

# Combating Corruption in Malaysia: An Analysis of the Anti-Corruption Commission Act 2009 with Special Reference to Legal Enforcement Body

Wan Murshida Wan Hashim<sup>1</sup>, Mazlena Mohamed<sup>2</sup>

<sup>1</sup> Faculty of Law, Universiti Teknologi MARA (UiTM), Kelantan, Malaysia

<sup>2</sup> Ahmad Ibrahim Kulliyah of Laws, International Islamic University, Gombak, Selangor, Malaysia

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## Abstract

*Having a specific enforcement body to tackle corruption constitutes one of the significant initiatives in the effort to fight the matter. As such, a comprehensive and effective law should be enacted for the said matter and any enforcement body established thereunder must be seen capable to fight corruption effectively. In Malaysia, a body governing the matter known as Malaysian Anti-Corruption Commission has been established by virtue of the law passed by the government namely the Malaysian Anti-Corruption Act 2009. Being the main legislation governing corrupt practices in Malaysia, the Act provides amongst others, provisions governing the Commission and other bodies established thereunder. This paper provides a doctrinal analysis of the Malaysian Anti-Corruption Commission Act 2009 with special reference to the provisions governing legal enforcement body so much so that it provides an insight into its efficacy. The findings revealed that there are some loopholes in the laws by which could result in vitiating the efficacy of the legal enforcement body to combat corruption in Malaysia.*

Keywords: *corruption, legislation, Malaysian Anti-Corruption Commission*

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## INTRODUCTION

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It is without a doubt that having a comprehensive set of anti-corruption law constitutes one of important initiatives to combat corruption. However, it should be noted that having a black letter law alone would do no benefit to the nation unless it is accompanied by a proper implementation of the law itself.

Therefore, for the purpose of implementation, a specialized legal enforcement body dedicated to combat corruption should be established with the objective to investigate and to prosecute all cases related to corruption. This special body should be given full powers and authorities so as to enable it to carry out the duty to the best of its ability.

At international level, the United Nations has come out with a first legally binding instrument against corruption known as United Nations Convention on Corruption (hereinafter referred to as UNCAC) of which provides comprehensive sets of standards, measures and rules on matters concerning corruption. The UNCAC is open for ratification by all world countries and the signatories are required to ensure that their legal and regulatory regimes to fight corruption operate consistently with the signed instrument.

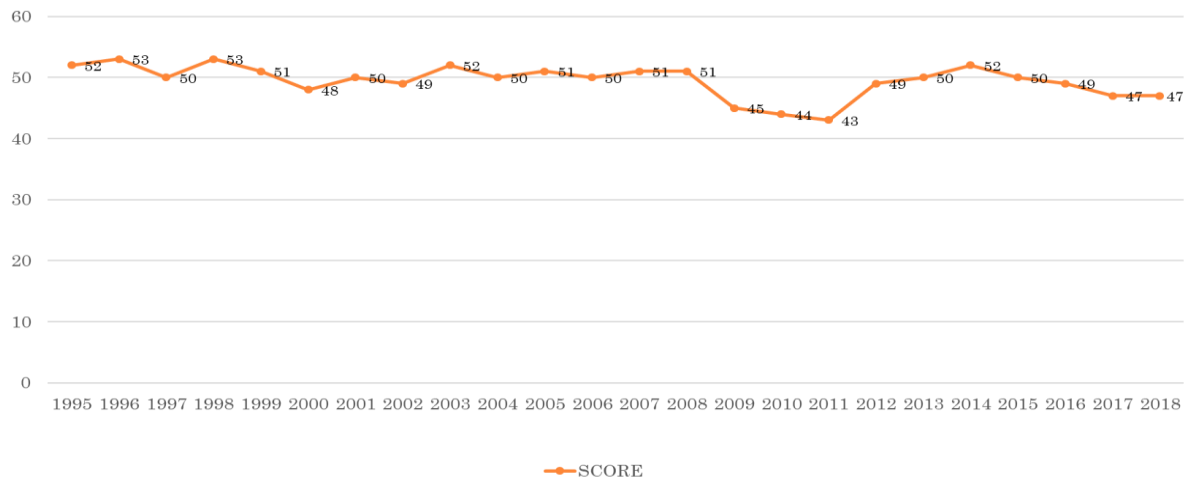
The UNCAC has been adopted by Malaysia on 9<sup>th</sup> December 2003 and was ratified as well as enforced on the 24<sup>th</sup> September 2008. Following the ratification, a new anti-corruption law was passed in 2009 known as Malaysian Anti-Corruption Commission Act 2009 so as to fulfil the requirements of combating corruption as spelled out in the UNCAC. This paper analyses and examines the content of the Malaysian Anti-Corruption Commission Act 2009 (hereinafter referred to as MACC Act 2009) with special reference to the provisions governing legal enforcement body on corruption so much so that it would provide an insight

into the efficacy of the said body to fight corruption in Malaysia. Therefore, this paper attempts to address one research question i.e. the extent to which the provisions of the MACC Act 2009 could empower the enforcement bodies established thereunder to combat corruption effectively in Malaysia.

## LITERITURE REVIEW

### *An Overview of Corruption Level in Malaysia*

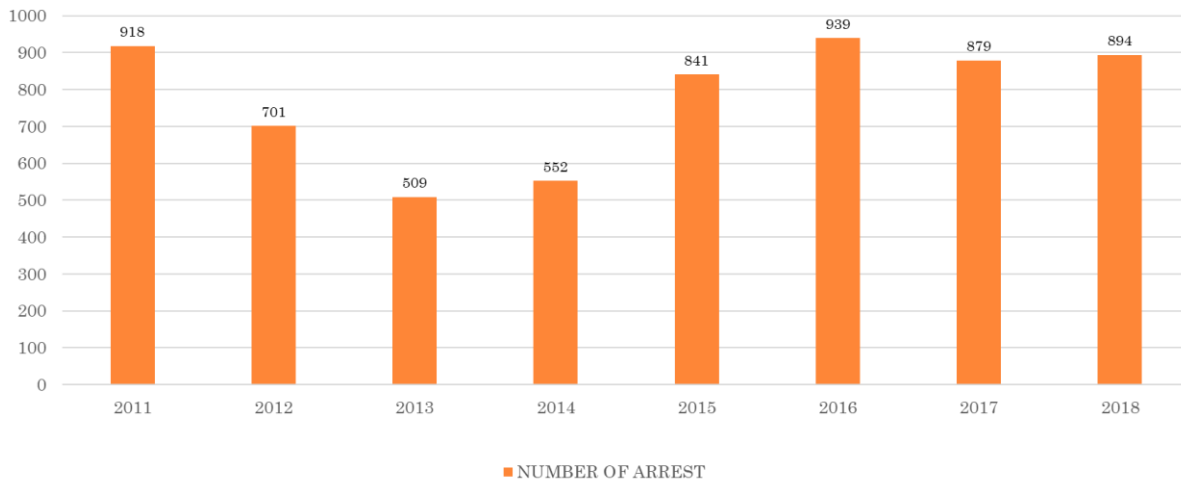
According to Transparency International (TI), the indication of corruption degree in the world nations could be measured by Corruption Perception Index (CPI) by which it uses a scale of zero to 100, where zero is highly corrupted and 100 is very clean. In the 2017 and 2018 survey, the index found that more than two thirds of the 180 countries and territories inclusive Malaysia score below 50, with an average score of 43. Figure 1 provides the score that Malaysia has obtained since the inception of CPI in 1995.



**Figure 1: *Corruption perception index (CPI) – Malaysia***  
*(Source: Transparency International -TI)*

The CPI revealed that Malaysia score 47 in 2017 and remains the same score in 2018. This score is in fact a two-points decreased from the previous score in 2016, to wit: 49. The worst score that Malaysia had ever experienced in the index was in 2011 of which saw a nine-point decreased over the last sixteen (16) years since the inception of the CPI in 1995 to wit: 43. The highest score Malaysia had ever gained in the index is 53 in 1996 and 1998. The index showed that Malaysia in 2014 score 52 but consecutively dropped its score to 50, 49 and 47 in 2015, 2016 and 2017 respectively. The Malaysia’s CPI score in 2018 remains stagnant i.e. 47 by which indicates that many more efforts and strategy must be put forward so as to resolve corruption matters holistically.<sup>1</sup> In terms of number of arrests made in relation to corruption, the statistics of the said matter are shown in Figure 2.

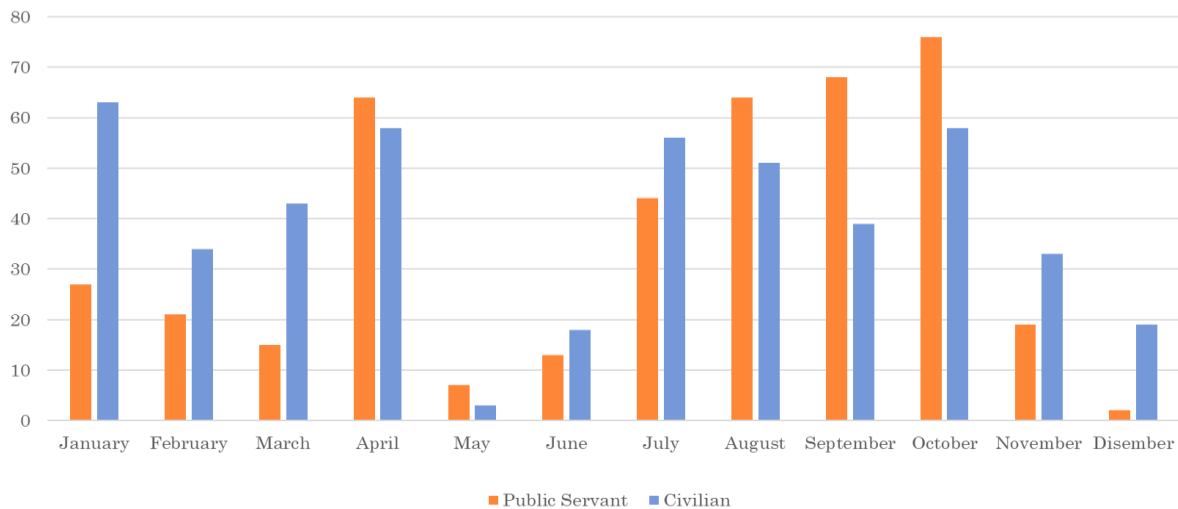
<sup>1</sup> On 29 January 2019, the government has launched a strategy to combat corruption called National Anti-Corruption Plan 2019-2023 (NACP) to replace National Integrity Plan (NIP).



**Figure 2: Statistic of arrests for corruption-related cases**  
 (Source: *Suruhanjaya Pencegahan Rasuah Malaysia-SPRM*)

Statistics from the website of Malaysian Anti-Corruption Commission (MACC) revealed that quite substantial number of arrests was made by the MACC from 2011 till 2018 by which involving public official and civilian. There were 918 people being arrested in 2011 and the number was reduced from 500 to 700 in the following years but later increased to 841 and 939 in 2015 and 2016 respectively. In 2017, the number dropped to 879 and in 2018, the statistics showed the number of arrests was 894. Statistics from MACC also revealed that even though there were 863 cases being investigated and 879 arrests were made in 2017, only 373 people were produced in court for prosecution.<sup>2</sup> This indicates that the substantial number of arrests in relation to corruption cases does not necessarily reflect the real position of corruption level in Malaysia. This is because any arrest made by legal enforcement body in relation to corruption does not mean that the person is already guilty of an offence, but it is simply an allegation that corruption might have been committed by the person in question. With regards to category of offender, Figure 3 provides the statistics of corruption cases involving public servant and civilian in 2018.

<sup>2</sup> Bernama, December 27, 2018. "Waging war against the 'mother' of all crimes". Available at <https://www.nst.com.my/news/crime-courts/2018/12/444369/waging-war-against-mother-all-crimes>



**Figure 3: Statistics of offender category in 2018**  
 (Source: *Suruhanjaya Pencegahan Rasuah Malaysia- SPRM*)

With reference to offender category, the above MACC statistics showed that most of the cases do not involved high-profile people as offenders but ordinary civilians or public servants. Only a small number of cases involving politicians and high-profile leaders were brought to the court<sup>3</sup> or if so brought, some of the cases were discharged and acquitted due to no strong evidence against them.<sup>4</sup> The case of Tan Sri Kasitah Gadam, the former Minister of Rural Development and Cooperatives was an example of a high-profile case of corruption where the accused was discharged and acquitted from corruption charges after few years of trial due to failure on the part of the prosecutor to prove a prima facie case against him.<sup>5</sup> Another example is the case of a former managing director of Perwaja Steel Bhd, Tan Sri Eric Chua. The case came to light way back in 1996 following a disclosure made by the then Minister of Finance in the Dewan Rakyat due to the poor financial performance of Perwaja. The accused was officially charged in 2004 but, was discharged and acquitted in 2007.<sup>6</sup> Having said that, what matters most is not the number of accusations or the number of arrests made in corruption-related cases, but it is the number of convictions towards the accused as that in fact denotes an achievement of the progressive and aggressive action of government in the fight against corruption.

<sup>3</sup> In 2011, only two politicians were charged with corruption in court. See [www.sprm.gov.my/index.php/penguatkuasaan/statistik-operasi/statistik-tangkapan](http://www.sprm.gov.my/index.php/penguatkuasaan/statistik-operasi/statistik-tangkapan). In 2018, two prominent politicians were officially charged with corruption namely Dato' Seri Mohd Najib Razak and Dato Seri Ahmad Zahid Hamidi, the former Prime Minister and Deputy Prime Minister of Malaysia respectively.

<sup>4</sup> The MACC statistic showed that from 2013-2018, the highest number of complaints was related to government procurement i.e. 42% and discovered that from 2012 -2014 majority of the cases were due to political inference in the procurement. See Edge Weekly (2019). Ideas: NACP a key step in curbing endemic corruption. Available at <https://www.theedgemarkets.com/article/ideas-nacp-key-step-curbing-endemic-corruption>.

<sup>5</sup> [2009] 1LNS 714

<sup>6</sup> The Sessions Court acquitted and discharged Tan Sri Eric Chia Eng Hock, the former managing director of Perwaja Steel Sdn Bhd, without calling him for defence on charges of criminal breach of trust involving RM76.4 million.

## ***Anti-Corruption Laws of Malaysia***

There have been number of anti-corruption laws enacted by the government of Malaysia since its independence. The first primary anti-corruption law passed by the government of Malaya (before the establishment of Malaysia in 1963) was the Prevention of Corruption Act 1961 [Act 57] (hereinafter referred to PCA 1961). This Act was introduced to repeal the anti-corruption law that was widely used in Malaya during British occupation namely Prevention of Corruption Ordinance 1950. The PCA 1961 was later extended to Sabah and Sarawak after the establishment of Malaysia in 1963.

The PCA 1961 was in force for a quite number of years until 1997 when a new law was passed by Parliament known as Anti-Corruption Act [Act 575] (hereinafter referred to ACA 1997) by which repealed the PCA 1961. Thereafter in 2009, the government passed another law on corruption known as Malaysian Anti-Corruption Act 2009 [Act 694] by which repealed the ACA 1997. The objectives of this Act are to promote integrity and accountability of public and private sector administration by establishing anti-corruption commission as well as to educate the public authorities, public officials and members of the public about corruption and its detrimental effects on administration and the community.

## ***Malaysian Anti-Corruption Commission Act 2009 [Act 694]***

The Malaysian Anti-Corruption Commission Act 2009 (hereinafter referred to as MACC Act 2009) came into effect in January 2009. The MACC Act 2009 consists of several parts namely 1) The establishment of Anti-Corruption Commission, 2) The establishment of Oversight Committees, 3) Offences and Penalties, 4) Investigation, search, seizure and arrest 4) Evidence and 5) Prosecution and Trial of offences. For this paper, the focus of analysis is on the provisions pertaining to the establishment of Anti-Corruption Commission as the main legal enforcement body to combat corruption and the establishment of three oversight or watchdog bodies under the MACC Act 2009 namely the Advisory Board, the Special Committee and Complaints Committee.

## ***Anti-Corruption Commission***

The Malaysian Anti-Corruption Commission (hereinafter referred to as the MACC) was established under the MACC Act 2009 by which abolished the Anti-Corruption Agency (hereinafter referred to as the Agency) that was established under the Anti-Corruption Act 1997. Comparatively, there is not much difference between the MACC and the Agency in terms of its establishment as both are statutory bodies and are functioning as the main legal enforcement authority to fight corruption. Both are conferred with powers under their respective legislations to detect and investigate cases pertaining to corrupt practices.

However, it should be noted that having an enforcement body with investigative powers similar with Police Officer does not of itself reflect the effectiveness of it in the effort to combat corruption. While having statutory investigative powers are vital to every enforcement body, the first important thing that must be given attention is the extent to which the body is able to deal with corruption issues without any interference from others. Thus, the very basic approach in combating corruption is about empowering the legal enforcement

body with elements of independent and transparent in all aspects.<sup>7</sup> Being independent and transparent are important since it would certainly garner the public confidence upon the efficacy of the enforcement body towards fighting corruption.

It was reported by Pemudah, the government's special task force to facilitate business, that the enforcement body has only investigated 10.1% or just 7,223 cases out of the total of 71,558 cases being reported in 2000-2006.<sup>8</sup> Of the total number of the cases reported within the same period, only 4.1% or 2905 people were arrested, 1.8% or 1287 persons were prosecuted and only 0.7% or 524 of those charged with corruption was convicted.<sup>9</sup> This unsatisfactory performance of the enforcement body may result in deterring the public confidence towards its ability to fight corruption in Malaysia. Therefore, to determine the efficacy of the legal enforcement body to fight corruption in Malaysia, the following provides an analysis of the provisions governing the establishment of the MACC as enshrined in the MACC Act 2009.<sup>10</sup>

### ***Appointment of the Head of the MACC***

The appointment of the person in charge of the MACC who is called by the name Chief Commissioner is made by the Yang di-Pertuan Agong on the advice of the Prime Minister.<sup>11</sup> Likewise, in the case of dismissal, the Chief Commissioner shall hold the office at the pleasure of the Yang di-Pertuan Agong subject to the advice of the Prime Minister.<sup>12</sup> Looking at these two provisions, there is an indication that the appointment or the dismissal of the Chief Commissioner of MACC is within the sole power of executive particularly the Prime Minister, whose decision is certainly unable to be challenged by anyone.

In the case of *Dato' Seri Anwar Ibrahim v Perdana Menteri & Anor*<sup>13</sup>, the issue was whether the letter of revocation of appointment of the appellant as Minister of Finance and Deputy Prime Minister issued by the Prime Minister contravened Article 43(5) of the Federal Constitution. The Article provides amongst others the revocation to be made by the Yang di-Pertuan Agong on the advice of the Prime Minister. The Appeal Court ruled that 'acting on advice' means that the revocation of appointment is within the power of the Prime Minister to decide and it is a formality that demand the revocation to be acted upon by Yang di-Pertuan Agong who is then duty bound to accept the decision made by the former as it is. The court said;

*“Under the scheme of the Federal Constitution, the Yang di-Pertuan Agong is a constitutional monarch who acts on ministerial advice and not on his own initiative. The power to dismiss any Minister is in effect with the Prime Minister. He can, at any time, advise the Yang di-Pertuan Agong to dismiss any Minister*

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<sup>7</sup> Article 36 of the UNCAC reads “Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks”.

<sup>8</sup> The enforcement body during this period was the Anti-Corruption Agency established under the Anti-Corruption Act 1997.

<sup>9</sup> The Sun Daily 2008, available at [www.thesundaily.my/node/164884](http://www.thesundaily.my/node/164884). Within this period, the main legislation applied in Malaysia was the Anti-Corruption Act 1997 under which the Anti-Corruption Agency was established.

<sup>10</sup> No material difference is found between the MACC Act 2009 and the ACA 1997 pertaining to the roles, duties, powers as well as functions of the legal enforcement body established under the respective legislations.

<sup>11</sup> Section 5 (1) of the MACC Act 2009 is in *pari materia* with Section 3(1) of the ACA 1997

<sup>12</sup> Section 5 (3) of the MACC Act 2009 is in *pari materia* with Section 3 (4) of the ACA 1997

<sup>13</sup> [2007] 3CLJ 377



*and His Majesty is bound to act on the advice of the Prime Minister. In short, no Minister can remain as a member of the Cabinet if the Prime Minister decided that he should be dismissed*<sup>14</sup>

Therefore, by analogy, as far as the Chief Commission of the MACC is concerned, he can at any time be dismissed by the Prime Minister who could simply inform the Yang di-Pertuan Agong about the decision he has made. This shows that the security for the tenure of office of Chief Commissioner is never ever provided by the MACC Act 2009 since his appointment and dismissal depends upon the decision taken by the Prime Minister. The inadequacy of protection given by the law to the person who is in charge of fighting corruption seems to be awkward since tenure security is one of the importance aspects that should be given attention so as to enable the duty to be performed without any fear or favour. Since the Prime Minister is in full authority to make decision in relation to the appointment and dismissal of the official in charge, there could create a perception that the MACC might only operate under the order of the person in higher authority.

The ideal of being independent from the Executive is obviously of great importance to the MACC to avoid any capricious actions taken by people in higher authority. There is a possibility though might not be true that some corruption cases involving people in higher authority will escape from any investigation or action being taken against them. Thus, the provisions governing the MACC as stipulated in the MACC Act 2009 are most unlikely could render itself to be a truly independent body that is free from any political control or interference. This loophole in fact could render the MACC to not really having full powers from the very beginning of its establishment since the position of the Chief Commissioner who is the head of the enforcement body is not in reality independent. This scenario can be referred back to what happened in 2016, when the Chief Commissioner of the MACC and his deputy were said to have been forced to resign due to political interference amid investigation into a malpractice allegation involving government investment company known as IMDB that implicated the then Prime Minister of Malaysia.<sup>15</sup> Both the Commissioner and the Deputy claimed that the resignation of them was not on their own freewill but was made under pressure following the decision to indict the then Prime Minister for corruption.<sup>16</sup> Consequently, based on the foregoing discussion, the provisions that provide the rule regarding the appointment and dismissal of the Chief Commission of MACC could not deem suffice to strengthen the Commission and in fact has vitiated its efficacy as a primary enforcement body to fight corruption in Malaysia.

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<sup>14</sup>*Ibid*, Per Raus Sharif (JCA) at p.391

<sup>15</sup> Free Malaysia Today (2016, June 23). Available at <https://www.freemalaysiatoday.com/category/nation/2016/06/23/rafizi-macc-heads-forced-to-quit>.

<sup>16</sup> The Star Online. (2018, May 22), Available at <https://www.thestar.com.my/news/nation/2018/05/22/new-macc-chief-breaks-down-in-recounting-what-he-went-through>

## *Powers of the Commission*

According to the MACC Act 2009, the MACC is given extensive powers in relation to corruption cases; and amongst others are to receive and consider reports on the offence, to detect and to investigate reports on corrupt matters.<sup>17</sup> However, in terms of prosecution, no such power is ever conferred to it. Although there is a legal and prosecution department established under the MACC, no absolute power of prosecution is conferred to the Commission to prosecute cases that have been investigated.<sup>18</sup>

The power to prosecute criminal cases in Malaysia falls under the authority of the Public Prosecutor who is the Attorney General.<sup>19</sup> As a result, all cases investigated by any authoritative bodies in Malaysia require consent to be obtained from the Public Prosecutor who will decide either to allow or to disallow the case to proceed.<sup>20</sup> This means that, all investigation on corruption cases carried out by the MACC must thereafter be forwarded to the Attorney General for consent of an indictment.<sup>21</sup> If no consent is obtained, no criminal proceeding can be brought against any person.

Under article 145 (3) of the Federal Constitution, the power conferred to the Attorney General is absolute and he does not have to consult any person, when exercising his powers in relation to criminal prosecutions. Likewise, no person or body can compel him to institute any criminal proceedings which he does not wish to institute or to continue the same which he has decided to discontinue.<sup>22</sup> This means that technically it is at the instance of the Attorney General either to charge or not to charge any criminal proceedings upon anyone even towards the Prime Minister and his Cabinet. In *Lim Kit Siang v United Engineers (M) Bhd and 3 Ors*,<sup>23</sup> VC George J stated the position of Attorney General as follows;

*“In Malaysia, the AG’s position is very different from that of his British counterpart. He is a civil servant appointed by His Majesty the Yang Di Pertuan Agong on the advice of the Prime Minister. He is not answerable to anybody, neither to any Minister nor to any Ministry, not even to the Prime Minister, not to Parliament and to the people (in that his is not a political appointment). However, he holds office during the pleasure of the Yang di Pertuan Agong which in effect means during the pleasure of the Executive.”*

Even though it seems that the Attorney General is not answerable to anyone, not even to the Prime Minister, ironically, the Attorney General himself is an office of which the appointment shall be made by the Yang di-Pertuan Agong under the advice of the Prime Minister.<sup>24</sup> Likewise, he shall hold the office at the pleasure of the Yang di-Pertuan Agong, but, the decision to determine as such in fact lies upon the Executive particularly the Prime Minister. As such, it could lead to a bad perception towards the Attorney General who is supposedly to act only in the best interest of the nation and for justice but could possibly act

<sup>17</sup> See section 7 of the MACC Act 2009

<sup>18</sup> Section 58 of the MACC Act 2009

<sup>19</sup> See Article 145 (3) of the Federal Constitution and Section 376 of the Criminal Procedure Code

<sup>20</sup> Article 145 (3) of the Federal Constitution read as follows “shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence”

<sup>21</sup> This power is also found in Section 376 (1) of the Criminal Procedure Code which provides that “The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings conducted under the Code”

<sup>22</sup> See Tommy Thomas, The Attorney General – The most powerful person in Malaysia? *INSAF, August 1983*

<sup>23</sup> (No 2) [1988] 1 MLJ 50 at pg. 58

<sup>24</sup> Article 145 (1) of the Federal Constitution



in the favour of the person whose power is deemed to be more superior than he is so as to save his position.<sup>25</sup>

As regards judicial review over the Attorney General's power, in *Long b Samat & Others v PP*<sup>26</sup> Suffian LP has given a comment that the Federal Constitution has clearly bestowed upon the Attorney General an unfettered discretionary power as regards criminal prosecution. As a result, the court can neither compel the Attorney General to discontinue any criminal proceedings that he has instituted, nor 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. As *per* Tun Suffian LP;

*"Anyone who is dissatisfied with Attorney-general's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts."*<sup>27</sup>

Given that the powers of MACC exclude prosecution, there is a possibility that even if a strong case could be built against the accused person, it would finally bring the case to a dead end when no consent is given by the Attorney General to proceed with prosecution.<sup>28</sup>

In United Kingdom for instance, the enforcement body that deals with corrupt matters known as Serious Fraud Office is given both powers of investigation and prosecution.<sup>29</sup> As such, the enforcement body is a capable to prosecute any person upon completion of investigation without necessary of getting any approval whatsoever from the Attorney General. This could avoid any interference either expressly or impliedly from any institutions especially the Executive from giving order as to the manner of which investigation and prosecution of corruption related cases should be carried out. At this point, the legal enforcement body on corruption is deemed not to be opening itself to criticism in relation to its independency as it is clearly seen able to decide anything on its own without any interference whatsoever from others in higher authority.

## ***Oversight Committee***

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<sup>25</sup> The fragility of the Attorney General's tenure of office could be evidenced by the removal of former Attorney General Tan Sri Abdul Gani Patail in July 2015 amid allegation of corruption against the former Prime Minister, Dato'Seri Mohd Najib b Razak. See The Guardian online, 28 March 2016, Former Malaysian attorney general planned charged against PM-report, available at <https://www.theguardian.com>; Austin Ramzy, The New York Times online, July, 28, 2015. The Guardian, Malaysia's premier dismisses Deputy and Attorney General amid scandal, available at <https://www.nytimes.com>. See also The Guardian, 6 July 2015, Malaysian taskforce investigates allegations \$700m paid to PM Najib, available at <https://www.theguardian.com>.

<sup>26</sup> [1974] 2 MLJ 154

<sup>27</sup> *Ibid* at pg.158. However, in *In Rosli Dahlan v. Tan Sri Abdul Gani Patail & Ors* [2014] 11 MLJ 481, the High Court ruled that the notion of the Attorney General's absolute prosecutorial immunity is anathema to the rule of law. Notwithstanding the different ruling, the decision of Superior Court prevailed over the decision of all courts below it.

<sup>28</sup> This was evidenced by the decision made by the then Attorney General, Tan Sri Apandi Ali not to initiate any criminal proceeding against the then Prime Minister, Dato' Sri Mohd Najib Razak in relation to the investigation carried out by MACC on corruption. He has also ordered the investigation carried out by the MACC on three cases related to corruption be closed. See Malaysiakini, (2016, Jan 25), AG:No charges against PM, SRC and RM2.6b cases closed, available at <https://www.malaysiakini.com>.

<sup>29</sup> The Serious Fraud Office was established by the Criminal Justice Act 1987 is able to detect, investigate and prosecute individuals and corporates in serious fraud matters.

According to Part III of the MACC Act 2009, there are three statutory oversight committees established thereunder namely Anti-Corruption Advisory Board, Special Committee on Corruption and Complaints Committee.<sup>30</sup> These statutory oversight committees were established as checks and balances of the MACC's roles and functions. The first two oversight bodies are functioning as supervisor to the MACC with regards to the powers exercised by the latter and the Complaints Committee on the other hand is to supervise complaints made against the officers of the MACC as well as to identify weaknesses in their work procedures.

In addition to the above statutory bodies, there are two other oversight committees established through administrative order of the Prime Minister namely Operational Review Panel and Consultation & Corruption Prevention Panel. For this paper, the discussion is limited to the statutory oversight committees established under the MACC Act 2009 to wit; the Anti-Corruption Advisory Board, Special Committee on Corruption and the Complaints Committee. Since the MACC is modelled after the Hong Kong anti-corruption agency, a reference is also made to the oversight committees established in Hong Kong namely Advisory Committee on Corruption, The Operation Review Committee, The Corruption Prevention Advisory Committee and The Citizens Advisory Committee on Community Relations so as to provide an insight into the said matter.

### ***Anti-Corruption Advisory Board***

The Anti-Corruption Advisory Board (hereinafter referred to as ACAB) is formed under section 13 of the MACC Act 2009 and according to the provision of the law; the functions of the ACAB are as following:

- a) To advise the Commission on any aspect of the corruption problem in Malaysia;
- b) To advise the Commission on policies and strategies of the Commission in its efforts to eradicate corruption;
- c) To receive, scrutinize and endorse proposals from the Commission towards the efficient and effective running of the Commission;
- d) To scrutinize and endorse resource needs of the Commission to ensure its effectiveness;
- e) To scrutinize the annual report of the Commission before its submission to the Special Committee on Corruption; and
- f) To submit its comments to the Special Committee on Corruption as to the exercise by the Commission of its functions under this Act.

The above shows that the functions of the ACAB are concentrated on advising, endorsing and scrutinizing any matters relating to corruption. The ACAB is responsible to advise the MACC on the policies or strategies that could combat corruption effectively. In terms of effective management of the MACC, the ACAB must ensure that enough resources in relation to the Commission's operation and administration have been provided for.

Comparatively, the ACAB is very much similar with the Hong Kong Advisory Committee on Corruption whereby the functions of the latter are to oversee the general work

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<sup>30</sup> Section 13, 14 and 15 of the MACC Act 2009

direction of the Independent Commission against Corruption or ICAC<sup>31</sup> as well as to advise the Commission on policy matters. Notwithstanding the similarity, the Hong Advisory Committee is empowered by the Hong Kong Independent Commission Against Corruption Ordinance to have a say in the event of terminating an officer of the ICAC. The Ordinance expressly empowered the Commissioner of the ICAC to terminate any officer in the interest of the Commission after consultation has been made with the Advisory Board.<sup>32</sup> This indicates that the principle of good governance is being practiced since the dismissal of an officer falls within the purview of its oversight committee so as to avoid abuse of power. Unfortunately, there is no such provision in the MACC Act 2009 that empowered the ACAB to have a say in relation to termination or appointment of the officer of the MACC.

According to the MACC Act 2009, the ACAB is required to scrutinize the annual report of the MACC and to give comments on the performance of the latter before the documents could be submitted to the other oversight committee namely Special Committee on Corruption. By contrast, the annual report of the Hong Kong ICAC must be directly submitted by the Advisory Committee to the Chief Executive who is the highest person in authority. Since there is no involvement of intermediary in relation to the submission of the documents, some layer of bureaucracy could be avoided, thus would in turn expediate decision-making process. However, in terms of good governance, the ACAB stands in a better position than that of the Hong Kong Advisory Committee. This is because the ACAB is not directly answerable to the Prime Minister since the report must be submitted to the other oversight committee for approval, thus exhibiting an element of independency and transparency in its operation.

In terms of composition, the ACAB consists of members whose appointment is made by the Yang di-Pertuan Agong upon the advice of the Prime Minister.<sup>33</sup> The selection of members by the Prime Minister shall be amongst people from public or private services.<sup>34</sup> Although there is not much difference between the ACAB and the Hong Kong Advisory Board in terms of composition and appointment, the fact that the ACAB is not detachable from the Executive may create a suspicion over its competency as a system of checks and balances to the MACC. Even though quite the same rule applied to Hong Kong where the appointment of the Advisory Board are made by the Chief Executive, it should be noted that to equalize Malaysia with Hong Kong is not practicable since the anti-corruption agency of the latter has been widely perceived to be truly independent and effective in combating corruption.<sup>35</sup> This has been statistically proven by Hong Kong's CPI score of 76 and was ranked 14<sup>th</sup> amongst 180 countries in 2018.<sup>36</sup> In addition, Hong Kong has not experienced the situation of gross mismanagement that happened in Malaysia where people in highest authority had been accused of exercising entrusted power abusively in the effort to cover up misdeeds. It was reported that the members of the MACC oversight committees had insisted on the investigation into the IMDB scandal which implicated the then prime minister but to no avail.<sup>37</sup> This means that even if the matter is brought to the attention of those in authority

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<sup>31</sup> This anti-corruption agency was established under Independent Commission Against Corruption Ordinance (Cap 24)

<sup>32</sup> Section 8 (2) of the Independent Commission Against Corruption Ordinance (Hong Kong)

<sup>33</sup> Section 13(2) of the MACC Act 2009

<sup>34</sup> Section 13(4) of the MACC Act 2009

<sup>35</sup> Quah, Jon ST, (2017), *Minimising Corruption in Hong Kong and Singapore: Lesson for Asian Policy Makers*. Public Administration and Policy 20(2). pg.7-22,

<sup>36</sup> Transparency International. (2018). *Corruption Perception Index*. Retrieved from <http://www.transparency.org/cpi>

<sup>37</sup> The Malaysian Insider, (2016, February 24), *MACC oversight panel meets last time today, insists Najib should face charges*. Available at The Edge Online. Retrieved from <https://www.theedgemarkets.com/article/macc-oversight-panel-meets-last-time-today-insists-najib-should-face-charges>

for further action, there is a high possibility that it may finally come to a dead end since most of the key appointments on major public sectors are within the control of one person namely the Prime Minister.<sup>38</sup> Therefore, it would be better off for Malaysia not to follow suit the rules applicable in Hong Kong since some of them are not practicable to be applied here.

### *Special Committee on Corruption*

The Special Committee on Corruption (hereinafter referred to as the SCC) is another oversight committee established under the MACC Act 2009. The functions of the SCC amongst others are to advise the Prime Minister on any aspects of corruption problem, to examine the annual report as well as the comments made by the ACAB on the performance of MACC under the MACC Act 2009.<sup>39</sup> Since the ACAB is required by the law to submit the above-mentioned documents to the SCC, the latter is deemed to be in superior position to the former. In discharging the duty, the SCC is required to make an annual report to the Prime Minister who shall then lay the report to the Parliament.<sup>40</sup>

The SCC had made recommendations and suggestions to Parliament with regards to empowering the MACC as well as creating free corruption environment in Malaysia since its inception in 2009. For instance, amongst the suggestion made by the SCC to ensure greater transparency and independency of the MACC are the formation of the Malaysian Anti-Corruption Service Commission, the appointment of Chief Commissioner under the Federal Constitution,<sup>41</sup> an enactment of a specific provision of law for public misconduct,<sup>42</sup> a declaration of political funding by all political parties to be scrutinized by auditors annually<sup>43</sup> to name a few. Unfortunately, some of the recommendations and suggestions which are considered material and needed urgent attention are left without respond by the members of Parliament.<sup>44</sup> It was also reported that some of the recommendations were made years ago but had yet to be discussed in the Parliament.<sup>45</sup>

In terms of composition, the members of the SCC are selected amongst the members of Parliament whom shall not be any administration members.<sup>46</sup> The law also specifically stated that there should not be any redundancy with respect to the composition of the SCC and ACAB.<sup>47</sup> Notwithstanding the rule which does not require any advice of the Prime Minister in relation to the appointment of the members by the Yang di-Pertuan Agong, the MACC Act 2009 provides that the selection of the members of the Committee shall be made by the Leader of the House of Representative. According to Section 4A(2) of the Standing Order of the Dewan Rakyat of Malaysia (Public Business),<sup>48</sup> the leader of the House of Representative refers to a member of the House who is presently the Leader or Deputy leader

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<sup>38</sup> See New Straits Time (2019, July 19). PM: From now rom now, key appointments in public sector must go through select committee. Retrieved from <https://www.nst.com.my/news/nation/2019/07/505396/pm-now-key-appointments-public-sector-must-go-through-select-committee>

<sup>39</sup> Section 14 (1) of the MACC Act 2009

<sup>40</sup> Section 14(4) of the MACC Act 2009

<sup>41</sup> See SPRM. *Annual Report 2014*. Retrieved from <https://www.sprm.gov.my/images/AnnualReport/MACC-AnnualReport-2014.pdf>

<sup>42</sup> See SPRM. *Annual Report 2016*. Retrieved from <https://www.sprm.gov.my/images/AnnualReport/MACC-AnnualReport-2016.pdf>

<sup>43</sup> See *SC Annual Report 2010*. Retrieved from <https://www.sprm.gov.my/images/laporan%20tahunan/Laporan%20JKMR%202010.pdf>

<sup>44</sup> Press statement by Tan Sri Abu Zahar Ujang, the Chairman on the Special Corruption Committee (SCC) in 2015. Retrieved from <https://www.sprm.gov.my/index.php/en/arkib-kenyataan-media/919-scc-urge-gov-to-enact-improvement-to-corruption-law>.

<sup>45</sup> See The Star Online (2015, December 7). Retrieved from <https://www.thestar.com.my/news/nation/2015/12/07/panel-act-on-law-proposals-committee-wants-tougher-antigraft-laws/>

<sup>46</sup> Section 14 (2) of the MACC Act 2009

<sup>47</sup> Section 64 of the MACC Act 2009

<sup>48</sup> Standing Order of the Dewan Rakyat of Malaysia. Available at <https://www.parlimen.gov.my>

of the Government as the case may be. By conventional practice, such a position is held by the Prime Minister or its Deputy. Here, again it shows that the Prime Minister is still the person in authority to decide the composition of the Committee whose functions amongst others is to advise him on corruption matters.

Apart from the SCC, there are other oversight committees namely the Consultation & Corruption Prevention Panel (hereinafter referred to as CCPP) and the Operations Review Panels (hereinafter referred to as OPR). The CCPP and the OPR are formed under the administrative order of the Prime Minister and are functioning as the checks and balances to the MACC. The functions of the CCPP and OPR are the same with the Hong Kong oversight committees to wit; the Operation Review Committee, the Corruption Prevention Advisory Committee and the Citizens Committee on Community Relations. Amongst the functions of the CCPP and OPR are to advise the MACC on public education with the objective to inculcate hatred amongst members of the society towards corruption as well as overseeing investigations carried out by the MACC on corruption cases. Since these oversight committees are formed under administrative order of the Executive and not under any legislation, they are perceived to be less powerful than the statutory oversight committees namely the ACAB and the SCC.

### ***Complaints Committee***

The Complaints Committee (hereinafter referred to a CC) is another committee set up under the MACC Act 2009 with the function to monitor the handling of complaints of misconduct made against the officers which is non-criminal.<sup>49</sup> The CC is also empowered to identify any weakness in the work procedures of the MACC and to make recommendation for improvement. Comparatively, the CC is just the same with the Hong Kong oversight committee known as ICAC Complaints Committee. However, there is a slight difference with CC whereby the ICAC is required to submit its annual report to the Chief Executive. The report shall also be tabled at the Legislative Council and thereafter be made available to the general public as a measure to enhance the transparency and accountability of the ICAC.<sup>50</sup> As far as the CC is concerned, there is no such requirement provided by the law.

With regards to the member of the CC, the appointment is made by the Minister who is responsible for the MACC<sup>51</sup> to wit; Home Minister. The persons selected shall not be members of any of the oversight committees established under the MACC Act 2009 or formed under the administrative order. In comparison to the ICAC Complaints Committee, the members are selected from the member of Legislative Council as well as prominent members of society.

## **CONCLUSION AND RECOMMENDATION**

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<sup>49</sup> Section 15 of the MACC Act 2009

<sup>50</sup> See the Annual Report 2018 of the ICAC. Retrieved from [https://www.admwing.gov.hk/pdf/ICC%20Annual%20Report%202018\\_eng.pdf](https://www.admwing.gov.hk/pdf/ICC%20Annual%20Report%202018_eng.pdf)

<sup>51</sup> Section 2 of the MACC Act 2009



Having anti-corruption law is no doubt constituted one of the significant efforts to combat corruption. Without rules and regulations, corruption could not be successfully tackled even though all other necessary means are made available. Nevertheless, having laws will not be meaningful if the laws itself have many loopholes by which could defeat the very purpose of its enactment. As far as MACC Act 2009 is concerned, the very basic purpose of its objective amongst others is to fight corruption and this would be executed through an establishment of an enforcement body called Malaysian Anti-Corruption Commission. To be a successful body to fight corruption, the most vital aspect that must first be made available is the independency of the body from all sorts of influence. However, the establishment of the MACC as an independent body is far from being as such due to some loopholes in the laws governing it. The provisions of the Act that govern the MACC have created uncertainty as to its ability to be independent. Similar situation is also found in the provisions governing the statutory bodies that are formed under the MACC Act 2009 as a check and balance mechanism to the power exercised by the MACC. Based on the available provisions, all these bodies could not truly be seen independent due to its connection with the Executive particularly the prime minister.

Since the Advisory Board and the Special Committee are formed as checks and balances mechanism to the primary enforcement body namely the MACC, the independency of all these bodies must be given a great attention. The concentration of power onto one person i.e. the Prime Minister with regards to the selection of all the members of the statutory bodies in fact has created a negative perception towards the efficacy of all those bodies. These bodies could not truly be seen independent in the real sense and consequently could vitiate their quality as oversight or watchdog committees in assisting the MACC to combat corruption in Malaysia. It is very awkward that the MACC Act 2009 which becomes the main legislation with the objective to fight corruption does not contain laws that could really strengthen the efficacy of the body established thereunder. It is also worth noting that currently, almost all the oversight committees except for the CC are in the state of dormant as no appointment of new members are made after the expiration of tenure of the old members.<sup>52</sup> It is very vital for these committees to be reactivated as it in fact reflect the and will be reactivated later so that it could become the checks and balances to the MACC at full throttle. Till the date of this paper was written, there is yet any official appointment of new members to the oversight bodies.

To be a truly independent body that could effectively fight corruption, the body should not be subservient to the government particularly the Executive. The appointment of the Head of the body or the members of the committees established under the MACC Act 2009 particularly the Commission, the Advisory Board and the Special Committee on Corruption under the power of the Prime Minister may bring about to a bad perception towards the Commission to wit: The Commission is under the control of government or Executive bias. Furthermore, the giving of power solely to one person pertaining to the selection of the members of the oversight bodies may create a perception that these bodies might be toothless especially when the government itself involved in the issue. Thus, the solution to avoid from being perceived as such, the provisions governing the appointment and dismissal of the head of the MACC should be amended so as for the power not to be concentrated upon the Prime Minister. Likewise, the provisions governing the selection of members of the Advisory

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<sup>52</sup> See Five Oversight MACC entities to be reactivated, says Chief Commissioner. (2019, July 18). Retrieved from <https://www.malaymail.com/news/malaysia/2019/07/17/five-oversight-entities-of-macc-to-be-reactivated-says-chief-commissioner/1772207>



Board and the Special Committee must be amended so to ensure a truly independent body could be established by which could provide a safeguard to the interest of the nation. Finally, the MACC must be conferred with prosecution power so as enable it to make its own decision either to initiate or not prosecution against person being investigated.

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