

AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION ASIA/PACIFIC COURTS CONFERENCE

**SYDNEY, 22 AUGUST 1997 JOINT PRESENTATION WITH THE HON MR JUSTICE YONG PUNG
HOW, CHIEF JUSTICE OF SINGAPORE**

The Hon Sir Gerard Brennan, AC KBE

Chief Justice of Australia

Your Honour the President, Your Honour Mr Justice Yong Pung How, Chief Justice of Singapore, Chief Justices and other Heads of Overseas Delegations, Distinguished Visitors from Overseas, Your Honours the Chief Justices and Judges of the several Australian Courts, Mr Attorney, Ladies and Gentlemen:

Australia welcomes multi-national Conferences attended by representatives of the nation States of our Region. Each of you who comes from overseas will find in this country citizens who, recently or from generations past, hailed from the countries you represent. Ours is largely a nation of immigrants and our civilization has been enriched by the cultures and the genius of our indigenous peoples and of those who, in the last two hundred years, have made Australia their permanent home. Our multi-cultural society has found expression in our legal system which, notwithstanding the traditional obstacles of cost and delay, gives effect to the equality of every person before the law. In a Conference of this kind, Australians involved in the judicial branch of government seek to learn from the judicial systems in other nation States and, if we can contribute to their judicial systems, we shall be honoured to do so.

Peace, order and good government are the aspirations of all our peoples. Peace with other nations, peace at home. Order internationally, order domestically. Good government for one's own people and good government that offers no threat to other nations. These aspirations seek fulfilment in a time of rapid social and economic change and in a region which will be transformed socially, economically and perhaps culturally within the next few decades. In a Region in which, and at a time when, change rather than stability is the predominant feature, we must ask whether the work of the Judiciary contributes to peace, order and good government - not only to domestic peace, order and good government but to peace, order and good government at the international level.

International relations have always been the responsibility chiefly of the Executive Government, not of the Judiciary. And so it will remain. The municipal Courts are concerned with the domestic legal order. The international legal order is prescribed by international custom and by the treaties and arrangements that are negotiated by Executive Governments. During the last half-century, however, international relations have become increasingly concerned with aspects of the domestic legal order and, within limits, the domestic legal order has drawn concepts from international law. There are familiar treaties dealing with the reciprocal enforcement of judgments, extradition, letters rogatory and other means of invoking the jurisdiction of one Court for the aid of the jurisdiction of another. In addition, treaties have been made requiring modification of the internal legal order of the States Parties. The *International Convention on the Elimination of All Forms of Racial Discrimination*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *International Convention on the Rights of the Child*, the *Conventions of the International Labour Organization*, the *Berne Convention for the Protection of Literary*

and Artistic Works , the *Paris Convention for the Protection of Industrial Property* , the *General Agreement on Tariffs and Trade* , - to name some of the more obvious examples - call for modification of domestic laws. As domestic laws are administered by the municipal Courts and the administration of those laws which implement treaties is a matter of international concern, the work of municipal Courts becomes an element in international relations.

Other domestic laws are of international concern. The laws of contract, corporations and securities, laws relating to foreign investment and international trade, laws relating to the sale of goods, to shipping and to the international movement of currency, laws governing intellectual property, criminal laws especially those dealing with terrorism, trafficking in drugs, and organized crime: the administration of these and other laws attract the interest of the international community. The regularity of their administration affects the relationship of the people of one nation with the people of another.

A nation's domestic legal system prescribes its Constitution, it reflects the culture, the religion and the values of its people. It mirrors the civilization of that nation and is its most definitive expression. An understanding of the way in which the legal system of any nation works gives a profound understanding of the social and political state of the nation as well as the ethos of that nation and its people.

It is surprising, perhaps, that so little attention has been given internationally to the significance of the judicial branch of government of the nation States. A better assessment of the working of domestic Courts would do much to dispel international misunderstandings and to focus attention more precisely on some of the sticking points of international diplomacy. There are practical questions to be answered. A trader wants to know if judicial relief is available when excessive customs duty is levied or an administrative power is abused. The investor wants to know whether judicial remedies are available to protect an investment or to enforce a security. The inventor, local or foreign, has to find out if there is effective protection of industrial property. Environmentalists and other nation States wish to discover whether there are legal remedies to enforce compliance with environmental standards or obligations prescribed by international treaty. Families are anxious to ensure that there is legal protection for expatriate workers. A custodial parent seeks assurance that wrongfully abducted children will be returned. Law enforcement agencies insist that no country should be an Alsatia for drug dealers or terrorists. If the domestic legal system of a nation State fails to provide the assurances that are looked for by the international community, that State suffers an ostracism commensurate with the failure. When nation States have or develop a sense of regional identity with other nation States, the domestic legal order of each of them becomes a matter of common concern.

Of course, the shortcomings in a legal system can be glossed over and diplomatic assurances can be given in broad and imprecise terms. But broad and imprecise terms, however anodyne they may be at the time, are pregnant with misunderstanding that may blow out into an issue that creates or exacerbates international tension. Far better that the strengths and weaknesses of a domestic legal system be stated in terms as precise as practicable.

Of course, to gain a correct understanding of a domestic legal system, it is necessary to appreciate the function which the law is expected to perform in the particular society. A lawyer brought up in the western positivist tradition may find it hard to appreciate that, in the traditional legal thinking of China, so Professor Alice Tay ¹ tells us, strong reliance on positive law is "evidence of the breakdown in the social order and of lack of harmony between the state and society". She quotes a familiar passage from Confucius to support her statement:

" If people be led by laws [fa] and uniformity is sought to be given them by punishments, they will try to avoid punishments but have no sense of shame. If they be led by virtue and uniformity is sought to be given them by *li* - [correct behaviour involving moral propriety through ritual] - they will have a sense of shame and moreover, will become good."

Positivism and Confucian thought are not the only influences on the various jurisprudential values espoused in the Asian-Pacific region. What is important to appreciate if we are to live and work and trade together harmoniously and to our common advantage is that the laws of our several nations serve our peoples in different ways. The Judiciaries of the region perform functions that are responsive to local cultures and conditions. Thus I can say with a sense of awesome respect that, if the High Court of Australia had to cope with the volume of litigation that is dealt with by the Supreme Court of India, its function would be quite different from the function it has performed since it was established 94 years ago.

The Judiciary of each country is charged with the responsibility of administering its legal system. The rule of law in each country depends on what the Judiciary makes of it. The objectives and functions of our respective Judiciaries were stated in the Beijing Statement adopted two years ago in these terms:

"(a) to ensure that all persons are able to live securely under the Rule of Law;

(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

(c) to administer the law impartially among persons and between persons and the State."

It is one thing to agree on the ideals, as the Chief Justices of Asia and the Pacific agreed in the Beijing Statement. But the fulfilment of those ideals depends on the training and expertise of judges, the facilities for performing the judicial function and judicial independence. Judicial independence is an ideal to which every nation State gives respect, but the content of the concept differs. When one nation State lacks trust in the independence of the Judges in another nation State, there is diminished confidence in that State's commitment to the rule of law. International trade and investment suffer, tensions focussing on human rights arise, doubts about discrimination and personal security grow and relations between Governments deteriorate.

The factors which are relevant to the assessment of a State's commitment to the rule of law are not ascertained merely by reference to the written laws of a State. The rule of law as a predictable, normative and regulatory standard depends on the actual practices and traditions of each nation State. A real understanding of the way in which the rule of law operates in each State, of the way in which the law of the State works to protect legal interests that are of concern to other States, can be obtained by free and frank discussions between the Judges of the respective States. Such discussions are an untapped source of international understanding and a valuable means of diminishing tensions that arise from a failure to appreciate accurately the institutional differences that reflect the differing cultures and systems of government in our region. Judicial resources could be harnessed to enhance regional understanding. But how?

This Conference, at which more than 20 countries in the Asia-Pacific Region and approximately 30 from throughout the world are represented, shows the way. During this Conference, discussions on core values of a desirable judicial system, the significance of the Courts in the community, the requirements - both managerial and technological - of an efficient Court system will broaden the participants' understanding of the various judicial institutions in our region. Such exchanges of information are of great importance in ensuring that our Courts serve their peoples well. They also point the way to achieving a better international understanding of the rule of law in each nation State.

It is only when Judges and Court Administrators come to know one another and are willing to exchange frankly their experiences that we shall be able to appreciate the dynamics and the frustrations, the successes and the shortcomings, of our respective legal systems. Therefore, let there be an ongoing dialogue among the Judges and Administrators of Courts in the Asia Pacific Region. Not a formal Conference with set papers by experts, but rather informal seminars in which frank exchanges would take place, in which common problems would be identified, in which ideas of jurisprudence, or technology, or administration would be discussed, and in which mutual support would be gained. Such a dialogue should not be restricted to Chief Justices, but the participants should be restricted to those who have responsibility for the exercise of the judicial function. The dialogue should not be undertaken at the initiative of any one State, but rather should be supported by all States in the region as a means of fostering international regional understanding and co-operation. The funding would be modest, but it should be regular. A small organizing secretariat, internationally funded, would convene seminars once or twice a year in centres rotating within the Region and would ensure that the participants have an opportunity to visit and to study the judicial structures in the host country.

A Judicial Foundation for Asia and the Pacific performing that limited function offers no risk to international relations. Judges have nothing to offer each other economically; we would not presume to offer political or economic advice; but we can exchange ideas which are apt to dispel the misunderstandings and want of mutual appreciation that impair international relations and we can offer one to another both the wisdom and the technology that we respectively develop in the administration of domestic justice. This does not call for any revolution in our way of doing things: what it does call for is a frank and genuine exchange of information about the way that the law is administered in our respective jurisdictions.

By participating in dialogue among the Judiciaries of our Region, our domestic Courts will be better equipped to serve the peace, order and good government of the State and will make a tangible contribution to the peace, order and good government of the Region to which we belong.

¹ "The Struggle for Law in China" (1987) 21 *University of British Columbia Law Review* 561.