

2003

The Independence of the Judiciary in the Asia-Pacific Region

The Hon David K. Malcolm

University of Notre Dame Australia, dmalcolm1@nd.edu.au

Follow this and additional works at: https://researchonline.nd.edu.au/law_conference



Part of the Law Commons

This conference paper was originally published as:

Malcolm, T. K. (2003). The Independence of the Judiciary in the Asia-Pacific Region. *10th Conference of Chief Justices of Asia and the Pacific*.

This conference paper is posted on ResearchOnline@ND at https://researchonline.nd.edu.au/law_conference/5. For more information, please contact researchonline@nd.edu.au.





10th Conference of Chief Justices of
Asia and the Pacific

31 August – 5 September 2003

*The Independence of the Judiciary in the
Asia-Pacific Region*

By the Hon David K Malcolm AC CitWA
Chief Justice of Western Australia

Hotel New Otani
Tokyo
Japan



The Concept of Judicial Independence

It is almost universally acknowledged that one of the hallmarks of a democracy is the independence of the Judiciary. A Judiciary which exists merely to do a Government's bidding or to implement Government policy provides no guarantee of liberty. What do we mean by independence of the Judiciary? The former Chief Justice of Tasmania, Sir Guy Green has defined it as *"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 apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control."*

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 public confidence can lead to instability and even a threat to the very existence of society. In the late seventeenth century in England, the politicisation of the Judiciary and its subservience to the Crown was a material factor in the Revolution of 1688. One of the complaints against George III recited in the *American Declaration of Independence* was that, *"He has made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."*

There are many occasions upon which a Judge is required to decide what is just, what is fair or what is reasonable. In cases of that kind, a Judge necessarily seeks to apply basic values representative of community values.



In doing so, he or she does not merely reflect public opinion, or is influenced by prejudice, emotion or sentiment. The Judicial Oath requires every Judge to administer justice according to law, without fear or favour, affection or ill-will. Parliamentary democracy and the rule of law are dependent for their existence on an independent Judiciary. The partisan administration of the law is a denial of the rule of law.

The recognition of the principle of the independence of the Judiciary does not make Judges immune from criticism. However, only in very exceptional cases will charges of contempt be brought in respect of criticism of the Judiciary. Nevertheless, any member of the public has the right to criticise in good faith in public or in private any decision by the Court or a Judge. Provided there is no imputation of improper motives or any attempt to impair the administration of justice, anyone is entitled to make fair comment, even outspoken comment, on matters of public interest.

International Recognition of the need for Judicial Independence

The need for judicial independence has now been recognised on an international basis. The Asia-Pacific Region has done so by its adoption of the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* ("The Beijing Principles"). The *Beijing Principles* reflect an agreement between the Chief Justices from a range of countries throughout the Asia-Pacific Region on the minimum standards necessary to secure judicial independence in their respective countries. 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



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

The *Beijing Principles* originated from a statement of principles formulated by the LAWASIA Human Rights Committee and a small number of Chief Justices and other Judges at a meeting in Tokyo in July 1982. "LAWASIA" is the acronym of the Law Association of Asia and the Pacific. It is an association of lawyers, law teachers and Judges founded in 1966 which is committed to the protection of human rights and the maintenance of the rule of law by an independent Judiciary. It covers the same Region covered by the United Nations Economic and Social Committee for Asia and the Pacific ("ESCAP") which reaches from Afghanistan to the Russian Federation, Japan and Korea and extends south to Sri Lanka and the Seychelles, Australia, New Zealand and the countries of the Western Pacific. I have been a member of LAWASIA since 1968 and Chairman of the Judicial Section since 1989.

The Judicial Section has been responsible for the promotion of the biennial Conference of Chief Justices of Asia and the Pacific, held contemporaneously with the general LAWASIA Conference. These Conferences have been held every two years since 1985. The First Conference took place in Penang, Malaysia 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; and Seoul, Korea, 1999. The 10th Anniversary Conference of Chief Justices of Asia and the Pacific is being held in Tokyo in September 2003.

In 1991, the Conference accepted a recommendation I made that the Chief Justices develop a Regional statement of the principles of the independence of the Judiciary. Some years previously, the United Nations had published a statement of the basic principles of the Independence of the Judiciary and recommended that more detailed statements be developed in the various individual UN Regions around the world. The Asia-Pacific Region was the first of the United Nations Regions to attempt to develop such a statement. In August 1995, at the Sixth Conference of Chief Justices of Asia and the Pacific in Beijing, I presented a paper entitled the *Second Revised Statement of Principles of the Independence of the Judiciary*. After further amendment, all 20 Chief Justices present unanimously adopted the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* ("The *Beijing Principles*"). The Chief Justices of 38 countries in the Region have now subscribed to the *Beijing Principles*. They have the full support of the United Nations and the United Nations Rapporteur on the Independence of the Judiciary, Mr Param Cumaraswary who was appointed to that position by the Secretary General of the United Nations. The adoption of the *Beijing Principles* was a remarkable development. It is quite extraordinary that nations, from the two countries with the world's largest populations to some of the smallest countries with



widely different legal and political systems were able to reach a consensus on the minimum standards necessary to maintain judicial independence.

There are six key aspects of the *Beijing Principles*. These are the judicial function¹, the concept of judicial independence², judicial appointments³, security of tenure⁴, jurisdictional issues⁵ and resources and finance⁶.

The Judicial Function

The first key aspect of the *Beijing Principles* is the definition of the parameters of the judicial function. An appreciation of the parameters of the judicial function is central to an understanding of the concept of judicial independence. It is these parameters which provide the legitimate foundation for the set of safeguards which we call the principles of judicial independence. They find expression in Article 10 of the *Beijing Principles*. Article 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;*
- (ii) *to promote, within the proper limits of the judicial function, the observance and the attainment of human rights within its own society; and*
- (iii) *to administer the law impartially between citizen and citizen and between citizen and State.*

¹ Encapsulated in Article 10 of the *Beijing Principles*

² Encapsulated in Articles 3 and 4 of the *Beijing Principles*

³ Encapsulated in Articles 11 and 12 of the *Beijing Principles*

⁴ Encapsulated in Articles 18 and 21 of the *Beijing Principles*

⁵ Encapsulated in Articles 33 and 34 of the *Beijing Principles*



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.⁷ 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 all matters brought before it.

In turn, such an 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 that 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, insofar as those rights are recognised, the Judiciary can play an important part in upholding them, whenever the powerful attempt to abridge them in an *ad hoc* or arbitrary manner. As Mr L.V. Singvi observed in his Final Report to the United Nations Commission on Human Rights in 1985: "*The strength of legal institutions is a form of insurance for the rule of law and for the observance of human rights and fundamental freedoms and for preventing the denial and miscarriage of justice.*"⁸

The Concept of Judicial Independence

The second key aspect is the concept of judicial independence itself. What judicial independence means is set out in Article 3 of the *Beijing*

⁶ Encapsulated in Articles 41 and 42 of the *Beijing Principles*

⁷ The Hon Justice RD Nicholson AO, *Judicial Independence and Accountability: Can they Co-exist?* (1993) 67 Australian Law Journal 404 at 410-411

⁸ Singhvi, LM *Final Report to the United Nations Commission on Human Rights* (1985) at n 44



Principles which provides that the independence of the Judiciary requires that:

- (i) *the Judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and*
- (ii) *the Judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.*

These first two aspects of the *Beijing Principles* are fundamental. The subsequent provisions of the *Beijing Principles* constitute the machinery that works to maintain judicial independence, which is essential to the fulfilment of the judicial function.

Judicial Appointments

The third aspect of requirement of the *Beijing Principles* relates to judicial appointments. If we seek from our Judges an attitude of impartiality and the ability and determination to enforce the Rule of Law, it is important that the selection process which leads to judicial appointments should be calculated to supply individuals of this calibre. Articles 11 and 12 of the *Beijing Principles* provide that:

- (11) *To enable the Judiciary to achieve its objectives and perform its functions, it is essential that Judges be chosen on the basis of proven competence, integrity and independence.*



(12) *The mode of appointment of Judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.*

In the process of appointment of Judges, it is necessary that the influence of the Executive should be kept to a minimum in order to reduce potential for improper considerations. This also has the advantage of encouraging public confidence in the impartiality of appointees. To further encourage such public confidence, the selection process should be open and formal.

The independence of the Judiciary, as an institution, from the Executive and Parliament, is commonly referred to as institutional independence.⁹ In contrast, the freedom from interference to which a Judge is entitled is known as individual independence. Individual independence is an essential safeguard for the maintenance of impartiality. Impartiality is the duty of a Judge. The guarantee of freedom from improper influence is the means by which performance of that duty by all Judges can best be achieved.¹⁰

Security of Tenure

⁹ The Hon Justice RD Nicholson, n 7, p 405

¹⁰ The Hon Justice MD Kirby, *The Abolition of Courts and Non-reappointment of Judicial Officers in Australia* (1994) at 3



Security of tenure is one of the most important aspects of individual independence and is the fourth key aspect of the *Beijing Principles*. Without a guarantee of tenure, subject to the proper performance of his or her judicial function, there is no guarantee that the fear of losing his or her appointment will not, even subconsciously, influence the decision of a Judge, thereby infringing the principle of judicial impartiality and diminishing the rule of law. Holding an appointment at the pleasure of the Executive can do irreparable damage to both the appearance, and fact, of impartial decision making. In contrast, tenure promotes both the appearance, and the fact, of impartiality, because it: "...insulates Judges from the need to worry about political reaction to their decisions."¹¹

The need for security of tenure finds expression in Articles 18 and 21 of the *Beijing Principles* which provide that:

(18) *Judges must have security of tenure.*

(21) *A Judge's tenure must not be altered to the disadvantage of a Judge during his or her term of office.*

Due recognition is given to national differences which incorporate confirmation procedures for tenure.¹² However, recognition is also given to the ideal of judicial appointments which, in the ordinary course, only terminate upon the attainment of a set age.¹³

Inevitably, there will be occasions upon which the Executive has an apparently legitimate claim to the termination of a judicial appointment,

¹¹ Dieng, A., *The Rule of Law and the Independence of the Judiciary: An Overview of Principles* (1992) 1 CIJL Yearbook 21 at p 29

¹² See *Beijing Principles* Article 19

¹³ See *Beijing Principles* Article 20



because of a failure to carry out the judicial function.¹⁴ In these cases, it is vital that the processes adopted to test such a claim are carefully handled. As a minimum, the process for removal should incorporate a thorough and impartial investigation of the reasons put forward for removal, as is suggested in Article 25 of the *Beijing Principles*. Provision should be made for the appointment by Parliament of an independent tribunal of inquiry to inquire into any allegation of misbehaviour and make recommendations to the Parliament thereon. As Article 26 of the *Beijing Principles* states, there should be a right to a fair hearing, and in accordance with Article 27 of those *Principles*, there should be a judgment which is based on established standards of judicial conduct.

A related issue is the non-reappointment of a Judge upon the abolition of the court of which he or she was a member. This, as has been pointed out by Justice Kirby, has the potential to damage judicial independence because, "*if judicial officers are repeatedly removed from their offices, and not afforded equivalent or higher appointments, the inference must be drawn that their tenure is, effectively, at the will of the Executive.*"¹⁵ This result could be avoided if, upon abolition of a court, the Judges of the former court are appointed to the new court, or offered an equivalent appointment or full compensation. Article 29 of the *Beijing Principles* provides for this.

Articles 31 and 32 of the *Beijing Principles* relate to the conditions of judicial service. Judges must be provided with adequate and secure remuneration. It is important for judicial remuneration to be commensurate

¹⁴ See *Beijing Principles* Article 22

¹⁵ The Hon Justice M.D. Kirby, *The Abolition of Courts and Non-reappointment of Judicial Officers in Australia* (1994) at p.3



with the office of a Judge. First, it assists to attract suitable persons capable of meeting the exacting demands of judicial office. Secondly, it minimises the potential for litigants to exercise financial influence over the decision making process. Thirdly, it promotes institutional independence by contributing to the status of the Judiciary as an institution.

As Article 31 of the *Beijing Principles* stipulates that remuneration should be secure, in the sense that it may not be reduced or otherwise altered to the detriment of a Judge during the term of office. A Judge who faces the possibility of financial disadvantage if his or her decisions displease the Executive is not placed in a position from which it is easy to exercise the judicial function with true impartiality.

A legitimate exception to this principle may be made where the reduction in remuneration is across the board, non-discriminatory and agreed to by the Judges concerned, there would be no adverse implications for individual judicial independence, however, institutional independence may still be at risk.

Jurisdictional Issues

The *Beijing Principles* also deal with jurisdictional issues, which is the fifth key aspect of the *Principles*. The *Beijing Principles* point out that a failure to recognise the exclusive jurisdiction of the Courts over matters of a justiciable nature constitutes a potential threat to the institutional independence of the Judiciary. The benefits of an impartial and independent Judiciary are of no value if a matter within the jurisdiction of a court is diverted to a specialist tribunal in which none of the hallmarks of impartiality



and independence are observed.¹⁶ Article 34 of the *Beijing Principles* asserts that the jurisdiction of the highest court in a society should not be limited or restricted without the consent of the members of the court. As Article 33 of the *Beijing Principles* states, the Judiciary should be given exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

Resources and Finance

The sixth key aspect of the *Beijing Principles* is relevant to the resources and finance of the Courts. One area where there is a potential threat to the independence of the Judiciary is in the financing of the work of the Courts. It must be accepted that Parliament is responsible for the appropriation of funds to operate the Courts in the same way as for any other arm of the government. The constitutional position in relation to money bills, however, gives effective control over the appropriation of funds for the Court to the Executive government. Hence the Judiciary is financially dependent on the Executive. A potential threat to judicial independence is posed by the preparation of judicial estimates by anyone not acting under the direction of the Judiciary and, by the exercise of control by the Executive over the way in which the courts expend the funds granted to them.

Obviously, modern court systems must be operated with public funds. These can only be raised and appropriated by Parliament. Someone must account to Parliament for the way in which the money is spent. Under the Westminster system there must always be a Minister who has this responsibility. Hence, there cannot be total independence of the Judiciary in

¹⁶ The Hon Justice R.D. Nicholson, *Judicial Independence and Accountability: Can they Co-exist?* at p.415



the sense of an absence of accountability. It remains however, the duty of Parliament and the Executive to provide adequate financial resources for the due administration of justice.

A possible way of ensuring judicial independence could be providing for a guarantee of judicial autonomy with respect to courts' budgets and staff. In Western Australia in 1993, the Independent Commission to Review Public Sector Finances, appointed by the incoming Court Government chaired by Mr Lesley McCarrey, recommended that the Judiciary should have a separate budget allocation and be able to manage the finances of the courts. It recommended that the vote for the law courts be separately identified in the Consolidated Revenue Fund estimates and should be determined after discussion between the Treasurer and the Chief Justice each year¹⁷. It is a matter of some regret that this recommendation was not implemented.

In order for the Judiciary to discharge their functions they require two particular categories of administrative services. The first relates to the reception, filing, organisation of the documents and legal processes relating to any legal proceedings, the management and listing for hearing of the cases to be heard, and the recording, processing and implementation of the orders and judgments made by the Courts, together with the processing of appeals. These services are provided by the staff of the Registry of the Court. The other category comprises the services of those persons who provide direct support to the Judges such as their personal staff, including associates, research assistants, secretaries and ushers as well as court reporters and

¹⁷ *Report of the Independent Commission to Review Public Sector Finances: Agenda for Reform*, Vol 1, August 1993, Western Australia at pp55-56 (the "McCarrey Report")



librarians. The extent of control by the Judiciary over both these areas of administrative services is a measure of judicial independence.

In 1984, Chief Justice King, then Chief Justice of South Australia said, *"A court should be in a position to command out of its own resources the personnel and the physical necessities to carry on its work without reference to the executive branch. So far this has proved to be unattainable, except in the case of the High Court of Australia ... The best which we have been able to achieve is the convention that it is the responsibility of the executive arm of government to provide unconditionally the necessary resources for the administration of justice and to respect without question the integrity and independence of the Judiciary."* In Western Australia, the courts have yet to match the South Australian achievement, although the integrity and independence of the Judiciary has not been questioned.

The prosecution and trial of persons accused of criminal offences is not a Government programme which can be cut or expanded dependent upon the availability of funds. It is essential that those who have been charged with offences are brought to trial without delay. The function of the Judiciary to preside over and decide the cases brought before the Courts, either by criminal prosecutions or civil litigants or by appeals, is likewise not a Government programme which can be cut or expanded depending on the general availability of funds. The functions performed by the Courts and the services rendered to the community by the Judiciary are both essential and independent. Access to the Courts is a critical aspect of the rule of law. It follows that the obligation of Parliament and the Executive is to provide the necessary resources to enable the Judiciary and those who assist them to



manage the flow of trials, appeals and other proceedings within the Courts without undue delay.

Models of administration adopted in various courts impact on the independence of the Judiciary. This issue was discussed at the 7th Conference of Chief Justices of Asia and the Pacific in Manila 1997. Prior to the Conference, I asked the Chief Justices to provide me information on the procedures applicable to the appointment of staff, the management and allocation of matters before the Court and the setting of budgets. The objective was to obtain an overview of the administrative and financial structures of Courts in the Region. It should be noted that the review was not intended to identify and recommend to the Chief Justices the most appropriate form of management structure. To make such a recommendation, going beyond the general statements contained in Articles 36 and 37 of the *Beijing Principles* would need to take into account differences in the cultural and legal or constitutional histories of each country, in addition to the resources available to each Court. Instead, the review was designed to provide an opportunity for the Chief Justices to understand the differences between the jurisdictions represented at the Conference and to provide material to aid future discussion of the methods of ensuring the administrative independence of the Judiciary.

The section on *Appointment and Employment of Administrative Personnel* dealt with the services involved in the reception, filing, organisation of the documents and legal processes relating to any legal proceedings, the management and listing for hearing of the cases to be heard



and the recording, processing and implementation of the orders and Judgements made by the Courts, together with the processing of appeals.

In all but three countries' Courts, administrative staff were employed as members of the relevant public service agencies. In the majority of Courts, the administrative staff were appointed by a senior administrative officer and/or relevant public service agency in accordance with a legislative or other formal regime established by the legislature. While on its face this tends to suggest that the Courts have little independence from the legislature or executive, it should be noted that in most cases, the appointment of administrative staff involved a senior administrative officer within the Court and/or an appointment board or commission. In a large number of Courts, the Chief Justice is responsible for the discipline and supervision of administrative staff. For example, the administrative staff of the Subordinate Courts of Singapore are selected and appointed by the Public Service Commission, which delegates its authority to a Judiciary Personnel Board. The Board consists of members of the Judiciary of the Supreme and Subordinate Courts in addition to a member of the Public Service Division. Following appointment, the administrative staff remain under the supervision of the Registrar, subject to the control of the Senior District Judge. In the case of the Supreme Court of Nepal, administrative staff is appointed in a similar manner, in conjunction with a Judicial Service Commission and remain under the supervision of the Judges of the Court to which they are appointed.

The position of the Supreme Courts of Pakistan, Japan and the High Court of Australia was of particular interest. In the case of Pakistan, the



administrative staff of the superior courts is appointed, remunerated and supervised by their respective Courts directly, in the exercise of a constitutional guarantee of independence. The process of appointment is governed by Rules of Court. Once appointed, the junior administrative staff remains under the supervision of the Registrar as administrative manager of each Court, who is also appointed by the Court.

Each Court within the Japanese hierarchy manages the appointment and supervision of its staff directly by virtue of a similar constitutional guarantee of independence. In the Supreme Court of Japan, this guarantee is carried into effect by virtue of Articles 12 and 13 of the *Court Organisation Law*.¹⁸ Article 12 provides that: "*In its conduct of judicial administrative affairs, the Supreme Court shall act through the deliberations of the Judicial Assembly and under general supervision of the Chief Justice of the Supreme Court.*" Article 13 provides that: "*The Supreme Court shall have a general Secretariat which shall administer the miscellaneous affairs of the Supreme Court.*"

By comparison, the High Court of Australia manages its administrative staff by virtue of the establishment of an independent management structure by legislation. While the Commonwealth *Constitution* establishes a Judiciary as an independent arm of government, the *Constitution* is silent in terms of the Court's administrative independence. Members of the administrative staff are appointed by the Chief Executive and Principal Registrar of the Court

¹⁸ *Court Organisation Law*, Law No.59, 1947



pursuant to the *High Court of Australia Act 1979*, enacted some 79 years after the Commonwealth *Constitution*.¹⁹

While the ability of the Judiciary to appoint administrative staff independent of interference by the legislature, or, more likely, a Minister or other member of the executive is a desirable guarantee of independence, it remains an ideal. I note that in the majority of Courts, the wages and salaries of administrative staff are paid either from consolidated revenue, or the budget of a government department, following its appropriation from a national budget. While the government continues to meet the financial demands of the Court, it is only reasonable to expect that, in the majority of cases, they will seek to retain some control over the management of administrative staff.

In those jurisdictions where the Judiciary has been established as an independent organisation, administrative staff are paid by the Court itself. I have already outlined the structure of the Supreme Court of Japan. In the High Court of Australia, the payment of the wages and salaries of administrative staff is governed by the *High Court of Australia Act*. Section 37, for example, provides that: "*Moneys paid to the High Court shall be applied only in payment of any remuneration and allowances payable under this Act to any person other than a Justice*".

Judges in the majority of the Courts in the Asia-Pacific Region have personal staff. The nature of such staff varies widely from the inclusion of what could be termed "domestic staff", such as gardeners or housekeepers through to the appointment of legally trained research assistants. In only

¹⁹ *High Court of Australia Act 1979* (Cth)



50% of those Courts in which personal staff are appointed does the Judge appoint the staff member himself or herself. In most other cases it is the Registrar or manager of the Court, or the government department charged with responsibility for the Court, that appoints the Judges' personal staff. In terms of independence, this may present a number of difficulties. For example, an inefficient or unsuitable staff member may have a direct impact on the efficiency of the Judge, particularly where the Judge relies on that staff member for services which he or she cannot perform himself or herself. In Western Australia, appointments of Judges' personal staff are made by the Attorney General at the request of the Chief Justice.

Another related question is how the independence of personal staff members is guaranteed. For example, where the appointment and conditions of a staff member are subject to the control of an individual or agency separate from the Judiciary, difficulties may arise if there is a dispute between the staff member and that department. A dispute about the level of remuneration is an example. Such a dispute would have a direct impact on the Judge to whom the staff member is appointed. I note that in all cases, the wages or salaries of the Judges' personal staff are ultimately paid from consolidated revenue.

In a little over one third of the Courts surveyed in the Asia-Pacific Region, the Judges do not have personal staff. They are, however, often assigned additional administrative staff to support and assist them in their duties. In the majority of cases, similar issues to those that I have identified in relation to administrative staff would also arise.



In some jurisdictions these issues are dealt with by the establishment of a distinct administrative structure. In Japan for example, Judges' personal staff are appointed in a similar manner to the balance of the administrative staff. In Hong Kong, the manager of judicial administrative affairs, called the Judiciary Administrator, appoints the staff. In both cases, a "pool" of available staff is created from which a Judge is assigned staff.

It should be noted that, in the majority of those Courts in which personal staff are appointed by a body external to the Judiciary, the Judges to whom staff are assigned retain supervisory and disciplinary control over their day-to-day tasks.

The procedures adopted for Case Management and Listings in each of the Courts, can be dealt with shortly. Scheduling the sittings of the Court, the management of the lists and the assignment of Judges to particular matters are generally undertaken under the supervision of, or with the direct involvement of, the Chief Judicial Officer in each jurisdiction, a council or committee of Judges or the Judge assigned to a particular matter. In all jurisdictions, therefore, this aspect of the administrative management of the Courts is under the direct control of the Judiciary. For example, in the Court of Appeal and High Court of New Zealand, the sittings of the Court are managed by the Chief Justice, pursuant to the legislation that establishes each Court. Section 60 of the *Judicature Act 1908* (NZ) provides that:

"(1) The Court of Appeal may from time to time appoint ordinary or special sittings of the Court, and may from time to time



make rules...in respect of the places and times for holding sittings of the court..."

Section 52(1) subss. (a) and (b) of the *Judicature Act*, dealing with the High Court, provides that:

"(1) Any three or more Judges, of whom the Chief Justice shall be one, may from time to time-

(a) Appoint sittings of the court for the dispatch of civil and criminal business; and

(b) Make for each place where an office of the High Court is established, rules respecting the places and times for holding sittings of the court, sittings in chambers, the order disposing of business...and such other matters."

In the superior Courts of Japan, all matters are dealt with by the Judicial Conference of each court. I have already outlined the legislative provisions that give form to the Conferences in relation to administrative staff. In the Supreme Court of Brunei Darussalam, the sittings of the Court and the listing of matters for trial are dealt with by the Registrar in conjunction with the Judges and the Chief Justice.

In those jurisdictions in which the Court will go "on circuit" or sit in Regional areas, the Chief Judicial Officer also deals with the listing of matters and the designation of a particular Judge to deal with the circuit, either alone or in conjunction with the Registrar.



It is worth noting also that in all but one of the Courts²⁰, rules of court are made either by the Judges in Council or by the chief judicial officer. In some jurisdictions, the rules are subject to disallowance by the executive or the legislature. Although not addressed in the survey, it may be interesting to identify the circumstances in which the executive or legislature can and will disallow rules made by the Judiciary.

In the vast majority of Courts, the regimes that apply to the internal administration of listings and procedure are largely free from interference by the executive or the legislature. This conclusion is significant. The removal or exclusion of external interference in the assignment of particular Judges to particular matters, and the exclusion of interference in settling rules of procedure, also serve to remove or exclude bias, or an appearance of bias, from the judicial process. External interference in the judicial process, as distinct from the judicial function, will create an apprehension in the mind of the community that the Judiciary is merely an administrative organ of the legislature or the executive. This leads into a discussion of the next section of the survey, dealing with the administrative structure of the Courts in the context of the broader public administration.

The purpose of the section on *Position of the Court Within the Justice System* was to identify the extent of judicial independence in practice. There were divergent answers given by the Courts on this topic.

²⁰ The Supreme Court of the Maldives indicated that the President set rules of court in that jurisdiction.



In Australia, a comprehensive study of forms of Court governance was published in 1991. Entitled *Governing Australia's Courts*²¹, it provided a summary of the forms by which Australian courts were managed, incorporating methods of selecting staff and settling budgets. In that report, three models of Court governance were utilised to compare and categorise the Courts studied:

- *The "traditional model"* was used to describe those systems of administration in which the management of the Court fell directly under the supervision of an administrative officer responsible to a member of the executive government, usually the Attorney General. Until the late 1980's, most courts in Australia were administered in this manner.
- *The "separate department model"* was used to denote those systems of governance in which the provision of administrative services to the Judiciary was administered by a separate department of state that falls within the portfolio of a member of the executive. Management responsibilities were shared between the chief judicial officer and a senior administrative officer responsible to the department. By reference to administrative services, I mean those services that fall into the first category that I outlined earlier.
- The final model was the *"autonomous model"* in which the chief judicial officer bears the responsibility for the management of both the administrative and judicial arms of the Court. In some cases, the chief

²¹ Church & Sallman, *op cit.*



administrative officer is appointed by the chief judicial officer or by government on the nomination of the chief judicial officer²².

In analysing and comparing the various courts' structures throughout the Region, I have utilised these three models. I acknowledge that the three categories are imperfect, as not every model of Court administration utilised will fit precisely in one or other of the three categories.

Only two of the Courts surveyed fell within the traditional model in terms of their administrative structure. In the Supreme Court of the Maldives, the administration and management of the Judiciary remains under the control of the President's office. Interestingly, the administration of the Supreme Court of Victoria remains under the control of the Attorney General.

Six of the Courts fell within the "separate department" model. All of the State Supreme Courts of Australia, except for Victoria, fall within this model. The administration in those Courts is managed by departments that are structured in a similar manner. The management of administrative services for the Supreme Court of Brunei Darussalam is conducted by the Civil Service Department.

The balance of the Courts surveyed representing the great majority conform to the autonomous model. What is common to many of the Courts that have applied this model is that the Judiciary has been constituted as a distinct department of government as a means of guaranteeing judicial independence. In that case, a constitutional guarantee of "adjudicatory

²² This style is also known as a "centralised" form in the United States; Graham C., "Reshaping the Courts: Traditions, Management Theories and Political Realities", in Hays S. & Graham C.,



independence" has been carried through to create structures for "administrative independence".

Much of the previous sections of the survey carried over into the final section on Court Funding and Expenditure. As I indicated earlier, complete administrative independence for the Courts is the ideal. However, all Courts remain dependent on government and, in particular, the legislature for the funds to maintain their operations and for the provision of administrative services. In all cases, funds are allocated to the Courts from consolidated revenue or from an annual budget settled by the legislature. In almost all cases, Japan being the notable exception, the funds are allocated to the Courts by the legislature, as an item in a national or provincial budget, or by a member of the executive from funds allocated to his or her portfolio.

It is notable that in all Courts participating in the survey the budget estimate is settled either by, or in conjunction with, the chief judicial officer of each jurisdiction. In many cases, it is the principal or chief registrar of each Court that has primary responsibility for settling the budget estimates and bears primary responsibility for the administration of the Court's budget. This is because the registrar has day to day responsibility for the administrative management of the Court's services. In a number of Courts where registrars perform judicial functions these responsibilities rest with an Executive Officer or equivalent.

I have outlined earlier the constitutional position of the Supreme Court of Japan. It is worth revisiting this in the context of budgetary arrangements

Handbook of Court Administration and Management, (1993), pp. 3 *et seq*



their Court as it provides an example of the most secure method of ensuring independence while dependent on the legislature and executive for the provision of funds. Article 83 of the *Court Organisation Law* provides that the amount to be allocated to the Courts, as distinct from any broader justice portfolio, is to be independently appropriated by the national budget. The budget estimate for the Japanese Courts is prepared by the Supreme Court Secretariat and receives the approval of the Judicial Conference. Once the budget estimate is received by the executive, the opinion of the Supreme Court on the estimate is sought²³.

In terms of the final question in this section, an alarming number of Courts reported that financial constraints have had an impact on the management of the Courts and the judicial function. For example, the Supreme Court of Cambodia has acknowledged that lack of funds has meant that there has been some difficulty in arranging travel for witnesses in criminal trials. There is also a lack of Judges with specialist training and there is little prospect for ongoing professional training. The Supreme Court of Mongolia has abandoned circuit work due to a lack of funds to allow judicial officers to travel.

In April of 1997 the then Chief Justice of Australia, Brennan CJ, announced in the course of opening the 12th South Pacific conference in Sydney that the eight Chief Justices of Australia's States and Territories had that day released a *Declaration of Principles of Judicial Independence* relating to judicial appointments. It contains a set of principles adopted by the Chief Justices applicable to Australian circumstances.

²³ *Court Organisation Law*, Article 18 (2)



Coinciding with this public announcement, the Chief Justices published the *Declaration* referring to the *Beijing Principles* which indicated that the *Declaration* specifically took them into account and said:

". . . in any state or country, the key to public confidence in the Judiciary is its manifest impartiality.

There is a crucial link between judicial impartiality and the principles of judicial independence, understood as a set of protective safeguards. This Declaration of Principles, like the Beijing Principles, has as its aim the articulation and promotion of the principles of judicial independence."

The *Beijing Principles*, by articulating the benchmark principles of judicial impartiality and the Rule of Law, have the potential to make a substantial contribution to both the social and economic development of the Asia-Pacific Region. As the Secretary General of the International Commission of Jurists has said:

"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."²⁴

The adoption of the *Beijing Principles* represented the achievement of a remarkable consensus between the Chief Justices of a range of countries - from the two countries with the world's largest populations to some of the



smallest. It was also necessary to accommodate the differences between those countries within the common law tradition and those within the continental or civil law systems. The common law tradition is reflected in a high degree of judicial independence and the absence of a career judicial service, with appointments made largely from the ranks of the private profession. The civil law system reflects both a collegiate system and a career judicial service undertaken as an alternative to private practice. There are also significant differences in the approach to procedure as between the common law adversarial system and the inquisitorial system. The authoritarian traditions of some countries mark them off from those with more democratic traditions. There are numerous variations across a wide spectrum, many of which reflect the divergent cultures of the different countries in the Region. The achievement of a consensus on the principles of the independence of the Judiciary in the Asia-Pacific Region was a tribute to the determination of the Chief Justices to reach agreement on the minimum standards necessary to secure judicial independence in their respective countries.

Conclusion

An up-to-date legal framework administered, interpreted and applied by a sufficient number of persons of ability who comprise the Judiciary is as much an essential part of the infrastructure of our State as roads, power and water supply. Conditions conducive to judicial independence need to be

²⁴ Dieng, A *The Rule of Law and the Independence of the Judiciary: An Overview of Principles* (1992) at 35.



maintained and nurtured. This will allow Judges the freedom to reach decisions determined only by intellect, conscience and an honest and careful assessment of the evidence and application of the law. Hopefully, more provision for the guarantee of judicial independence can be made in Western Australia by amendment to our State Constitution. Just over a week ago I presented a paper to a Conference on the State Constitution proposing a series of amendments required to give constitutional recognition and protection of the independence of the Judiciary. The making of such these amendments would bring Western Australia into line with the standards of the international community in respect of judicial independence.

It is remarkable that a consensus on the standards necessary to ensure judicial independence has been reached within the Asia-Pacific given that the countries of the Region are very different from one another. Each society has its own history, legal tradition, political system, culture, values and priorities. No single mechanism for maintaining an independent Judiciary can be transplanted elsewhere without amendment and have the same effectiveness. Each jurisdiction must reflect on its existing safeguards and evaluate their effectiveness in securing an independent and impartial Judiciary.²⁵ Western Australia has benefited greatly from the international discussion and agreement about standards of judicial independence in the Asia-Pacific. It is hoped that the countries of the Asia-Pacific will continue to focus their attention on the independence of the judiciary and develop policies protecting that independence. This will ensure the maintenance of democracy throughout the Region.

²⁵ Debeljak, J *Judicial Independence: A Collection of Material for the Judicial Conference of Australia*, February 2003 at 10

