

LETTER

LETTER | Judges' Ethics Committee instead of tribunal: A relook



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LETTER | The mandatory retirement age for the superior court judges in Malaysia is 66 years with a possible extension of six months as laid down in Article 125(1) of the Federal Constitution.

A judge may however resign from his office at any time by writing under his hand to the Yang di-Pertuan Agong.

Except as above, a superior court judge cannot be removed from office other than for the grounds stated in article 125(3), namely when he has violated any provision of the code of ethics prescribed under clause (3B) or on the ground of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office.

The representation for the removal of a judge will be relayed to the Agong by the prime minister or the chief justice after consulting the prime minister.

The above clause also prescribes the procedure, namely that the Agong shall refer a representation to a tribunal and may act on the recommendation of the tribunal.

The above procedure however does not apply to additional judges of the Federal Court appointed for such purposes or for such period of time pursuant to article 122(1A) and judicial commissioners appointed for limited durations pursuant to article 122AB.

The composition of the tribunal is specified in Article 125(4), namely that it shall consist of not less than five persons who hold or have held office as a judge of

the Federal Court, the Court of Appeal or a High Court, or if it appears to the Agong expedient to make such appointment, persons who hold or have held equivalent office in any other part of the Commonwealth.

However, where a judge has committed a breach of any provision of the code of ethics which breach in the opinion of the chief justice does not warrant the judge being referred to a tribunal, the chief justice may, pursuant to Article 125(3A), refer the judge to a body constituted under federal law to deal with such a breach.

Article 125(3B) additionally provides that the Agong, on the recommendation of the chief justice, the president of the Court of Appeal and the chief judge of the High Courts may, after consulting the prime minister, prescribe in writing a code of ethics which shall also include provisions on the procedure to be followed and sanctions which can be imposed other than the removal of a judge from office under Clause (3), in relation to a breach of any provision of the code of ethics.

Hence came the enactment of the Judges' Code of Ethics 2009, which every judge of the superior courts must observe as required by Article 125(3C).

The code basically entrenched the ethical standards of a judge in his personal and professional lives, and should a breach occur, the code prescribed the procedure to be followed and the sanctions that may be imposed other than removal from the office.

It is obvious from clause 125(3A) that not all breaches of the provisions of the code of ethics would attract the establishment of a tribunal but may, at the discretion of the chief justice, be referred to the body constituted under federal law to deal with such a breach.

The "body constituted under federal law" is the Judges' Ethics Committee, which is entrusted with the power to enforce the Judges' Code of Ethics through a mechanism provided in the Judges' Ethics Committee Act 2010.

Hence, in dealing with such a breach, instead of the Agong appointing a tribunal the power has now been delegated to the Judges' Ethics Committee

through the chief justice.

The committee may, after concluding that the breach has been committed, impose the appropriate sanctions as provided in the Judges' Code of Ethics, namely, the recording of an admonition to the judge or the suspension of the judge from his office for such a period not exceeding one year.

Naturally, the sanctions to be meted out against the accused judge has to be proportionate to the nature and gravity of the alleged breach of the code of ethics.

It is arguable that the "sanctions" in Article 125(3B) for breach of any provision of the code of ethics as well as the reference of the accused judge to the Judges' Ethics Committee to deal with the breach at the direction of the chief justice pursuant to Article 125(3A) is inconsistent with Article 125(3) which as noted earlier deal inter alia, with the removal of a judge from office "on the ground of any breach of any provision of the code of ethics" and also for the Agong to appoint a tribunal and to act on its recommendation in accordance with Article 125(4).

While not denying the power of the Parliament to make amendments to the constitution so long as the requirements of Article 159 are observed and hence, the inclusion of Article 125(3A), it is nevertheless questionable whether the delegation of power to appoint a tribunal by Agong to the Judges' Ethics Committee at the discretion of chief justice, would augur well with the basic structure doctrine.

Delivering the unanimous decision of a nine-member bench in *Alma Nudo Atenza v PP & Another Appeal* [2019], Richard Malanjum CJ (as he then was) stated: "And while the Federal Constitution does not specifically explicate the doctrine of basic structure, what the doctrine signifies is that a parliamentary enactment is open to scrutiny not only for clear-cut violation of the constitution but also for violation of the doctrines or principles that constitute the constitutional foundation. The role of the judiciary is intrinsic to this constitutional order. Whether an enacted law is constitutionally valid is always for the courts to adjudicate and not for Parliament to decide."

Hence, the delegation of power to the chief justice to refer any breach of the provision of the code of ethics to the committee is arguably an alteration of the basic structure of the constitution.

The amendment may also be construed as a relegation of Agong's power to appoint a tribunal and act upon its recommendation.

Indeed, pending any reference and report of the tribunal, Article 125(5) has conferred the power on Agong, on the recommendation of the prime minister and after consulting the chief justice, to suspend a judge from the exercise of his functions.

The suspension in the context of the above clause is to ensure that there is no obstruction or interference with the due process of the investigation.

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