



Lim Chee Wee

First step of many to repair the judiciary

Q: What is your opinion of this bill? *

A: It's a step in the right direction, but there should have been a consultation process in coming up with the bill.

There is also the issue of the missing Judges' Code of Ethics 2008, which we have yet to see. There are several short-comings with the bill. The first is that there is no procedure for lodging a complaint against a judge.

There is also insufficient provision the actual judges' ethics committee's investigative and adjudicative process.

And in terms of accountability, there should be a requirement for the publication of an annual report with the number of complaints lodged, how many are disposed of and action taken

on a no-name basis.

If one were to compare this with other jurisdictions in terms of international best-practices, for example, the United States, Britain, Australia and Canada, these are the basics that they have in their judicial conduct process.

And I think Britain has taken it one step further where they have a Judicial Appointments and Conduct Ombudsman, which actually looks at the Official of Judicial Complaints process and ensures that the Office of Judicial Complaints itself is performing.

So, in Britain, you have an investigative body and an oversight body as well.

Q: If all the shortcomings were addressed, would this be a comprehensive bill?

A: If it's addressed in the bill and the code, yes.

Our present code is rather bare. It only provides for 10 different prohibitions.

These prohibitions are based on the six Bangalore Principles on Judicial Conduct – judicial independence, impartiality, integrity, propriety and appearance of propriety, equality in treatment to all, competence and diligence.

While the judges' can of ethics 1994 (amended 2000), attempts to address these six principles, I think it can be fleshed out.

We don't have to re-invent the wheel, we can just look at the other jurisdictions.

There are two issues in Malaysia that we ought to address: First, whether judges who retire ought to be allowed to appear as advocates in the courts; and second, how do we prevent the "Lingam-gate" situation from happening again.

The judges' code of ethics is just one dimension. But I think the public is still wondering what has happened to the criminal investigation, and the royal commission's findings and recommendations.

Q: This committee just investigates; it doesn't take any action. Is this a problem?

A: Yes. Unlike other jurisdictions, there is no disciplinary sanction.

In Malaysia, under Article 125 of the Federal Constitution, the only sanction that's provided for against a misbehaving judge is removal.

But in England, you can actually have guidance, formal warning, reprimand, and removal.

For example, in 2007, an English High Court judge, Sir Peter Smith, was reprimanded for refusing to recuse himself from a case involving a law firm, against which he had shown undoubted animosity, because he was actually in negotiations with the firm to go and work with that firm.

And when the negotiations broke down, he was very bitter about it.

So, there was a clear bias there on the part of the High Court judge, but he refused to recuse himself, and the then Lord Justice reprimanded him.

Judicial misconduct occurs all over the world. Recently in the United States, a Federal Court judge, Samuel Kent, was removed for repeated sexual molestation of two female court employees.

But the difference between what goes on in Britain and the US and what goes on in Malaysia, is that in those countries, you get to know about what happens; you get to know that misbehaving judges are punished.

In Malaysia, too much about misbehaving judges is done by way of one-to-one complaints by the Bar to senior judges.

Q: The inquiry is held in camera (confidentially, not open to the public). So, if someone is found to have committed a misconduct, should that finding be made known?

A: Yes.

In other jurisdictions, they disclose the number of complaints received, and what happens to them; whether the complaints are upheld or dismissed.

In England, there's an ombudsman who will act on the complaints about the complaints process itself.

Let's draw the distinction between complaints about the decision and complaints about conduct.

Complaints about a decision go on appeal (in the courts), and complaints about the conduct of a judge goes to this forum (the committee) to be addressed.



Another problem about the bill is Clause 9, which states that the inquiry refers only to any breach of provisions in the code of ethics.

This bill should provide for complaints of any kind – whether it's a breach of the ethics code or otherwise.

Q: If this bill is passed, if there's an inquiry and a person is found guilty, what happens next? The law only provides for a tribunal in a case that warrants removal of the judge.

A: That then begs the question: What are the disciplinary sanctions short of removal? The bill doesn't specify it. It may be addressed in the code of ethics, but it should be specified in the bill itself.

Q: How effective is this committee actually going to be?

A: Like everything else in Malaysia, it all depends on the individuals: Whether they're going to be vigilant, whether they're prepared to be transparent, and demonstrate public accountability.

The present structure of the judges' ethics committee is insufficient, so far as public accountability is concerned.

For one thing, there's no provision for an annual report; secondly, all proceedings are in camera.

In other jurisdictions, certain proceedings can be conducted in public, where the public interest element in the complaint is such that the public interest would over-ride the confidentiality of the public office holder.

Q: They would only investigate within the scope of what is a breach of the code of ethics?

A: Yes.

England has provisions for conduct after retirement. So, even if you're a retired judge, there might be a possibility for proceedings there (in the committee).

Q: The decision of the committee is final and conclusive. It can't be challenged, appealed, reviewed, nullified or questioned in any other court. Is that good or bad?

A: As far as I am aware, I don't see this in any other jurisdiction.

But I can see the rationale for it; otherwise, what might happen is that the decision of this committee would be unnecessarily be challenged in the High Court, Court of Appeal or Federal Court.

That's why a review body should be built into this bill, and it should have an external membership. The composition should be of people who have never been a judge.

This would kill off the perception that judges are looking after themselves.

Alternatively, there should be an ombudsman, to look at whether or not the process of complaints was conducted appropriately.



Lim Chee Wee now Bar President

Q: If the committee is run primarily by members of the judiciary, what needs to be done so that it won't be seen as just "brothers looking after brothers"?

A: There are two dimensions to that. The present Chief Justice appears to be working hard to improve the efficiency of the judiciary. The disposal rate of cases has increased.

But there are still some black-sheep in the judiciary, and these are the ones that have to be weeded out.

First, we need to see stronger public action by the judiciary, in terms of what it is doing to weed out the black sheep.

Second, there has to be an oversight dimension to it, by way of external members or an ombudsman.

At the end of the day, it's the individuals. If you appoint the right judge, who's intelligent, honest, has integrity, the right temperament and knows how to behave then we wouldn't be where we are today.

Q: If this bill is passed in this session and a committee is set up, do we have enough people in the judiciary to restore confidence in it?

A: I think there are. The majority of our judges are honest and competent. But there are a few black sheep that tarnish the image of the judiciary. The Chief Justice should take stronger action against the black sheep.

Q: The procedure for the inquiry is not on paper. What needs to be included?

A: Initiation of the complaint, withdrawal of the complaint; and there needs to be a threshold that has to be satisfied.

For instance, when you look at a complaint and there are insufficient particulars, should you write to the complainant? Or, do you need corroborative evidence from the complainant?

Once the threshold is satisfied, what happens next? It says here it is not a trial, but it is an inquiry on any breach of the provisions of the code of ethics. It doesn't provide for the complainant to be able to testify, with or without other witnesses.

Q: In England, there is a nominated judge, who assists the Lord Chief Justice in determining whether or not to charge.

A: This is to determine whether or not there are merits to the complaint. The nominated judge filters vexatious, unmeritorious complaints.

Once that threshold is satisfied, it goes to an investigating judge, and then after that a review body, comprising two judges and two lay persons. So, in England, it's a three - step process.

Q: Wouldn't this take up a lot of the judges' time?

A: The public deserves, and expects higher standards from our judges.

If you hold judicial office, your standard of behaviour, both on the bench and off the bench, has to be of the highest standards. The public expects that, because of the powers that are vested in your office. A judge determines the lives and fortunes of the people.

Q: We don't have a nominated judge system, and this bill doesn't tell us how the complaint gets to the CJ, and neither does it tell us how the CJ decides to charge. And, since we don't know if or when a complaint has gone up to the CJ, we don't know whether he's discarded any of the complaints.

A: We should have mechanisms for that. And that's why an annual report should be produced as well, on a no - name basis (the judge is not named).

These are things that are lacking in this bill, which should be in the bill. The code of ethics should prescribe the dos and don'ts of behaviour, but the bill should prescribe the process.

Q: These concerns have been voiced before, and yet this bill is going to second reading without any amendments being made to it. Why is this?

A: The government has to change its mindset on how bills are tabled in parliament.

The common statements we hear from ministers is: "Let's get this legislation through first, and then when we encounter bottlenecks or problems, we'll amend the law."

The mindset should be: "Let's go through a consultation process with all the stakeholders and get as perfect as possible a piece of legislations."

Pieces of legislation such as this should go through the entire consultation process of the Law Reform Committee

Q: Would it be more beneficial to society for the government to temporarily withdraw the bill? Or should it proceed with it?

A: If the government were to withdraw it, it should withdraw it to refer it to a consultative process.

Then, have it re-tabled for first reading in the budget session.

The Bar has looked at it and given its views, so, if the government is prepared to sit with the Bar, we are more than happy to assist them.

Q: Who was involved in the drafting of this bill?

A: Probably the Attorney - General's Chambers and the judiciary. We were not consulted.

Q: Do you think you have a right to be consulted?

A: Yes. This affects the administration of justice. The Bar has always given its views on any issue affecting the administration of justice. And I think the public deserves to be consulted.

Q: This bill as it stands, does it have bite?

A: It is two steps forward, when more could have been done. So, it does take us forward, slightly.

Q: How would we know that it's taking us forward slightly when we don't know what the complaint is, whether it's being investigated, whether there are any actions, and what the actions are? All we know is there's a panel that might or might not meet. Does this mean that this committee only exists on paper?

A: It would appear so. To me, the judiciary has set up a mechanism to look into all this but there is no accountability.

After this bill is passed, the committee can operate in the dark, under the radar.

Q: Under the current law, the Chief Justice decides whether a case should go before a tribunal. How does the CJ decide whether something is serious enough to warrant a removal?

A: The law doesn't say.

Q: As a lawyer, what would be your understanding of how bad it has to be for a judge to warrant removal?

A: To me, it would be corruption, fraud, judges making decisions influenced by politics or whatever else, sexual harassment, incompetence, slow disposal rate of cases.

The last two, incompetence and slow disposal of cases, depends on the extent of it.

But corruption, bribery, and decisions made as a result of influence, should be outright removable offences.

Q: Was the pre-1988 judiciary a mythical era that everyone remembers fondly, but actually wasn't that great?

A: Partly. If you recollect all the pre-1988 decisions, when it comes to administrative law and human rights law, it was very pro-government. But such was the depth of how low we've gone, that, even pre-1988 is considered a "golden era" for the judiciary!

But to be fair, senior Singapore lawyers have told me that they consider the pre-1988 judiciary to be superior to their judiciary. So, in some ways it's a golden era, and in other ways – when you look at the judgment of Eusoffe Abdool Cader, Tun Suffian Hashim – they were very pro-government.

Q: A decision doesn't have to be anti-government for it to be fair, does it?

A: No, of course not. The decisions they made were well- reasoned, and well-written.

And pro-government judges like Suffian, Eusoffe, and Raja Azlan (now Sultan Azlan Shah of Perak) were considered to be independent and very competent.

A lot of work has to be done to restore the confidence in the judiciary to the pre-1988 era. That work has to be done by all the judges and all the lawyers together.

Bringing order to the courts

THE Judges' Ethics Committee Bill will be among the most important bills to be debated in Parliament this session, because theoretically, it accords control on the discipline of judges.

This bill will enable a committee, which comprises senior sitting judges or retired judges, to investigate into any allegation of a judge breaching the provisions of the Judges' Code of Ethics.

It was tabled for the first reading on 15 Dec last year, but could not go any farther at that time because the new Judges' Code of Ethics had yet to be drafted. Because of this, the committee bill could not be debated, as the ethics code needed to be referred to and debated in tandem with it.

The New Sunday Times understand that the new ethics code is now ready, and is expected to accompany the committee bill when it is tabled for the second reading at parliament, sometime in the next two weeks.

THE BILL, AND THE BAR COUNCIL'S TAKE ON IT

In scrutinizing the bill, the Bar Council found issue with the method in which complaints are made.

The council found that the bill is silent on how complaints are to be lodged, stating only that referrals are made by the Chief Justice to the committee. This intimated that a complaint would have to be lodged with the Chief Justice himself, and this might prove to be "a psychological impediment in deterring an individual or entity from lodging a judicial complaint."

The Bar also had problems with the process of enquiry, the disciplinary proceedings against a judge found to be in breach of the code, and the time limit in which a complaint must be lodged from the time of the offence; all of which are not provided for in the bill.

In its internal working paper, the Bar Council also found problems with the fact that the Evidence Act 1950 would not apply to the proceedings of the committee.

"By the Rule of Law, the judges should not be above the law of evidence but subject to more stringent procedures in the enquiry."

The Bar offers in comparison the practices in Britain and the Australian state of New South Wales, which, among others, have separate bodies with separate functions to look into whether there is sufficient grounds for a complaint to be investigated; whether a case is substantiated or not and what actions should be taken; and whether there was a proper process of enquiry and whether the appropriate action was taken.

Current Judges' Code of Ethics

JUST as much as a judge applies the law and rules upon the common man, there are rules by which the judge himself has to live by.

The current Code of Ethics was drawn up in 1994 and amended in 2000, and is to be found in Clause 3(A) of Article 125 of the Federal Constitution.

The code applies to a judge of the High Court, Court of Appeal, and Federal Court, throughout his period of service, and the breach of any provision in this code may provide a ground for the removal of the judge from office.

On the day that a person is appointed a judge, he has to cease having any connection with the firm where he was practicing as a lawyer prior to his appointment.

To do this, he has to ensure that his name is removed from the firm's name, that it does not appear in the firm's letterhead, and that he does not have any dealings with the firm or any member of the firm.

Once a person becomes a judge, he would have to declare in writing all his assets, if asked to do so by the Chief Justice.

WHAT A JUDGE CAN'T DO

1. Put his private interests before his judicial duties.
2. Behave in a way that might bring his private interests into conflict with his judicial duties.
3. Behave in a manner that might cause a reasonable suspicion that he has allowed his private interests to come into conflict with his judicial duties, to the extent of impairing his usefulness as a judge.
4. Behave in a way that might cause a reasonable suspicion that he has used his judicial position for his personal advantage.
5. Conduct himself dishonestly or behave in a manner that would discredit the Judiciary or bring it into disrepute.
6. Be lacking in efficiency or industry.
7. Be late in disposing of cases, delivering decisions, and writing grounds of judgment, without reasonable explanation.
8. Refuse to obey a proper administrative order or refuse to comply with any statutory direction.
9. Be absent from his court during office hours without a reasonable excuse or prior permission from the Chief Justice, President of the Court of Appeal, or Chief Judge.
10. Be a member of any political party, or participate in any political activity.

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