matters and performs legal works for the Executive.

#### **Powers of the Attorney General**

A significant provision relating to the powers of the Attorney General is found in Article 145(3) of the Federal Constitution, which states;



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.

This power 'to institute, conduct or discontinue any proceedings' is exercisable by the Attorney General at his discretion, which means he is at liberty to decide as he thinks fit. Thus, where an offence is alleged to the Attorney General has power to that person. Where has initiated and started a prosecution in court, he has power to discontinue that proceeding.

Further, Article 145(3A) states that :

Federal law may confer on the Attorney General power to determine the courts in which or the venue at which any proceedings which he has power under Clause 3 to institute or to which such proceedings shall be transferred.

These constitutional provisions giving powers to the Attorney General are further strengthened by the provisions in the Criminal Procedure Code which deals with the procedures for criminal prosecutions in the country. Section 376(i) of the Criminal Procedure Code states :

The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal proceedings under this Code

and in Section 418A of the Code it is stated that :

... the Public Prosecutor may in any particular case triable by a criminal court subordinate to the high Court issue a certificate specifying the High Court in which the proceedings are to be transferred and requiring that the accused person be caused to appear or be produced before such High Court.

Thus, the Attorney General does not only have power to institute, conduct or discontinue any criminal proceedings at his discretion, he also has power to institute a proceeding in a High Court instead of a subordinate court or to transfer a proceeding from a subordinate court to a High Court specified by him. All these provisions give the Attorney General wide power to determine when- to prosecute, who to prosecute and where to do so. The effects and the extent of the powers conferred on the Attorney General have been recognized and confirmed by the courts in a number of decided cases and generally, the courts have given a broad interpretation of Article 145(3).

In *PP v Hettiaranchigae L.S Perera*(6), the Federal Court that only the Attorney General has the power to institute, conduct and discontinue proceedings and until he makes up his mind the courts must wait. In that case, Sufian LP said :

In our view, this clause from the supreme law (Federal Constitution Article 145(3)) clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue... Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.

In *Repco Holdings Bhd v PP*(7), it was held that the exercisable by the Attorney General cannot be questioned in and cannot be the subject of judicial review.

The Attorney General has unfettered discretion under Article

choose in which court to charge a person(8). He has complete whether to charge a person under one law or the other(9).

In *Teh Cheng Poh v PP*(10), the Privy Council held that Article 145(3) has given the Attorney General wide discretion in criminal prosecutions and his power to exercise the discretion is not an infringement of the concept of equality before the law as provided in Article 8(1) of the Federal Constitution.

The overriding consideration in giving such a broad interpretation to the powers of the Attorney General seems to be the fact that the Attorney General has to consider many relevant factors including public interests before deciding to charge a person for an offence. He has to give an unbiased consideration and his decision should not be dictated or influenced by some irrelevant consideration.

#### **Power to Bring Relator Action**

Under the common law, the Attorney General, as the protector and the defender of public interests, has power to bring an action to restrain interference with a public right or to abate a public nuisance or to compel the performance of a public duty.

In *A-G at and by the Relation of Pesurohjaya Ibu Kota Kuala Lumpur V Wan Kam Fong* (11), the court held that the Attorney General was competent to sue for a permanent injunction to restrain the defendants from using their premises as a restaurant without a license from the Pesurohjaya.

#### **Attorney General as Member of Pardons Board**

The Attorney General is also a member of the Pardons Boards of each State and the Federal Territories of Kuala Lumpur and Labuan. Before tendering their advice to the Yang di-Pertuan Agong, or the Ruler or the Yang di-Pertua Negeri, as the case may be, the Pardons Board shall consider any written opinion which the Attorney General may have delivered thereon.

### **5. The Police and Other Public Officers**

The main function of the Police Department is the maintaining of peace and order in the society. As part of this function, the Police Department is also involved in the administration of justice as it is vested with the powers to investigate into an alleged commission of an offence, to apprehend and to detain suspects and to produce them in court to be dealt with by the law.

In the judicial process, officers from the Police Department have important role to play in the prosecution of offenders especially in the lower courts. Although the power to prosecute offenders is exclusively vested with the Attorney General who is the Public Prosecutor, as provided under Article 145(3) of the Federal Constitution, the law allows the Public Prosecutor to delegate this function to police officers and certain other public officers. Section 377 of the Criminal Procedure Code, provides that :

Every criminal prosecution before any court and every inquiry before a Magistrate shall, subject to the following sections, be conducted

- a) by the Public Prosecutor, a Senior Deputy Public Prosecutor, a Deputy Public Prosecutor, Assistant Public Prosecutor;
- b) subject to the control and direction of the Public Prosecutor, by the following persons who are authorized in writing by the Public Prosecutor :
- 1) an advocate;
  - 2) a police officer not below the rank of inspector;
  - 3) an officer of any government department;
  - 4) an officer of any local authority;
  - 5) an officer of any statutory authority or body ; or
  - 6) any person employed or retained by any local authority or any statutory authority or body...

Under Section 377(b)(2) of the Criminal Procedure Code, above, the Public Prosecutor may authorize a police officer not below the rank of inspector to prosecute offenders in court on his behalf. The said authorization must be in writing and such an officer shall be under the control and direction of the Public Prosecutor.

Where it is not practicable for such prosecutions to be conducted by the persons listed, the prosecution may be conducted by a police officer below the rank of inspector. This is provided in the proviso to Section 337 of the Code which states:

... provided that in any district in which it may be impracticable, without an unreasonable amount of delay or expense, that such prosecution or inquiries should be so conducted it shall be lawful for the Public Prosecutor from time to time, by notification in the Gazette, to direct that prosecution... may be conducted in that district by a police officer below the rank of

inspector...

With such a provision as in Section 377 of the Code, it is common, therefore, to find that prosecutions, especially at the lower courts, are usually conducted by police officers and not by the Public Prosecutor himself or his deputies. Where such police officers are properly authorized to prosecute, they may do so and the court cannot insist that the prosecution should be conducted only by the Public Prosecutor or his deputies. In *P.P. V Mat Radi* (12), the accused, a member of the police force, was charged with corruption. The prosecution was conducted by a Police Inspector and an Assistant Superintendent of Police. The Magistrate was of the view that offences involving members of the police force should be prosecuted by the Deputy Public Prosecutor and since it appeared to him that the Deputy Public Prosecutor was not interested to do so, the Magistrate discharged the accused. On appeal by the Deputy Public Prosecutor, the High Court held that the grounds for the discharge was wrong in law as the police officers were authorized and the prosecution was valid.

Apart from police officers, Section 377(b) of the Code also allows prosecutions to be conducted by other public officers if they are so authorized by in writing by the Public Prosecutor. Such officers shall remain under the control and direction of the Public Prosecutor. Thus, it is also common for prosecutions to be conducted by officers from other government departments and public bodies such as the Immigration Department, Customs Department, Inland Revenue Department, local authorities and other statutory bodies where offences fall within the jurisdiction of their respective departments. The authority of these public officers to prosecute must only come from the Public

Prosecutor as only he has the exclusive power under the law to prosecute. Where a power to prosecute is purportedly given under the authority other than the Public Prosecutor, the courts have held that to be unconstitutional as it contravenes Article 145(3) of the Federal Constitution which gives the Public Prosecutor the exclusive right to prosecute for offences and under Section 377 of the Criminal Procedure Code, only he can authorize prosecutions to be conducted by other persons.

In *Repro Holdings Bnd v P. P.*(13), the court had to consider the validity of Section 126(2) of the Securities Industry Act 1983 and Section 39(2) of the Securities Commission Act 1993. Section 126(2) of the Securities Industry Act 1983 provides that a prosecution for any offence against any provision of the Act may be conducted by the Registrar of Companies or by any officer authorized in writing by the Registrar or by any officer authorized in writing by the Chairman of the Securities Commission. Section 39(2) of the Securities Commission Act 1993 provides that any officer of the Securities Commission authorized in writing by the Commission may conduct any prosecution of any offence under the Act. The court held that Section 126(2) of the Securities Industry Act 1983 and Section 39(2) of the Securities Commission Act 1993 are unconstitutional as they contravene Article 145(3) of the Federal Constitution. In that case, Gopal Sri Ram JCA said :

... Since the Constitution exclusively authorizes the Attorney General to conduct prosecutions, it must follow, as night follows day, that no other authority may be lawfully empowered to exercise that function.

Similarly, in *Quek Gin Hong V P. P.*(14), Section 44 of the Environmental Quality Act 1974 which provides that the Director

General for Environment may prosecute for offences under the Act was held to be unconstitutional as it contravenes Article 145(3) of the Federal Constitution which gives the exclusive right to prosecute only to the Public Prosecutor.

In the case of appeals, Section 378 of the Criminal Procedure Code provides that no person shall appear on behalf of the Public Prosecutor on any criminal appeal other than the Public Prosecutor, a Senior Deputy Public Prosecutor or a Deputy Public Prosecutor. Therefore, the authority given to police officers and other public officers to prosecute on behalf of the Public Prosecutor does not include the authority to appeal against the decision of the court for cases which they have prosecuted. Nevertheless, their role is important as they become the extension of the Public Prosecutor in criminal prosecutions especially in the lower courts and in specific matters falling within the jurisdiction of the respective government departments or other public bodies.

## **6. Legal Practitioners**

Legal practitioners are practicing lawyers who, in this country, are also known as advocates and solicitors. The work of a legal practitioner is basically of two types. The first involves attending court to argue cases and the other involves work which are done in the office such giving advice and preparing documents. In England, the two types of work are done by different persons where a barrister attends court and a solicitor does work in the office. Their functions are separate as barristers cannot become solicitors and solicitors cannot become barristers although a solicitor may have limited rights to appear



in the lower courts. Thus, the legal profession in England is said to be a divided profession between barristers and solicitors.

In Malaysia, there is no division in the legal profession as a legal practitioner here can perform all the work done by both the barristers and the solicitors of England. A legal practitioner in Malaysia is an advocate (barrister) and at the same time, he is a solicitor. In practice, it is common for some legal practitioners here to specialize only as advocates whilst some prefer to work in the office doing work which do not involve going to court. However, a majority of our legal practitioners, especially those who are new in the profession, tend to perform both functions depending on the cases at hand.

As far as the judicial process is concerned, the role of advocates is crucial as they become an integral part of the process that goes on in the courts. In both criminal and civil cases the advocates have important functions to perform. In a criminal case, an advocate is usually needed to defend and argue the case on behalf of the accused. In a civil case, advocates are usually needed by both the contesting parties when the plaintiff uses an advocate to present his claim and the defendant uses another to defend the claim.

Once admitted to practise by the court, an advocate and solicitor has an exclusive right of audience in all courts of law and only the court may strike him off the roll or suspend him from practice. All advocates and solicitors are by law members of the Malaysian Bar and are subject to the control of the Bar Council. The Bar Council is established for the purpose of proper management of the affairs of the Malaysian Bar as well as for the

purpose of the proper performance of its functions under the Legal Profession Act 1976, an Act governing the legal profession in Malaysia.

One of the most important functions of the Malaysian Bar as stated in Section 42 of the Legal Profession Act 1976 is:

... a) to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour...

This, in effect, places upon the advocates and solicitors a duty to uphold justice and to protect the public.

In the course of discharging their duties in court, advocates are regarded as officers of the court and are bound to assist the court in the judicial process of dispensing justice. For example, an advocate is not supposed to act in a manner or do things which may tend to mislead the court such as concealing evidence which are unfavourable to his case.

The role of advocates in court proceedings is crucial as they compliment the court in the judicial process. At the same time, members of the public need the services of advocates when they have matters which have to be settled in court. The adversarial system of trials as practised in this country places the advocates as an integral part of the judicial process. Without the litigants the advocates have very little functions and without the advocates the court cannot discharge its functions effectively.