

BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY

Presented by: Hon. Paul De Jersey
(Chief Justice of Queensland)

Observance of the rule of law is generally accepted as an imperative for any contemporary regime, although views as to the content of the concept are not uniform. But again speaking generally, there is acceptance that it critically embraces judicial independence.

Consistently, the 'Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia region' has been signed by 32 Chief Justices from throughout the Asia Pacific region, and significantly, from diverse jurisdictions: from both common law and civil law systems; from procedurally divergent adversarial and inquisitorial systems; from both democratic and authoritarian regimes; and from nations of widely differing cultures.

The Beijing Statement accordingly reflects a remarkable consensus. The Statement grew out of a 'joint statement of principles of independence of the judiciary' adopted in Beijing at the 6th Conference of Chief Justices of Asia and the Pacific, on 19 August 1995. It was then signed by 20 Chief Justices from the region.

The Statement was revised into its current form on 28 August 1997 at the 7th Conference held in Manila. The original signatories have been joined by 12 additional Chief Justices, so that the Statement has now been adopted by 32 countries from the Asia Pacific region. Those countries are said to represent approximately two thirds of the world's population.¹

Of the 20 initial signatories in 1995, six were Chief Justices from Pacific jurisdictions: M Le Premier Président Olivier Aimot, Premier Président of the Court of Appeal of New Caledonia, the Rt Hon Sir Thomas Eichelbaum, Chief Justice of New Zealand, the Hon Sir Arnold Amet, Chief Justice of Papua New Guinea, the Hon Charles D'Imecourt, Chief Justice of Vanuatu, the Hon Tiavaasue Sapolu, Chief Justice of Western Samoa, and the Hon Sir Gerard Brennan, Chief Justice of Australia.

Following the Beijing Conference, another six Chief Justices signed the Statement, and they included, from the Pacific, the Hon Sir Timoci Tuivaga, Chief Justice of Fiji, the Hon Sir John Muria, Chief Justice of the Solomon Islands, and the Hon Nigel Hampton, Chief Justice of Tonga.

The four Chief Justices who newly signed the Statement at Manila included three from the Pacific, the Hon Richard Lussick, Chief Justice of the Republic of Kiribati, the Hon Daniel

¹ Senior Judge J Clifford Wallace, United States Court of Appeals for the Ninth Circuit "An Essay on Independence of the Judiciary: Independence From What and Why " 58 *NYU Annual Survey of American Law* (2001) 241, 249

Cadra, representing the Chief Justice of the Marshall Islands, and Chief Justice Sir Gaven Donne, Chief Justice of Nauru and Tuvalu.

In the result, there has been substantial adoption of the Statement by the judiciaries of this region.

The lineage of the Beijing Statement can be traced through a number of different international instruments incorporated in the recitations to the Statement, including the Charter of the United Nations, the Universal Declaration of Human Rights, and the Basic Principles on the Independence of the Judiciary.

In a common law context, the concept of judicial independence can of course be traced back to the *Act of Settlement 1701*, which gave judges tenure for life, during good behaviour, rather than at the pleasure of the Crown. The *Act of Settlement* "recognised that the independence and impartiality of the judiciary could not depend simply on the personal integrity and resilience of individual judges. It was necessary for independence to be institutionalised."²

International recognition has also been extended in instruments such as the Syracuse Draft Principle on the Independence of the Judiciary prepared by the International Commission of Jurists in 1981, the International Bar Association Minimum Standards of Judicial Independence of 1982 (the New Delhi Standards), the Montreal Universal Declaration on the Independence of Justice (1983), and the Universal Charter of the Judge by the International Association of Judges (1999), amongst others. The Beijing Statement demonstrates support for judicial independence more locally, in the Asia Pacific region. The geographical span of these various instruments demonstrates an impressive commitment to principles of judicial independence which is most encouraging.

It is essential that the Beijing Statement retain its currency. A search of the worldwide web discloses some prominence in the treatment of the Statement on the internet, mainly on websites devoted to the law and legal issues. This is perhaps to be expected, as the Statement "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 the lawyers of the region in a powerful phalanx devoted to the doing of impartial justice according to law".³

It is pleasing to see that the Statement has been cited in support of moves towards greater judicial independence. I note as an example Chief Justice Lunabek of Vanuatu recently referred to the Beijing Statement when seeking judicial control of court budgets. The Statement expresses and carries with it the collegial support of many other judges in the

² The Hon J J Spigelman AC, Chief Justice of New South Wales *Judicial Independence: Purposes and Threats* (address to the 7th Worldwide Common Law Judicial Conference, 30 April 2007, London)

³ The Hon Sir Gerard Brennan, AC KBE *The Significance of the Beijing Statement of Principles of the Independence of the Judiciary* (address delivered at the 15th LawAsia Conference, 30 August 1997, Manila)

region, and I hope that Statement's principles are of assistance in translating matters such as these into reality.

But to be as influential as it should be, the Statement should be engraved on the consciousness of executive government throughout the region. That will only be secured through an educative process.

The Statement has now been on our shelves for 12 years. Its message is timeless. While not set in stone, and while aspects of detail may need to be revisited from time to time, its essentials are immutable. A concern is that the Statement may be overlooked unless regularly taken down from the shelf, dusted off, and discussed.

The readers should, importantly, include executive governments and legislators; those who administer public agencies with coercive powers, such as police and military services; others with the capacity to inform and influence public opinion, particularly the media; and those responsible for the education and training of prospective legal practitioners. As the identity of relevant leader's changes, care must be taken to ensure successors are made aware of the Statement.

Despite the fact that judicial independence means that judges may rule against the government without influence or fear in cases that come before the court, it is of course in executive government's best interests to support that independence. If I may quote from an article by J Clifford Wallace, Senior Judge of the United States Court of Appeals for the Ninth Circuit, "A judiciary that does not independently review the actions of the other branches [of government] detracts from the people's belief in their government's legitimacy".⁴

A court that does not make decisions impartially according to law, but is instead subject to improper influence, whether from the executive or any other source, will make unpredictable and biased outcomes. Properly having regard only to the evidence and the law will deliver consistent and predictable outcomes upon which citizens, business, investors and the international community can rely to order their affairs. Many countries in the region rely to some extent on international investment, and some in fact need that investment to raise community living standards, as those executive governments will well know. Outside investment is considerably more likely if investors can turn to an independent judiciary, and rely on predictable judicial decisions.⁵

All branches of government, not to mention the community, are mutually benefited by judicial independence. The executive and the judiciary have a role to play in legitimating the other, and executive governments should be aware of, if nothing else, their own self-interest in supporting a strong, independent judiciary. As a barrister submitted to me recently in court, you can

⁴ Senior Judge J Clifford Wallace "An Essay on Independence of the Judiciary: Independence From What and Why " 58 *NYU Annual Survey of American Law* (2001) 241, 251

⁵ Senior Judge J Clifford Wallace "An Essay on Independence of the Judiciary: Independence From What and Why " 58 *NYU Annual Survey of American Law* (2001) 241, 254

always bet on a horse called 'Self Interest', as you know it will always be doing the best for itself.

Judges themselves have only a limited capacity to advance education in relation to the Statement and the principles of judicial independence.

Senior Judge Wallace has said however that if or when judicial independence is threatened, "judges must be prepared to make their case, in some way, to the citizens. After all, it is the citizens who lose if the judiciary becomes a sycophant to the executive branch".⁶ Ultimately, as Sir Gerard Brennan, former Chief Justice of Australia's High Court observed, "judicial independence does not exist to serve the judiciary; nor to serve the interests of the other two branches of government. It exists to serve and protect not the governors, but the governed".⁷ When citizens and communities are aware of how an independent judiciary will benefit them by improving their access to justice, they are more likely to push executive governments to properly resource and respect the judiciary.

Acknowledging the productively symbiotic relationship between the judiciary and the legal profession, the latter can potentially play a very useful role in publicising this important statement of principle. I am not sure of the extent to which bar associations and law societies are aware of the existence of the Statement, let alone its content.

That these principles are fundamental does not guarantee they are fully understood. History bears this out. There is a notorious example of an Australian state leader unable to explain the doctrine of the separation of powers – some decades ago. I fear many members of the public would not understand the basis for giving judges security of tenure. Some 'letters to the editor' published during recurrent debates on sentencing levels would tend to confirm that fear. Yet the rationality of the justification, once expounded, is obvious.

The general public's appreciation of the nuances of the judicial function rests at a fairly low level. The Statement is in readable form and readily comprehensible. It could be a useful addition to legal studies and civics education courses at secondary schooling level.

The importance of the Statement is reflected by the extent of adoption within the Asia Pacific region, especially in light of the aspects of diversity to which I have referred. In signing the Statement in Beijing, the Chief Justices recorded their conclusion that its content presented 'the minimum standards necessary to be observed in order to maintain the independence and effective function of the judiciary'. The Statement is primarily significant, of course, for its content. I wish to spend a few moments mentioning the major pillars of the Statement.

⁶ Senior Judge J Clifford Wallace "An Essay on Independence of the Judiciary: Independence From What and Why" 58 *NYU Annual Survey of American Law* (2001) 241, 249

⁷ The Hon Sir Gerard Brennan AC KBE *Judicial Independence* (address to the Australian Judicial Conference, 2 November 1996, Canberra)

The Statement begins with an elucidation of the concept of judicial independence. Following affirmation of the pivotal significance of the judiciary, there is reference to international conventions affirming every person's entitlement to 'a fair and public hearing by a competent, independent and impartial tribunal established by law', and the indispensability to that end of an independent judiciary. It proclaims that independence is essential to observance of the rule of law, and that it must be guaranteed by the State. The Statement goes on to affirm that judicial independence means a judiciary deciding matters impartially 'without improper influences, direct or indirect from any source', and the existence of jurisdiction for judges 'over all issues of a justiciable nature'.

Then the Statement offers a summary of the goals of the judiciary:

- '(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.'

The Statement then makes more particular, machinery type provision in relation to the fields traditionally regarded as features of the landscape of judicial independence: the appointment of judges of competence, integrity and independence, without discrimination; the security of tenure of judges, with removal only for incapacity or inappropriate conduct proven to the satisfaction of an independent tribunal; judicial conditions, which must be at an appropriate level, and guaranteed for the term of a judge's appointment; a guaranteed jurisdiction, which at the highest level cannot be altered except with the consent of the members of the court, and this extends to maintaining a court's jurisdiction, and not diverting it to a tribunal not imbued with independence and impartiality; judicial administration controlled by the court, especially in relation to the allocation of cases; a relationship with the executive which is free of pressure upon the judiciary; and adequate resourcing of the courts, an issue of considerable practical concern in the Pacific region.

While 'the rule of law' has become a by-word of rapidly developing regimes, with recognition its genuine observance is essential for, among other things, international investment, the boundaries of the concept are not necessarily well understood. And while judicial independence is accepted as one of its constituent parts, I doubt the understanding of most would extend to the sort of detailed prescription made by this Statement.

Yet the Statement is, for its historical derivation, of enormous significance, especially where the Chief Justices from jurisdictions of such diversity were able to come to this agreement. For a statement of 'minimum standards', the comprehensiveness of the Statement is reassuring.

For the most part, this Statement surpasses the merely aspirational. It confirms minimum standards which must be met. It is not susceptible of criticism on the basis of abstractness. Having established a general requirement, it then goes on to deal with particular, concrete manifestations of the point. The wide-ranging coverage of the Statement means it should provide the basis for an apt response to most of the situations which may arise. But more

importantly, if its principles are known and understood, that may forestall problems arising. I think it is very important to note the quite detailed provision made by the Statement. It is patently a serious attempt to establish a blueprint of considerable practical utility.

If I might take for a moment the fourth recitation to the Statement – “whereas the organisation and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality”. I have spoken today about the educative aspect, and how the benefits of judicial independence flow to executive government and ordinary citizens. I have also spoken about the limited role that judges can play in advancing these issues, or translating the principles into reality. I am indebted to an article by Senior Judge Wallace, “An Essay on Independence of the Judiciary: Independence From What and Why”,⁸ for a number of practical steps that we ourselves may apply to advance the principles of judicial independence contained in the Statement, and I would like to take a moment to mention a few of these.

Firstly, resources. Lack of appropriate resources can severely impede the proper functioning of a court. Unfortunately, some here today may have first-hand experience of this. Senior Judge Wallace comments that “If the courts can find ways to make their current resources go further, they will take one step towards the goal of greater fiscal independence. There is no one more qualified than the judges who work within the system to seek out inefficiencies, to restructure case flow, and thereby to extract a greater amount of justice from the same amount of funding.”⁹ Case management, mediation, regular evaluation of administrative systems, and training of court staff may be utilised to great effect.

Backlogs and delays impact upon public trust and confidence in the court system. Senior Judge Wallace comments that “it is incumbent upon the judiciary itself to take a leadership role in solving the problems. Judicial education can be used to train judges how to process cases more efficiently and effectively, and many innovations, both procedural and technological, can be employed to decrease the time between the filing of a suit and its resolution”.¹⁰ Speedy disposal of cases and fair adjudications will improve citizen’s access to justice, and the public image and respect for the courts.

Public awareness of the value of judicial independence is important, as I mentioned earlier. Interrelated with this is the need for public to be made aware of the activities of independent judiciaries. Senior Judge Wallace suggests that “in order to demonstrate that the country’s law apply fairly and equally to all, the public should be informed of the bringing to account of government officials who are corrupt or otherwise violate the law”.¹¹ Publication of court judgments by means of the internet is an inexpensive and, generally, broadly accessible way to inform the public of the court’s activities.

⁸ 58 *NYU Annual Survey of American Law* (2001) 241

⁹ Senior Judge J Clifford Wallace “An Essay on Independence of the Judiciary: Independence From What and Why” 58 *NYU Annual Survey of American Law* (2001) 241, 248

¹⁰ 58 *NYU Annual Survey of American Law* (2001) 241, 253

¹¹ 58 *NYU Annual Survey of American Law* (2001) 241, 251

The abiding significance of the Statement must depend on the implementation and maintenance of the standards it sets. They must first be more broadly understood. It is not enough that Chief Justices and their judges appreciate and support them. That is a given. To be relevant and definitive, they must be accepted more broadly by those whose depredations, intentional or unwitting, can render the work of the courts of law peripheral or ephemeral. The Statement should be understood and accepted to the point where a government tempted to intrude upon judicial authority, and thereby diminish the rule of law, would be dissuaded from that course in recognition it would run contrary to the principle expressed by the Statement.

As I have suggested, an important first step is to ensure, by one means or another, that this vastly important Statement is much more broadly publicised and understood than is presently the case.