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THE JUDICIAL INTEGRITY GROUP (JIG)

DEUTSCHE GESELLSCHAFT FŰR INTERNATIONALE ZUSAMMENARBEIT (GIZ)

GERMAN FEDERAL MINISTRY FOR ECONOMIC COOPERATION AND DEVELOPMENT (BMZ)

UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC)

BERLIN, GERMANY

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RULE OF LAW, JUSTICE AND DEVELOPMENT

The Hon. Michael Kirby AC CMG

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ABSTRACT

A conference on the Rule of Law, Justice and Development was convened in Berlin on 29 January 2020. In addition to judges and lawyers from many countries there were nearly 30 judges from Africa. The conference assembled in a time of retreat from multilateralism and pushback. The initiatives of Germany to explore working together (*Zusammenarbeit*) is praised, as are the members of the Judicial Integrity Group (JIG) and many distinguished participants.

[*] Text for keynote address at the Judicial Integrity Conference in Berlin, 28-29 January 2020.

[**] Former Justice of the High Court of Australia (1996-2009); founding member of the Judicial Integrity Group (2000 -); Co Chair of the International Bar Association Human Rights Institute (2018 -).

The author analyses the central themes of the Berlin conference: the rule of law, justice and development. However, the main focus of this keynote is on the rule of law as a founding notion of the United Nations system 1945 and of the *Universal Declaration of Human Rights* 1948. The rule of law is not the same as having laws and obeying them. The author illustrates this theme with 3 examples. The first was from his own country, Australia. It concerns the indigenous peoples' rights. The laws from colonial times were oppressive and unequal for the Aboriginal people, until altered by judges in the *Mabo* decision of the High Court of Australia in 1992. The second was Germany. The Nazi state had a plethora of laws. Many were gravely oppressive towards minorities. That oppression is illustrated in the new Museum on the Topography of Terror created not far from the conference venue. The third was an African country, Zambia. Within recent days two decisions in the courts of that country have revealed both sides of the rule of law conundrum. The Chief Justice of Zambia had upheld an application of prisoners in the central prison. She ordered that their entitlement to basic rights and human dignity be upheld. However another judge had sentenced two prisoners convicted of adult consensual sexual activity in private, to 15 years in prison based on colonial criminal laws. Remembering the central need for law having an ethical content, respectful of human rights, is a primary requirement of the rule of law in today's world. It is the chief lesson suggested by this address.

TIMELY MEETING – WORTHY FOCUS

This conference is timely, coming as it does at the beginning of a year that will mark the 75th anniversary of the end of the Second World War; the

adoption of the *Charter* of the United Nations[1]; and the commencement of the global initiatives to establish a new world legal order. The conference is valuable because it is convened near the centre of the governmental district of Germany, in Berlin. Necessarily, it gives rise to many reflections on the changes that have happened in the past three quarters of a century. It also demands reflection on the urgent global needs of the present age, given the special contemporary dangers in our world.

There is an irony in the fact that we meet at a time when the United States of America, under the Trump Administration, is returning to policies of isolationism. And the United Kingdom, under Prime Minister Boris Johnson, is departing the European Union. Yet leadership in the topics of this meeting are being afforded by Germany, under the banner of international working together ("*Zusammenarbeit*").

It is therefore appropriate to commence these remarks with words of thanks and praise for the two principal host organisations (GIZ and BMZ), to the German Minister who opened the conference; and to the German people who have contributed the organisational impetus and funding to bringing us together, as if to demonstrate the special commitment of Germany to the ongoing importance of multilateralism and cooperation in the world.

The unexpected outbreak at this time of a new dangerous human virus (novel corona virus) demonstrates that even powerful nations cannot tackle many of the global challenges alone. Certainly, they cannot tackle them without close cooperation from each other and with the organs of

[1] *Charter* of the United Nations, 26 June 1945, entered into force 24 October 1945. See F.F. Martin et al (eds), *International Human Rights Law and Practice*, Kluwer, The Hague, 1997, 1.

the United Nations. The flags in Berlin fly at half-mast to mark the anniversary of the liberation of the Auschwitz Concentration Camp by the Red Army, exactly 75 years ago. That event is also a symbol for the need for global cooperation, so as to build a human future based on working together, not drifting apart.

Special thanks are owed to Professor Dr Rudolf Mellinghoff (past Judge of the German Constitutional Court and current President of the German Federal Finance Court) who convened our meeting. During many years he has been a leader of the Judicial Integrity Group (JIG).[2] Those who have travelled from far away and those who have come from close at hand, owe a considerable debt to GIZ and BMZ for the efficient organisation of the event. These organisations have ensured the participation and cooperation of UNODC, Transparency International based in Berlin and other bodies. All of them should be acknowledged. A large cohort of judges from all parts of Africa have added fresh dimensions to our deliberations. They would have been entirely missing 75 years ago. They too have demonstrated the importance of working together to defend universal human rights and to achieve economic, social and human development.

ACKNOWLEDGING THE PARTICIPANTS

Judicial Integrity Group: The core participants who have come to Berlin are, first, the members of the JIG. They have convened to participate in

[2] The Judicial Group on Strengthening Judicial Integrity is an independent, autonomous, not-for-profit and voluntary entity comprising senior judges of several countries, combined to share common values and beliefs in the integrity of the judiciary.

their 8th plenary meeting since the foundation of the JIG in 2000.[3] Their meeting is separate. It will follow the conclusion of the broader assembly, comprising the judges and other officials from the African continent.

The first (preparatory) meeting of the JIG took place in Vienna in 2000 at the invitation of the United Nations Centre for International Crime Prevention (UNCICP). The meeting coincided with the 10th UN Congress on the Prevention of Crime and Treatment of Offenders. Funding for that initiative, as with the fourth meeting in Vienna in 2005 and the fifth meeting also in Vienna in 2007 was provided by UNODC. The second and third meetings of the group, in 2001 and 2003, were held in Bangalore, India and Colombo, Sri Lanka respectively. They were supported by funding from the United Kingdom Department for International Development (DfID). All participants in the JIG at that time were chief justices of common law (mostly Commonwealth) countries. The JIG was chaired by Judge Christopher Weeramantry (Judge and later Vice President of the International Court of Justice). Dr Nihal Jayawickrama, initially as Executive Director of Transparency International in Berlin working alongside the late Jeremy Pope, has served continuously as coordinator of the JIG.

For most of the early meetings. I was rapporteur of the JIG: a humble role. Support to fund the meetings was provided at and after the sixth meeting in Lusaka in 2010, through the seventh meeting at Garmisch-Partenkirchen, 2012 in Germany and up to the eighth meeting in Berlin in 2020, by BMZ, GTZ (later GIZ). Of the original participants only Justice Benjamin Odoki [later Chief Justice] of Uganda and I, now a past Justice

[3] Nihal Jayawickrama, *The Judicial Integrity Group 2000-2020*, conference paper for the JIG Conference Berlin, January 2020.

of the High Court of Australia, remain. Yet it is Dr Jayawickrama who has been the linchpin for the JIG since the beginning. It was he who stimulated the preparation of principles on judicial independence and integrity. There were first considered at the second meeting of the JIG in 2001. The resulting document was improved and strengthened by consultation with a broader group of judicial officers from civil law countries. This became known as the *Bangalore Principles of Judicial Conduct*.[4] It has been the most important and valuable product of the work of the JIG. It has influenced national and international consideration of judicial integrity. However, in recent years, defects and deficiencies have increasingly become apparent in the JIG:

* The disproportionate preponderance of judges from common law backgrounds and their ideas and preconceptions;
* The disproportionate (originally near total) participation of male judges;
* The gradual preponderance of retired as distinct from serving judges;
* The clear need to provide for change and renewal in the membership of the JIG, especially by the addition of women judges who now play an ever-increasing role in the global judiciary; and
* Attention to the advent of new and previously unconsidered problems requiring updating of the *Bangalore Principles*, many as a result of technology (such as use of social networks; engagement with artificial intelligence; and possible new concepts). It is essential to address such issues if the JIG is to maintain a leadership role.

[4] *Bangalore Principles for Judicial Conduct*, published with Commentary by UNODC, Vienna, September 2007.

It is particularly important to pay tribute to earlier leaders in the work of the JIG whose deaths have diminished the Group since its last meeting. They were Judge Christopher Weeramantry of the World Court (Sri Lanka) and Chief Justice Pius Langa (South Africa). They were great judges and active participants from the start in the JIG's work. The death also of former Chief Justice P.N. Bhagwati of India, who attended the second and third meetings of the JIG, is another sad loss. These developments demonstrate the importance and timeliness of the Berlin meeting. The eighth session of the JIG will afford us the opportunity to renew the Group's membership; diversify its talents; improve gender equity; and embrace still serving and younger judges to afford fresh insights on the contemporary challenges of judicial integrity. Only if such renewal and change are regularly addressed will the JIG maintain its relevance for the international family of judicial officers and the UN bodies (especially UNODC, ECOSOC, UNDP and UNCICP) that cooperate to serve them.

There have been many additional initiatives concerned with judicial integrity, all of which have picked up and utilised the *Bangalore Principles* of the JIG. Some members of the JIG, including myself, have participated in various ways with these other networks. One of them was the Judicial Integrity Initiative Workplan launched by the International Bar Association (IBA) President, David W. Rivkin in January 2015. This body has worked closely with the Human Rights Institute (HRI) of the IBA of which I am now Co-Chair. As well, the United Nations Development Programme (UNDP) has helped establish an *Integrated Framework and Integrity Group of Champions* in APEC. This body is designed to strengthen the rule of law and the promotion of human rights as cornerstones of UNDP in conjunction with the judiciary in the countries of the Association of Southeast Asian Nations (ASEAN). It has a present project life of 3 years

(2017-2020). It was launched at a meeting in Bangkok on March 2018. Most recently, it has held meetings in Jakarta and a further meeting will be held in Singapore in 2020.

A third initiative with which the JIG has been associated, is that taken by UNODC following the adoption of the *Doha Declaration* and meetings in Doha, Qatar, which seek to extend the judicial integrity dialogue within the broader family of the United Nations. A meeting that was to have taken place in Doha in late 2019 was postponed and will now convene later in 2020. These and other international, regional and specialist initiatives must be considered alongside the initiatives of the JIG, as supported successively by UNODC, DifD and GIZ and BMZ. Judicial integrity and anti-corruption initiatives are key strategies for building an effective judiciary as a vital component of economic and social development. But at the heart of the judiciary mission is the maintenance of justice and universal human rights.

The African Judiciary: As bodies intimately involved in development programmes in many countries of the world, JIG and BMZ contribute to the work of judicial integrity worldwide as an attribute of universal human rights and global development. As a great trading nation, Germany has a keen interest in international strategies for anti-corruption and the initiatives of the United Nations in that regard. The work of UNODC in promoting the value of judicial integrity through Article 11 of the United Nations *Convention Against Corruption,* published by UNODC in 2015, has been of special significance for JIG and BMZ.

Part of the GIZ and BMZ support for the sixth meeting of the JIG in Lusaka in 2010 was addressed to “implementation measures”. These were designed to render the *Bangalore Principles* more effective in countries facing the contemporary challenges of institutional corruption. However, the focus of the German agencies was not limited to corruption. The emergence of the global debate on the international right to development and the later adoption, in 2015, of the *Millennium Development Goals* have illustrated the close interrelationship of development objectives and the achievement of the UN goals of the rule of law and development.

The thematic focus of the GIZ and BMZ programme for the Berlin conference reflects the impressive participation of African judges and other jurists attending this initiative for the first time. The preponderance of participants from Africa is clear. A break-down of the overall participation in the first part of the meeting may be recorded:

Europe: 7
America and Caribbean: 2
Asia/Pacific: 4
Arab: 2
Africa and Arab countries: 38
Germany: 18

Inevitably, the participation of so many colleagues from Africa and the Arab lands and participants from the host country, Germany obliges a practical and sharply focused attention to the developmental goals of judicial integrity and the attainment of justice. In recent times German-supported projects, working in collaboration with the JIG, UNODC and UNDP, have examined particular issues involving the interaction of judicial

integrity and economic and social development in Cote d'Ivoire; Ghana; Tunisia; Ethiopia and Togo. As these projects have shown, experience at the workface of justice in such countries demonstrates the complexity and multiple dimensions of attaining the rule of law, justice and development by the inter-action of each of these objectives.

Country-level engagements have also illustrated the need for a special focus on particular issues. These have included gender, access to justice and opportunities for corruption that come to the attention in reports on national and regional initiatives in particular jurisdictions.

In this sense, the great value of combining the expertise and knowledge about challenges in Africa and the Arab countries with a meeting of the JIG is clear. It imparts the experience of the JIG at the high level of principle apparent in the *Bangalore Principles of Judicial Conduct;* whilst at the same time drawing upon practical experience at the judicial workface to test, verify and update the principles hitherto adopted by the JIG. For this interrelationship and for conceptual thinking about contemporary judicial experience in all continents, all participants must be grateful to GIZ and BMZ. They have afforded us this opportunity for dialogue and interchange.

I also acknowledge and honour Dr Adel Omar Sherif, Deputy Chief Justice of the Supreme Constitutional Court of Egypt. Also the most recent appointees to the JIG, Chief Justice Mogoeng of South Africa and Justice Adrian Saunders, President of the Caribbean Court of Justice.

RULE OF LAW AND LAW OF RULES

Analysis of themes: The three principal themes of the Berlin conference are: the rule of law; justice; and development. Presented with these three goals for our deliberations, a judge (or indeed any other public official) will naturally seek to analyse them and consider the ways in which each of the objectives relates to the others.

The demand for the rule of law is a natural feature of any conference concerned with issues of judicial integrity. Judicial officers are the chief guardians and protectors of the rule of law, although the attainment of that goal depends on many other actors in government, in the economy and in civil society. Judges are needed if society is to be governed by rules rather than by the whim of tyrants; or the power of large economic or other interests; or the tyranny of terror, guns and violence. Judicial officers of integrity are essential if rights and obligations are to be determined by impartial officials, whose publicly reasoned orders are accepted as the way to resolve the ultimate issues of conflict in society. The rule of law affords a measure of predictability, demonstrating that the community will enforce pre-existing rules because the alternatives involve the deployment of unbridled power and self-interest.

Any system of law that affords those governed by it an acceptable measure of reason and predictability will require the participation of judicial officers at a high level who exhibit professional training and personal integrity, whose orders are normally obeyed without a need for enforcement because the alternative is chaos and unacceptable levels of injustice. Thus, formal features of the rule of law will ordinarily include elements that must be complied with to render a rule lawful. These

include ascertainable contents that avoid open-ended discretions; facilities to recognise justifiable exceptions to governing rules where particular features of the facts and circumstances demand exceptions; the separation of judicial decision-makers from other branches of governmental power; and principles for the application of the rules; and trained personnel with a capacity and readiness to render public decisions in particular cases 'without fear or favour; affection or ill-will'.[5]

The need for the rule of law exhibiting these (and other) features and of judicial officers to apply these general features of governance are universally regarded as essential if society is to enjoy the desirable features of a civilised legal order observing the rule of law.

When the United Nations *Charter* was adopted, 75 years ago, it was originally proposed that it should contain an International Bill of Rights. It was expected that this would reflect the fundamental principles upon which the post-war legal order would be based. In the event, because of differences that emerged over the contents of such a Bill of Rights, and over how it would be enforced, the *Charter* was completed without this essential component. Nevertheless, in the Preamble to the *Charter,* explicit mention was made of the fact that a foundation for the new international organisation would be "universal human rights". Indeed, as a foundational principle of the United Nations, that objective was given primacy in the list of other objectives that included the attainment of international peace and security and the achievement of global justice.[6]

[5] These are the words of the judicial oath or affirmation, commonly administered (with or without variations) in countries, like Australia that derive their judicial traditions from the United Kingdom.
[6] UN *Charter*, above n. 1, Preamble.

Although a judicial organ (the International Court of Justice) was created as part of the United Nations, that body was not afforded a general jurisdiction over disputed questions of universal human rights or concerning the rule of law or global justice. In order to define how these goals were to be attained, an expert body, chaired by Mrs Eleanor Roosevelt, was created to prepare the *Universal Declaration of Human Rights* (UDHR) for the consideration and approval of the United Nations General Assembly. It was in the preambular statement of the UDHR of 10 December 1948, that specific mention was first made of the rule of law:

> "… It is essential if man is not to be compelled to have recourse to rebellion against tyranny that human rights be protected by the rule of law…"

The importance of the rule of law for the protection of universal human rights and the recognition that justice worldwide, unadorned, was itself an objective of the United Nations, constituted important guidance for the new world legal order. The provision of rules was to be important for without ascertainable, predicable and enforceable rules unpredictable, chaotic, selfish and self-interested decisions of people with power would have the potential to tyrannise others. It was the need for rules that exhibit characteristics of justice and that reflect and enforce universal human rights, that gave the rule of law as the United Nations intended it a special moral quality beyond that present in a society governed by rules alone.

Sadly, many illustrations, including in the world that the United Nations came to replace, demonstrated that rules alone are not sufficient. Indeed, sometimes rules can provide the elements of oppression that a civilised legal order will abhor and avoid.

Australia's laws: Let me illustrate the foregoing proposition in the safest way possible by reference first to my own country, Australia. By doing this, I will seek to show that my proposition is a universal one. It is not confined to ill-governed, undemocratic or uncivilised nations.

As a modern nation, Australia was established by mainly British settlers and convicts who, in a remarkably short time, created democratic legislatures and independent courts, copied on their predecessors operating in Britain. The legislatures in Australia are some of the oldest continuously operating elected parliaments in the world. From the start, the laws that they enacted were generally acceptable to the majority of the people whom they governed. However, so far as minorities were concerned, the laws so enacted were often highly discriminatory and sometimes oppressive. The indigenous people were largely ignored in the law and their lands were seized without compensation. This approach persisted until 1992 when the judges of the High Court of Australia overturned 150 years of land law. The court declared that native title to land had to be recognised.[7] This change was not effected by a democratic legislature. It was imposed by an independent court of unelected judges applying general principles of the common law. There was no relevant national or regional charter of constitutional rights to which the Aboriginal people could apply for relief.

There were many other minorities in Australia who suffered from rules of law that were clear, lawful and enforced by independent judges. Sexual minorities (LGBTI) were criminalised until the 1990s in most parts of

[7] *Mabo v Queensland [No.2]* (1992) 175 *Commonwealth Law Reports*, 1 at 42.

Australia. Eventually it took an appeal from the UN Human Rights Committee to initiate the steps necessary to remove the last of such laws.[8] Women (who were not a minority) were long denied equality under Australian law. The rules were clear. They were enforced by independent courts. As late as 1918, a legislative provision allowing any "person" to be admitted to practise as a lawyer in parts of Australia was held by judges to exclude a "female person", because it had ever been thus.[9] Even today there are still laws and practices that discriminate against women. Communists were only protected from the loss of their civil rights in Australia in 1951 by a strong decision of the highest court.[10] That decision was later affirmed in a national referendum.[11] The law was clear. It was made by a democratic legislature. Only a creative interpretation by unelected judges defended the equal political rights of the minority.

Today one of the major issues in Australian constitutionalism concerns the power of the Federal Parliament to enact laws to authorise the Executive government to detain indefinitely (potentially forever) so-called "boat people" who seek to travel to Australia to claim refugee status. The majority of the High Court of Australia has upheld the constitutional validity of such detention laws and of provisions diverting vessels on the high seas to deposit their human cargo in harsh conditions in foreign island countries.[12] The majority of judges have so far found the law clear and within the relevant federal constitutional power.

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[8] *Toonen v Tasmania* (1994) 1 *International Human Rights Reports* 97 (No.3). Cf. *Croome v Tasmania* (1997) C*ommonwealth Law Reports* 119.

[9] V. Bell "By the Skin of our Teeth – The Passing of the *Women's Legal Status Act* 1918 [NSW]" (2018) 92 A*ustralian Law Journal* 966. Referring to *Legal Practitioners Act 1898* (NSW), s4.

[10] *Australian Communist Party v The Commonwealth* (1951) 83 *Commonwealth Law Reports* 1 at 193, per Dixon J.

[11] *Australian Constitution* (*Communists and Communism*) 1951 (referendum was defeated in accordance with s. 128 of the Australian Constitution.

[12] *Al-Kateb v Godwin* (2004) 219 *Commonwealth Law Reports* 562 at 581 per McHugh J; contrast 622 [169] ff, per Kirby J. See also *Plaintiff M68/2016 v Minister for Immigration* (2016) 257 *Commonwealth Law Reports* 42 at 168 [410] per Gordon J (diss.).

So the application of *rules* is no guarantee by itself, of the moral quality and justice of the laws so enforced. Rules are important. They can be a protection from pure discretion and brute power. But they are not necessarily a protection from injustice, discrimination and derogation from universal human rights.

Germany's topography of terror: An even clearer illustration of this insufficiency of rules of law, narrowly interpreted, can be seen in the history of Germany during the Nazi period. Those in doubt can visit the new *Museum on the Topography of Terror*[13] established in Berlin not far from this conference. I mention it with the encouragement of some of our hosts with whom I have spoken. And because of the impact that a visit inevitably has on anyone who comes to confront the ease with which civilised countries can sometimes fall victim to rules that lack any basic moral content.

Visiting the Museum this past night I was struck by the crowds of young Germans: teenagers and youths who walked quietly, conversing softly and deep in thought, through the images of oppression. Advocates for the rule of law must likewise confront a central lesson of this museum. The Nazi state was not a place without laws. It was full of laws.

One exhibition at the museum takes the visitor through the parade of laws that were adopted and enforced to oppress Jewish people in Germany after 1933 and later in the occupied territories. It started with laws to enable the Executive to enjoy exceptional legislative powers to make laws

[13] Museum on the Topography of Terror, Berlin https://www.topographie.de/en/topography-of-terror/.

oppressing this and other minorities. Then there followed laws to remove Jews from the civil service. Then laws to forbid marriage between defined Jews and "Aryans". Then laws excluding the use of public facilities and parks by Jews. Then laws requiring the wearing of badges to signify the presence of Jews and other people of minority status. There followed laws obliging Jews to include in their given names the Jewish name 'Sarah' for a female and 'Israel' for a male. Then the laws obliged Jews to travel in public transport at the back of the vehicle. Before long, there was another law to forbid the use of public transport at all. Laws soon required finally compliance with commands of surrender to transport to an unknown fate in the East. So this was *not* a land without law.

Evidence is provided in the Museum of how those laws were implemented by local courts. Other minorities, communists, socialists, LGBTI people, Jehovah Witnesses, the disabled and the "work shy" had their own series of laws. Many of them contained similar provisions. Particularly noteworthy was the fact that many of the leaders of the Schutzstaffel force (SS) were lawyers. Their biodata boasted doctorates of laws from famous universities. Lawyers contributed to the enforcement of these laws with their injustices. After the "Night of the Long Knives", Adolf Hitler declared that he had assumed the position of the "supreme judge" of the nation to protect it from those who had been murdered. The judges did not protest against these laws. The only recorded instance of a protest concerned interference with judicial pensions.[14] This is why, remembering these events, judges of Europe today march alongside judges in lands where the moral quality of law has been undermined or endangered. This can

[14] Ingo Müller (trans Deborah Lucas Schneider), *Hitler's Justice – The courts of the Third Reich*, Harvard University Press, 1992.

happen whenever extra-constitutional steps are taken or "black holes" exist in the enforcement of the law.

All this is not to say that rules and duly made laws are not important as a protection against misuse of power, abuse of discretions and oppression of minorities. Far from it. But it is to insist on the vital importance of the concept of justice and the critical controlling force of universal human rights over rules of law. *Rules* and even duly enacted laws on their own, are insufficient. Judicial integrity that focuses only on *rules* may miss the point of the challenge that has been presented in recent times in two otherwise successful rule of law societies, Australia and Germany. Every land represented at this conference would be able to tell stories that make the same points.[15]

African cases: Because so many participants at this conference are from Africa, it is appropriate to conclude with instances that show the ongoing struggle in African countries to apply the rule of law, to uphold justice and to use law and justice together as instruments for the achievement of economic and social development. As well for the attainment for the goals expressed in the 2015 *Millennium Development Goals* of the United Nations.[16]

To illustrate the fact that African judges are also confronted by challenges that sometimes include elements in some ways similar to those that have arisen in long-established western democracies, I want to illustrate my point by reference to an African country that has been involved in an

[15] See M.D. Kirby, "The Rule of Law Beyond the Law of Rules" (2010) 33 *Australian Bar Review* 195; Cf. Lord Bingham, "The Rule of Law" (2007) 60 *Cambridge Law Journal* 67 at 81.
[16] Millennium Development Goals https://www.un.org/millenniumgoals/.

earlier dialogue with the JIG and its hosts at this conference, namely Zambia. The sixth meeting of the JIG took place in Lusaka in 2010. The JIG was addressed by the then Chief Justice of Zambia (Chief Justice Sakala) who participated in that meeting as a special guest.

I have had the privilege of travelling to Zambia on other occasions and of delivering an invited address the members of the Zambian judiciary. I described one such visit in a biographical sketch that was later published.[17] Advantage was taken of the JIG presence in Lusaka to examine, and plan ahead, for the effective implementation of the *Bangalore Principles on Judicial Integrity,* along the lines adopted at the Lusaka meeting in 2010.

One of the recent reports on a case coming before the Zambian courts affords proof of the appreciation, at the highest level of the Zambian judiciary, of the requirement, that to amount to rules as building blocks for the rule of law, the rules must attain standards demanded by universal notions of justice and of fundamental human rights. There is also another illustration showing, I believe, that having *rules* alone is not enough. A judiciary of integrity must consider whether the rules are oppressive, unjust and fall short of contemporary global standards of justice and human rights.

The first case is reported in the *Legal Brief* on African. It records legal developments that occurred little more than a week ago.[18] Two men who had been convicted in Zambia brought legal proceedings to challenge the

[17] "Out in Africa", Chapter 6 in M.D. Kirby, *A Private Life – Fragments, Memories and Friends*, Penguin, 2012,
[18] *Legal Brief*, 21 January 2020 (Carmel Rickard) https://legalbrief.co.za/diary/a-matter-of-justice/story/prisoners-victory-paves-way-for-rights-based-suits/pdf/. The decision of the Supreme Court of Zambia was delivered on 21 January 2020.

congestion of the cell in which they were detained in Lusaka. They alleged that it was ‘abysmal’ and the food ‘virtually inedible, often rotten or contaminated’. The men in question pointed out that they were HIV positive. And they alleged that the conditions of their imprisonment were such as to violate their legal rights under the Constitution of Zambia, enforceable by the courts.

The Government of Zambia argued that it did not have the money to improve prison conditions; that Zambian law did not accept the direct enforcement of economic, social and cultural rights by the courts; and that nothing could be done to enforce a health and dietary needs presented by the compromised immune systems of the prisoner applicants. The evidence suggested that the prisoners’ conditions were prone to subject them to life-threatening diseases such as tuberculosis because of the inability to flush lavatories and the intensely crowded conditions of the cells. Originally intended to house 15 prisoners, the cell in which the two men were accommodated held 75 or more prisoners. This made it impossible for all prisoners to sleep properly at night and to breathe uncontaminated air in the cell.

The trial judge made all findings of fact favourable to the prisoners. However, she concluded that there was nothing the court could do about the case. Upon appeal, the Supreme Court bench, led by Chief Justice Irene Mambilima, accepted that the economic, social and cultural rights were not part of the constitutional Bill of Rights in Zambia . They were principles of state policy. However, she concluded that prisoners’ rights in this case were covered by the Bill of Rights and were enforceable. This was because the State had failed to consider the right of these particular prisoners to life as including “a right to a dignified life”. Such a right to

dignity, mentioned in the first article of the UDHR extended to the right to nutritious food. It could not be left only to the State authorities to decide what this obligation demanded. The men were at serious threat to their lives because they were confined in “breeding grounds for infection”. The courts and the law had a role to play in this situation. There was no gap in the law. Law had a voice in Zambia. The State was ordered to take immediate steps to reduce overcrowding; to improve food and conditions; and to report back to the court on compliance with its order.

In earlier times, in many jurisdictions, courts in common law countries dismissed such cases on the basis that funding had to be left to the Executive Government and the legislature that raised taxes from the citizens. This argument did not convince the Zambian Chief Justice. She insisted there was a “growing trend of indirect judicial protection of the right to food, for example, by connecting that right with other rights… and by defining the right to life as a right to a *dignified* life.”

Only if the court took this step would the State be obliged to attend to the grave issue that had been brought to the notice of the courts. So the judicial orders were made. I hope and assume that they will be obeyed. Literally, they appear to involve a matter of life and death.

Just a few weeks before that case was decided, worldwide shock was voiced over the case of two men in Zambia who were convicted under a provision of the criminal law of “having sex against the order of nature”. The men, Steven Sambo, 30 and Japhet Chataba, 38, were convicted after a hotel employee described in evidence how she saw them having sex “when looking through a window.” The men, citizens of Zambia, were

each sentenced to 15 years in prison.[19] Inferentially, adding to the crowding at Lusaka Central Prison. The President of Zambia (H.E. Edgar Lungu) defended the provisions of the criminal law and the sentence: "Even animals don't do it, so why should we be forced to do it because we want to be seen to be smart, civilised and advanced and so on?... Those advocating gay rights should go to hell… That issue is foreign to this country."

The American Ambassador to Zambia, expressing his horror at the sentence asked why Zambia was punishing two men who "hurt no one", whilst "meanwhile, government officials can steal millions of public dollars without prosecution." In response to this comment, the Ambassador was recalled on the insistence of the Zambian Government. According to *Lusaka Times*, the President of Young African Leaders Initiative, Andrew Ntewewe, told a press briefing that the "two misfits" had actually been given leniency by the sentencing judge. This was because 15 years imprisonment was the minimum sentence. She could have opted for "the maximum, life imprisonment".

The crime in question in this second case in Zambia was inherited at independence from the United Kingdom in 1964. Zambia has had 56 years to repeal and replace it through its Parliament. Despite arguments and representations, the law has never been repealed. The responsibility for continuing and enforcing the crime rests with Zambia. The conviction and punishment appears to be contrary to many resolutions and findings

[19] L.Wakefiled, "A gay couple in Zambia have been sentenced to 15 years in prison for the crime of loving one another.", *Pink News* (London) https://www.pinknews.co.uk/2019/12/02/zambia-gay-prison-same-sex-15-years-crime-homosexuality-africa-president-edgar-lungu/

of the UN Human Rights Council and of national and regional courts and bodies of high authority.

This is a case where the applicable law is found in *rules*. Those rules have been applied unquestioningly. Recent judicial decisions in India;[20] Botswana;[21] Belize;[22] and some other countries (but not all)[23] have abolished these colonial rules. A sad feature of them is a common failure of the legislative process to amend the law and the diversity of judicial opinions when the courts are approached. Nevertheless, the trend of judicial decisions appears to favour abolition. Including in Africa. Reading the terrible punishment meted out to prisoners Steven Sambo and Japhet Chataba, and their punishment in conditions of overcrowding and disease, poses many questions about the rule of law in countries. Sometimes rules serve as a source of needless oppression. The rule of law opens up the necessity of judging the law so as to go beyond mere formalities. And to examine the substance of the rules and their justice and compliance with universal human rights.

CONCLUSIONS

I conclude as I began, expressing thanks to our German hosts for bringing us – judges, lawyers and other public officers together and providing the opportunity to share knowledge, experience and analysis about the

[20] *Natjev Singh Johar v Union of India* (2019) WP (Crl) No 76/2016, decision of the Supreme Court of India.
[21] *LM v State*, decision of the High Court of Botswana, 11 June 2019, per Leburu J.
[22] *Caleb Orozco and United Belize Advocacy Movement v Attorney General of Belize*, Supreme Court of Belize and *Jason Jones v Trinidad and Tobago*, High Court, per Rampersad J. 12 April 2018.
[23] *Lim Meng Suang v Attorney General* [2015] 1 SLR 26 (CA, Singapore); *David Kuria & Ors v State*, decision of the High Court of Kenya, 24 May 2019.

requirements of the modern world of the rule of law, justice and development.

Judges and legal practitioners have a moral obligation to reflect on the substance of what they are doing and the legal power that they wield. It is not sufficient that the rules comply formally with the requirements of a valid law. There remain the questions of whether it conforms to justice and fundamental human rights. If it does not, it will probably impede economic and social development is society. If it does not, judges should point this out. They should explore the ways in which they can bring law into harmony with justice and human rights.

Coming to a meeting such as this and sharing experiences and insights affords us all a precious learning experience. Judicial officers everywhere are subjected to crushing workloads and enormous pressures of decision-making. This conference allows us the chance to stand back from our daily work and to reflect on where it fits in to the international challenges of the world of the United Nations. That world teaches us to keep our eyes on justice and development. It also teaches the protective importance of having rules. Judges must control the unbridled discretions of public and private individuals who enjoy powers over the lives of others. This is what is meant by saying that everyone is subject to the rule of law.

The most important point of this conference, I suggest, comes from reflecting on the need to clarify in our minds, and in our actions, the value of the rule of law. Repeatedly, it is declared to be a foundation stone for all that judges and lawyers do. But the chief lesson of this introductory talk is that, of themselves, rules are important. Yet they are not enough. Rules that attend to Justice and conform to universal human rights

contribute notably to economic and social development. Rules that discriminate and deprive people of their human dignity serve only to oppress. In such cases, wherever it is possible and lawful, judges must play their part. The rule of law connotes more than the law of rules.

Here in Berlin I honour three fine leaders of sensibility who are in my mind on this occasion. They have helped to teach us these lessons; Gerard Brennan, judge of Australia, who wrote the leading opinion on indigenous land rights in the *Mabo* case. Claus Graf Schenk von Stauffenberg of Germany, executed not far from this conference venue, who rebelled against tyranny and who taught the insufficiency of patriotism and the necessity of a basic moral quality in the law. And Chief Justice Irene Mambilima of Zambia who confronted shocking rules and inhuman conditions. And reached for the principles of universal human rights and human dignity to find justice and to apply the mandate of our common humanity. Three heroes of the rule of law seen in its entire perspective. They guide us all into the future.