

Executive Summary

Upgrading Democracy: 'Soft Laws' and The Ombudsman

Democracy is being tested and assaulted on all fronts today. Southeast Asian countries like Philippines, Cambodia and Vietnam are increasingly becoming authoritarian. In the west, right wing extremists are being elected into office. Case in point, Donald Trump who made banning Muslim tourists entry into the United States a key component of his election campaign is now President. Closer to home, the 1Malaysia Development Berhad scandalised our nation with its reported misappropriation of funds. Now more than ever, it is imperative democracy is protected in Malaysia. But how do we do this?

In his paper, **"Upgrading Democracy: 'Soft Laws' and the Ombudsman"**, Guernsey legislative counsel member and solicitor Roy Lee, makes an argument for the creation of the Office of the Ombudsman in order to protect democratic governance in Malaysia. Although soft law institutions like the Ombudsman have no power to make legally binding decisions, they are essential in ensuring that public officials remain accountable, transparent and fair in their actions and decisions.

Soft laws are an essential mechanism for maintaining democratic governance because they do not rely on litigation, the Courts or even a written Constitution. Their ultimate aim is to infuse democratic values into the day-to-day decision-making and actions of public officials. Soft laws fall under the following categories:

- **Soft laws that are applied before policies are made** - these can be in the form of regulatory impact assessments which may be required before legislation is enacted. The assessment would involve public consultations and the findings are made publicly available. Other examples, include a requirement for a statement to be made to Parliament when a bill is not compatible with an international convention or charter.
- **Soft laws that guide or restrain the actions of public officials** - this second category inform the norms of public official's behaviours through codes of practice. This typically applies in high-risk contexts where the potential for abuse is high, e.g., arrests, investigations, search and detentions by law enforcement officers.
- **Soft laws that apply after decision and actions are taken by public officials** - This category consists of processes by which the decisions and actions of public officials are investigated, reviewed and sometimes taken to task.

The Ombudsman is a soft law institution, in which an official is appointed to investigate complaints against public officials. In Malaysia, the office of the Ombudsman is represented by the the Biro Pengaduan Awam (Public Complaints Bureau, PCB). However author Roy Lee, points out that the PCB pales in comparison to the New Zealand Ombudsman in terms of scope of powers to investigate and address disputes between citizens and government. The office is also lacking in terms of independence and transparency, the differences highlighted as follows:

	New Zealand Ombudsman	Public Complaints Bureau (PCB)
Independence	<ul style="list-style-type: none"> The Ombudsman is appointed under the Ombudsmen Act 1975, confirmation requires the consent of every party in Parliament. The most senior ombudsman is an Officer of Parliament. He/she is independent of the civil service and the Executive. Instead, is accountable to Parliament. 	<ul style="list-style-type: none"> The PCB is a department under the Prime Minister's department and is staffed by civil servants. The PCB reports to the Permanent Committee on Public Complaints headed by the Chief Secretary to the Government, the permanent committee in turn reports to the Cabinet.
Transparency	<ul style="list-style-type: none"> The Ombudsman can make a public report to Parliament should a public official fail to act on his/her recommendations. This threat including the threat of media exposure is enough to make the public official fix his/her own error . The Ombudsman can also force the relevant Ministry or Agency to publish its own error. 	<ul style="list-style-type: none"> The PCB has no power to get public officials to answer to Parliament, nor can it make recommendations in Parliament The PCB can only invoke stronger sanctions through the Permanent Committee and Head of Civil Service
Scope of powers	<ul style="list-style-type: none"> The Ombudsman has the power to examine the legislation and policies made by the government. The Annual Report of the Ombudsman which includes a summary of key cases and their outcomes also sets an invaluable benchmark for future practice/decisions. The Ombudsman can also take action in situations where the action/decision is "unjust", "oppressive" or "improperly discriminatory". 	<ul style="list-style-type: none"> The PCB has no power to examine government policies and legislation. The PCB lists stories of complaints handled successfully. However, these standards of conduct for public officials cannot be applied to government practices and policies. "Unfair action" and "abuse of power" are two grounds of complaints, this is not as extensive as the New Zealand Ombudsman.

The PCB's fatal flaw is its lack of independence from the Executive, while the PCB may be able to investigate public officials it cannot practicably restrain the power of the Executive. Therefore, the PCB must be removed in order to make way for an Ombudsman that is genuinely independent of the executive, playing special attention to democratic governance benchmarks and international best practices.

Nevertheless, no one reform is the 'silver bullet' that will cure Malaysia's democratic governance deficit. Rather, a whole package of reforms is needed besides 'soft law' institutions such as the Ombudsman, the Malaysian Government must also enact reforms to Parliament as well as laws that restrict freedom of expression. It is important to enable a strong Parliament and free and independent media in order to maximise the effectiveness and value of the Ombudsman to democratic governance.



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