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The Independence of the Judiciary as the Base of Business and Economic Development

By the Hon David K Malcolm AC
Chief Justice of Western Australia
Chairman, LAWASIA Judicial Section

Tokyo
Japan

Chief Justices
Your Honours
Ladies and Gentlemen,

The rapid nature of information exchange, the increasingly porous nature of international boundaries through electronic communications and the movement of capital and labour have presented a range of new issues in the administration of justice. These have major implications for the Courts and the role of the Courts, particularly in newly liberalised economies. International trade has raised issues concerning both substantive law and procedure. Foreign investment in the Asia Pacific region and the increasing affluence of particular socio-economic groups in countries throughout Asia and the Pacific has seen increasing demands for the reform of the law and the methods of its enforcement in order to provide consistency and coherency in commercial relationships. These factors have been referred to by the Chief Justice of Singapore as Trade, Technology and Tribe:

> *"Trade would refer to trends in international economics, the flow of goods and services and investments. Technology represents the broad implications of scientific advancement while Tribe describes how socio-economic forces can bind communities together or pull them further apart."*[1]

[1] The Hon Yong Pung How, Keynote Address to the Asia Pacific Courts Conference, Manila, the Philippines, (1998) 1 *Courts Systems Journal* 138 at p. 147

At the same time as we have seen the blurring of international boundaries by new technologies, we have also seen an increasing belligerence in the assertion of a national identity and State sovereignty.

These rapid changes demonstrate the need for strong and stable legal institutions to harness the benefits of change while avoiding the social, political and economic pitfalls which uncontrolled change can bring. In my view, there are two guiding principles that must be borne in mind when seeking the required strong and stable legal institutions. The first is the importance of the rule of law and the role of an independent judiciary in providing a sound foundation for social and economic change. The second is the need for the law to remain relevant to society while avoiding the destructive influences that rapid change may have on society.

The Asia Pacific region has seen the liberalisation of a number of Asian trade markets. The liberalisation of trade in these countries has seen an exponential growth in the number of foreign corporations doing business in the region. Liberalisation has also placed new and weighty demands on the administration of justice and Court systems. In particular, there is requirement that all countries in the region pursue the development of a strong indigenous legal system. In the present context that means a legal system that will assist both foreign and domestic businesses in establishing stable business and trading relationships and provide for the effective resolution of commercial disputes. The importance of a strong and independent judiciary to the economic and social development of the nation cannot be overstated. As the Secretary General of the International Commission of Jurists has commented:

"Far from being a luxury for a poor state, a legal structure which is quantitatively and qualitatively sufficient to carry out the services expected of it must be considered one of the necessary components of a society and a precondition for its progress."[2]

A great deal of work has been undertaken within the Asia Pacific region in recent years by the World Bank, the Asian Development Bank ("ADB") and the International Development Law Organisation ("IDLO") in the modernisation and strengthening of regional legal systems. In this context, the importance of a strong legal system and adherence to the rule of law cannot be underestimated as a fundamental part of economic development. More than 30 years ago when Deputy General Counsel of the ADB, I learned that the law and its administration are as much part of the economic infrastructure as communications, transport and the financial systems. Private investors and their financiers look not only at the potential for returns in investment in developing economies, but also ask whether investors' rights can be effectively and impartially enforced by the domestic legal system. Investors and traders will also take into account whether property and contractual rights will be upheld and enforced and other commercial activities can be conducted free from arbitrary actions by government, powerful individuals or special interest groups[3]. A lack of confidence by investors and foreign businesses in the domestic legal regime of any country will translate into the withdrawal of investment and missed opportunities for the advancement of standards of living.

[2] Dieng A., *The Rule of Law and the Independence of the Judiciary: An Overview of Principles* (International Commission of Jurists; Geneva, 1992) at p. 35

[3] Shihata I., "Judicial Reform in Developing Countries and the Role of the World Bank" in *The World Bank in a Changing World; Volume 2* (World Bank; New York, 1995) at p. 151

The development of a legitimate and stable legal system requires the development, not only of a consistent and transparent legislative or rule-making process, but also a strong and efficient indigenous Courts system through judicial education and the development of Court infrastructure.

Respect for the legal system by the citizens themselves can also have a positive effect on the economic prosperity of a developing economy. Studies undertaken by the World Bank have found that if reform is to be sustained, attitudes to the law must also be changed. For example, in some countries it was found that individuals by-passed the legal system to resolve disputes because of a lack of respect for the Courts. Local businesses and individuals made unwise, inefficient and costly decisions on the conduct of their affairs as a result of a lack of understanding and advice on regulatory regimes and the function of the Courts in resolving disputes. Andrew Vorvink, writing on issues facing the World Bank in legal reform concluded that:

> *"Informing the public and entrepreneurs about new laws, economic rights and options to resolve economic disputes can affect future behaviour and cause more efficient economic decisions as well as a better respect for the rule of law generally."*[4]

In terms of the process of political and economic reform that is being implemented in a number of countries, respect for, and adherence to, the rule of law provides an important foundation for reform. It has been

[4] Vorvink A., *The World Bank and Legal Technical Assistance: Current Issues* (World Bank Legal Department; New York, 1997) at p. 7

suggested that the fostering of observance of the rule of law assists in economic and social development by teaching political parties and individuals that the law cannot be manipulated, bent or broken in order to achieve partisan political ends[5].

It has now been recognised for some time that an effective legal system administered by an independent judiciary is as essential to the infrastructure of a country as the transport, communications, and the legislative, financial and administrative systems in a country. The maintenance of an independent judiciary is an integral part of ensuring adherence by the State to the principles of the Rule of Law. Neutrality, independence of mind and the absence of external interference in the application of the law and the administration of justice are central to judicial independence.

The mere existence of a process that outwardly guarantees judicial independence and complies with the Rule of Law is insufficient for this purpose. The long term stability of a system of laws, and thereby the stability of the State, cannot be dependent on fear. While there are facilities available to any State to enforce the law through the use of force, history has shown that those States which use brute force as the primary means to enforce the law, eventually succumb to revolution. The community must have confidence in the constitutional or legal processes that make the law. The law must also reflect commonly held beliefs and values and then be applied fairly, equally and impartially to all members of the community.

[5] Larkins C., "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis", (1996) 44 *American Journal of Comparative Law* 605 at p. 606

Law reform on a global scale requires, and must necessarily have, at its core, the co-operation of law reformers of countries of differing political, social and economic paradigms in order to have any chance of coming to grips with even the most basic legal reform concepts. Law reform covers a vast area of legal issues from the complex concerns of a treaty between foreign neighbours to the issues of judicial corruption.

I do not think it would be an overstatement to say that we live in exciting times in the context of international relations and rapid advances in technology. In recent times the advent of high-speed communications and the increasingly global nature of economics has meant the development of close bonds between the nations in the Asia Pacific region. Where the region was once the arena for combat of Western powers and then Western political ideologies, it has now become one of the most politically and economically important regions in world trade.

I repeat that an effective legal system administered by an independent judiciary is as essential to the infrastructure of a country as the transport, communications, and the legislative, financial and administrative systems in a country. These are the essentials which form the base of business and economic development in the countries of Asia and the Pacific.

There have been some landmark developments in law reform in the Asia Pacific Region in recent years. Some of these have been the result of the efforts of the members of LAWASIA, the Law Association of Asia and the Pacific. The LAWASIA Region is co-extensive with the region covered by the United Nations Economic and Social Committee for Asia

and the Pacific ("*ESCAP*"), and following the collapse of the Soviet Union it now includes the Russian Federation: countries like Kazakhstan, Uzbekistan, Kyrgyz Republic, as well as former countries who were members and still are from Afghanistan in the east swinging around Korea, down to New Zealand and Samoa in the Pacific Ocean, and across to Sri Lanka in the Indian Ocean.

For some years now I have been the Chair of the Judicial Section of LAWASIA and I have been responsible for the organisation of the biennial Conference of Chief Justices of Asia and the Pacific since 1989. In recent years the Conferences have been attended by the Chief Justices of some 25-30 or more countries in the Region.

The Conference of Chief Justices is convened on behalf of the LAWASIA Judicial Section and, as is now the practice, held contemporaneously with the general LAWASIA Conference. The First Conference took place in Penang, Malaysia 1985 and subsequent Conferences have been held in Islamabad, Pakistan 1987; Manila, Philippines 1989 and 1997; Perth, Australia 1991; Colombo, Sri Lanka 1993; Beijing, People's Republic of China 1995; the Philippines in 1997; Seoul, Korea, 1999 and New Zealand in 2001. The Chief Justices Conference was first held in conjunction with the LAWASIA Conference in Perth in 1991.

At the 6th Conference of Chief Justices of Asia and the Pacific held in Beijing, in August 1995 the Conference adopted the *Beijing Statement of Principles of the Independence of the Judiciary* as a statement of minimum standards to be observed in order to maintain the independence and

effective functioning of the Judiciary in the Region.[6] This is really quite a remarkable development which was foreshadowed by the United Nations when they adopted their *Basic Principles on the Independence of the Judiciary* and recommended that in the various regions of the world the judiciary get together and adopt statements which were applicable to their particular regions. The Asia Pacific Region is the first region in the world where such a set of principles has been adopted.

It is almost universally acknowledged that one of the most fundamental aspects of the protection of human rights and the rule of law is the maintenance of an independent judiciary. There are a number of definitions, which have been advanced of judicial independence. Most academic definitions centre upon the absence of external influence in the administration of justice. For example, judicial independence has been defined variously as:

> *"... the degree to which judges actually decide cases in accordance with their own determinations of the evidence, the law and justice free from coercion, blandishments, interference, or threats from governmental authorities or private citizens."*[7]

or, in the context of a parliamentary democracy:

> *"... the capacity of the Courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or*

[6] Nicholson, RD *5th Conference of Chief Justices of Asia and the Pacific: Evaluation Report* at 24.
[7] Rosenn K., "The Protection of Judicial Independence in Latin America" (1987) 19 *University of Miami Inter-American Law Review* 1

apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control."[8]

It has been suggested that there is an additional aspect to judicial independence that many of these definitions omit, that is, the extent to which the judiciary holds the public confidence that they are the appropriate body to determine what is right or wrong[9].

The maintenance of public confidence in the impartiality of judges is essential to public acceptance of the law and the legal system. A loss of that confidence can lead to instability and threaten the existence of society. The link between the independence of the judiciary and judicial impartiality is not however well understood. One of the means whereby the links between independence and impartiality can be articulated is in the setting of minimum universal standards to protect judicial independence and thereby preserve judicial impartiality. Since the early 1980s, development of the concept of judicial independence at the international level, in particular by the enumeration of its key features, has proceeded apace through instruments such as the International Bar Association's *Minimum Standards of Judicial Independence* (1982) ("*New Delhi Standards*") and the United Nation's *Draft Principles on the Independence of the Judiciary* (1981) ("*Siracusa Principles*"), the UN *Basic Principles on the Independence of the Judiciary* (1985) ("*Basic Principles*") and *Draft*

8 Sir Guy Green, "The Rationale and Some Aspects of Judicial Independence", (1985) 59 *Australian Law Journal* 135

9 Larkins C., "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis" (1996) 44 *American Jounrl of Comparative Law* 605 at p. 610

Universal Declaration on the Independence of Justice (1989) ("*Singhvi Declaration*").

The *Bejing Statement* is quite comprehensive and I do not propose to give any detailed exposition of it. What it does do is provide a common definition of the judicial function that is accepted by Judges in some 30 countries in the Asia Pacific region. Article 10 of the *Beijing Principles*[10] provides that the objectives and functions of the Judiciary include:

> *(i) to ensure that all persons are able to live securely under the Rule of Law;*[11]
>
> *(ii) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights within its own society;*[12] *and*
>
> *(iii) to administer the law impartially between citizen and citizen and between citizen and State.*[13]

These functions complement and overlap each other. For example, it is to the Judiciary that the power of, and responsibility for, resolving disputes according to law is given.[14] The natural consequence of this allocation of responsibility is that, the judicial power must be exercised by a consistent and unwavering application of the Rule of Law. It follows that the Judiciary must apply the Rule of Law impartially to matters brought before it. As one judge has put it:

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10 See also *Singvhi Declaration* Art. 1.
11 *Beijing Principles* Art. 11 (a).
12 *Beijing Principles* Art 11 (b).
13 *Beijing Principles* Art. 11 (c).
14 See generally Nicholson, RD *Judicial Independence and Accountability: Can they Co-exist?* at 410-411.

> "*The exercise of ... judicial power ... requires that judicial decisions be made 'according to law'. If the power is exercised on some other basis, and particularly as the consequence of influences whether of power, policy, private thoughts or money, it follows that an essential requirement of the judicial power is negated*."[15]

In turn, a consistent, impartial and unwavering application of the Rule of Law tends to protect persons from the infringement of human rights, to the extent that they are recognised by the Rule of Law which applies in a particular country. There is room, within the historical and cultural context of a country, for a legitimate debate about the appropriate scope of human rights within that country. However, in so far as those rights are recognised, the Judiciary can play an important part in upholding them, whenever there is a powerful attempt to abridge them in an *ad hoc* or arbitrary manner.

[15] Nicholson, RD *Judicial Independence and Accountability: Can they Co-exist?* at 405.