

15TH LAWASIA CONFERENCE

THE SIGNIFICANCE OF THE BEIJING STATEMENT

OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY

MANILA, SATURDAY 30 AUGUST **The Honourable Sir Gerard Brennan, AC KBE**

Chief Justice of Australia

The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region is remarkable for the extent of the concurrence that it has achieved. Through their respective Chief Justices, 32 Nation States of the Region have assented to the statement of principles which it contains. The concurrence is remarkable because the Statement expresses ideals common to legal systems of very different kinds. Systems which are based on the common law and systems based on the continental (especially the German) legal system have found common ground; societies informed by different value systems esteem the judiciary as "an institution of the highest value in every society". States whose governments follow the Westminster model, States based on the American model and States whose governments have developed from earlier socialist forms all acknowledge that the objectives and functions of the judiciary include:

- (a) [ensuring] that all persons are able to live securely under the rule of law;
- (b) [promoting] within the proper limits of the judicial function the observance and attainment of human rights; and
- (c) [administering] the law impartially among persons and between persons and the State."

Of necessity the Beijing Statement is expressed in general terms. Each Nation State which applies the Principles of the Statement achieves the stated objectives of judicial independence in the context of its own legal system. In Australia during the past year the Chief Justices of the Supreme Courts of the States and Territories took the Beijing Statement into account in making a Declaration of Principles relating to judicial appointments. The Chief Justices declared their opposition to the appointment of acting judges instead of permanent judges except for reasons of necessity. And they opposed the appointment of judges to offices or to perform functions where the appointment or the continuation of the appointment is at the discretion of the Executive Government of the State or Territory. The Declaration is a practical example of the way in which the general principle of judicial independence is applied to ensure that public confidence in the manifest impartiality of the judiciary is maintained. That general principle is embodied in Chapter III of the Australian Constitution which requires judges appointed to the High Court of Australia or to other Federal Courts to be

appointed permanently with security of tenure until the age of retirement and with irreducible remuneration. As that provision ensures the independence of the justices of the High Court and of other Federal Courts it was unnecessary for me as Chief Justice of the High Court or for the Chief Justices of other Federal Courts to join in the Declaration made by the Chief Justices of States and Territories.

Although the Beijing Statement was taken into account by the Chief Justices, it would be a mistake to think that it was either the inspiration of the Declaration or the catalyst for making it. The Declaration itself described the Beijing Statement as a prescription of "minimum standards for judicial independence making due allowance for national differences in the LAWASIA region". Nonetheless the Beijing Statement expresses values which are common throughout the region. The description of the Beijing Statement as a prescription of minimum standards illustrates both its utility and the need for further understanding of national differences.

So far as the Beijing Statement prescribes minimum standards and commands the support of the several judiciaries of the region, it provides the matrix of understanding that allows the judiciary and the legal professions to meet and discuss matters of common concern. It affords a bond of mutual support in repelling attacks on judicial independence and it combines the judges and lawyers of the region in a powerful phalanx devoted to the doing of impartial justice according to law.

But the application of the principles in the Beijing Statement must take place in the context of particular legal systems. The purpose of the Statement is not to protect the judges but to guarantee the rule of law at the hands of an impartial judiciary. The Beijing Statement will not achieve that objective if the hands of the judiciary are tied by restrictions on their jurisdiction. This is recognized by Articles 33 and 34 of the Statement which declare, inter alia, that the judiciary must have jurisdiction over all issues of a justiciable nature. But each legal system prescribes the issues that are justiciable and the issues that are not. In those countries where the courts are accustomed to exercise jurisdiction to review executive action, or even legislative action, in accordance with *Marbury v Madison*, the rule of law is made to govern a broad range of State activity. In countries which do not admit the principle of *Marbury v Madison*, the rule of law depends in part upon its acceptance by the repositories of State power. The Beijing Statement has a different operation in countries of these two kinds. Thus it appears that the Beijing Statement does not prescribe a norm adherence to which will produce comparable legal systems throughout the region. It would be a mistake to expect the statement to do more than provide a moral incentive to each country to create and maintain a competent, incorruptible and independent judiciary. Such a judiciary advances and preserves the rule of law by fearlessly applying it in each case independently of external influence, whether by the Executive Government or by any other source.

The rule of law must be the aim and object of every legal system, else legal power becomes an instrument of oppression and corruption. By extending the jurisdiction of the judiciary, by appointing competent, incorruptible and independent judges, by shielding their independence with proper tenure and remuneration, by isolating the judges from the pleasure or displeasure of the Executive branch of government and by providing the Courts with the resources needed to exercise their jurisdiction efficiently, the rule of law is advanced and preserved. Diminish any of these safeguards and freedom and the stability of society are placed at risk.

So much can be accepted as axiomatic. But until further study is done to disseminate understanding of the way in which the principles of the Beijing Statement are applied in the respective jurisdictions within the Region, there will be misunderstandings about those principles and the fidelity of particular countries to them. In other words, there is much more to be done to ensure that the same understanding of the rule of law is shared throughout the Region. If justice according to law were commonly understood in every country and

were done in every country, we should all be at peace, we should all have our own and our peoples' dignity respected and we should be enabled to share in the prosperity that can come with a predictable and firm trading regime.

This is still some distance off. But the Beijing Statement is a step along the way. If ever we reach the end of that road, LAWASIA will have contributed much to the peace, order and good government of the world.