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JUDICIAL INTEGRITY –
WHAT HAS BEEN
ACHIEVED?

The Judicial Group on Strengthening Judicial Integrity
Sixth Meeting,
Lusaka, Zambia
23 January 2010.

The Hon. Michael Kirby AC CMG

THE JUDICIAL GROUP ON STRENGTHENING JUDICIAL INTEGRITY

SIXTH MEETING, LUSAKA, ZAMBIA

SATURDAY 23 JANUARY 2010.

REGIONAL WORKSHOP ON JUDICIAL INTEGRITY IN AFRICA: INTEGRITY-BASED JUDICIARY REFORM EFFORTS – LESSONS LEARNED FROM GOOD PRACTICES

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SETTING FOR THE WORKSHOP

It is my privilege to attempt a summary of the outcome of the first day of this workshop. It has convened following the conclusion of the sixth meeting of the Judicial Integrity Group (JIG) in Lusaka, Zambia. All of us pay our respects to the Chief Justice of Zambia (the Hon. Ernest Sakala), his judicial colleagues and other Zambian officials who have made us so welcome. The meeting of the JIG was one of the most productive that I have attended. And I have attended all but one of them.

The meeting of the JIG was fruitful:

- * The members of the JIG re-affirmed the *Bangalore Principles on Judicial Conduct*, adopted at earlier meetings of the JIG;
- * They endorsed the *Implementation Measures*, based upon a draft prepared by the JIG Co-ordinator (Dr. Nihal Jayawickrama). Steps are in hand for the preparation of the final version of the

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Implementation Measures, when they are approved by a procedure adopted by the JIG; and

- * The JIG also adopted *Dissemination Measures* which set out the steps to be taken in establishing and maintaining a website on the work of the JIG; distributing the *Bangalore Principles* world-wide; and promoting those *Principles*. As in the past, all of these steps were resolved by a process of full and frank debate. Decisions were adopted by consent. As might be expected, for the high level of present and past judicial officers who are members of the JIG, the work of the group is performed with an excellent level of efficiency and economy.

INTRODUCTION TO THE WORKSHOP

The workshop was opened by Chief Justice Sakala. He emphasised two features of the current age which had to be kept in mind throughout the workshop:

- * The growing insistence on accountability of all organs of government, including the judiciary. We can all now be questioned, he explained. No-one is above the law or beyond accountability to the Constitution and standards of integrity; and
- * Judges, like other national officials, all now operate in 'the global village'. What happens in one country becomes known in others. Lack of integrity is greatly damaging not only to the legal institution but to the economy and constitutionalism itself. Judges can no longer hide under the slogan of 'autonomy'. Every country's judicial system can be assisted by learning from, and applying, the *Bangalore Principles on Judicial Integrity*.

These opening remarks were followed by welcoming comments by representatives of the sponsors. Ms. Gabriele Zoeller (Government of Germany, BNZ) praised the adoption of the Lusaka Declaration and hoped that its message would be spread worldwide. Dr. Dedo Geinitz (GTZ) stressed the importance of bringing knowledge of the work of JIG to a much wider audience. Mr. Macleod Nyirongo (UNDP) emphasised the way in which judicial integrity operated to support the wider objectives of democracy and sustainable development. Mr. Dimitri Vlassis (UNODC) described the achievement and provisions of the *International Convention Against Corruption*, which now has 143 parties, together with the European Union. He explained how that Convention set global standards and brought the judiciary face-to-face with significant challenges which it is bound to meet. He also described the upcoming twelfth United Nations' Congress on Crime Prevention and Criminal Justice. This will take place over eight days in Brazil in April 2010. He emphasised that no country can even begin to tackle the fight against corruption without the assurance of a judiciary of manifest incorruptibility.

After a brilliant address on the theory and history of judicial integrity given by the JIG Chair (Judge C.G. Weeramanty), the final introductory paper was presented by Dr. Jayawickrama. He recounted the history of the JIG since it was formed in 2000. He described the successive meetings of the Group; the formulation of the *Bangalore Principles of Judicial Conduct*, the preparation of the published commentary on those Principles; the adoption of the principles for court personnel; and the implementation of survey instruments for gathering data relating to judicial corruption for court users and other stakeholders. By three pilot projects conducted in Uganda, Sri Lanka and Nigeria, attention was

given to points of systemic weakness. These were, in turn, the subject of a report during the workshop sessions.

It may be hoped that Dr. Jayawickrama, who as Co-ordinator, has unrivalled knowledge in this respect, will publish a paper marking the tenth anniversary of the JIG and recounting (in the way he did for us) its estimable history. It is a notable history. It deserves to be more widely known.

SUBSTANTIVE WORKSHOP SESSIONS

The ensuing sessions of the workshop produced most interesting reports and commentaries:

- * Deputy Chief Justice Adel Omar Sherif (Egypt), a member of the JIG, laid emphasis on the need for close attention to be given to the traditions and procedures of civil law countries. He stressed that, in some particular respects, the judiciary in such countries had a different tradition; different methods of judicial appointment and promotion; and different procedures. More people in the world live in countries which follow the civil law tradition than the common law. In Africa, the majority of countries observe civil law procedures. The JIG has sought to reflect this concern. The Lusaka meeting and the workshop were privileged by the attendance of judges from this tradition, including Judge Sherif (Egypt), Judge Christine Chanet (France) and Judge Rudolf Mellinghoff (Germany). But the warning from Judge Sherif was well taken.

- * Johanna Wysluch (GTZ) stressed the value of empirical analysis of the impact of initiatives such as the *Bangalore Principles*. She urged consultation with relevant members of civil society and not only with judges who may sometimes be the last to know of problems that need to be addressed.

- * Mr. Irakli Adeishvili (Georgia) described the moves towards the establishment of an independent judiciary in that country, following independence upon the break-up of the Soviet Union. He stressed the critical significance of court budgets. He reported that the *Bangalore Principles* were known in Georgia through the initiatives of the Council of Europe. He suggested that such important principles should be disseminated to the public and not only to the judiciary. He urged their translation into many languages to promote awareness of the *Bangalore Principles* and demands for the observance in practice.

- * Deputy Chief Justice Mieke Komar Kantaatmadja (Indonesia) described the extraordinary progress that has been made in her country since the replacement of autocracy by democratic governance. She described the adopted of the Judicial Code and the way in which complaints against judges are now handled. She revealed the disposition of complaints and reportage on action in court and tribunal websites.

- * Judge Mellinghoff (of the German Constitutional Court) provided a masterful history of the German judiciary, back to the early days of Roman law influence, through the Mainz Statute. He explained candidly the defaults of the judiciary during the Third Reich and the

special challenges presented by the need to assess the suitability for continuance of judges of that regime and of the former Democratic Republic. Only about a third of the judges who had served in the GDR were re-appointed to the German judiciary following reunification. Doubtless some of the same problems had to be faced in Georgia and other countries of post-communist Europe. Judge Mellinghoff described candidly the selection process for judges in Germany and the procedures adopted for the protection of the judiciary as well as for identifying legitimate complaints.

- * Lady Justice Eusebia Munuo (Tanzania) examined the duties devolving on judges in her country that can be traced to the judicial oath provided by the Constitution. She emphasised the importance of non-discrimination in the selection and service of judges. She explained provisions for the removal of judges for “gross incompetence”. She reported that, whilst this facility is not often used, its availability has proved beneficial. Care would need to be taken to prevent misuse of such provisions by the executive government.

- * The following session involved Dr. Oliver Stolpe (UNODC) and Justice Kashim Zannah (Chief Judge, Borno, Nigeria) scrutinising in tandem the procedures for strengthening judicial integrity in Nigeria. The corrosive effect of past military regimes was explained. So was the difficulty of designing and implementing reforms for the judiciary. Proper tributes were paid to the support given throughout by the chairman of the session (Justice M.L.

Uwais, former Chief Justice of Nigeria). He serves as a member of the JIG.

- * Justice Zannah explained the outreach to the public; the education of information officers; the involvement of journalists; the improvement in electronic records; the monitoring of good practices; and the achievement of many improvements in the courts in his state. By reference to surveys of judicial officers and court users, significant results were demonstrated in perceptions of integrity and efficiency. These results tended to demonstrate the utility of the pilot project conducted under the auspices of the JIG in Nigeria and elsewhere.

- * Mr. Thomas Vennen (GTZ, Kenya) summarised the lessons he had derived from this session. He asked how one could secure leadership within the judiciary to copy the initiatives in Borno. And how one could procure the political support that was necessary to fund, initiate and follow up the results of such pilot projects. In an interesting aside, Mr. Vennen asked whether the kindling of a reformist attitude within the judiciary had influenced the outlook of other state actors, including the police service. One hope of improving judicial integrity is that it will have a subtle influence upon all organs of government; and thereby improve the functioning democracy of the state.

ASSESSMENT – TEN GOOD IDEAS

As one would expect, the sessions of the workshop very were well chaired, being in the control of successive members of the JIG, most of them with very long judicial experience in presiding in like hearings.

The best humour of the day was evident in the comments of Justice Zannah (who is very tall). It was suggested that so successful had been the initiatives in Borno that he had actually grown taller in consequence. This was a suggestion that some members of the audience found astonishing. But Justice Zannah stands tall in every way in our estimation.

The Deputy Chief Justice of Indonesia introduced a highly practical comment in a question concerned with the provision of funding for the reforms introduced in her country. As the funding came from overseas sponsors, she speculated that some of it might have been given in the hope of a visit to Bali. In the context of a conference on integrity, participants thought it best not to explore that possibility.

Many good ideas were expressed during the sessions. I would single out ten:

- * First, the proposal that the JIG Co-ordinator should publish a record of the history of the JIG deserves follow-up.
- * Secondly, the suggestion for increase in the input of knowledge about the judiciary of the civil law tradition obviously deserves more attention. A question arises as to why there were no representatives of Francophone Africa present at the meeting, given that they cover half of the map of the continent. Even if this were to mean an increase in costs, by the provision of interpreters, it would help the JIG address realistically the special problems that arise in civil law nations.

- * Thirdly, the JIG was urged to collect instances where the *Bangalore Principles* had been implemented or utilised both in national courts and in judicial decisions. Reference was made to a recent decision of the Privy Council in London concerning removal from office of the Chief Justice of Gibraltar in which the *Bangalore Principles* were cited by the majority (*In Re Schofield*, JCPC, 2010).

- * Fourthly, the instruction of Judge Weeramantry must also be remembered. He urged, in his opening remarks, that the *Bangalore Principles* should be incorporated into law courses, specifically those related to legal and judicial ethics. The *Principles* could not be properly understood without a cross-cultural awareness of the long historical and religious traditions that underpin the principles adopted by the JIG. Some of these are mentioned in the published *Commentary*.

- * Fifthly, Dr. Stolpe's emphasis on the importance of empirical studies and of the measurement of the implementation of the *Principles* deserve to be remembered. The value of user perception may sometimes be limited. But the more that empirical markers for improvement in court culture and practices can be derived and published, the more likely it is that governments and the judiciary will support the introduction of necessary reform.

- * Sixthly, several participants emphasised the need for all countries to re-evaluate their own system by reference to the *Bangalore*

Principles and to report on any difficulties which those Principles might be thought to create.

- * Seventhly, the special needs of developing countries may sometimes require particular variations of practice that have not been a feature of judicial practice in developed countries. Thus, the provision for removal of judges for “gross incompetence” may not be a priority in nations like United Kingdom and Germany. But in Tanzania, the provision to this effect was said to work sensibly in the relatively rare cases in which it had been invoked.
- * Eighthly, the particular, practical initiatives that have been implemented in Borno state, Nigeria, were clearly deserving of close attention. For example, the utilisation of the media (often hostile to judicial institutions) was described by Justice Zannah. Properly deployed, the media can sometimes be powerful allies in the implementation of reform and the achievement of higher standards of integrity.
- * Ninthly, a question remains as to how the political will can be mustered by governments that all too often neglect the judicial institution and perennially under-fund it. What are needed in this respect are institutional reforms so that progress is not dependent on the existence of a particular chief justice or judge with a strong personal commitment to integrity and the changes needed to uphold and defend it.
- * Tenthly, the maintenance of the highest standards, and the avoidance of discrimination, were lessons that I derived especially,

but not only, from the observations of Justice Munuo of Tanzania. She stressed the critical importance of avoiding gender discrimination and the need to treat all litigants equally before the law. This, from the start, has been a consistent message of the JIG. The judiciary serves the law and the Constitution. It must itself always avoid discrimination against litigants, lawyers, witnesses and anyone else on the basis of what the *Bangalore Principles of Judicial Conduct* declare as “irrelevant grounds”. In para.5.1 of those Principles, it is stated:

“A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes (“irrelevant grounds”).”

This last consideration is important because we all know that our societies sometimes fail in their treatment of minorities. I know this from my own life’s experience. I grew up in Australia when it denied basic rights to its Aboriginal and other indigenous peoples. Additionally, Asian and African immigrants were rejected and stigmatised during a time of so-called ‘White Australia’. As well, my own basic rights were denied on the grounds of my sexuality.

In Africa, the blight of racial discrimination has been reduced by the overthrow of apartheid in South Africa. But other forms of racial discrimination exist, as does discrimination on the grounds of gender, religion and homosexuality. In a workshop in the heartland of Africa, it is important to say that treating human beings as less worthy citizens, and denying them basic rights because of their sexual orientation is no more

acceptable than doing so on the basis of race and gender. It is like punishing them for being left-handed, a feature rightly condemned in today's Lusaka newspaper. Issues of sexual orientation are now coming to Africa as recent events in Uganda, Malawi, Rwanda and Kenya demonstrate. Often the judiciary will be called upon to be the guardians of unpopular minorities. The *Bangalore Principles on Judicial Integrity* requires that the judges should respond to that call with strength and determination. This too is an aspect of judicial integrity.

Further sessions of this workshop remain to be concluded. But, already, it has established its utility and demonstrated the value and importance of the work of the JIG and the influence of its *Bangalore Principles of Judicial Conduct*. In departing, I pay my respects to the Chief Justice and Judges of Zambia; the government and people of Zambia; my colleagues in the JIG and in this workshop and the judges and lawyers of Africa who bring the rule of law and protection of fundamental human rights to every corner of this mighty continent.
