THE BANGALORE DRAFT CODE OF JUDICIAL CONDUCT

CIVIL LAW COMMENTARY - SOME OBSERVATIONS

The Hon Justice Michael Kirby AC CMG

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GENERAL COMMENTS

1.1 *Finding consensus:* The commentaries of the judges from civil law countries on the Bangalore Draft Code of Judicial Conduct (the Bangalore Draft) are invaluable. I regret that my obligations to the International Bioethics Committee prevent my participation in the meeting in the Hague. There are some significant differences between the approaches of the judicial group, all comprising judges from countries substantially or wholly of the common law tradition and judges of the civil law tradition. If the aim is an international draft acceptable to both (and any other) traditions, it is self-evidently necessary:

- To give way in essentials; and

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* Rapporteur of the International Group on Judicial Integrity. Justice of the High Court of Australia. One-time Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia.

- To confine the Bangalore Draft to truly essential items upon which consensus can be reached.

1.2 *Title of document:* The commentaries on the "Code", as a title for the Bangalore Draft, are not unexpected. Many of the commentators in common law countries have made the same point. In such countries "code" also means a self-contained document of an imperative nature containing all of the relevant rules on the particular subject. There were many objections by judges in Australia to the use of the word "code". Especially because of the generality of some of the "principles", it seems highly desirable that the word "code" should be dropped. Instead, I would suggest "guidelines". There is a precedent for this. The OECD Guidelines on Privacy proved extremely influential in the development of national laws on that subject. The word is softer, less coercive and less self-implementing than "code". At the upcoming meeting of the Judicial Group in Colombo, the word "code" should be dropped in light of the civil law comments.

1.3 *The core values:* There are some very telling comments, from the civil law perspective, on the key values to be attained and the ordering of those values. These are also comments that have been made in some common law countries. For example, beginning the Bangalore Draft with the value of "Propriety" now seems inappropriate. There are more fundamental values than this. A similar point was made in Bangalore by Justice Claire l'Heureux Dubé

(Canada). This criticism should also be accepted and the identification and order of the basic values should be reassessed. As many of the comments have pointed out, there is overlap between several of the values. Thus, there is much overlap between impartiality, independence and integrity. The question is what are the truly "core" values to be included in the final document.

1.4 *Back to UN basics:* Various suggestions are made by the civil law commentators. Some of them are mutually inconsistent. Possibly the best guidance for us all is to return to the basic statement of the requirements of a judge as set out in Article 14.1 of the *International Covenant on Civil and Political Rights* (ICCPR). Not all countries are participants in the European Convention system. Not all countries have regional human rights systems (There is not in the Asia Pacific). Accordingly, the ICCPR is probably the closest we all come to a basic core text. Art 14.1 states:

> "1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a *competent*, *independent* and *impartial* tribunal established by law ...".

In light of the civil law comments on the proliferation and overlap of the core values and their ordering, it might be worth reconsidering the draft and bringing the subsidiary values under the three fundamental values mentioned in the ICCPR, namely competence, independence and impartiality. At least if we stick to

them and keep the Bangalore Draft organised in accordance with the ICCPR, we are building upon, and elaborating, the most fundamental of United Nations human rights instruments.

1.5 *Prosecutors and judges:* A number of the civil law commentaries urge the inclusion of reference to prosecutors. I appreciate that in civil law countries the prosecutors have a special role in the administration of justice. Also in common law countries, prosecutors have special and independent functions. They are not mere servants of the State. They have independent duties to perform. But they are strictly independent of the judicial branch. When I served as Special Representative of the Secretary-General for Human Rights in Cambodia I found that common law human rights NGOs were shocked by the special status accorded to prosecutors. They were scandalised that prosecutors had a higher bench and were not consigned to equality in the geography of the courtroom with the accused. This would be an irreconcilable difference between common law and civil law traditions. So far as the theory of the common law is concerned (not always reflected in past practice at least), prosecutors are simply another litigant. And the courts have little whatever to do with prosecutorial decisions, very rarely interfering in the exercise of prosecutorial discretions. If we are to find a universal draft, it will be necessary to treat the competence, independence and integrity of prosecutors separately from the guidelines governing judicial officers (judges and members of independent tribunals).

1.6 *Implementation:* There are some wise comments on the so-called value of implementation and accountability (Value VII). These point to the great differences between different countries in the implementation of principles of judicial integrity. A similar problem arose twenty years ago when I chaired the OECD Committee on Privacy. It was possible to secure agreement on the basic guidelines. It was impossible to secure agreement on implementation of those guidelines. Putting it generally, the civil law countries favoured administrative procedures and detailed regulation. The common law countries favoured implementation by independent courts and tribunals with minimal bureaucracy. In the end, the guidelines accepted that implementation would follow the traditions of each country. So it has proved. The result has been successful. The core values have been held in common but Europe (and the United Kingdom) have tended to favour data protection authorities. Common law countries have tended to favour judicial remedies. Because the disciplining of judges is very commonly provided for in national constitutions and in detailed regulation, it may be prudent, in the light of the civil law commentaries, to delete the supposed value of implementation and to include references to that subject in an accompanying document instead of in the Bangalore Draft itself.

1.8. *Explanatory memorandum:* This leads to a conclusion that some of the detail of the present Bangalore Draft should be reduced. There is a much greater chance of securing consensus internationally

if we stick to the truly core values. This does not mean that the work already done will be lost. The Bangalore Draft could be accompanied by an explanatory memorandum. This would supplement the core values with detailed commentary on:

- The position under judicial codes etc of different countries;
- The specific subtopics that arise under the core values;
- The particular issues of implementation alongside the basic core values; and
- The ways in which different countries go about implementing the values. So long as the implementation is accessible, independent, fair and effective, we should not be too concerned about national differences. It is very difficult to change a country's constitution. That is a reason for avoiding unnecessary provisions in the Bangalore Draft that challenge constitutional requirements that tend to proliferate in the subject of judicial standards and discipline.

1.9 *National specificities:* Another point that comes out of the civil law comments is the specificity of the needs of some countries. Such specificity may arise from the recent history of such countries. For example, countries that have had recent exposure to totalitarian political regimes with subsequent difficulties of civil order, may have particular requirements, eg to prohibit association with political parties or to prohibit particular activities such as gambling by judges.

We must aim for a draft that allows flexibility essential to address specific problems that arise in these areas.

1.10 *Developing/developed countries:* A similar need for flexibility arises from the great range and variety of the judicial office in different parts of the world. One of the sub-texts refers to village courts which are common in many developing countries but not in developed or European countries. Yet if a very large proportion of disputes is handled before such courts, any guidelines on judicial conduct must be wide enough to include them. The solution again will probably be to delete express mention of village courts in the guidelines themselves and to include reference to this topic in the accompanying explanatory memorandum.

PARTICULAR COMMENTS

2.1 *Preamble:* The suggestion is that this be reduced. I agree. The reference to the codes of other countries could be transferred to the explanatory memorandum. We should anchor our draft in universal instruments, particularly the ICCPR. There is an interesting comment on the emergence of European judicial systems from the protective shell of the administrative state. The common law systems are emerging from a different shell, possibly because of the same stimulus of universal human rights. Their shell was one of self-satisfaction, complacency and inadequate scrutiny of the State and its actors. So far as countries of the Commonwealth of Nations

are concerned, they are not influenced by "American programmes". Their judiciary follows a strong tradition. But the earlier United States acceptance of a Bill of Rights has led in that country to the earlier influx of human rights ideas. It is important for the civilians to understand that Commonwealth judges are just as resistant as they are to "trendy" United States ideas and ways of doing things.

2.2 *Real source of judicial power:* The theory that judicial power derives from the people and depends on public acceptance would also be controversial in some common law countries. This does not mean that public confidence is unimportant. What is important is the role of the judiciary in upholding constitutionalism and the rule of law. This role should certainly be included in preambular statements.

2.3 *Values:* I agree with much of the criticism of the current draft, the overlap of some of the values. I have suggested that the solution to this is a reversion to the three core values in the ICCPR and the reorganisation of the other values as subordinate to the three essentials. Competence is an essential value. Without competence, the so-called "judge" is simply a functionary of the State and not an agent of law and constitutionalism.

2.3 *Missing values:* The comments from Serbia on so-called "missing values" are not persuasive. Their value (a) is part of independence; (b) of impartiality; (c) of competence; (d) of

independence; (e) of impartiality; and (f) of impartiality and independence. However, I agree that the clauses are unnecessarily prolonged and can be shorter.

2.5 *Judicial freedom of expression:* A comment is made (Salas/France) that judges have an ability to speak publicly. In most common law countries the judicial freedom of expression would be regarded as diminished by the obligations of the judicial office. Thus judges *absolutely* cannot speak on matters of party politics or on cases that may come before them in court. This does not mean that, in appropriate circumstances (eg a university lecture) judges cannot discuss general issues of legal theory and principle. In purely private circumstances to trusted friends they may express personal views. But there would be no question in most common law countries that judges, upon appointment, lose certain freedoms of expression and association. These comments affect the supposed issue of judicial contact with the media. Obviously, this has to be handled very carefully. In most countries, the media is not particularly interested in the serious problems that judges have to resolve. Often the media is only interested in entertainment, scandal and confrontation. Each country's judges will face this issue in their own way. But most judges of the world will probably be well advised to be cautious in their dealings with the media whose agenda is different from the judicial obligation. This may be a reason for leaving discussion of media to the explanatory memorandum because in different societies different views will be held on this

topic (eg as to whether television filming may take place in courts). Membership of unions is also somewhat controversial in common law countries. Part of the difference of attitude may derive from the fact that in such countries judges are not normally part of a career profession. Typically they are appointed in middle age from out of the private practising profession. They are only rarely promoted. Organisation in industrial unions (as distinct from professional associations with modest objectives) is extremely rare.

2.4 *Propriety:* I agree that this value should be repositioned and that there is overlap, particularly with impartiality. The model of the Canadian Judicial Council's *Ethical Principles for Judges* should be followed, distinguishing the general principles from detailed commentary and illustration. It was not intended that judge should avoid close personal relations with a relative or spouse who is a lawyer; simply that the professional must be kept separate from the personal because members of society will otherwise not accept the impartiality of the judge. The suggested divorce between legal and ethical issues on this topic (comment 1.4) may be hard to attain. The legal rules in each country are basically grounded in ethical principles. Previous political activity, in most countries, should be neither a precondition to, nor disqualification from, judicial appointment. But whether this is so may depend on the politics of the particular country. This, as the Romanian comment indicates, may necessitate consigning this subject to the explanatory memorandum. The right to strike by the judiciary, who owe their

duty to the Constitution and the law, is not something that would normally be accepted in common law countries. In turn, this may be a difference deriving from the different traditions of appointment, recruitment, promotion and service of judges. In most common law countries judges immediately divorce themselves from political association of any kind. If they pursue a political life, they must resign from the judiciary. This is regarded as an aspect of the separation of powers. It will be necessary to reflect the different values in different countries on political involvement.

2.5 *Propriety: Educational Activities (para 1.12):* It is not only educational activities. What is involved is participation in law reform bodies, committees or commissions concerning improvement of the law or review of controversial cases. Some of the differences on this subject may derive from differing constitutional understandings concerning the strictness of separation of powers.

2.6 *Propriety: Fund raising:* The reason behind the strict rule against fund raising in common law countries is that it may otherwise give rise to an appearance that a person who gives funds to a cause supported by a judge may secure favours from that judge in court.

2.7 *Propriety: Practising law:* This is also a tricky subject. When I was in Denmark I learned that judges of higher courts perform private arbitrations. This would be regarded as completely forbidden

to judges in common law countries whilst they hold judicial office. Obviously it will be necessary to find a neutral formula or to remove this to the explanatory memorandum.

2.8 *Propriety: Independent commissions:* This is also a subject of controversy in common law countries. In Australia it used to be common for judges, including federal judges, to take part in Royal Commissions of Inquiry, including on general social issues. The misuse by governments of judges in this way, sometimes to mask political embarrassments, has led to a general retreat of judicial involvement in such activities. In some parts of Australia serving judges have never taken part in such inquiries. There are a lot of retired judges who can be used if need be without the potential to damage the judicial title and office. But this may have to be removed given that some countries, without strict separation of powers, do not hold to a similar opinion.

2.9 *Propriety: Gambling:* The Romanian suggestion to forbid judicial gambling would not accord with the view in most common law countries that such private activities, so long as they were relatively modest and did not give rise to suggestions of money laundering etc, were purely personal and part of the judge's private life.

2.10 *Independence: Overlap:* It will be necessary as the first comment suggests, to clarify the distinction between independence

and impartiality. However, both of these are values expressed in the ICCPR. Independence appears to relate more to the office of the judge where as impartiality relates to the manifest performance of that office but each reinforces the other, including of chief or presiding judges. There have been cases in common law countries concerning the misuse of power by chief justices improperly to suspend or remove from the exercise of office subordinate judges. Any such activity must be carried out strictly in accordance withe law (*Crane's Case*).

2.11 *Integrity:* The consensus on this value may suggest either that it is subsumed under (or includes) other values or that it is a value that has truly been expressed in terms of the core values.

2.12 *Impartiality:* The comment on the formulation of the principle appears correct.

2.13 *Impartiality: Media:* Discussion of judicial contact with the media (or whether that should be performed by court officials rather than judges) is important. But it is likely to vary greatly between countries and might be more appropriate for the explanatory memorandum.

2.14: *Impartiality: Spousal privacy:* Unfortunately, because of the public nature of the judicial role the comment on 4.7 concerning the spousal and family right to privacy may have to give way to the

needs of manifest impartiality. Unfortunately, members of the public will never believe that if a judge's spouse or partner has a large shareholding in a litigant before the court that the judge did not know and was not affected by that fact. People, especially losing litigants, are very suspicious and the judicial reputation for impartiality must be won every day.

2.15 *Impartiality: Waiver:* The issue of whether parties can waive the public's entitlement to manifestly impartial performance of the judicial office has been the subject of judicial commentary in common law countries. However, the issue has been resolved in favour of waiver by frank disclosure to the parties. This represents a practical solution although it has some theoretical difficulties. The practical need to ensure that cases are concluded and not held up by suspicious or paranoid litigants is one that every court system must address. That is why in para 4.10 the judicial duty to perform the office is expressly mentioned.

2.16 *Impartiality: Assignment of cases:* This comment on 4.10 raises an important issue. But the methods of assignment vary significantly from court to court and country to country. This would appear an issue suitable for the explanatory memorandum.

2.17 *Equality: Assumption of Bias?* I do not believe that para 5.2 contains any assumption of bias merely an instruction against it.

2.18 *Equality: Unjust differentiation:* I agree with the comment that the word "unjust" should be deleted (comments 5.3, 5.6). The idea is sufficiently incorporated in the words "discrimination" and "irrelevant".

2.19 *Impartiality: Fact finding:* This may be a fundamental clash between the common law and civil law conceptions of the role of a judge. Although the two systems are coming closer together (and the purely passive role of the judge of the common law has been modified greatly in recent years) essentially the common law judge is an umpire to determine matters placed before the court by the parties. The inquisitorial role of the judiciary is not accepted in most common law courts. Partly for historical reasons in England, there is a great fear of inquisitors and a belief that the duty of inquisition is incompatible with neutrality and impartiality. It will be necessary to find a formulation that respects the two traditions. But I suspect that this is getting very close to a fundamental difference between civil law and common law approaches to the judicial function.

2.20 *Competence and diligence:* The object that the judge should be informed about legal norms or laws is the end in sight. But the expression in 6.4 is designed to acknowledge that the judicial duty includes securing education and information to permit the judge to do a competent job.

20.21 *Implementation and accountability:* The comments on the difficulty, for an international draft, of accommodating the many differing ways of implementing guidelines on judicial conduct (or national laws on the subject) is fairly made. Those who drafted the Bangalore Draft were keen to avoid the charge that they had indulged in motherhood statements without any thought to ensuring that the high sounding principles were actually carried into effect. If we look at the object from an international perspective, it is to strengthen and reinforce the independent judiciary, particularly in developing countries. There the problems include lack of independence, lack of competence and corruption. It may be that we can agree on some more general statement to the effect that principles are not enough and that effective, transparent, efficient and just means will be provided by the State that will:

- Ensure that the guidelines are known to judges and the public;
- The guidelines are implemented with due respect to due process to judges;
- The guidelines are upheld by the institutions, procedures and laws devised in each country according to its own Constitution and judicial and civic traditions.

FOLLOW UP

3.1 *Colombo meeting:* Clearly, the report of the meeting in the Hague will be vital for the meeting of the Judicial Group in Colombo,

Sri Lanka in January 2003. I look forward to the report on the upcoming meeting which will be of great value to the Judicial Group.