



*Constitutionality of
the “Independent
Police Complaints
of Misconduct
Commission Bill
2019” (IPCCMC
Bill)*

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Relevant Constitutional Provisions

Police Force Commission

140. (1) there shall be a police Force Commission whose jurisdiction shall extend to all persons who are members of the police force and which, subject to the provisions of any existing law, shall be responsible for the appointment, confirmation, emplacement on the permanent or pensionable establishment, promotion, transfer and exercise of **disciplinary control** over members of the police force:

Provided that parliament may by law provide for the exercise of such disciplinary control over all or any of the members of the police force in such manner and by such authority as may be provided in that law, and in that event, if the authority is other than the **Commission**, the disciplinary control exercisable by such authority shall not be exercised by the Commission; **and no provision of such law shall be invalid on the ground of inconsistency with any provision of this part.**

Relevant Constitutional Provisions

(2) **Federal law may provide for the exercise of other functions by the police Force Commission.**

(3) the police Force Commission shall consist of the following members, that is to say:

- (a) the Minister for the time being charged with responsibility for the police, who shall be Chairman;
- (b) the officer of police in general command of the police force;
- (c) the person performing the duties of the office of Secretary General to the Ministry under the Minister for the time being charged with responsibility for the police;
- (d) a member of the public Services Commission appointed by the Yang di-Pertuan Agong;
- (e) not less than two nor more than six other members, appointed by the Yang di-Pertuan Agong.

Police Service Commission in the Constitutional Commission Report 1957

*Note that the Constitutional Commission
used “Police Service Commission”, not
“Police Force Commission”*

Constitutional Commission Report

113. We further recommend that police and internal security, extradition and fugitive offenders, aliens, and immigration should be federal subjects, but that appointments in the police should be matters for the Police Service Commission in accordance with recommendations which we shall make in Chapter VIII”

158. With regard to the Police Service Commission, we recommend that the Chairman of the Commission should be the Commissioner of Police. The Police Force is a disciplinary service and it is imperative in the interests of the State that its high standards of conduct should be maintained. To ensure this, it is necessary that the Commissioner should have ample powers to regulate and review the behaviour and efficiency of all members of the Force. We think that all powers vested in the Commissioner of Police under existing law should continue to be vested in him and that all powers now vested in the High Commissioner or the Secretary of State should be vested in the Commission. Otherwise **the duties and responsibilities of this Commission should be similar to those of the Public Services Commission and should apply to all members of the Police Force.**

History

- In consequence to the Constitutional Commission Report, the draft of the Federal Constitution, which was prepared by the Commission, the provision on the Police Force Commission was entrenched in the Federal Constitution (currently under Article 140)
- Looking at the historical document, there was NO intention of the Constitutional Commission to give the power to regulate “disciplinary control” to other authority than the Police Force Commission.

This phrase (“We think that all powers vested in the Commissioner of Police under existing law should continue to be vested in him and that all powers now vested in the High Commissioner or the Secretary of State should be vested in the Commission”) seem to indicate that matters concerning the police, including disciplinary control, should be left with the Force

- However, an amendment was made to Article 140(1) in 1976 by inserting a proviso as quoted above.

Current authorities concerning Police Misconduct

1. Police Force Commission (Suruhanjaya Pasukan Polis)

Tatatertib di bawah Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 dan Pindaan (2002).

Tindakan Penamatan Perkhidmatan di bawah Peraturan-Peraturan Pegawai Awam (Pelantikan, Kenaikan Pangkat dan Penamatan Perkhidmatan) 2005.

Tindakan Surcaj di bawah Akta Acara Kewangan 1957.

2. Malaysian Anti-Corruption Commission

3. Enforcement Agency Integrity Commission /

Suruhanjaya Integriti Agensi Penguatkuasaan

4. Jabatan Integriti Pasukan Polis

5. Public Complaint Bureau – or may be the newly announced by the Government, i.e. “Ombudsman”

Issues

Issues

140(1)

Provided that parliament may by law provide for the exercise of such **disciplinary control** over all or any of the members of the police force in such manner and by such authority as may be provided in that law, and in that event, if the authority is other than the **Commission**, the disciplinary control exercisable by such authority shall not be exercised by the Commission; **and no provision of such law shall be invalid on the ground of inconsistency with any provision of this part.**

ISSUES:

- Does Parliament has the power to legislate a law creating an authority to exercise the power in relation to “disciplinary control”?
- Meaning of “disciplinary control”. Does it include punishment – which may include “dismissal” or “demotion – reduction in rank”?
- In exercising powers in relation to “disciplinary control” does the IPCMC’s power include criminal investigation power that may allow the use of special powers – special investigation powers - under the Criminal Procedure Code?
- Does the officers under investigation given certain rights? What are the rights of the officer under disciplinary proceeding guaranteed by the Bill? Does rule of natural justice is applicable?

*Does Parliament
has the power to
legislate a law
creating an
authority to
exercise the
power in relation
to “disciplinary
control”*

- The main reference to justify the legislation of the IPCMC Bill is the **Proviso to Article 140(1) of the Federal Constitution.**
- The answer to this question is **YES**. The Parliament has the power to legislate a law, creating an authority “...**for the exercise of such disciplinary control**”
- **BUT** the Parliament has **NO** power to legislate a law granting other powers than “disciplinary control” to the authority created by such law (in this case, the IPCMC is the authority) i.e. the proposed IPCMC shall have **NO** authority on other matters than “disciplinary control”
- Historically speaking, Clause (1): proviso inserted by Act A354, paragraph 32(a), in force from 27-08-1976
- I found no reason was stated in the Parliament Hansard on the intention to the inclusion of such proviso. Therefore, there is no indication on the purpose of the provision.

*Does
“Disciplinary
Control” include
power to dismiss
or
demote/reduce
in rank?*

- The generality of the word “disciplinary control” does **NOT** include power to dismiss because the IPCMC does not have the power to appoint. **Section 29 of the 11th Schedule** to the Federal Constitution states that:

“**Power to appoint includes power to dismiss**— where a written law confers upon any person or authority a power to make appointments to any office or place, the power shall, unless the contrary intention appears, be construed as including a power to dismiss or suspend any person appointed and to appoint another person temporarily in the place of any person so suspended or in place of any sick or absent holder of such office or place: provided that where the power of such person or authority to make such appointment is only exercisable upon the recommendation or subject to the approval or consent of some other person or authority, such power of dismissal shall, unless the contrary intention appears, only be exercisable upon the recommendation or subject to the approval or consent of such other person or authority.

- **THEREFORE** - It is recommended that the IPCMC is to be given the power to conduct disciplinary inquiry but not the power to dismiss or demote/reduce in rank of police officer

- It is recommended that the IPCMC is to have an “oversight function”
- Alternatively, although the IPCMC may have the power to conduct disciplinary investigation, the IPCMC shall NOT be given the power to dismiss or demote/reduce in rank a police officer who is found to have committed misconduct. The power to dismiss and power to demote/reduce in rank shall be retained and be carried with care by the Police Force Commission (**this power must not be delegated**). If there **were** Police Force Commission Act, the power is possibly be made clear in the Act.

In carrying out power to investigate disciplinary misconduct can the IPCMC Task Force be allowed to use “special powers” under CPC?

- Does “disciplinary control” include the power to conduct criminal investigation against police officer.
- Section 29(3) of the IPCMC states that:

For the purpose of investigating any incident under section 47 (proposed amendment 51), the members of a Task Force shall have all the powers of investigation as contained in the Criminal Procedure Code [Act 593] and such powers shall be in addition to the powers provided for under this Act and not in derogation thereof.

Note: Although this power concerns serious cases, that are causing grievous hurt or death in custody, the Commission or the task force should not be given the special investigation power under the CPC because they are not conducting a criminal action, but disciplinary action.

- It is recommended that the power to investigate by the IPCMC should NOT include the special powers under the CPC which are used in criminal investigation

This recommendation is made upon the following reasons

Selamat bin Rasumin lwn. Tan Sri Dato' Dri Khalid bin Abu Bakar, Lembaga Tatatertib Polis Diraja Malaysia Bukit Aman dan Kerajaan Malaysia
(Permohonan Semakan Kehakiman No. 25-203-07/2015)

This recommendation is made upon the following reasons:

1. Having reference to the decision of the High Court in the case of **Selamat bin Rasumin v. Tan Sri Khalid Dato' Khalid bin Abu Bakar & Ors.** Pada Perenggan 26

...memandangkan rakaman percakapan Pemohon diambil "unlawfully" kerana Pegawai Siasatan Tatatertib telah menggunakan 'special powers' yang hanya diberikan kepada Pegawai Penyiasat dalam kes jenayah di bawah Kanun Prosedur Jenayah, maka rakaman percakapan Pemohon di bawah seksyen 112 Kanun Prosedur Jenayah adalah 'inadmissible in evidence' kerana tidak ada kuasa untuk menggunakan Chapter XIII bagi kes tatatertib

This judgement was upheld in the Court of Appeal on 5th July 2018 and the Federal Court on 17 April 2019

- Can IPCM Bill provides express provision to allow the IPCMC Task force to use 'special powers' under CPC ?

The High Court in *Selamat bin Rasumin* made it clear that the CPC was meant to provide procedure for criminal investigation only.

At Para 21 & 22 the decision,

....persoalan yang perlu diputuskan terlebih dahulu adalah samada Pegawai Siasatan bagi kes tatatertib boleh menggunakan kuasa di bawah Bab 13 (XIII) Kanun Prosedur Jenayah yang diberikan oleh undang-undang kepada Pegawai Penyiasat kes jenayah yang menjalankan siasatan jenayah.

'Pre-amble' Kanun Prosedur Jenayah (Akta 593) menyatakan bahawa "Suatu Akta berkenaan Prosedur Jenayah".

The learned High Court Judge also referred to the following:

1. Mallal's Criminal Procedure Edisi ke-6 Malayan Law Journal pada muka surat 1869 (Perenggan 4364) dan
2. Keputusan Mahkamah Agung (FMS) dalam kes *Fong Sai Mun, Thong Pow. Chow Pool, Loke Wai v. PP* [1931] 1 LNS 10

Based on the above decision, it is recommended that the IPCM CANNOT justify express adoption/application of special powers under the CPC in the conduct disciplinary investigation by the IPCMC

This recommendation is made upon the following reasons

2. The word “discipline” does NOT mean or does NOT include the word “crime”. The word “crime” is NO where found under Article 140, nor in its proviso.

3. In addition, the Proviso to Article 140 does not mention the phrase “criminal investigation”. The phrase “criminal investigation” appears in Item 3 of the 9th Schedule to the Federal Constitution. If “criminal investigation” was meant to be included within the meaning of the phrase “disciplinary control” under Article 140 of the Federal Constitution, it should have been explicitly addressed thereto.

*Does officers under
IPCMC investigation
guaranteed of
fundamental rights*

***“...and no provision of
such law shall be
invalid on the ground
of inconsistency with
any provision of this
part.*”**

RULE OF NATURAL JUSTICE

- Parliament has a wide power under this provision. The Parliament can make law which is inconsistent with the provisions of Part X of the Federal Constitution.
- Part X is the Part concerning “Public Services”
- This Part X also has provisions providing for “Restriction on Dismissal and Reduction in Rank” under Article 135.
- Although the Proviso to Article 140 (1) allows the Act of Parliament legislated in pursuance to the proviso, which states that **“...and no provision of such law shall be invalid on the ground of inconsistency with any provision of this part”**, the officer under investigation must be given their rights – the law must not contravene the rule of Natural justice.

Rule of Natural Justice

Ong Ah Chuan v PP [1981] 1 MLJ 64

This is an appeal case from Singapore in Privy Council: The issue was on the constitutionality validity of section 15 of the Misuse of Drugs Act that creates a rebuttable presumption that upon the proving of possession of more than a certain amount of controlled drugs by a person, he is presumed to have had such drugs in his possession for the purpose of trafficking under the Act and is punishable as such (The presumption was held by the Privy Council to be not inconsistent with the Constitution)

Lord Diplock:

- “In any constitution based on the Westminster model any reference made to law, **especially in the context of guarantees of fundamental liberties, must refer to a system of law which incorporates the fundamental rules of natural justice**”
- i.e. law which does not flout the rules of natural justice.

Rule of Natural Justice

Che Ani bin Itam v Public Prosecutor [1984] 1 MLJ 113 (FC))

Raja Azlan Shah LP:

“It is now firmly established that ‘law’ in the context of such constitutional provisions as arts. 5, 8 and 13 of the Federal Constitution refers to a system of law which incorporates these **fundamental rules of natural justice** that had formed part and parcel of the Common Law of England that was in the operation at the commencement of the Constitution”

Rule of Natural Justice

- In conclusion on discussion of rule of natural justice, the IPCMC Bill MUST respect the rule of natural justice.
- It follows therefore, the Bill must include the rights of the officers under investigation for the purpose of “disciplinary control”.
- Therefore, it is recommended that the IPCMC Bill be attached with “the Police Bill of Rights”
- It is also recommended that the IPCM explicitly provide for such rights in this IPCMC Bill

Functions and Powers of IPCMC

Functions of Commission

Section 4 of IPCMC Bill

Section 4 of IPCMC Bill states the following functions of IPCMC

- (a) to promote integrity within the police force;
- (b) to protect the interest of the public by dealing with misconduct of any member of the police force;
- (c) to formulate and put in place mechanisms for the detection, investigation and prevention of misconduct of any member of the police force;
- (d) to advise the Government and make recommendations on appropriate measures to be taken in the promotion of integrity within the police force; and
- (e) to exercise disciplinary control over all members of the police force in such manner as may be provided in this Act or any written law

Functions of Commission

Section 4 of the Bill

- What is allowed by the Constitution is an Act “to provide for the exercise of such disciplinary control”
- However, the quoted phrase is neither defined in the Federal Constitution, nor found in this IPCMC Bill.
- THUS, in consequence, section 4 of the IPCMC Bill can be interpreted widely and may be without control due to the generality of the functions of the Commission as stated therein
- Functions of the Commission under Section 4 IPCMC Bill may be unconstitutional as include subject matter which on the express provisions which may not form part of “disciplinary control”.
- Therefore, it is recommended that the phrase “disciplinary control” MUST be defined, either by way of constitutional amendment or be included in the IPCMC Bill. Without definition, it may be interpreted widely and such wide interpretation may result in abuse of powers and this is AGAINST the Rule of Law.

Powers of IPCMC

Section 5

Section 5 Powers of Commission

(1) The Commission shall have the power and may do all things necessary for, or in connection with, **or incidental to**, the performance of its functions under this Act.

(2) Without prejudice to the generality of subsection (1), the Commission may—

- (a) **advise the Government on the enhancement of the well-being and welfare of members of the police force;**
- (b) assist the Government in formulating legislation **or recommend administrative measures** to the Government or the police force, to promote integrity and abolish misconduct;
- (c) **provide for the auditing and monitoring of particular aspects of the facilities, logistics, operations and standard operating procedure, of the police;**
- (d) **visit any place and premises such as police stations, police quarters, lock-ups and detention centres and to make any necessary recommendations;**
- (e) study and verify any infringement of the standards operating procedure of the police and make any necessary recommendations;
- (f) receive and assess any complaint of misconduct from any person against any member of the police force and investigate the complaint; and
- (g) collect and process any information and evidence relating to any investigation under this Act and take such lawful measures and do such lawful acts as may be necessary relating to it.

Issues on Powers of the Commission

- The phrase “ or incidental to” is too wide and may encroach/include into matters beyond “disciplinary control”
- In my opinion, the following powers may be beyond the meaning of “disciplinary control” and therefore **may encroach into the power of the Police Force Commission**
 - (b) assist the Government in formulating legislation **or recommend administrative measures** to the Government or the police force, to promote integrity and abolish misconduct; (except abolish misconduct) Even so, this phrase is not clear as to its meaning.
 - (c) **provide for the auditing and monitoring of particular aspects of the facilities, logistics, operations and standard operating procedure, of the police;**
 - (d) **visit any place and premises such as police stations, police quarters, lock-ups and detention centres and to make any necessary recommendations;**

- The most important observation is that the IPCMC may encroach into the Police Force Commission.

Definition of Misconduct under Section 22

22. (1) The Commission may receive or **deal** with complaints against any member of the police force referred to it, on the following misconduct:

“.....(f) the commission of any criminal offence by a member of the police force”.

This provision may justify the conduct of criminal investigation by the IPCMC. However, as reasons mentioned earlier, it is unconstitutional for the IPCMC to conduct criminal investigation as “disciplinary control” should not include criminal investigation.

In the same vein, Section 25 of IPCMC Bill states:

“Classification of complaints

The classification of complaints shall be as follows:

(a) where the complaint involves any offence under Part IV of the Malaysian Anti-Corruption Act 2009 [Act 694], the complaint shall be referred to the Malaysian Anti-Corruption Commission;

(b) where the complaint involves any criminal offence under any other written law, the complaint shall be referred to the relevant authority;

(c) where the complaint involves any misconduct mentioned in section 22, the complaint shall be referred to any officer of the Commission for investigation; and

- This provision does not exclude/deny the power of the IPCMC to conduct investigation. It should be included in the paragraphs to clearly state who shall conduct the “criminal investigation”

*Amendment to
Federal Article
140(6)
Constitution
necessary?*

- Question to raise at this point is whether will it be necessary to exclude “disciplinary control” from the provisions in Article 140(6)(a).
- This question arises due to concern on the constitutionality of matters relating to “disciplinary control” if made by the Police Force Commission.

Recommendation and Conclusion

- The IPCMC powers and functions of the IPCMC should be restrictive to “disciplinary control”. It is recommended that the phrase “disciplinary control” is defined in order to give to the phrase a clear cut or an express provision in the IPCMC. This is particularly important to respect the fundamental rights of all officers under investigation and to avoid abuse of powers
- It is recommended that Police Bill of Rights be attached to the IPCMC as a form of safeguarding the fundamental rights of the police, that is to be presumed innocent until proven otherwise.
- It is recommended that the IPCMC Bill to include penal provision on complainants whose complaint found to be frivolous, vexatious or made in mala fide (see Section 25(d)(i) IPCMC Bill which states the complaint is frivolous, vexatious or not made in good faith. This is to protect the fundamental rights of the police, to be respected of their dignity and at the same time to ensure that the complaints made are truthful.

- The IPCMC shall be responsible to conduct investigation on “misconduct” which are within the meaning of the phrase “disciplinary control”
- This IPCMC must not be seen as “confrontational” to police force and therefore the rights of the police are clearly spelt out in the Bill.
- While the “disciplinary control” authority is under IPCMC, the all other authorities on matters concerning the police force are all within the purview of the powers and functions of the Police Force Commission as found under Article 140(1). Therefore, the IPCMC must not be seen as “competing” with the powers and functions of the Police Force Commission.

- Therefore it is recommended that, apart from IPCMC Bill, there shall also be a Bill introduced in pursuant to Article 140(2) of the Federal Constitution. Article 140(2) states that
“Federal law may provide for the exercise of other functions by the Police Force Commission”
- It is submitted that concurrent legislation of the Act will avoid overlapping on the scope of powers and functions of both Commissions (Police Force Commission and IPCMC)