

INDEPENDENT COMMISSION FOR POLICE CONDUCT – A CONSTITUTIONAL PERSPECTIVE

PRELIMINARY

I wish to congratulate the Hon'ble members of the Select Committee for their legislative diligence and democratic consultation. YB, YB's work brings great credit to our new parliament.

YB, YB's effort to listen to all parties and to try to bridge differences between various points of view is commendable. This is evidenced by the proposal to change the title of the Bill into something more positive – from the Independent Police Complaints of Misconduct Commission (IPCMC) to the Independent Commission Police Conduct (ICPC).

An independent commission to oversee the police should not be feared by the police. While it will expose wrongdoing, it will also highlight the good work the police do to keep the society safe. An independent commission may be able to highlight the constraints, legal and financial, under which the police work. An independent commission may help to improve the image of the police.

This image has taken a battering due to several unfortunate recent events which need not be highlighted here.¹

Everywhere in the world, the police are armed with massive power and an independent oversight body is always a good idea. As a generalisation, self-regulation does not usually work, and some external control is always desirable.²

RELEVANT CONSTITUTIONAL ISSUES

Issue 1: Supremacy of the Constitution - Article 4. The Constitution is the supreme law of the Federation and no provision of any peace-time law (like the IPCMC/ICPC can violate any provision of the Constitution. No glaring issues of unconstitutionality seem to exist but constitutionality is always a contentious issue.

Issue 2: Equal treatment - Article 8(1): This article requires equality before the law and equal protection of the law.

¹ Enforced disappearances of Pastor Koh, Amri and a few others; discovery of migrant death camp on Thai-Malaysia border, periodic reports of custodial deaths, inability or unwillingness to enforce the Federal Court judgment in the *Indira Gandhi Mutho* case, the recurring cases of alleged corruption, and the unproved allegation of links with underworld figures.

² The existing Police Force Commission under Art 140 is headed by the Minister. Other members are: the IGP, the KSU, a member of the PSC, not less than 2 nor more than 6 other members appointed by the YDPA. The top three are linked with the Home Ministry and the police.

Some officers have argued that the police force is being singled out. Indeed, it is being singled out unlike immigration, customs etc. But that is because the complaints against the police constitute the largest chunk of complaints received by the Enforcement Agencies Integrity Commission (EAIC). The notion of equality does not prevent reasonable “legislative classification”. The rule that “like must be treated alike” permits those dissimilarly situated to be treated differently.

However, issues of unconstitutionality may be raised e.g. (if the law has no provision for appeal against a disciplinary decision)

Issue 3: The authority dismissing or reducing a member of the police force in rank cannot be subordinate to that which, at the time of dismissal or reduction, has the power to appoint: Article 135(1):³

Exception 1: The subordinate dismissing or reducing authority may do so if the relevant Commission had delegated its power to it.⁴

In the case of the police, the relevant constitutional questions will be:

(i) Is the ICPC subordinate to or equal in rank to the Police Force Commission? (ii) Will the Police Force Commission delegate its disciplinary powers to the ICPC?

Exception 2: Art 140(1) excludes Art 135(1). The Police Force Commission (PFC) has the power of appointment, confirmation, emplacement, promotion, transfer and discipline. However, *Parliament may by law confer disciplinary power on some other authority (like the ICPC). With that, the PFC will be excluded: Art 140(1).*

Exception 3: Clause (5A) of Article 144 also permits Federal law to provide for the exercise by any officer or Board the powers of a Commission.

Articles 140(1) and 144(5A) presumably exclude the Art 135(1) rule that the authority dismissing or reducing a public servant cannot be subordinate to the authority which, at the time of dismissal or reduction, has the power to appoint.

The contentious issue is whether Art. 140(1) must be read in the light of and subject to Art. 135(1) which seeks to ensure that the dismissing authority is not inferior in rank to the appointing authority? Must the ICPC be equivalent in rank to the PFC?

³ Surinder Singh Kanda v Govt of Malaya [1962] MLJ 169 PC; Rokiah Mhd Noor v Menteri Perdagangan [2018] 3 AMR 653 FC

⁴ This is also provided for in Art 144(6).

One view is that in creating this “authority”, Parliament is NOT bound by any provision of Part X because Art 140(1)’s proviso is explicit that “*no provision of such law (creating a new authority) shall be invalid on the ground of inconsistency with any provision of this Part*”.

Most respectfully it is submitted that:

- The Constitution must be read as whole and harmoniously.
- Article 140(1) could not have intended to exclude all the other provisions of Part X (Articles 132-148, and especially Art 135(1) and 135(2)). All that Article 140(1) does is to permit the creation and legalisation of another disciplinary authority besides the PFC.
- However, this new authority is not exempt from Article 135(1) [on the rank of the dismissing authority]. Members of the ICPC must not be inferior in rank to the appointing authority *unless the PFC delegates its powers to the ICPC*. Given the very senior membership of the PFC under Art 140(3) – the Minister, IGP, KSU, a member of PSC appointed by the YDPA, and 2-6 members appointed by the YDPA – there is no doubt that the ICPC will fall foul of Art 135(1) *unless the PFC delegates its powers to the ICPC*. The present Bill will not be sufficient to get the ICPC going unless the ICPC is clothed with delegated power by the PFC.
- Article 135(2) on the right to a hearing will continue to apply to the PFC despite the provision of 140(1).

Issue 4: Article 135(2) - No public servant shall be dismissed or reduced in rank without a reasonable opportunity of being heard.⁵

Article 135(2) awards the right of hearing to only two categories of officers – those facing dismissal or reduction. Disciplinary actions other than dismissal or reduction in rank (like warning, fine, medical retirement) are not protected by Art 135(2).

However, court cases have emphasised that despite the silence of Art 135(2), such persons will be protected by principles of natural justice which are part of common law. Common law is part of our law under Art 160(2). In addition, such persons are also protected by Article 5 and 8’s guarantee of due process and equality.⁶

It is recommended that in the light of developments in administrative law, the new Bill should go beyond Art 135(1) and explicitly grant the right of hearing to all police personnel facing disciplinary proceedings, subject however, to the constitutional exceptions in Art 135(2).

There are five constitutional exceptions which exclude the requirement of a hearing:

- Where a criminal charge has been proved⁷
- Where it is not reasonably practicable

⁵ Mahan Singh v Government [1978] 2 MLJ 133

⁶ Tan Tek Seng v Suruhanjaya Perkhidmatan Awam [1996] 2 AMR 1617

⁷ Zainal Hashim v Govt [1979] 2 MLJ 276

- On the ground of security
- Where the police officer to be disciplined is under detention, supervision, banishment etc.
- Where the service was terminated in the public interest.

CONTENTIOUS PROVISIONS OF THE BILL

Issue 5: Can the same authority investigate as well as adjudicate?

- It will be a serious breach of the “rule against bias” in natural justice if the same person or persons double up as investigators as well as judges.
- However, there is no breach of natural justice if the authority has separate units or departments and their jobs are separated – one doing the investigation and another doing the adjudication including the imposition of punishments.
- In criminal law there is a clear distinction between the investigators and the adjudicators. But in the civil law of disciplinary proceedings, the practice is that the same authority (but not the same persons) handles the various aspects of disciplinary proceedings. Thus, university discipline under Act 30 is handled in toto by the university though those who investigate and frame charges do not, and cannot, sit on the Disciplinary Board. In income tax proceedings under the Income Tax Act, issues of parliamentary privilege under Article 63, and judicial proceedings under Article 125, the same agency or institution accuses, investigates, serves notice and then adjudicates. As long as the ICPC personnel who investigate do not sit on the Disciplinary Board, there is no breach of natural justice.
- The tenability of this argument rests on the distinction between disciplinary (civil) and criminal proceedings. The IPCMC/ICPC powers of investigation must, therefore, assiduously refrain from leaning on the Criminal Procedure Code (CPC) powers of criminal investigation. The Bill must be vetted to ensure that the civil nature of the investigation and proceedings is preserved.
- Under s. 27 (4) any person who has been served a notice and who fails to comply commits an offence punishable with RM10,000 fine or jail up to two years or both. These are criminal powers. The Commission should not have criminal powers. The IPCMC/ICPC Act must clarify that the Commission can file a report with the police or relevant agency.

Issue 6 - Punishments: Section 34 on Punishments is vague, indefinite and therefore illegal. It is not stated what the quantum of the fine, forfeiture of emoluments, or reduction of salary may be. For what period may emoluments be deferred?

Issue 7 – Variation of Punishments: Section 37(1)(b) on Decision of the Minor Misconduct Disciplinary Appeal Board allows the Board to vary the punishment to a lesser one. But the Board cannot enhance! Why should this be so?

Issue 8 – Review: Section 37(2) is improper and unnecessary. “Review” is for the courts, not for a body that has already made a determination!

Issue 9 - Yang di Pertuan Agong’s (PM’s) arbitrary power to dismiss a Commissioner under s. 7(4): This is out of sync with modern trends in constitutional and administrative law. The power to dismiss must be qualified by the procedural safeguards of giving reasons and allowing an opportunity for rebuttal.

Issue 10: Procedural safeguards of natural justice for the accused must be explicitly mentioned in the Act. The new Act must take note of Art 135(2) plus judicial decisions on due process.

Issue 11 – No Appeals?: Appeals exist for minor misconducts : ss. 35-37. What about for major infractions? Is there any provision for appeal against the decision of the Disciplinary Board under s 31 (3)?

Issue 12 - Officers: We should include legal academicians: S 16(3).

Issue 13 - Complaints Committee’s power to recommend rejection of a complaint under s. 25(e)(iii) is very improper. Existence of alternative remedies should never be a ground for exclusion of a remedy.

Issue 14 – Some have raised the issue that the complaints committee which classifies complaints is not headed by a Commissioner but by “officers of the Commission”: s. 23. It is submitted that this is justifiable to avoid the allegation of bias on the part of the Commissioners and to avoid disqualification of the Commissioners from adjudicating on the basis of the nemo iudex in causa sua rule

Issue 15 - The proposal that IPCMC/ICPC Commissioners should have senior police ranks is unnecessary as this Commission is meant to be a reformatory, and investigative body and involved in discipline, not criminal prosecution (which criminal prosecution must go before courts subject to the CPC and the Evidence Act). Of course, the Commission should have the power, along with disciplinary punishments, to recommend to the relevant authorities that criminal prosecution be commenced. That will not amount to double jeopardy under Art 7(2).

Minor Errors and Omissions

The Preamble, section 3 and the Statement of Objects and Reasons have not changed the name of the Bill.

Conclusion

At the Institutional Reform Committee meeting last year, the members were told that by officers of the EAIC, that their recommendation to the police to prosecute were often not

heeded. For this reason, an independent Commission, not dominated by the police, is needed. The present Bill provides a workable blueprint.

There are no perfect laws. Let us have an imperfect one even if it does not emulate the various models available: Police (Dzaidin) Commission Model (2005); the MACC (2009) model; the UK; Hong Kong; or Australian models.

Submitted by: Shad Saleem Faruqi (Prof Emeritus Datuk Dr)
University of Malaya
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