



ADVANCING THE CAUSE OF JUDICIAL INTEGRITY IN THE ASIA/PACIFIC REGION

BANGKOK, THAILAND, 12-13 MARCH 2012

The Hon. Michael Kirby AC CMG

**SUPREME COURT OF THAILAND – CRIMINAL DIVISION FOR
PERSONS HOLDING POLITICAL POSITIONS**

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JUDICIAL INTEGRITY AND THE FIGHT AGAINST CORRUPTION

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THE HON. MICHAEL KIRBY AC CMG*

BANGALORE PRINCIPLES OF JUDICIAL INTEGRITY

I applaud the decision to convene this conference. It is a privilege to be asked to give this keynote address. Combating corruption in every society requires many initiatives and much effort. However, none is more important and urgent than building, and maintaining, a judiciary of integrity that commands the respect of the citizens.

One of the main developments in judicial reform, happening throughout the world, is the attempt to improve and measure judicial integrity¹. In developing countries and in the newly independent states of Central and Eastern Europe, integrity based judicial reform programmes are gathering pace:

“Responding to a call made by the United Nations in 2006, nearly every country on every continent is in the process of requiring their judges to establish their accountability to certain core judicial values”

These judicial values appear in several human rights instruments of the United Nations, starting with Article 19 of the *Universal Declaration of*

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1. Nihal Jayawickrama, “The Politicisation of the Sri Lankan Judiciary”, published in *Sunday Leader*, 24 July 2011, Colombo, Leader Publications Pvt.Ltd., 14.

Human Rights (UDHR), proclaimed by the General Assembly on 10 December 1948:

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

The principles stated in the UDHR are reaffirmed and elaborated in the *International Covenant on Civil and Political Rights* (ICCPR). By Article 14.1 of that Covenant it is declared:

“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”

Two concepts have been added by the ICCPR:

- (1) The requirement that the tribunal must be “competent”; and
- (2) That it must be “established by law”, not created *ad hoc* at the whim of other powers.

Over the years, several United Nations agencies and conferences have returned to the basic principles stated in the UDHR and ICCPR. In this way, United Nations organs have created further basic principles on the independence of the judiciary, designed to uphold and assure the independence of courts and other essential qualities of justice and the rule of law. These principles include the United Nations *Basic Principles on the Independence of the Judiciary*, adopted in September 1985 and endorsed by the General Assembly in November of that year; and more recently the *Bangalore Principles of Judicial Conduct*, adopted by the Judicial Integrity Group (JIG), working under the supportive aegis of the United Nations Office on Drugs and Crime (UNODC).

The *Bangalore Principles* have been the principal focus of many global and regional meetings of judges, including a regional workshop held in Jakarta in January 2011 about which I propose to talk. Since the establishment of the JIG in 2000, I have served as Rapporteur of the Group. Its principles have increasingly been accepted by the judiciary around the world, and by international agencies, as an excellent

statement and elaboration of the core principles by which the judiciary should perform its functions and fulfil its obligations.

The *Bangalore Principles*, identify six essential values and proceed to explain and elaborate these, giving guidance as to how they will be carried into effect.²

The values are:

- (1) Independence;
- (2) Impartiality;
- (3) Integrity;
- (4) Propriety;
- (5) Equality; and
- (6) Competence and Diligence.

In developing the *Bangalore Principles*, the JIG has consulted widely with judges of the major legal traditions of the world, specifically judges from the common law and the civil law traditions.

Between 26-27 January 2012, a regional workshop on judicial integrity in South-East Asia. The workshop was designed to address issues of judicial integrity and ways in which its values could be upheld in countries in the region.

Gathered at the Jakarta regional workshop, were distinguished judges of the Supreme Court of Indonesia and of other courts in the Indonesian hierarchy who were co-hosts of the meeting. In addition, there were participants from other countries, notably Germany (a major sponsor), Australia, and East Timor, The Netherlands, the European Union, ASEAN and officers of a number of embassies based in Jakarta. Judges or other officials were present from these countries, as well as Afghanistan, Bangladesh, Cambodia, Japan, Laos, Malaysia, Mongolia, Myanmar/Burma, Nepal, The Philippines, Singapore, Sri Lanka and Thailand. The JIG was represented by Judge Rudolf Mellinghoff (Germany), Dr Nihal Jayawickrama (JIG Co-ordinator) and me. Much of the work in Jakarta was devoted to examining the *Bangalore Principles* and considering them in the context of the attributes of law and justice within the Asia/Pacific region. I propose to explain some of the main

² United Nations Office on Drugs and Crime (UNODC), Judicial Integrity Group, Commentary on the *Bangalore Principles of Judicial Conduct*, UNODC, Vienna, 2007. The *Bangalore Principles* were endorsed by United Nations, ECOSOC Resolution 2007 – 23.

points to emerge in the course of the workshop. The recency of the Jakarta meeting and the relevance of its themes make it appropriate, in Thailand six weeks later, to take advantage of its conclusions so that we can take our debates to a higher level.

THE JUDICIARY IN THE ASIA/PACIFIC REGION

Positive Features: A number of positive features, tending to support the moves towards enhanced judicial integrity in the Asia/Pacific region, were noted by the participants:

- (1) *Economic Growth:* The growth of the economies in Asia and particularly in South Asia, has defied expectations and differentiated the region from the serious economic consequences of the ongoing global financial crisis as it is affecting Europe and North America. In the context of still robust economic growth in Asia, the strengthening and improvement of the judiciary is important, given that a judiciary of integrity contributes, in a marked way, to secure economic growth.
- (2) *Populations:* Within Asia, there are strong historical and cultural traditions of hard work and resilience, often in the face of adversity. These features of culture and growing levels of school and tertiary education, raise expectations of integrity in all branches of government, including the judiciary.
- (3) *Judiciary:* At the same time, the standards of the judiciary have been raised, conformably with the regularisation of systems of judicial appointment; increased requirements of educational and vocational attainments; and improved facilities for continuing judicial education. The exposure of judges in the region to members of foreign judiciaries, with long traditions of integrity, has also fired the imagination of such judges. Not by accident were the earlier principles of judicial independence for the region adopted in Beijing at a regional meeting of chief justices.³

³ D. Malcolm, "The Beijing Statement of Principles of Independence of the Judiciary in the LAWASIA Region", (1996) 70 *Australian Law Journal* 299.

- (4) *National Endorsement:* The *Bangalore Principles* have been endorsed by several countries in the region. Specifically, The Philippines, encouraged by former Chief Justice H. Davide (then a member of the JIG), adopted the *Bangalore Principles* for observance by the judiciary of that country. Attention has been given to the *Bangalore Principles* by judicial authorities in other lands, including Indonesia.
- (5) *Australian Developments:* In Australia, increasingly engaging with the countries of its geographic region, several developments are worth noting. The nation's highest court (the High Court of Australia) is participating in the Asia/Pacific Judicial Forum and Justice Kenneth Hayne of that Court is currently the Chairman of the Forum. Coinciding with the publication of the *Bangalore Principles*, the Council of Chief Justices of Australia approved the publication by the Australian Institute of Judicial Administration of a *Guide to Judicial Conduct*.⁴ It reflects many of the same principles and applications as expressed in the *Bangalore Principles*. It also draws on earlier publications by the Canadian Judicial Council.⁵

Negative features: As against these positive developments in the region, a few negative considerations were noted:

- (1) *Colonial Relics:* Most of the countries in the Asia/Pacific region went through a colonial experience in which outside rulers imposed their laws, sometimes introducing alien and oppressive arrangements, many of which have been preserved by post-colonial governments. These include, in several jurisdictions of the region, the colonial criminal laws relating to consensual adult sexual activity, which impede the successful strategies to fight HIV/AIDS, that is prevalent in the region.⁷ But they also include exceptional emergency laws, which effectively place some conduct of executive government outside the supervision of the courts, thereby undermining compliance with universal human rights.

⁴ Australian Institute of Judicial Administration, 2002, Melbourne.

⁵ Canadian Judicial Council, *Commentaries on Judicial Conduct (1991) and Ethical Principles for Judges (1998)*.

⁷ Commonwealth Secretariat, *Commonwealth of the People: Time for Urgent Reform (London, 2011)* 98-102

- (2) *Governmental Interference*: In a number of jurisdictions, well publicised instances of alleged or established governmental interference in the independence of the judiciary stand as a warning of the fragility of the separation of governmental powers and the need to assure judges against governmental intrusion. The existence of such intrusion in Indonesia was reported by the International Commission of Jurists during the Soeharto regime⁸. In Malaysia, the removal of the Lord President of the Federal Court (Tun Salleh Abas) from his office was widely condemned, including by the first Prime Minister of the country, Tunku Abdul Rahman⁹. Constitutions and words on paper cannot provide a total assurance against events of this kind. A culture of constitutionalism must be created. And the judiciary has a vital role to play which can be fulfilled only if the judges enjoy tenure, independence and integrity¹⁰.
- (3) *Legal Reform*: A constant problem of developing countries is the inability to ensure the speedy and effective reform of the law, so as to remove the risks and opportunities of corruption, designed to cut corners and to overcome or circumvent legal inefficiencies and impediments. Although law reform agencies and other such institutions have been created in the region, typically they are poorly funded, small and relatively ineffective. Unless the law is updated, the temptations of powerful interests to get around its provisions constitute an important institutional impediment to judicial integrity.
- (4) *Salaries and Corruption Allegations*: In most countries of the region, the judiciary is seriously under-remunerated. Often judicial salaries are pegged by reference to relativities with military and administrative officers. Yet there are special reasons why judicial salaries must place judicial officers beyond the risks of temptation. When, between 1993-6 I served as Special Representative of the Secretary General for Human Rights in Cambodia, I endeavoured to persuade

⁸ International Commission of Jurists, *Mission to Indonesia* (October 1999), Geneva, 15ff

⁹ Tun Salleh Abas and K. Das, *May Day for Justice*, Magnus, Kuala Lumpur 1989. See pxi, where Tunku Abdul Rahman described the removal as "the most shocking story in modern and judicial history"

¹⁰ The position in the judiciary of Sri Lanka has been critically reviewed by Dr Jayawickrama. See n1 above. In a foreword to the book in n9, the author also drew attention to challenges to judicial integrity arising in Fiji (following a coup) and in Australia.

the World Bank to this opinion. Without success. Cambodian judges at that time were paid little more than \$US20 per month. Although things have improved and the World Bank has come to appreciate the essential need to create a judicial infrastructure of manifest integrity and strength to defend so much else in each country, the challenge of ensuring proper judicial salaries is a near universal one.

- (5) *Judicial Example:* Unfortunately, cases exist where judges themselves have acted in ways that are prone to appear to ordinary citizens as lacking in the proper standards of integrity. Yet citizens in the region frequently have no remedy, nor the resources or means, to respond to such instances.¹¹.

THE VALUE OF DIALOGUE

Given the unique and peculiar circumstances of each country when it comes to the judiciary, and the complex of cultural, historical, economic, religious and other forces that impinge upon the values that influence judicial activity, some might doubt the value of regional workshops addressed to the theme of judicial integrity such as that held in Jakarta and now this one in Bangkok. However, in response to any such doubts, there are a number of words that can be said:

- (1) *Learning from each other:* Without in any way diminishing the independence of each national court system, and its duty to conform to its own national constitutional and legal requirements, there are sufficient analogies and similarities in the judiciary across borders to ensure that the exchange of views and of experiences will be of value in formulating and implementing the principles of judicial integrity in one's own country. This is why regional workshops are especially valuable because geographical propinquity will often connote cultural similarity and similar institutional responses to common problems.

¹¹ R.J. Smith, "Law group seeks ethics code for Supreme Court", *Washington Post* 24 February 2011, A2.

- (2) *Accepting Adversity*: None the less, inevitably, there will be differences in the ways in which particular countries address similar or identical problems of judicial conduct. Pragmatic economic and other forces will influence the way judges look at problems and resolve them. In the case of the JIG, it has revealed that significantly different approaches to the disclosure of financial interests of family members of a judge exist in civil and common law countries. Likewise, the question whether a judge could, after appointment, maintain contact with political parties, was another element in respect of which different legal traditions offer different opinions.¹²
- (3) *Differing Priorities*: In different jurisdictions, different priorities will emerge, so far as judicial integrity is concerned. In some, actual corruption by the payment of money or the promise of favours will represent an urgent challenge that will require immediate attention. In other countries, the problems for judicial integrity will involve no monetary corruption or improper influence: yet the infractions may be more subtle and in some ways more insidious.¹³
- (4) *Corruption Convention*: The adoption by the international community of the *United Nations Convention against Corruption*, with UNODC as its guardian, provides a special occasion for implementation of the *Bangalore Principles*. Although judicial corruption is not the only form of corrupt conduct that undermines integrity in a given society, it is incontestably an important form of corruption. The role of the gold standard of the *Bangalore Principles* and of the JIG may therefore be significant in advancing the practical implementation of the Convention, specifically in respect of various forms of judicial corruption and lack of integrity. It is for this reason that it is important for the judiciary in every country to consider the principles propounded by the JIG and to measure local practice, legal and institutional responses and attitudes against the *Bangalore Principles* and the commentary offered by the JIG as to how those principles should be interpreted and applied in practice.

¹² UNDC, JIG, *Bangalore Principles*, above n2, 15f

¹³ Transparency International, *Annual Report 2010*, Berlin, 39 ("Judiciary"); cf. M.D. Kirby, "Maintaining judicial integrity in an age of corruption" (2012) 35 *Australian Bar Review* 1 (Frank Costigan Lecture), at 12-17

- (5) *Publicisation and Promotion*: If the *Bangalore Principles* of the JIG are accepted and found useful in the foregoing respects, it will be important to promote knowledge of them, particularly in the judiciary throughout the world. It will also be necessary to collect instances where the *Bangalore Principles* have been applied by municipal courts¹⁴ or by judicial disciplinary bodies and administrators. It will also be essential to consider the way in which the JIG itself is constituted, its membership appointed and renewed, and elaborations of its principles collected, and commented upon. Additionally, it will be essential for the JIG to reflect and report upon the ways the *Bangalore Principles* can be measured and audited, in their application in individual countries.

These and other questions were discussed in the Jakarta workshop. However many of the interventions by the participants were addressed to the principles, strategies, and implementation measures designed to promote integrity in the judiciary. I now turn to describe some of the commentaries that were made in Jakarta upon these.

SUGGESTIONS ON THE PRINCIPLES

The following are some of the suggestions that were made in Jakarta in respect of the *Bangalore Principles*:

- (1) A number of the judicial participants emphasised the importance of lifting the perception of the problem from simple monetary corruption to the wider issues of integrity dealt with by the JIG. This idea was expressed by one judge from Thailand present in Jakarta. He insisted that “integrity is not just honesty”. Thus, it is necessary to recognise that honesty on the part of judges is essential; but it is insufficient for the attainment of full integrity.
- (2) Likewise, several participants stressed that the value of independence includes, as the JIG itself has emphasised, independence from other judges in substantive decision making, including within multi member courts.

¹⁴ See e.g. *Re Chief Justice of Gibraltar* (2010) 2 LRC 450 (PC)

- (3) Judge Mellinghoff, German member of the JIG, instanced the need to recognise that the assignment of cases or of work within the courts, to members of the judiciary, is an attribute of judicial independence. This is a notion that has been affirmed recently by the High Court of Australia and can sometimes be overlooked by executive government.¹⁵ If parties or governments can effectively choose their judges, they can hope to influence the outcomes of cases. Judge Mellinghoff also described the importance of providing judges with appropriate immunity from suit and tenure for the performance of their judicial duties, whilst at the same time affording appropriate remedies to litigants for fraudulent, criminal or seriously incompetent judicial conduct.
- (4) A participant from The Philippines emphasised the importance of appreciating the relevance for judicial integrity of chronic underfunding of the courts, including court budgets and judicial salaries.
- (5) Several participants urged that the judicial integrity principles should be placed in the context of both universal human rights principles and the *United Nations Convention Against Corruption*, Article 11. As well, the economic self interest of countries for supporting and obtaining judicial integrity, needed to be emphasised and appreciated.
- (6) Dr Jayawickrama gave instances of the way in which judicial transfers could be misused. The desirability of addressing the problem of preferential treatment of judicial officers was stressed.
- (7) In my own remarks, I suggested that more work needed to be done (including in the Asia/Pacific region) concerning the differences that exist between conceptions of judicial integrity prevailing in common law and civil law countries.

¹⁵ *Fingleton v The Queen* (2005) 227 *Commonwealth Law Reports* 166; [2005] HCA .

OBSERVATIONS ON STRATEGY

A number of important reflections were offered in Jakarta concerning the strategies that needed to be adopted in giving effect to the *Bangalore Principles* in different jurisdictions:

- (1) The, the Deputy Chief Justice of the Supreme Court of Indonesia recognised that judicial integrity is a sensitive topic where there is sometimes a need to reconcile competing principles. An example given was the potential clash between notions of judicial independence and rigorous responses to allegations of incompetence and lack of diligence.
- (2) Mention was made of the desirability of taking advantage of regional treaties and interests. Thus the ASEAN Human Rights Commission could be informed and invited to be engaged in regional elaborations of the *Bangalore Principles*. The more this was done, the greater might be the chance of securing the co-operation of all branches of government and the realisation of the importance of judicial integrity for the people, the nation and the region.
- (3) A participant from Malaysia suggested the desirability of identifying the growing number of countries, including in the region, with new codes of conduct that had been influenced by the *Bangalore Principles*. Such countries now include the judiciary in Malaysia, The Philippines and Singapore. Where a new national judicial code has been adopted, it would be desirable that the JIG and regional bodies should measure the provisions of the code against the *Bangalore Principles* and draw inconsistencies to the notice of the judiciary concerned. This would give the judges the opportunity to consider bringing their judicial code into line with the international standard.
- (4) A judge from Myanmar/Burma emphasised the special opportunities afforded by ready made international standards for his country and others during a process of democratic transition.

- (5) Several participants emphasised that judicial education should be part of the ongoing strategy of the JIG. Simply publishing guidelines does not ensure their implementation. They must be supplemented by follow up and instruction.
- (6) The possible need for UNODC to draw the work of the JIG and of the *Bangalore Principles* to the notice of the states parties which have already subscribed to the *United Nations Convention against Corruption* was mentioned by several participants, including from UNODC and UNDP.
- (7) Judge Mellinghoff proposed that the JIG should consider a strategy of auditing or monitoring judicial integrity so as to ensure that the principles and recommendations advocated by the JIG make an actual difference on the ground in the countries affected.
- (8) Several participants suggested the holding of more regional meetings, or missions to individual countries, on the basis that this was the most valuable way of involving the judiciary and engaging its support for the *Bangalore Principles* and their implementation. The conference in Bangkok affords another opportunity to reflect on the principles and their application.
- (9) Judge Vreese of The Netherlands urged that the JIG should bring its commentary on the *Bangalore Principles* up to date with reference to developments that have occurred since 2003, including the Declaration by the International Association of Judges; the principles of integrity adopted by the United Nations Appeals Tribunal; and the recent International Bar Association Principles on the election of United Nations Judges, adopted in Dubai in 2011.
- (10) Some participants suggested the renaming of the *Bangalore Principles*, given the recent decision of the City of Bangalore to adopt a different name. This proposal was contested, as was a consequential suggestion by the writer that the word “Bangalore” should be dropped to avoid confusion with an earlier statement of Bangalore Principles.¹⁶

¹⁶ The Bangalore Principles on the domestic judicial application of international human rights norms 1988. See M.D. Kirby, (1988) 62 *Australian Law Journal* 514 at 516.

OBSERVATIONS ON IMPLEMENTATION

During the course of the Jakarta workshop many observations were made on ways of increasing and improving the rate of implementation of the *Bangalore Principles* in the Asia/Pacific region:

- (1) Mr R. Sudarshan (UNDP Asia/Pacific Regional Centre) raised the possibility of adopting a Judicial Integrity Index (JII) akin to the UNDP Development Index.
- (2) Mr Ajit Joy (UNODC) suggested that participating states might consider the utility of adopting an integrity implementation commission, as had been done in Indonesia.
- (3) One participant recommended the need to institute a regular declaration by judicial officers of their personal assets. There was discussion concerning whether publicity should attach to any such a declaration.
- (4) Several participants proposed the establishment of Academies of Law or, where they already existed, that they should include, amongst their activities, research into integrity codes'.
- (5) Several judges emphasised the importance of timeliness in dealing with allegations of judicial corruption and all other deviations from judicial integrity.
- (6) Participants from civil law countries indicated the importance of integrity in the conduct of competitive exams for admission to the profession of judging, raising important issues of integrity. Similarly, the procedures for appointments for judges from the private practicing profession raise integrity issues in countries that follow the common law tradition.
- (7) Many participants stressed the importance of ongoing education for the judiciary in the principles of integrity.
- (8) Judge Mellinghoff described the difficulties that can arise for the orders made by a judge found to be corrupt and possibly removed from office. Are all that judge's orders immediately suspect and should some procedure be

adopted to permit their review? Should such orders be automatically suspended, as tainted by a finding of judicial corruption or want of integrity?

- (9) Judge of Appeal Chao of Singapore emphasised the need to build up a momentum for systemic change in the judiciary, as a consequence of individual instances of alleged error or lack of integrity. The possibility of establishing an ethics committee to guide judges in advance of problems arising was explored. So was the role of individual appellate decisions as laying down broad principles for the operation of integrity rules.¹⁷ Some thought needed to be given to strategies to secure, manage and maintain good talent in the judiciary. Not all issues of integrity need to be negative.
- (10) The differential involvement of the legislature in ultimate decisions on judicial integrity, typical of countries of the common law, was explored and recent experience in Australia described where a State legislature had shown indulgence to judicial officers evidencing behavioural problems. So was the creation of a judicial commentator to be available to the media, as in The Netherlands and Indonesia, so as to ensure accuracy and proportionality in the media reportage of judicial cases and problems.

CONCLUSIONS

The conference in Bangkok is specially timely and useful as it follows up the recent workshop in Jakarta. It can be expected that there will be further workshops in the Asia/Pacific region addressed to issues of judicial integrity. The support of the host country and of its courts and judges is essential for the success of such meetings. So is the financial support given by embassies and overseas foundations. I wish to record special thanks to the German Government and to GIZ Foundation and the Konrad Adenauer Stiftung for facilitating these workshops and contributing greatly to their success. There will be further such meetings. They will serve the cause of judicial integrity, without which the promises of peace and security, economic equity and universal human rights, expressed in the *Charter of the United Nations*, will be unfulfilled.

¹⁷ An Instance given in discussion was the decision of the Court of Appeal in Singapore in the case of *Thong Ah Fat v Public Prosecutor* (2011).

We, the participants in Bangkok do not need to re-invent the wheel. We can take advantage of the work of the Judicial Integrity Group. We need to learn of, and reflect upon, the *Bangalore Principles*. We need to build on the conclusions of the recent meeting in Jakarta. We need to contribute with fresh insight and enthusiasm to the task of assuring a judiciary in the region that is independent, impartial, competent and a true guardian for the people of the rule of law and universal human rights for all people.
