THE ADMINISTRATION OF CRIMINAL JUSTICE IN MALAYSIA: THE ROLE AND FUNCTION OF PROSECUTION

*Abdul Razak Bin Haji Mohamad Hassan**

INTRODUCTION

Malaysia as a political entity came into being on 16 September 1963, formed by federating the then independent Federation of Malaya with Singapore, North Borneo (renamed Sabah) and Sarawak, the new federation being Malaysia and remaining and independent country within the Commonwealth. On 9 August 1965, Singapore separated to become a fully independent republic within the Commonwealth. So today Malaysia is a federation of 13 states, namely Johore, Kedah, Kelantan, Selangor, Negeri Sembilan, Pahang, Perak, Perlis, Trengganu, Malacca, Penang, Sabah and Sarawak, plus a compliment of two federal territories namely, Kuala Lumpur and Labuan.

Insofar as its legal system is concerned, it was inherited from the British when the Royal Charter of Justice was introduced in Penang on 25 March 1807 under the aegis of the East India Company. Appropriately, the Malaysian legal system has not been plucked out from the sky but it is the product of our experiences over the centuries; so does its criminal justice system which goes side by side with the development of its legal system. In discussing the subject of The administration of criminal justice, understanding the constitutional history just cannot be avoided. Inadvertently, the legal system that Malaysia inherited from its colonial masters colours the pattern of the criminal justice system today.

* Deputy Head of Criminal Investigation Department, Royal Malaysia Police, Sarawak Contingent, Malaysia.

PART I

A. Constitutional History

The territories of Malaysia had been part of the British Empire for a long time. After the Second World War, there was a brief period of British military administration. A civilian government came into being in 1946 in the form of a federation known as the Malayan Union consisting of the eleven states of what is now known as West Malaysia. This Federation of Malaya attained its independence on 31 August 1957. In 1963, the East Malaysian states of Sabah and Sarawak joined the Federation and was renamed "Malaysia".

B. Parliamentary Democracy and Constitutional Monarchy

The Federal constitution provides for a parliamentary democracy at both federal and state levels. The members of each state legislature are wholly elected and each state has a hereditary ruler (the Sultan) or Yang di-Pertua Negeri (Governor) in the states of Malacca, Penang, Sabah and Sarawak. The head of state must act in almost all matters on the advice of ministers drawn from and responsible to the State Legislative Assembly.

This pattern is repeated at the federal level. Parliament is a bicameral legislature, the lower House (the House of Representatives) being wholly elected. The federal head of state, known as the Yang Di Pertuan Agong, who is appointed from among the nine Malay Sultans and serves a five-year term, must act on the advice of the Federal Cabinet or a minister acting under the general authority of the cabinet. The Prime Minister has to be a member of

the House of Representatives commanding the confidence of the House. The Upper House, the Senate, has two senators elected by each Sate Legislative Assembly and a number of members nominated by the Federal Government.

All laws are passed by Parliament, and there are bodies that see to its enforcement. The interpretation of the laws lies mainly with the judiciary. The country exercises formal social control through the establishment of a formal criminal justice system which is characterised by the existence of criminal laws, law enforcement agencies, prosecutors, judges, magistrates, correction officials, prisons and other institutions.

C. The Administration of Justice

The federal constitution provides for the exercise of power by the Legislature, the Executive and the Judiciary. The judiciary plays an important role in this balance of power. It has the power to hear and determine civil and criminal matters, and to pronounce on the legality of any legislative or executive of the federal as well as state constitutions.

The fundamental principle in Malaysia is that an accused person is innocent until proven guilty by a competent court of law. Thus the criminal justice system in Malaysia provides various safeguards to protect accused persons. A duty is imposed on the states, particularly the police force, to maintain law and order in the interest of the public. Investigation into an offence resides with the police, and the duty to decide whether a person ought to be charged or not lies with the Attorney General, who is a public prosecutor.

D. Hierarchy of The Courts and Their Jurisdiction

The Federal Constitution of Malaysia specifically provides for the rights of the individual and to ensure that those rights are upheld. It also provides an avenue for which those who suffered any grievances or those who acted against the country's laws, to seek redress or to be punished. The courts for the administration of criminal justice are provided for by the constitution and other laws.

The highest in the hierarchy of the courts is the Federal Court. It is the final court of appeal. The court's jurisdiction is appellate, supervisory and advisory. This court consist of the Chief Justice and two other judges of the High Court or a greater uneven number as decided by the Chief Justice. The Court of Appeal has appellate jurisdiction to hear all appeals on question of law or sentences from subordinate courts. Three judges will sit in the courts to make decisions on any appeal. The High Court has jurisdiction to try all offences with the highest maximum sentence of death and also has appellate jurisdiction to hear appeals of cases from subordinate courts.

The Sessions Court has jurisdiction to try all offences except those with a possible sentence of death. Normally one judge will sit in the court to hear such cases.

The Magistrate Court is the lowest rung in the hierarchy of courts. It consists of two categories of magistrates, i.e., First Class Magistrates and Second Class Magistrates. First Class Magistrates are legally qualified and have jurisdiction to try all offences punishable with imprisonment of up to ten years or with a fine and 12 strokes of whipping. However their sentencing powers are limited to impose imprisonment sentences of not more than 6 years.

Lately because of the high backlog of cases in the Sessions Court, the power of the First Class Magistrate Court has been increased to hear cases of robbery under section 392 of the Penal Code and housebreaking and theft under section 457 of the Penal Code, which are punishable with imprisonment of not more than 14 years.

Second Class Magistrates are normally public servants and junior court officials experienced in judicial administration. The sentencing in criminal cases is only limited to imprisonment of not more than 12 months or a fine.

One interesting point to note is that, the First Class Magistrates also perform duties in Juvenile Courts, to try youthful offenders of the ages of 10 to 18 years. The magistrate sits with two advisors hearing all offences except those punishable with death. The court is being conducted in the Magistrate Chambers, to the exclusion of the public. The principle of this court is to rehabilitate the youthful offenders, preventing their development as criminals.

PART II

A. Structure and Roles of Prosecution

The prosecution of criminal cases is the main domain of the public prosecutor. In Malaysia, the person responsible for this is the Attorney General. He holds office by virtue of Article 145 of the Federal Constitution of Malaysia. The powers given to the Attorney General is contained in clause (3) of Article 145 which reads as follows:

> The Attorney General shall have power, exerciseable 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.

The law relating to criminal procedure in Malaysia is contained in the Criminal Procedure Code (F.M.S. Cap. 6) (hereinafter mentioned as CPC). The Code lays down rules for such matters as the mode of arrest; search of body, property or premises; police investigation of a case; prosecution of an accused person; and procedure for trial and the court competent to try and punish offences. In particular, according to section 376 (I) of the CPC, the Attorney General shall be the public prosecutor and shall have control and direction of all criminal prosecutions and proceedings under the Code.

The Attorney General is appointed by the Yang Di Pertuan Agong on the advice of the Prime Minister. Among the criteria on his appointment, he must be a person who is qualified to be a judge of the Federal Court. Immediately under him is the Solicitor General who also performs the same function in the absence of the Attorney General. Holding officers under the Attorney General's Chamber are the Senior Federal Counsel, Federal Counsel and Deputy Public Prosecutor. The Attorney General oversees all criminal prosecution in the country and in each state. There are Senior Federal Counsel and Deputy Public Prosecutors who perform this duty on the Attorney General's behalf.

The Public Prosecutor may appoint deputies who shall be under his general control and direction. The Deputy Public Prosecutor may exercise all or any of the rights and powers vested in or exerciseable by the Public Prosecutor. The power to institute criminal proceedings by the Public Prosecutor includes the power to bring criminal charges against persons.

The rights to appear before a court proceeding accorded to the Public Prosecutor is contained in sections 377 and 380 of the CPC. Besides the Public Prosecutor, the following persons are also authorised to conduct prosecution in court:

(1) a deputy public prosecutor,
(2) an advocate authorised in writing by the Public Prosecutor or a deputy public prosecutor, and
(3) a police officer not below the rank of Inspector.

The conduct of criminal proceedings in the High Court is usually done by the Public Prosecutor or his deputy. The cases that go to the High Court are of a serious

nature and demand meticulous attention. These are usually the cases that involved the death penalty or acts against the security of the country. Criminal trials in the Sessions Courts are now being conducted by deputy public prosecutors. Formerly, it was done by the police.

Prosecution of criminal matters in the Magistrate Courts are being done by the police. Besides the police, subsection (I), section 380 of the CPC allows any public officer to prosecute in any court in any case in which he is by any written law authorised to prosecute in such court. This refers to Immigration Officers, Custom Officers, Income Tax Officers and Anti-Corruption Agency Officers who have been given powers to prosecute cases coming under their respective departments. For instance, section 117 of the Customs Act 1967 provides that prosecution in respect of offences committed under the Act may be conducted by a Senior Officer of Customs, and section 39(2) of the Immigration Act 1959/63 states that every Immigration Officer shall have authority to appear in court and conduct prosecution of offences relating to the Act.

Deputy public prosecutors are law graduates either from local universities or from England. Before their appointment, they received intensive in-service training locally at the Judicial and Legal Institute. Similarly with police prosecutors in the lower courts undergo basic/advance prosecution courses at the Police College. Furthermore, section 3(3) of the Police Act 1967 provides that one of the duties of the police force is to prosecute offenders in court.

B. Professional Ethics of Prosecutors

Public prosecutors are part and parcel of the court officials. They are therefore bound by the ethics of the legal profession which are administered by the Law Society. Due to the public nature of the prosecutors duty, it is essential that their performance be above reproach. Courses and seminars are held frequently to train prosecutors on this aspect. Proper conduct of prosecutors in court is a norm and would greatly assist the court in the smooth running of the court proceedings. In this respect, most prosecutors are well versed with the court rules and procedure. Prosecutors have to be ready to proceed with a trial on a given date and would only request for adjournment in very extenuating circumstances.

C. Investigation of Criminal Cases

The criminal law defines criminal and delinquent behaviour and specifies sanctions which are enforced by a threat of punishment. In Malaysia, most of the penal provisions are contained in the Penal Code. The Code declares what acts or omission are offences and also provides for its punishment. It specifies the circumstances in which an act or omission will be regarded as an offence. This includes act or omission done intentionally, knowingly, voluntarily, fraudulently or dishonestly. It classifies offences such as those affecting the human body (e.g., murder, causing hurt), affecting property (e.g., theft, robbery), affecting reputation (e.g., defamation, insult), affecting public peace (e.g., unlawful assembly, rioting) and those affecting public health and safety (e.g., adulteration of food). It also determines the nature and quantum of punishment to be given for specific offences. Beside the Penal Code, there are numerous statutes which are either designed to punish specific offences such as the Dangerous Drug Act 1952 or which seek to regulate specific activities and only punish those who violate the rules (e.g., the Food Act 1983). Some statutes provide for preventive detention of persons without trial in a court of law, and this is to prevent them from engaging in any activity prejudicial to peace, order and security. The

Internal Security Act 1960 is one of those laws.

D. Law Enforcement Agencies

The sanctions imposed by the criminal law are carried out by the law enforcement agencies. The main body that does this is the police apart from other government agencies (e.g., Customs and Immigration Departments, to name a few). The functions of the police and other law enforcement agencies are to carry out investigation into any act or omission that is contrary to law. These can be summarised into three categories, namely:

(1) the discovery that a crime has been committed,
(2) the identification of the person/ persons suspected of committing the offence, and
(3) the collection of sufficient evidence to prosecute the suspect before the court.

The powers given to the police in respect of investigation are contained in the CPC although the Police Act 1967 Part VII also lists the duties and powers of police officers. Section 107 of the CPC requires every information relating to the commission of a crime is to be reduced into writing if given orally to the officer in charge of a police station. This happens when a person comes to the police station and makes a report of any incident. In legal term, this report is referred to as the first information report and its significance is that it is usually made very early after the occurrence of a crime. Thus the likelihood of fabrication is small because the memory of the informant is still fresh. This will form the basis of the case and the police will swing into action. Every such information shall be entered in a book and kept in the police station. It includes details such as the date and hour when the information was given and the signature of the person making the report. A copy of this report is then given to the police officers whose task is to investigate and they must be police officers of the rank of Sergeant or above or the officer in charge of the police station. They are called Investigation Officers or I.O.s.

E. Conduct of Investigation

In theory, as soon as the information is received, the investigating officer shall send the first information report to the public prosecutor. However, in practice this is usually not done and the investigating officer will normally straight away carry out the investigation. This includes the making of enquiries on the spot and the visit of the crime scene. The offender has to be traced and arrested. There are four categories of persons who may affect arrest, namely, the police officer, the Penghulu, the private person and the magistrate. Section 23 of the CPC allows a police officer to arrest without a warrant for any seizable offence committed anywhere in Malaysia. A seizable offence is an offence in which a police officer ordinarily arrests without a warrant according to the third column of the first schedule of the CPC. These are offences punishable with death or offences punishable with imprisonment for three years and above. Offences punishable with a fine only are described as non-seizable offences. The Penghulu may arrest without a warrant for a seizable offence but section 25 of the CPC requires him to hand over the person arrested to the nearest police station or police officer who shall then rearrest the person. A private person may arrest as provided under section 27 of the CPC, but the offence committed by a person must be a seizable one and committed in the view of the private person. Again the person arrested must be handed over to the nearest police station or a police officer without necessary delay. The mode of arrest is provided in section 15 of the CPC. Specifically, when a person is arrested, he shall actually be touched or his body confined unless he submits to the custody by word or action.

When a person is arrested, his body may be searched and all articles found be placed in safe custody. If these articles have any connection with a crime committed, then they may be detained until his discharge or acquittal. According to section 20 of the CPC, only a police officer can conduct a body search with strict regard to decency. The investigating officer can, when he received the first information report, discontinue to investigate if he finds that there is insufficient ground for proceeding further in the matter. In other words, if he finds that there is no offence disclosed in the information, he can close the case. When the investigating officer has determined that a seizable offence has been committed, he can start the investigation. He may by order in writing require the attendance of any person being acquainted with the circumstances of the case to come forward (section 111 of the CPC). If a person refuses to do so, the investigating officer may report such refusal to a magistrate who may then issue a warrant to secure the attendance of the person. Section 112 of the CPC provides for the recording of statements from witnesses by the police. Any person giving a statement to the police is bound to answer all questions relating to the case in question. He is legally bound to state the truth, whether or not the statement is made wholly or partly in answer to questions. This is because in the event that he is given earlier to the police, then that statement can be used to impeach his credit. He is also liable to be charged for giving false evidence in court.

F. Further Detention of Person Arrested

From the progress and development of the case, the investigating officer would have collected evidence from the scene of crime and these would be seized as exhibits of the case. If the suspect is known or is identified, then effort would be made to trace and arrest him. Things that are collected from the scene or from the victim would be properly packed and sent to the relevant authority for analysis to determine whether they have any connection with the case. These are important because it would help to identify the suspect. The investigating officers are given powers to conduct search under section 116 of the CPC for documents or other things necessary to the conduct of an investigation into any offence. Any person arrested must be produced before a magistrate within twenty-four hours inclusive of the time taken for the journey (section 28 of the CPC).

Article 5 of the Federal Constitution provides for the personal liberty of a person and in clause (4) of the same article, it also states that a person arrested and not released must be brought before a magistrate without unreasonable delay and cannot be detained for more than twenty-four hours. Any longer detention from that period has to be as ordered by the magistrate. In this connection, section 117 of the CPC allows the police to detain the arrested person for more than twenty-four hours and this extension of time has to be applied to the court when the person is produced before the magistrate. Detention on the order of the magistrate may not exceed a total of fifteen days, and the magistrate has to record his reason for granting the detention order. Normally, during the application for the remand order before the magistrate, the police would give their reasons in support of the application of further detention of the person. This is usually the case when they cannot complete the investigation within twenty-four hours and are not ready to indict the person arrested. Section 119 of the CPC provides for the police investigation diary and daily entries are made pertaining to the action taken in the conduct of the investigation. This includes:

(1) the time at which the order for investigation reached the police officer,
(2) the time at which he began and closed the investigation,
(3) the place or places visited by him, and
(4) a statement of the circumstances ascertained through his investigation.

A copy of the police investigation diary is submitted together with the grounds for further detention whenever an application is made under section 117 to the magistrate. If any person arrested wishes to make a statement, then a statement may be taken from him under section 113 of the CPC. This statement may amount to a confession or may be exculpatory in nature. It can either be oral or in writing. A caution is required to be administered to a person before he makes a statement in the following words:

> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

The statement has to be given to police officer of the rank of Inspector or above.

G. The Role of Public Prosecutors in Arresting and Detaining a Suspect

The supervision of criminal investigation is done by the police alone. The powers are given to the police to conduct investigation. The Attorney General has no investigative powers, and he is not involved in the process. The Criminal Investigation Department of the police force is the main body that conduct investigation into criminal matters. Supervision and direction of the investigation are controlled by the immediate superior officer of the investigating officer.

H. Indictment

After the investigation is completed, section 120 of the CPC requires the investigating officer to forward to the Public Prosecutor a report of the investigation. However in practice, not all investigation papers are forwarded to the public prosecutor. Where there is sufficient evidence and the investigation is completed within twenty-four hours, the person will be produced in court to answer the charge by the police or after the expiry of the further detention period (section 117 of the CPC). However, the Public Prosecutor in a written directive does require investigation papers to be forwarded to him before the indictment is made. These are usually cases of a serious nature like culpable homicide and those involving very important people and government servants. Some cases require the consent of the Public Prosecutor before any formal charges can be brought against any person. For instance, offences committed under the Immigration Act and the Prevention of Corruption Act. The recorded statements of witnesses, the suspect and the investigation diary of the investigating officer form the basis on which it is decided whether the suspect should be prosecuted in court. The police will prosecute the cases that need not be referred to the Public Prosecutor, but in all cases after the completion of the trial, the police must report to the Public Prosecutor the result of the cases. The Public Prosecutor may decline to prosecute further at any stage of the trial but before judgement. The police, however, cannot exercise this discretion. The approval of the Public Prosecutor has to be obtained first before any proceeding can be discontinued.

Not all cases investigated by the police end up with prosecution in court. The Public Prosecutor will study the evidence available in the investigation papers and only those with a 50 percent chance of conviction will be prosecuted. This entails

close co-operation between the Public Prosecutor and the investigating officer, and discussions are not uncommon between them prior to the court trial.

I. Plea Bargaining

Plea bargaining is not widely practice in Malaysia. In any case, it does not involve the judge or the magistrate. Thus, in open court, one does not see the accused person plea bargaining with the judge or magistrate. At the most, where an accused person intended to plead guilty to a lesser charge, this intention is conveyed to the Attorney General or a deputy public prosecutor. If this is accepted, the consent to reduce the charge is given to the prosecutor. Usually, the accused's counsel will communicate directly with the Attorney-General on the accused's behalf and make the proposition. The judge or the magistrate would not know that a plea bargain has taken place.

PART III

A. Trial Proceedings

Prior to the amendments to the CPC in February 1995, there were four types of trials conducted in the High Courts in Malaysia. They were:

(1) trials conducted by a judge sitting alone, the procedure of which is laid out in Chapter XX of the CPC;
(2) trials by a judge with the aid of assessors, the procedure of which was laid out in Chapter XXI of the CPC;
(3) trials by a judge with a jury, the procedure of which was provided in Chapter XXII of the CPC; and
(4) trials by a Judge sitting alone according to the Essential (security cases) Regulations 1975 (ESCAR).

Since 17 February 1995, trials by jury and trials with the aid of assessors have been repealed. Trials that remain are those conducted by a judge sitting alone in accordance with Chapter XX of the CPC and in accordance with ESCAR. Trial proceedings in Malaysia follow the adversarial system and are subject to two basic principles:

(1) an accused person is presumed innocent until proven guilty; and
(2) the prosecution must prove the charge against an accused person beyond reasonable doubt.

The prosecution will open its case first by calling its witnesses. Each witness is then cross-examined by the defence counsel or the accused person personally if he is not represented by a counsel. The prosecution closes its case when all the witnesses have given their evidence.

The judge or magistrate must decide whether a prima facie case has been made out. If the court is satisfied that a prima facie case has been made out, the accused will be called upon to enter his defence. If the accused succeeds in his defence, he is entitled to an acquittal. If not, the court will proceed to convict and pass sentence.

B. Cooperation for a Speedy Trial, Securing an Appropriate Sentence and Supervision over the Fair Application of Law

For every type of offence, the law prescribes a punishment which is either imprisonment not exceeding a certain period or a fine not exceeding a certain sum or a combination of both. In respect of serious offences, imprisonment is mandatory, and in more serious types of crimes, a minimum sentence of imprisonment or death is mandatory. An appropriate sentence will be passed by the court. Any sentence passed outside the limits set or less than the minimum is a sentence wrong in law and will be reversed, set aside or altered by the Appellate Court.

C. Execution of Punishments

The final disposal of the case is the passing of the sentence on the accused person. If the sentence consists of a fine, the accused person will be given time (usually until the later part of the day) to pay the fine or seek assistance from close relatives to settle the due. When an accused person is unable to pay, he would have to serve a default sentence in prison. Where the sentence is one of imprisonment, a warrant of commitment will be issued by the court to the prison authorities. The accused will be escorted to the prison designated and serve his sentence there. Where the accused person intends to appeal against the sentence or conviction, the court will usually grant a stay of execution of the sentence pending the appeal. The accused person may be released on court bail or remanded in prison if the offence is of a serious nature.

D. Public Prosecutor's Involvement in National Criminal Justice Policy

The Attorney General is also responsible for the drafting of laws to be enacted by Parliament. Any new laws or amendments to existing ones are drawn and drafted by the Attorney General's Chamber. Changes in the laws are eminent when the country progresses. For instance, with the advance of information technology, new laws are needed to protect the industries against unscrupulous opportunists. These are new crimes that demand new skill and in-depth knowledge in combating them.

CONCLUSION

People are in general law-abiding, but it is also true that everyone breaks the law sometimes and some people break it often. Compliance with the law is never complete. Law breakers have to be dealt with in accordance with the law. Thus in any society, there is some form of system in place to tackle this problem. In Malaysia, the justice system has been in place even before independence in each of the individual state, and when Malaysia was formed, the justice system that was adopted seemed to work well in preserving the laws of the country.

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APPENDIX

COUNT ORGANIZATIONAL STRUCTURE