

Asia-Pacific Judiciaries

Themes and Contemporary Perspectives

H. P. LEE AND MARILYN PITTARD

1.1 Introduction

In 1959, the New Delhi Congress of the International Commission of Jurists described the rule of law as ‘a dynamic concept’, a concept which ‘should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized’.¹ In his definition of the rule of law, Joseph Raz includes the requirement that ‘[T]here must be an independent judiciary charged with the application of the law to cases brought before it.’² He also emphasizes the need for principles of natural justice to be observed, in the sense that individuals must be given a fair and reasonable hearing, and that judicial review jurisdiction should be vested in the courts.

The existence of an independent and impartial judiciary is clearly underlined by the prescription in article 10 of the Universal Declaration of Human Rights: ‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.’ In 2015 there was widespread celebration of the 800th anniversary of the birth of the Magna Carta in which the English King John promised, *inter alia*, ‘we will sell to no man, we will not deny or delay to any man either justice or right.’³

¹ ‘Declaration of Delhi’ in *The Rule of Law in a Free Society* (International Commission of Jurists, Report prepared by Norman S Marsh, p 3) <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/1959/01/Rule-of-law-in-a-free-society-conference-report-1959-eng.pdf> accessed 14 July 2016.

² Joseph Raz, ‘The Rule of Law and Its Virtue’ (1977) 93 *LQR* 195, 196.

³ Now 25 Ed I c 29.

Judicial independence, impartiality and integrity are universally acknowledged values which promote constitutionalism, good governance and economic advancement in countries around the world. In an age of globalization, judicial institutions around the world, including the judiciaries of the Asia-Pacific, are coming increasingly under scrutiny. The judiciaries in this region operate against a backdrop of ethnic, linguistic, cultural, social and political diversity.

In a conference presentation, the Honourable Chief Justice Marilyn Warren of the Supreme Court of Victoria drew attention to the establishment in 2007 of the International Framework for Court Excellence⁴ and highlighted one of the core values aligned with the Framework: 'In general, a high level of public trust and confidence in the judiciary is an indicator of the successful operation of courts. Lack of corruption, high quality judicial decisions, respect for the judges, timely court proceedings and transparent processes will increase public trust in the judiciary.'⁵ The harsh reality confronting a number of Asia-Pacific states is that the judiciary will often pay a high price when it exercises its role of oversight of the executive arm of government. An irate executive with its control of the parliamentary arm in a Westminster system of government can bring the judiciary to heel quickly. The Right Honourable Sir Ninian Stephen once observed that the judiciary 'remains very much at the mercy of the other arms of government'.⁶

1.2 Background

Countries in the Asia-Pacific enjoy varying intensity of the rule of law. They also have political systems which vary from the highly democratic end of the spectrum to the more authoritarian end. The World Justice Project Rule of Law Index ranked 102 countries for 2015. Countries from the Asia-Pacific under study in this book featured in various positions in the Index from high-ranking to low-ranking. These countries included Singapore, ranked 9 (Score of 0.81); Japan, ranked 13 (0.78); Hong Kong,

⁴ International Consortium of Court Excellence, International Framework for Court excellence (2nd edn., March 2013), www.courtexcellence.com/~media/Microsites/Files/ICCE/The%20International%20Framework%202E%202014%20V3.ashx.

⁵ The Honourable Chief Justice Marilyn Warren, 'Connecting with Victoria's Culturally Diverse Communities: Enhancing Public Trust and Confidence in Courts and Tribunals' (2015) 25 JJA 3.

⁶ N. Stephen, 'Southey Memorial Lecture 1981: Judicial Independence – A Fragile Bastion' (1982) *Melbourne University Law Review* 334, 338.

ranked 17 (0.76); Malaysia, ranked 39 (0.57); Indonesia, ranked 52 (0.52); Sri Lanka, ranked 58 (0.51); India, ranked 59 (0.51); Vietnam, ranked 64 (0.50); China, ranked 71 (0.48); and Bangladesh, ranked 93 (0.42).⁷

Public trust in the judicial institution is of extreme importance as it enables disputes to be resolved without resort to violence. In democratic states, courts are established to deliver justice ‘without fear or affection’, to ensure the rule of law, and act as constitutional guardian. In authoritarian states, courts under the tight leash of their executive handlers are required to perform more varied functions. In their examination of the functions of courts in authoritarian states, Tamir Moustafa and Tom Ginsburg said:

Courts are used to (1) establish social control and sideline political opponents, (2) bolster a regime’s claim to “legal” legitimacy, (3) strengthen administrative compliance within the state’s own bureaucratic machinery and solve coordination problems among competing factions within the regime, (4) facilitate trade and investment, and (5) implement controversial policies so as to allow political distance from core elements of the regime.⁸

As the quality of democratic rule in Asia-Pacific states varies across the spectrum, the degree of public confidence in judicial institutions varies from the high end to plumbing the depths of the other end. This has given rise to the perception that the judiciary in a number of Asia-Pacific states lacks the requisite independence and impartiality to maintain public confidence in the administration of justice consistent with the rule of law and in accordance with international standards. The lack of judicial independence and impartiality may have serious implications for foreign citizens, individuals and corporate entities, who are prosecuted before these courts for a range of alleged offences or are embroiled in civil litigation in which one of the parties has connection to those who wield the levers of power. Foreign corporations or individuals who pursue civil remedies over failed transactions may be affected

⁷ Out of 102 countries/jurisdictions. <http://worldjusticeproject.org/rule-law-around-world> accessed 15 April 2016. Countries not covered in the book received the following ranking: South Korea, ranked 11 (0.79); Philippines, ranked 51 (0.53); and Pakistan, ranked 98 (0.38).

⁸ Tamir Moustafa & Tom Ginsburg, ‘Introduction: The Functions of Courts in Authoritarian Politics’ in Ginsburg & Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008). See also Mark Yushnet, ‘Rule by Law or Rule of Law?’ (2014) 22(2) *Asia Pacific Law Review* 79.

detrimentally, in their pursuit of those remedies, by courts that are not impartial and judges who lack integrity.

The book encompasses a study of how the judicial institution on a number of occasions is quite confronted with threats and challenges to its independence and impartiality. Harassment, intimidation and punishment of judges who seek to give meaning to their judicial oath of dispensing justice ‘without fear or favour’, sacking of chief justices and senior justices who refuse to bend to the wishes of a powerful executive, and the diminution of courts’ jurisdictions are all occurrences which significantly undermine the rule of law in the countries where they occur. The problems confronting judges and courts are explained and analysed, with the aim of establishing a commonality of standards which can be developed to strengthen and promote the values of judicial independence, impartiality and integrity.

1.3 Crises of Confidence

Doubts overhang the integrity and independence of the judiciary in a number of Asia-Pacific states as a result of crises which have afflicted these institutions.⁹ In Malaysia and Sri Lanka, the judiciary in each of these countries was embroiled in controversy as a result of executive-engineered dismissal of the most senior judge of the land.¹⁰ The independence of the judiciary is often eclipsed when the executive resorts to a brazen proclamation of emergency.¹¹ Interference by the military administration in the Fijian judiciary has devastated the image of that judicial institution.¹² Public confidence in the judicial institution in a number of countries in the Asia-Pacific region is thus at a low point.

⁹ See Marie Seong-Hak Kim, ‘Travails of Judges: Courts and Constitutional Authoritarianism in South Korea’ (2015) 63(3) *AJCL* 601. The article explores the role of the South Korea judiciary especially during the period of authoritarian rule from 1972 to 1980.

¹⁰ See H. P. Lee, *Constitutional Conflicts in Contemporary Malaysia* (Oxford University Press 1995) ch 3; ‘A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law in Sri Lanka’ (April 2013, a report of the International Bar Association (IBA) Human Rights Institute).

¹¹ See H. P. Lee, ‘Judiciaries in Crisis – Some Comparative Perspectives’ (2010) *Federal Law Review* 371–389; *A Long March to Justice: A report on judicial independence and integrity in Pakistan* (September 2009 – An IBA Human Rights Institute Report).

¹² Political crisis has also engulfed the Papua New Guinea judiciary: see The Honourable Justice John Logan RFD, ‘A Year in the Life of an Australian Member of the PNG Judiciary’ (2014) 12 *The Judicial Review* 79.

At the outset, it will be necessary to explore the constitutional and legal dimensions of the key concept of judicial independence and its various facets ('institutional' and 'individual' independence). Why is judicial independence so fundamental to any polity? To what extent, and how, do the various countries which constitute the focus of the book maintain and preserve this value? Is the requirement for judicial 'accountability' incompatible with the notion of judicial independence? In terms of the functioning of the judicial institution in the Asia-Pacific region in contemporary times, what are the challenges facing the judicial institution and what pressures bear upon those judiciaries which have to perform their role against the backdrop of a constitutionally entrenched or an ordinary statutory Bill of Rights? What significant changes, if any, have occurred to these judicial institutions over the course of time? What are the prospects for strengthening judicial integrity in countries where it is currently under stress?

The state of judicial independence is often shaped by political crises and conflicts where the courts have been drawn in to resolve the struggle for political power between competing political factions. Quite often, this leads to an undermining of judicial independence. Issues of impartiality and integrity in the Asia-Pacific can best be elucidated by focusing on a number of broad themes. It is acknowledged that the emphasis on each of these themes will vary from country to country, and that in some countries some of these themes may not have any relevance for judicial independence and may be viewed as having little or no significance.

1.4 The Appointment and Removal of Judges

For the judiciary to maintain its independence, it is essential that attention is paid to the process of judicial appointments in these Asia-Pacific countries. Are the existing processes in relation to judicial appointments highly 'unstructured'? Are the criteria for making appointments fully defined? Changes in the process of appointing judges are occurring in a number of countries but how effective are these reforms?

In countries which have been trying to strengthen the process of appointing judicial officers, quite often they have cast their eyes on the reforms which occurred in the United Kingdom in 2005. The *Constitution Reform Act 2005* (UK) and the *Inquiries Act 2005* (UK) made sweeping judicial reforms in the United Kingdom with regard to the process of appointment of judges. Key features of these reforms are the establishment of a Judicial Appointments Commission and the appointment of a

Judicial Appointments and Conduct Ombudsman. It is imperative that a significant way of ensuring a more highly independent judiciary must have at its core the aim of transparency and giving prominence to the value of judicial independence.

A further important matter in this regard relates to the appointment of judicial commissioners or ‘probationary’ or acting judges in a number of jurisdictions. There are concerns that such appointments without the security of tenure would impair the independence of the judiciary.

Episodes from the region also highlight the need for mechanisms dealing with complaints about judges to strike a proper balance between judicial independence and judicial accountability. The removal of a judge from judicial office is the ultimate sanction and a number of Asia-Pacific states have witnessed convulsions in the judicial institution when governments sought to exercise unbridled power to bring the judiciary to heel. A number of these crises under scrutiny in this book pose the question of how the processes for disciplining of judges in these countries can be strengthened to ensure the preservation of judicial independence and integrity.

1.5 Judges and Free Speech

This area of investigation involves a consideration of the exercise of free speech by judges and freedom of speech pertaining to criticism relating to the judicial institution or members of the institution. Forthright and open criticism may assist with processes of accountability and improvement in performance of courts. On the other hand, a defender of a court might assert the value of promoting and ensuring public confidence in the courts; a confidence which might be undermined by unfair, disproportionate or ill-motivated criticism. Courts rely largely on public confidence to carry out their work and to ensure that their decisions are respected. Any debate about criticism of judges needs therefore to take account of the proposition that judges should be slow to speak publicly other than through their judgments in accordance with law.

Are there legal powers (scandalising the court/contempt of court) accorded to judges to preserve their dignity? To what extent have courts in the Asia-Pacific relied on the contempt of court powers to ‘silence’ legitimate criticism of the courts? What is the comparative jurisprudence concerning acceptable criticism and contempt? How does the problem play out in jurisdictions which have an entrenched constitutional freedom of speech?

Consideration will be given to whether there are or there should be limits on judicial speech-making. Lessons will be drawn from other jurisdictions where judges who have asserted their right to freedom of speech have found themselves embroiled in controversies which resulted in adverse impact on the reputation and standing of the judiciaries.

1.6 Judicial Bias and Recusal

Impartiality and the appearance of impartiality are central elements in bolstering public confidence in the judicial institution.¹³ R. E. McGarvie explained:

Most losing parties will accept the decision of a judicial officer who has obviously conducted a hearing fairly, found the facts honestly, applied the principle of the law genuinely believed to apply, and given reason for the decision which show that this process was followed.¹⁴

It is a fundamental feature of the judicial system that a judge is not only impartial but must be seen to be impartial. When claims of judicial bias are raised the issue of recusal arises. At the same time, it has been pointed out that a decision by judges to disqualify themselves should not be made lightly; otherwise it would lead to a situation where litigants may exploit this avenue to choose their own judges. This area of investigation explores how allegations of judicial bias and the circumstances under which judges should recuse themselves are handled in the various countries. What legal test should operate to determine when judges should disqualify themselves from sitting on a case? Have the various legislatures intervened with statutory frameworks to regulate the issue? Is it regarded as satisfactory for a judge against whom a bias claim has been made to decide the issue? In the case of the highest court in the land are there avenues for a ruling by a judge of this court to be reviewed by the court itself? Is there consideration given to a register of interests in some of the jurisdictions?

¹³ Steven Rares, 'What Is a Quality Judiciary?' (2011) 20 *JJA* 133, 137.

¹⁴ R. E. McGarvie, 'The Foundations of Judicial Independence in a Modern Democracy' (1991) 1 *Journal of Judicial Administration* 3 at 6.

Cited in G. Sturgess and P. Chubb (eds.), *Judging the World, Law and Politics in the World's Leading Courts* (Butterworths 1988) 353. See also *The Queen v. Moss; Ex parte Mancini* (1982) 29 SASR 385, 391 per King CJ.

1.7 Judges and Non-Judicial Functions

Varying attitudes exist in relation to the propriety of judges agreeing to take on functions which are not essentially judicial in nature and which may compromise judicial integrity by making them instruments of executive power. Is it appropriate for judges to accept such roles or roles as a member or chair of a commission of public inquiry, or membership of statutory bodies performing non-judicial functions? Are there constitutional, statutory or common law impediments in the Asia-Pacific jurisdictions under consideration which preclude a judge from taking on the function of conducting, for example, a public inquiry? It is argued that judges have special skills which make them ideal to be a commissioner or a chair of a commission of inquiry. But are there dangers to the maintenance of public confidence in the judiciary? Should judges be empowered to perform various 'administrative' tasks, such as dealing with applications by the authorities for warrants to intercept telephonic or other forms of communications, to conduct surveillance, or to authorize preventative detention and control orders in relation to suspected terrorists? To what extent is public confidence in the judiciary eroded by the performance of such non-judicial functions?

1.8 Conclusion

It has been said:

Recognition of judicial authority depends on public acceptance of judicial decisions. As a result, the independence, impartiality and integrity of judges are highly important to the maintenance of public confidence in the system of government. But public confidence does not equate with popularity. Judges must seek to apply the law impartially and objectively. They must not seek to please the public, or politicians. Their decisions will, on occasion, be unpopular, but so long as they are just and involve an impartial application of the law, the Judiciary has discharged its public duty.¹⁵

¹⁵ Marilyn Warren, 'Unelected does not Equate with Undemocratic: Parliamentary Sovereignty and the Role of the Judiciary' (2008) 13(2) *Deakin Law Review* 1, 13.