

**International Association of Women Judges Conference
Amora Jamison Hotel, Sydney, Friday 28 April 2017, 9:00am**

"The Community of Courts in the Asia Pacific Region"

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One of the objectives of the International Association of Women Judges (IAWJ) is to "develop a global network of women judges and create opportunities for judicial exchange"¹. The IAWJ Asia Pacific Regional Conference promotes this goal by providing a forum for judicial officers from different legal systems to discuss challenges their courts face in delivering justice and how those challenges might be met. This 2017 Conference focuses upon topics such as how legal systems might better recognise the effects of gendered violence and deal with environmental issues in an age of climate change.

Collaboration between judges from different jurisdictions through conferences of this kind has been described as a feature of an emerging "global community of courts"². Members of this community are said to recognise one another as participants in a common judicial enterprise, which transcends national borders. They recognise that they "face common substantive and institutional problems; they learn from one another's experience and reasoning"³.

At a basic level, judicial exchanges foster an understanding between courts and through that understanding, trust and respect may develop. They may provide encouragement and support for judges in countries where the rule of law has come under assault⁴.

At another level, a benefit of participation in conferences of this kind is exposure to possible legal solutions to emerging legal problems. One writer, speaking in the 1970s in defence of comparative law as an academic discipline, suggested that, at least in the Western world, legal borrowing was the "usual way

of legal development”⁵. A moment’s reflection on the history of the common law and equity would bear this out.

The courts of the Asia Pacific region could be regarded as amongst the most collaborative in the world. The region is said to have been the first to secure widespread adoption of a set of principles on judicial independence⁶. This event occurred in the 20th century and close collaborations between the courts of the region continue today. I will return to this later. At this point it is worthwhile, I think, to consider some earlier historical events.

Legal borrowing is not a novel experience for countries in the Asia Pacific region. The dialogue between judges of the Asia Pacific region may in part be attributable to the region’s unique history of legal borrowing in the late 19th and early 20th centuries. This historical experience has left an imprint on the modern law of various Asia Pacific countries. It may also have contributed to a world view that is open and receptive to dialogues with the courts of other countries.

Perhaps the most prominent example of legal borrowing is Japan’s transplantation of French and German law during the Meiji Restoration⁷. In the late 19th century Japanese scholars and officials were travelling to Europe, to survey and discuss the legal codes which had been established or were in the process of being drafted. In the early 1870s two French jurists⁸ were engaged by the Japanese Ministry of Justice to advise on the drafting of new legal codes. The draft civil code based on the Napoleonic Code, the Code Civil of 1804, did not come into force in Japan but was nevertheless adopted by Japanese judges as “legal principle” until the new code, based on German law, was finalised in 1896.

Japan’s attention shifted to German law in the 1880s, which was about the time that the first draft of what was to become the BGB, or German Civil Code, was being discussed. We can speak of legal borrowings here too, for the German Code was based upon Roman law. Three German jurists⁹ prepared a Commercial Code, a Code of Civil Procedure and a Law of Organisation of Courts¹⁰ for Japan. Japan’s Civil Code of 1898 was largely modelled on the 1887 draft of the German

Civil Code. It is said, even today, that a “stable interest in German law persists” in Japan¹¹.

Japan’s transplantation of European law attracted the interest of Korea and of China. In 1881, King Kojong of Korea ordered a group of senior officials to travel to Japan to observe its society and culture firsthand. The officials who were designated to visit Japan’s Ministry of Justice returned with copies of Japan’s criminal procedure and penal codes. Although they criticised Japan’s reception of Western laws and civilisation as lacking critical evaluation¹², they proceeded to translate its codes. Korea subsequently employed a German diplomat as its first foreign legal adviser¹³. Laws governing the organisation of the courts and the Constitution of Korea, which were passed at the turn of the 20th century, reflected the growing influence of German and Japanese law in Korea.

China likewise took an interest in Japan’s legal reforms. In the early 1900s, the newly established Law Codification Commission invited Japanese jurists to assist in drafting its new legal codes¹⁴. The first three chapters of the Commission’s draft civil code (the “Qing Code”) were drafted by a Judge of the Tokyo Court of Appeals and were modelled on German law as adopted in Japan. Although it did not take effect, on account of the fall of the Qing Dynasty in 1911, later codes were similarly heavily reliant on German and Japanese law¹⁵.

Last year I was a member of a delegation comprised of members of the High Court of Australia, the Federal Court of Australia and the Law Council of Australia to China, at the invitation of the President of the Supreme People’s Court of the Republic of China. During that visit we met law professors from universities in Beijing who, to our embarrassment, displayed a not inconsiderable knowledge of both civilian law and the common law. The influence of European law on China’s current civil laws is well recognised. At the same time, the Supreme People’s Court has expressed an interest in the common law’s use of precedent. It will be interesting to observe if the Chinese courts are able to meld this aspect of the common law with their civilian-based codes.

There are other, lesser known, examples of legal borrowing in the Asia Pacific region. They include Nepal's use of French law as a model for reform in the mid-19th century and Thailand's borrowing of German and Japanese civil law in the early 20th century. In 1849 the founder of the Rana Dynasty of Nepal travelled to France and Britain. He was inspired by French law and on his return established a "Law Council" to draft a new legal code¹⁶. The "Country Code" was adopted in 1854 and remained the principal source of Nepalese law until 1963.

Thailand's King Rama V appointed a Commission in 1908 to draft civil and commercial codes with the assistance of French jurists. When disputes arose within the Commission as to how Thai and French law should be integrated, King Rama VI established a new Committee and instructed it to draft a code based on the German and Japanese civil codes¹⁷.

The extent to which the history of legal borrowing has shaped the development of the relevant legal system varies. These examples however serve to confirm that the borrowing of legal solutions from other countries is not a new phenomenon in the Asia Pacific and that jurists and governments in the past have found ways to collaborate despite barriers such as language, culture and distance.

The major reforms in Japan, Korea and China were not simply passive transplantations of French and German law. That is almost impossible for any legal system which must adapt foreign legal codes to its own society with its unique history and culture. Despite the Korean official's criticism of the Japanese, Japan's reforms were in fact heavily debated. By way of example, the draft civil code based on French law was criticised for its failure to take account of Japanese customs such as the traditional extended-family system. The later Chinese Kuomintang Civil Code retained aspects of Chinese social customs and provided for the application of custom in the absence of specific provision in the Code.

The motivation for these reforms and the borrowing of European law by Japan was in large part as a precondition to renegotiation of the "unequal treaties" of the mid-19th century¹⁸. Similar treaties are said to have prompted reforms

undertaken by China and Thailand. And it is suggested that the Nepalese reforms were attempts to protect the nation from British imperialism¹⁹.

It must also be acknowledged that the transplantation of the British and European legal systems in the region was not always the result of a choice exercised by countries in the region. Nevertheless it has allowed those courts to feel some affinity with other courts beyond their own borders and that has provided a basis for dialogue today. In the common law world the example of India comes to mind. The High Court of Australia and the Supreme Court of India meet every few years and, by reason of our shared heritage, are able to discuss legal problems common to our systems.

Modern judicial exchanges are not motivated by pressures of the kinds which had been felt by Japan and China. They are undertaken as a matter of choice because of the benefits perceived to flow from them, for example, exposure to other legal solutions and the strengthening of shared norms such as judicial independence and the rule of law.

Contemporary interaction between judges within the global community of courts is characterised by a far greater degree of dialogue than has historically been the case. Conferences such as this provide a forum for judicial officers across the region to collectively reflect on possible solutions to important transnational challenges confronting legal systems. The first session of the 2017 Conference – “The impact of judging on gendered violence” – will address an important issue that is the subject of the Family Violence Best Practice Principles published by the Family Court of Australia and Federal Circuit Court of Australia, the fourth edition of which was released in December 2016.

The success of IAWJ in the Asia Pacific region is perhaps no surprise in light of the growing collegiality between courts in the region. Six years prior to the establishment of IAWJ, the first LAWASIA Conference of Chief Justices of Asia and the Pacific was held in Malaysia in 1985. The goal of the Conference of Chief Justices is to provide an opportunity for “open exchange of views and information amongst Chief Justices”²⁰. Justices of the High Court of Australia regularly attend

the Conference and in 2015 the Court co-hosted the 16th Conference which was attended by Chief Justices (or their representatives) from 38 countries.

A significant achievement of the LAWASIA Conference of Chief Justices was the adoption at the 6th Conference in 1995 of the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region. That Statement was adopted by the Chief Justices (or representatives thereof) of 20 nations and has subsequently garnered further support and been referred to in judgments by Justices of the High Court of Australia²¹ and other courts throughout the region²². In 1997, Chief Justice Brennan of the High Court of Australia described the Statement as “remarkable” in its ability to express “ideals common to legal systems of very different kinds”²³. Chief Justice Gleeson later described the Statement as reflecting “the significance of international co-operation among judges”²⁴.

The Statement was recently reaffirmed by the “Colombo Declaration” signed last August at a Roundtable Meeting of Chief Justices of the Asia Pacific Region in Sri Lanka. That Declaration was signed by the Chief Justices (or representatives thereof) of 15 nations, including by Justice Bell on behalf of the Chief Justice of Australia. The Declaration recommends consideration of “amplification” of the principles in the Statement in light of “social, economic, political and global developments and challenges which affect the maintenance and protection of independence of the judiciary” that have arisen in the past two decades.

There are many other important forums for interaction between judiciaries emerging in the Asia Pacific region. One is the Asia Pacific Judicial Reform Forum (APJRF), the Secretariat of which is currently chaired by Justice Bell of the High Court of Australia. An important contribution of the APJRF was the publication in 2009 of *Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience*, a compilation of case studies discussing modern challenges in delivering justice such as delay and corruption. Contributors to the text include current and former judicial officers from Australia, Cambodia, Indonesia, Nepal and the Philippines.

The Asian Business Law Institute was launched in January 2016. Amongst other things, it aspires to provide a forum for members of the legal profession, including judges, to discuss and collaborate in developing business law in the region.²⁵

The High Court of Australia regards dialogue with overseas judiciaries through these forums and other modes of exchange as a priority. The Court has recently established an International Committee to facilitate dialogue with other judiciaries with a particular focus on our region.²⁶ The Council of Chief Justices is also working to develop a more coordinated approach to interactions between the Australian judiciary and overseas judiciaries and has recently established a Working Group to that end.

There are some courts with whom the High Court will talk but which do not share the same values as other courts such as the rule of law. To courts of some countries in our region, judicial independence means freedom from the pressures of corruption rather than reflecting a separation of powers. Judges of these courts may nevertheless strive to do justice by the people who come before them, within the confines of their legal system. From our perspective, it is preferable to maintain a dialogue about changes which are possible.

I have mentioned the delegation, in 2016, led by the High Court to the Supreme People's Court of China. A Letter of Exchange was entered into between our courts by which it was agreed to explore opportunities for the development of mutual understanding, education and cooperation between our judiciaries.

This is not to say that an engagement with another court involves the acceptance or legitimisation of any inhumane or unequal treatment of persons coming before that court. These are matters which, if possible, should be discussed. In discussions I have had in recent times with courts in Malaysia and Brunei, it would appear that Sharia Law is to be applied in some courts. The recent adoption of classic Sharia evidentiary principles stipulating the number and gender

requirements of witnesses in the Sharia Evidence Order of the courts of Brunei Darussalam and its Sharia Penal Code²⁷ would appear to disqualify women as witnesses and make it harder to prove gender-based violence²⁸. Given that a focus of this Conference is on violence of this kind, the operation of Sharia Courts in the region might warrant discussion.

The High Court and the Council of Chief Justices recognise the importance of being part of a global community of courts. Forums such as the IAWJ Asia Pacific Regional Conference encourage judges to think of themselves in a similar way. I am sure that its attendees will have a stimulating and productive Conference.

¹ www.iawj.org.

² Anne-Marie Slaughter, "A Global Community of Courts" (2003) 44(1) *Harvard International Law Journal* 191.

³ Anne-Marie Slaughter, "A Global Community of Courts" (2003) 44(1) *Harvard International Law Journal* 191 at 193.

⁴ Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2009) 120.

⁵ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, 1974) 7.

⁶ David Malcolm, "Judicial Reform in the 21st Century in the Asia Pacific Region" (2000-2001) *LAWASIA Journal* 72 at 74 referring to the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region.

⁷ (1868-1912).

⁸ Georges Bousquet and Gustave Boissonade. See Meryll Deane, *Japanese Legal system* (Cavendish Publishing, 2nd ed 2002) 62.

⁹ Carl Friedrich Hermann Roesler, Hermann Techow and Otto Rudorff.

¹⁰ Meryll Dean, *Japanese Legal System* (Cavendish Publishing, 2nd ed, 2002) 62-67; Professor John H Wigmore, "Legal Education in Modern Japan" (1893) 5 *Green Bag* 17 at 18.

¹¹ Harald Baum, "Teaching and researching Japanese law: a German perspective" in Stacey Steele and Kathryn Taylor (eds), *Legal Education in Asia: Globalization, Change and Contexts* (Routledge, 2010) 89 at 91.

¹² Chongko Choi, "On the Reception of Western Law in Korea" (1981) 9 *Korean Journal of Comparative Law* 141 at 146.

¹³ Chongko Choi, *Law and Justice in Korea: South and North* (Seoul National University Press, 2005) 17.

¹⁴ Philip C Huang, *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared* (Stanford University Press, 2001) 16.

¹⁵ Huixing Liang, *The Draft Civil Code of the People's Republic of China* (Martinus Nijhoff Publishers, 2010) xiv.

¹⁶ Professor Kanak Bikram Thapa, "Religion and Law in Nepal" in J Martinez-Torron and W C Durham (eds), *Religion and the Secular State: National Reports* (Complutense Universidad de Madrid, 2014) 517 at 518.

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- 17 Alessandro Stasi, *General Principles of Thai Private Law* (Springer, 2016) 3-4.
- 18 Harald Baum, "Comparison of law, transfer of legal concepts, and creation of a legal design: The case of Japan" in John O Haley and Toshiko Takenaka (eds), *Legal Innovations in Asia: Judicial Lawmaking and the Influence of Comparative Law* (Edward Elgar, 2014) 61 at 68.
- 19 Andras Hofer, *The Caste Hierarchy and the State in Nepal: A Study of the Muluki Ain of 1854* (Universitätsverlag Wagner, 1979) 40.
- 20 http://www.lawasia.asn.au/chief_justices_of_asia_and_pacific.html.
- 21 See, e.g. *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [3] per Gleeson CJ ("The fundamental importance of judicial independence and impartiality is not in question ... It was declared in Art 2.02 of the *Universal Declaration of the Independence of Justice* and in the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*").
- 22 See, e.g. *Vishaka v State of Rajasthan* (1997) 6 SCC 241 (Supreme Court of India); *Supreme Court Advocates on Record Association v Union of India* (2016) 5 SCC 1 (Supreme Court of India); *Republic of the Marshall Islands v American Tobacco Company* [2001] MHSC 2 (Republic of the Marshall Islands Supreme Court).
- 23 Chief Justice Brennan, "The Significance of the Beijing Statement of Principles of the Independence of the Judiciary" (Speech delivered at the 15th LAWASIA Conference, Manila, 30 August 1997).
- 24 Chief Justice Gleeson, "Global Influences on the Australian Judiciary" (Speech delivered at the Australian Bar Association Conference, Paris, 8 July 2002).
- 25 Chief Justice French, "Convergence of Commercial Laws – Fence Lines and Fields" (Paper presented at the Doing Business Across Asia – Legal Convergence in an Asian Century Conference, 22 January 2016, Singapore).
- 26 *High Court of Australia Act 1979* (Cth) s 17(5) provides for the establishment of committees.
- 27 Ann Black, "Informed by ideology: A review of the court reforms in Brunei Darussalam" in Andrew Harding and Penelope Nicholson (eds), *New Courts in Asia* (Routledge, 2010) 337.
- 28 Muswah Oral Statement: Brunei Darussalam (presented at the 59th Session of the CEDAW Committee, 27 October 2014), available at http://www.muswah.org/sites/default/files/MuswahOralStatement59CEDAWBrunei_1.pdf