# Judiciary independence in australia and malaysia

Montesquieu puts forward the idea that there is no liberty, if the judiciary power is not separated from the legislative and the executive. He said if it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; the judge would then be the legislator. If it were joined with the executive, the judge would behave with violence and oppression1. The principle of separation of powers is the foundation for a democratic state based on the rule of law.

The judicial power dispenses justice in disputes between citizens and government and its agencies. Therefore, there is a need to vest this judicial power in a mechanism independent of the legislative and executive powers of the government with adequate guarantees to insulate it from political and other influence to secure its independence and impartiality. The presence of an independent judiciary in a democratic government distinguishes that system from a totalitarian one2. The current form of Westminster government that Australia and Malaysia has adopted keeps the parliament in line with the executive policy.

Therefore, the judiciary is seen to be vital in providing the checks and balances. Judicial independence is the very foundation of any worthwhile legal structure. A free society would only exist as long as it is governed by the rule of law, which binds the rulers with the ruled. An independent judiciary is generally an essential requirement for the proper functioning of free and democratic society. The issue of judicial independence involves three fundamental conditions. Security of tenure of the judicial office-bearer, financial security and institutional independence.

According to the doctrine of separation of powers, judicial independence is to be taken as a bulwark against the concentration of power in the hands of the Parliament or the bureaucracy. At the practical level, there is a considerable challenge in achieving appropriate degree of independence3. In common law countries, the tension between the executive and the judiciary is the result of the doctrine of separation of powers. Under that doctrine, the political system of a nation divides its governmental power between a legislature, an executive and a judiciary.

In theory, the doctrine formulate a system that avoids concentrating too much power in any one body of government – the three powers are separated from one another and none is supposed to trespass into the other's jurisdiction. Furthermore, no arm of government is supposed to abdicate power to another arm. The premise of this construct is not a harmonious relationship but a checking and balancing of power. Inevitably, the checking provides the pattern for, and generates, tension between the three arms of government.

In practice, the doctrine of separation of powers is very difficult to implement. In Australia and to a greater degree, Malaysia, the system of party politics, the doctrine of responsible government and the executive's desire for an efficient and practical working government has combined to weaken and erode the doctrine of separation of powers. If there were a pure separation of governmental power, effective government would be impossible. It is an accepted fact that the executive and legislative arms of government cannot operate independently of one another.

As the United States experience often time shows, when the executive and the legislature cannot agree, a gridlock happens. The fundamental nature of legislative, executive and judicial power, more than any other factor, which has made it so difficult to maintain a strict separation between them. Judicial independence is primarily concerned with the protection of judges once appointed. It also reaches back in the process of selection. Therefore, it is important the judges are seen to be free from any appearance of partiality or pressure from the executive.

Apart from the protection that judges enjoy as individuals, the 1 2 3 Montesquieu, The Spirit of the Laws, Book XI. Dato’ Param Cumaraswamy, Justice is Not a Cloistered Virtue; Are Judicial Criticisms inter se Permissible?. RA Hughes, GWG Leane & A Clarke, Australian Legal Institutions: Principles, Structure and Organisation. 1 Electronic copy of this paper is available at: http://ssrn. com/abstract= 929856 independence of the judiciary as an institution is furthered by the doctrine of separation of powers.

Functional separation requires that no branch should control either of the others in their performance of their functions and no branch should be able to perform the functions of any others. Physical separation requires that no individual be able to hold office in more than one branch simultaneously. Even though the doctrine is not mentioned explicitly within both the Australian and Malaysian Constitution, the High Court of Australia and to a lesser degree, the Federal Court of Malaysia has held it to be implicit in the document as far as the judicial branch is concerned.

In Australia, only the courts exercise the judicial power of the Commonwealth and courts should not be vested with non-judicial functions4. Unfortunately, the judicial power of the Malaysian courts has been removed when the constitution was amended in 19885. The reception of the common law, right up to the present day in common law jurisdictions, in settled colonies like Australia or conquered sultanates like the Malay states in present-day Malaysia, adapt the incorporated law from the United Kingdom to suit the local circumstances.

The origins of Malaysian and Australian constitutional background derived from the United Kingdom. British occupation began during eighteenth century. The occupation of Penang in 1786 marked the beginning of British rule in Malaysia. The Royal Charter of Justice of 1807, applicable to the British colony of Penang, provided authority for the introduction of English law6. In this sense, Malaysia was an almost exact contemporary of the establishment of British rule in Australia. British law came to Australia in 1788 when the colony of New South Wales was established.

The subsequent divergence of attitude towards the doctrine of judicial independence in these two jurisdictions is largely because of the social, political and cultural differences between these two jurisdictions that contributed to it notwithstanding the fact that both inherited this doctrine from British constitutional theory. Both nations have a written constitution unlike the United Kingdom. It is arguably interesting to examine how the judiciary in both nations have developed and the challenges that each faced in maintaining its independence.

Each of these bodies of power has an instrumental and systemic role to play in running a democracy. This diffusion of political power among the institutions of government gives Australian democracy its pluralist characteristic. The fact that the judiciary in Australia is accountable only in nonelectoral ways does not undermine the validity of its contribution in this context. The legitimacy of each institution within this pluralist conception is determined by reference to its instrumental value in contributing to a democracy.

In turn, this instrumental value may be measured by the extent to which courts are practically compelled to regulate society where legislatures are not able or do not do so. The judiciary in Australia has two important strengths in a pluralistic democratic society. Firstly, the judiciary has the capacity to alter the common law to reflect contemporary values and assumptions. Secondly, it also has the capacity to enforce constitutional rights and to determine the boundaries of legislative power in systems governed by written constitutions.

In these cases, the decisions of the judiciary either directly change or, where the legislature has power to act, frequently cause the legislature to change the social, economic and political structure of the nation7. 4 5 6 7 Bede Harris, A New Constitution for Australia. Constitution Amendment Act 1988. Michael Kirby, Challenges to Justice in a Plural Society. Michael McHugh, The Strengths of the Weakest Arms. 2 Electronic copy of this paper is available at: http://ssrn. com/abstract= 929856

Before 1900, the Australian colonies adopted in varying degrees the tripartite separation of governmental power as the basis of its political system. When debating the system of government for the new Commonwealth of Australia, the founders did not create a new system of government. Instead, they adapted ideas for the Australian Constitution from the United Kingdom’s Westminster style of government, the United States’ constitutional structure and from the semi-federal Constitution of Canada, where each system distributed power to three arms of government.

To these forms and ideas, the founders made some amendments according to the circumstances and needs of the populace at that time. As a result, the doctrine of the separation of powers is entrenched in the Australian Constitution. The powers of government are set out in three chapters of the Constitution. Chapter I – ‘ The Parliament’ - deal with powers of the legislature; Chapter II – ‘ The Executive Government’ - provides for executive powers; and Chapter III – ‘ The Judicature’ - vests the judicial power of the Commonwealth in the High Court, federal courts and other designated courts.

Although the content of legislative and judicial power is defined in the Constitution, the content of executive power is alluded to rather than prescribed. Despite the fundamental natures of legislative, executive and judicial powers are made clear and their ordinary applications distinct, they overlap at some point. Courts formulate laws by making rules for governing their procedures; common law judges legislate by extending or modifying the principles of the common law or giving content to vague statutory notions.

The executive exercises judicial functions by deciding issues of law and fact in determining whether a statutory power or discretion should be exercised. And when Parliament punishes for contempt, determines election disputes or summons witnesses under subpoena, it shows that the expression " the High Court of Parliament" remains as accurate a description today as it was in the seventeenth century England. Despite the inefficiencies and tensions, the distinction between the judicial and the executive powers of government in particular continues to be closely guarded in the federal sphere and operates fully.

The Privy Council emphasised the importance of the separation in Attorney General for Australia v. R 8 (The Boilermakers Case) when it said that " in a Federal system, the absolute independence of the Judiciary is the bulwark of the Constitution against encroachment whether by the Legislature or by the Executive". The encroachments referred to by the Privy Council are basically the tense relations that exist between the executive and the judiciary when judicial review is part of the political system. The dangers of the doctrine of the separation of powers are excess.

The doctrine depends on the three branches of government understanding their respective areas of jurisdiction and not exceeding them, or at least not exceeding them in a gross or continuous way9. Chapter III of the Constitution governs the judicial branch. The courts under this part are frequently referred to as Chapter III courts. Section 71 of the Constitution gives the judicial power of the Commonwealth in the High Court of Australia, the Federal Court, the Family Court and other courts that the Parliament invests with federal jurisdiction.

Under s 72, High Court justices and justices of courts created by the Parliament are appointed by the Governor General in Council. Under s72, their tenure is protected. They may not be dismissed from office, other than by an address by both Houses of Parliament on the grounds of misbehaviour or incapacity and their remuneration may not be reduce while they are in office. The separation of powers doctrine has been rigorously adhered to with respect to the judiciary. Under s 71 courts may exercise judicial power of the Commonwealth.

They may only exercise federal jurisdiction a fits the definition of the judicial power of Commonwealth10. The High Court of Australia, the nation’s federal supreme court decided in December 1996 in Wik Peoples v. The State of Queensland11 that the native title to land of the indigenous peoples of Australia was not, as a matter of law, necessarily extinguished by the pastoral leases granted by the Crown and under statute over vast areas of the Australian continent beginning in the 19th century. The decision was by a majority of four to 8 9 [1957] AC 288. Michael McHugh, Tensions between the Executive and the Judiciary.

Bede Harris, Essential Constitutional Law. (1996) 187 CLR 1. 10 11 3 three of the Justices of the seven-member Court. This led to the fiercest criticisms ever made against the judiciary. Several politicians in both Federal and State Parliaments appeared to compete with each other to attack the Court and especially the majority judges. But very few showed any familiarity with the reasoning given by the judges. A senior Federal Minister singled one reasons, given by Justice Michael Kirby, out for special castigation, declaring that he was “ underwhelmed” by them.

Premier Rob Borbidge described them as nothing more than “ rantings and ravings”. He even made the constitutionally dangerous statement that “ at the end of the day, the Parliament is the highest court in the land” 12. These unprecedented attacks, never seen before in Australia, continued for several months, unmitigated by an effective defence of the Court by the traditional political guardian of judicial independence in Australia, the Attorney General. He stated that he did not agree with the convention that the Attorney General should defend the courts from criticism.

The judges must find ways of defending themselves. Several judges and retired judge criticised this statement. The politicians maintained their attack up until the present time. These political comments soon became the springboard for academic and media castigation. Recent High Court decisions, the Court and the justices were labelled with words such as “ bogus”’, “ pusillanimous and evasive”, guilty of “ plunging Australia into the abyss”, a “ pathetic ... self-appointed [group of] Kings and Queens”, a group of “ basket-weavers”, “ gripped ... n a mania for progressivism”, purveyors of “ intellectual dishonesty”, unaware of “ its place”, “ adventurous”, needing a “ good behaviour bond”, needing, on the contrary, a sentence to “ life on the streets”, an “ unfaithful servant of the Constitution”, “ undermining democracy”, a body “ packed with feral judges”, “ a professional labour cartel”. There were many more epithets of a like character, many stronger. Several judges and retired judges, the organised legal profession, leading members of the Bar, a former Governor-General, legal academics, a few members in Parliament and other individuals eventually spoke out in defence of the High Court13.

The Chief Justice of Australia, in an unprecedented move, wrote a private letter to the Acting Prime Minister to correct the erroneous suggestion, made publicly, that the court had deliberately delayed its decision in the pastoral leases case. The Chief Justice of Australia then spoke of the dangers of such sustained attacks on the judiciary at a series of legal conferences in Australia and overseas. From the United States, one Kathryn Graham wrote to the Australian press to condemn the disappointing lack of understanding of the role of the court.

The Chief Justice of New South Wales, in October 1997, called for a truce and for mutual respect between the branches of government. But the debate and the attacks go on. The feature of the Australian debate that has concerned many lawyers has been the complete shift from the bipartisan political acceptance of constitutional and other important decisions of the Court which had marked Australia’s history in the past, even when those decisions were extremely important and controversial. There is also the concern that such an unchecked criticism would undermine confidence in the courts and acceptance of court decisions.

There might be this argument putting forward that robust legal debate is good for the country. But a lot of judges and lawyers, unused to such unrelenting assaults, had their doubts14. However, in a free society, criticism of the judiciary is inevitable and some attention to the courts and their doings is both justifiable and desirable. The problem is about measuring the acceptable amount of criticism. In recent years, governments in the various states have resorted to appoint acting judges from the ranks of legal practitioners, academics and retired judges.

This in principle would lead to serious problems. Judicial independence is at risk when future appointment or security of tenure is within the area of the executive. The practice of appointing acting judges rather than supplementing the permanent establishment of the judiciary is questionable because their reappointment or permanent appointment is at the discretion of the AttorneyGeneral and Cabinet. This practice can be said to be similar to the Malaysian method of appointing judicial commissioner without the security of tenure.