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THE JUDICIAL GROUP ON STRENGTHENING JUDICIAL INTEGRITY

THIRD MEETING, COLOMBO, SRI LANKA

OPENING CEREMONY 10 JANUARY 2003

JUDICIAL INTEGRITY - A GLOBAL SOCIAL CONTRACT

The Hon Justice Michael Kirby AC CMG

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THIRTY YEARS - A RETURN TO SRI LANKA

As my 'plane approached the airport at Colombo I felt a mixture of anticipation and apprehension. These feelings were not produced by the latest cricket score, which chronicled how a Sri Lankan team trounced the Australian veterans. I knew that I could rely upon my New Zealand colleague, Mr Jeremy Pope, to hasten my receipt of bad news from the cricket ground.

The reason for my emotions was different. For it is almost exactly thirty years since I last visited Sri Lanka. In 1974, like many young Australians of that time, I travelled through Asia. I did so in a Kombi van. On the second such journey, I visited this beautiful

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island. I entered it by ferry from Rameswaram in India. A journey meant to be of days stretched into weeks. We travelled to Jaffna, to Colombo, Kandy, Galle, Polonnaruz and Anuradhapura. For more than a week we stood on the beach at Bentota, south of Colombo, and witnessed unforgettable sunsets in the company of peaceful people. How often, in the intervening years, I have thought of those weeks. In lives of professional pressure our minds escape to easy days when there was time for the "pursuit of happiness" that goal of human government that Jefferson promised as a fundamental human right¹. In later years, as the news of the violence that engulfed Sri Lanka spread, I often thought of those sun-drenched days and the friends we met from every community of this nation.

The Judicial Group is meeting in Sri Lanka at a critical time in the negotiations which all people of good will hope will bring peace, reconciliation and justice for all in this country. In the past, Ceylon was known as the pearl of the Indian Ocean. In recent years, Sri Lanka has seemed a tear - a place of human cruelty. All of us, who are friends from overseas, bring messages of hope for the success of the negotiations. The members of the Judicial Group who are judges, dedicated to constitutionalism and the rule of law, hope that

¹ The reference is to the American Declaration of Independence, written by Jefferson: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that amongst these are life, liberty and the pursuit of happiness".

these principles, together with respect for human rights, will strengthen Sri Lanka in the future.

THE INTERVENING YEARS

In the years since my last visit, great have been the changes that have occurred in the world. Many of the changes have been positive. Many have reinforced freedom. The Cold War has ended. The Berlin Wall has been dismantled. The move to democratic government has happened in many lands formerly controlled by totalitarian autocracies. The work of the international agencies for the protection of human rights has expanded. Two observers of the Judicial Group's work play key roles in that expanded role. Justice P N Bhagwati, one-time Chief Justice of India, chairs the United Nations Human Rights Committee in Geneva. Dato' Param Cumaraswamy of Malaysia is this year completing his nine year term as United Nations Special Representative for the Independence of the Judiciary and of Lawyers. Although imperfect, the growth of international and regional machinery for the advancement of human rights is a positive change of the last three decades.

Technology has brought many advances. These include the growth of the Internet and the expansion of cyberspace; the completion of the Human Genome Project; and the expansion of the facilities for international travel and communication. The world

economy has grown, although, in many developing countries, economic growth has been patchy and uneven.

Accompanying these positive changes are the negatives. A great epidemic of HIV/AIDS has afflicted humanity in a way that was totally unpredictable thirty years ago. It has shown once again how vulnerable our species is to new diseases. Malaria, an old enemy of humanity, is on the increase as is tuberculosis. Homelessness amidst the growing populations of the world is a huge problem. Access to water is one of the flash-points of danger for the new century. The proliferation of nuclear and chemical weapons spells peril for the very survival of the human species. Religious and other fundamentalism seems to afflict many of the great religions of the world whose shared basic lesson teaches us to love one another.

We are meeting in Sri Lanka at a dangerous moment for world peace. No one at this meeting would be other than conscious and concerned about the risks of war and violence and of the special dangers that power will replace law in international dealings.

AN ALTERNATIVE VISION FOR HUMANITY

In a sense, the Judicial Group represents an alternative vision for humanity. It is one different from that based on the power of capital and of weapons. The independent judiciary, that hears both

sides and decides disputes honestly, justly and lawfully in a peaceful way, is the model with which we are familiar.

The *Charter* of the United Nations sought to establish a new world order based upon three essential principles. They were the protection of international peace and security; the advancement of economic equity for all peoples; and respect for the fundamental human rights of individuals and peoples everywhere. These three objectives are inter-dependant. It is unlikely that peace and security will be stable without economic equity. Without economic equity respect for fundamental human rights will often be a hollow dream.

A key provision in the International Bill of Rights is the promise of access to judges of integrity. A promise appears in Article 14.1 of the *International Covenant on Civil and Political Rights*. It reads²:

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charges 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".

The triple crown of integrity of the judiciary is stated there: competence, independence and impartiality. They are the promises

² United Nations, Human Rights, *A Compilation of International Instruments* (Vol 1, 1994), 20 at 25.

which the work of the Judicial Group seeks to reinforce in every land.

We can see the way in which the alternative vision for humanity is being fostered by international, regional and domestic institutions. The media bring us daily coverage of the political organs of the United Nations - the work of the General Assembly and of the Security Council. Less well known is the work of the agencies with which we are familiar.

JUDICIAL AND HELPING ORGANS OF THE UNITED NATIONS

The *Charter* of the United Nations establishes the International Court of Justice. The Judicial Group is proud to be led by a distinguished former judge of that Court, who was until lately its Vice-President, His Excellency Judge Christopher Weeramantry. He is a son of Sri Lanka and was for a time a judge of the Supreme Court of this country. His work in the International Court is a demonstration of judicial integrity. His commitment to a humanitarian approach and his unique knowledge of the spiritual and philosophical beliefs of the world's great cultures and religions makes him a specially suitable person to lead our enterprise.

The work of the International Court is well established. But in recent times other judicial organs of the United Nations have been created. They include the specialised criminal tribunals for the

former Yugoslavia and Rwanda. The creation of the International Criminal Court is, we hope, another signal that humanity is turning away from brute power and substituting just and rational solutions to render accountable the tyrants and oppressors of humanity.

It is the helping agencies of the United Nations with which I have most acquaintance. I have just returned from a meeting in Canada of the International Bioethics Committee of UNESCO. That body is addressing some of the most puzzling challenges facing humanity as we contemplate the prospect of human control over the elemental building blocks of our species. At the end of this month I will travel to Geneva for a meeting of a new global body of UNAIDS, established to monitor those aspects of the HIV/AIDS epidemic that are specifically relevant to human rights.

At about the same time Dato' Param Cumaraswamy will be setting out for the meeting of the Human Rights Commission of the United Nations. Reporting to that Commission will be the Special Rapporteurs and Special Representatives established by the United Nations. For a time, in the 1990s, I was privileged to be the Special Representative for the Secretary-General for Human Rights in Cambodia. I there reported on a land in which the rule of law had been smashed, courts destroyed and judges killed or expelled. Great wrongs occurred in the Kampuchea of the Khmer Rouge. Whatever horrors Sri Lanka has faced in recent times, they were not as bad as the ghastly genocide that afflicted the Cambodian people.

Rebuilding a judiciary of integrity in a land so afflicted was a first priority of the Cambodian government and of my own work as United Nations Special Representative. I can remember participating in the training of the new judges in the No 1 courtroom of the court building in Phnom Penh. Most of the trainees had no familiarity with the law. Most were former teachers, selected because they could read and write. The questions they asked were fundamental. Indeed, they raised some of the issues that have been studied by the Judicial Group:

- ❖ Could they remain members of a political party? Many owed their preferment to their party connections and were disinclined to sever them. I told them that, whilst this question was answered in different ways in different countries, in my own nation complete impartiality was taken to require severance with all links with party politics. In countries of so much passion, like Cambodia, it was a prudent rule that I urged them to consider.
- ❖ What should they do where there is no law? The trainees pointed to the destruction of the old law books and the absence of efficient law-making machinery. In the days of the French protectorate, a magistrate in doubt could telephone the Ministry of Justice to be instructed on the law and advised on the case. I told the anxious trainees that they must find their solutions

amongst themselves. The separation of powers required independence from the Ministry. If there was no written law on the subject, they could do as the common law judges have done for centuries. Make it up. Develop the law from commonsense and notions of justice. But record the decisions and share them with each other so as to ensure consistency of approach and of principle.

- ❖ Could they accept gifts from litigants happy with their decisions? They pointed out that in the Khmer culture it was common to offer and receive gifts. In any case, they were in receipt of a paltry salary and the gifts would come in handy. I told them that the receipt of gifts was unacceptable for it would destroy the appearance of impartiality. No ordinary litigant could compete with a large corporation in gifts of gratitude. Integrity was the watchword for judges. Gifts were therefore forbidden. I saw the anxious eyes of the trainees, as if asking how they were to survive on their salaries of US\$20 a month. In Sri Lanka too, and in many lands, judicial salaries are inadequate. One of the main safeguards for integrity in the office where it is most important - the office of the judge - is the payment of adequate remuneration. Without such payments, detection and punishment will be only partly successful in removing the insidious effects of corruption.

In the United Nations Centre for International Crime Prevention, based in Vienna, there is a Global Programme Against Corruption. It is under the umbrella of that programme that the Judicial Group was initiated. I pay tribute to the dedication of Mr Petter Langseth of that Centre who has worked with the Judicial Group since its inception. Whilst the United Nations is often guilty of maddening inefficiencies, there is no other feasible way by which humanity can come together to solve global problems. One such global problem is corruption, inefficiency and lack of integrity in the judicial branch of government. But at least now there is an international body, comprising judges themselves, working towards the establishment of principles and the institution of a mechanism to uphold those principles so as to advance judicial integrity in every nation of the world.

I pay tribute to those who have made the meeting in Colombo possible. The Government of Sri Lanka, our hosts, who have welcomed our visit at this busy time. The United Kingdom Department of International Development which has generously provided the seeding funds to permit the initial meetings of the Judicial Group and to support the surveys on the extent of the problem of lack of integrity in the administration of justice in pilot projects. Those projects have taken place in Nigeria, Sri Lanka and Uganda, three countries of the Commonwealth of Nations. I also pay tribute also to Transparency International, an international non-governmental organisation that has supported the work of the

Judicial Group. I applaud the work of the other United Nations agencies and civil society organisations that have supported this unique initiative within the highest levels of the judiciary of many countries.

WORK OF THE JUDICIAL GROUP

The first meeting of the Judicial Group took place in April 2000 in Vienna. From the start, Dr Nihal Jayawickrama, another distinguished legal son of Sri Lanka, has taken part as co-ordinator of the Group. I pay tribute to his efficient and principled work in recording, and following up, the recommendations of the Group. At the first meeting, the Group settled on a plan to formulate a number of core values that would be stated in a Code of Judicial Conduct. It was hoped that, drawing on relevant instruments in many countries, this Code would provide the international community with a model that could be adopted to spread the notions of integrity in a systematic way.

The second meeting of the Group took place in February 2001 in Bangalore, India. Thanks to the work of Dr Jayawickrama, a draft "Code" was prepared. It was expressed in terms of basic values to be attained; the relevance of those values to judicial integrity; and the steps necessary to implement the values in practical cases. It drew on judicial codes already in force in many countries.

At Bangalore, the judges insisted that any such international "Code" would be subject to municipal law. In the event of any inconsistency with the Code, a judge owes his or her first duty to that law. The *Bangalore Principles on Judicial Integrity* were adopted. The *Principles* accepted in Bangalore have been widely published and distributed³. The then Chief Justice of India (Barucha CJ) who opened the Bangalore meeting, emphasised the importance of education for the judiciary. All participants expressed the hope that the formulation of the Bangalore values would help conceptualise the issue of integrity and facilitate education of judicial officers in the basic principles that they were committed to uphold.

A special meeting of the Judicial Group took place in November 2002 in the Hague, the Netherlands. The purpose of this meeting was to afford an opportunity to judges from countries of the civil law tradition to consider the work that had emanated from the Judicial Group. So far, the Judicial Group had comprised exclusively judges from English speaking countries, principally of the common law tradition. Chief Justices or senior judges who had taken part

³ The original draft of the *Bangalore Principles* is set out in the record of the second meeting of the Judicial Group, Bangalore (February 2001) published in (2001) 27 *Commonwealth Law Bulletin* 404 at 408. See also M D Kirby, "A Global Approach to Judicial Independence and Integrity" (2001) 21 *University of Queensland Law Journal* 147 at 150. Moves towards formal and informal statements on judicial integrity are now common. See eg Australia, Council of Chief Justices and Australian Institute of Judicial Administration, *Guide to Judicial Conduct* (2002).

had come from Australia, Bangladesh, India, Nepal, Nigeria, Sri Lanka, Tanzania and Uganda. The need was felt to expand the dialogue. The meeting in the Hague was extremely successful. It was agreed that the Bangalore Draft should be presented as "Principles" rather than a "Code". The latter word connoted something more final and exhaustive than was intended. It was also decided to omit the detailed provisions on implementation, leaving the manner of implantation of the principles to the lawmaking traditions of each participating country.

Several differences of view emerged in the meeting in the Hague. Civil law countries often afford a special status to prosecutors, different from that adopted in common law countries. Participation in politics is more common in the judiciaries of the civil law tradition. The right of free speech for judges tends to be less restricted. Methods of appointment, training and promotion are different. The right to withdraw a judge's labour in certain extreme circumstances is asserted by the judiciary of some countries. In others, there are specific problems connected with the risks of corruption, such as the participation of judges in gambling. Finding common ground between these different views imposes upon international meetings the obligation to delete the inessential and to stick to the fundamental prerequisites. A consensus emerged from the Hague meeting. The resulting *Bangalore Principles on Judicial Integrity* has been a remarkable product of the deliberations of highly experienced judges from both major legal traditions of the world,

from every continent and from many linguistic and cultural traditions. There has never been a similar exercise conducted globally with members of the judiciary.

Now the third meeting of the Judicial Group takes place in Colombo. With the assistance of the consultants, the judicial participants will be examining the report of the meeting in the Hague. They will be studying the reports of the case studies from Nigeria⁴, Sri Lanka⁵ and Uganda⁶. They will be examining the question whether surveys are useful as recording the *acuality* of loss of integrity in the judiciary or whether they simply chronicle *perceptions* and *beliefs*. They will be studying the ways to take the work of the Judicial Group further, as for example by consulting judges from countries of the Commonwealth of Independent States (the former Soviet Union) and from the nations of Latin America, Francophone Africa and elsewhere. In this way, it is hoped that the process of consultation and engagement will be continued and expanded. In the end, the product of these labours may be an international instrument of some kind - whether a declaration or a binding treaty remains to be seen.

⁴ P Langseth and A Mohammed (eds) *Strengthening Judicial Integrity and Capacity in Nigeria* (UNCICP, 2002).

⁵ Marga Institute, *A System Under Siege. An Inquiry Into the Judicial System of Sri Lanka* (2002).

⁶ Uganda, *Report of a Survey on Integrity in Uganda's Judicial System* by J-J B Barya and S P Rutabajuka (2002).

CONTINUING PROBLEMS

I do not pretend by this review that the work of the Judicial Group suggests that it has solved all of the problems of judicial integrity in the world. We do not labour under the misapprehension that the preparation of the *Bangalore Principles* or the conduct of surveys solves the truly hard problems of judicial integrity. Ours is merely the beginning of the process of solution.

A reflection upon where we are, and where we are going discloses many continuing issues that the Judicial Group must consider if this project is to be brought to ultimate success.

At present all members of the Judicial Group are men. Yet more than half of humanity are women. In many countries, the numbers of women judges has increased in recent years. Two Chief Justices of Commonwealth nations (Canada and New Zealand) are women. Women's experience of life tends to be different from that of men. Their perceptions of the law and of the judiciary itself, may be different. It may be less patriarchal and complacent. I hope that, in the future, the Judicial Group will include an increasing number of women and, indeed, of judges who share the experience of minority communities who are sometimes on the receiving end of partiality and prejudice against which the equality principle adopted by the Judicial Group.

The implementation of the *Bangalore Principles* will necessarily vary from one legal system to another. Perception of what *is* a lack of integrity will differ, even within a single legal tradition. An illustration of this can be seen in the recent decision of my own Court, the High Court of Australia. In *Ebner v Official Trustee*⁷, a question relevant to this subject arose upon which the court divided.

After the hearing of a case involving a dispute between a bank and a mortgagor, whilst the matter was reserved for decision, the judge's mother died. She left the judge a substantial parcel of shares in the bank. Through oversight, this inheritance was not drawn to the notice of the parties. The judge decided the case in favour of the bank. The unsuccessful mortgagor caused a check to be made on the Internet concerning the share register of the bank. He discovered the judge's interest. He applied to have the judgment against him set aside. The judge declined to do this. The Court of Appeal of Victoria supported the judge. It pointed to the fact that the shareholding, although not trivial, could not have been affected in any way by the decision in the case. In the multi-billion dollar capital of the bank, the judge's decision was irrelevant to the share values. But, as against this, the mortgagor insisted on the right to

⁷ (2000) 205 CLR 337. See also *Johnson v Johnson* (2000) 201 CLR 488.

have his case decided by a judge who had no interest in a party, in his case the bank.

The majority of the High Court of Australia decided against the mortgagor's challenge against the judge's imputed bias. They applied the test of what a reasonable person, knowing the relevant facts, might consider. They concluded that such a person would not have an apprehension that the judge might have been biased, obliging a rehearing of the case which had lasted very many days. I dissented on the basis of decisional authority⁸ and on the footing of my understanding of Australian law, as informed by fundamental human rights principles⁹. The case simply goes to illustrate the fact that instances of judicial integrity can give rise to sincere and genuine differences of opinion. Many are not wholly straightforward. Necessarily, the *Bangalore Principles* are stated at a high level of generality. In the application of those principles there will be room for differences of view and differences of application in different cultures and differing legal traditions.

⁸ *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HLC 759 [10 ER 301]; *Webb v The Queen* (1994) 181 CLR 41 at 75; *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 2]* [2000] 1 AC 119 at 132-133.

⁹ *Ebner v Official Trustee* (2000) 205 CLR 337 at 382-384 [143]-[149].

A third remaining problem is that of reconciling deeply felt differences between the perceptions of judicial integrity in countries of the common law and civil law traditions. Thus in Cambodia, I discovered that court furniture signalled the different status that a prosecutor traditionally enjoys in many civil law countries. The prosecutor is assigned to a bench only marginally lower in size and status than that of the judge. It is closer to the judicial bench than to the bar table. In the common law world, the prosecutor typically sits with the representative of the accused at the bar table to demonstrate symbolically the equality of the parties before the law. But in civil law countries the prosecutor enjoys a quasi-judicial status and is often assimilated to the rules governing the judiciary. In the common law tradition prosecutors are completely separate from the judiciary which ordinarily has no part to play in the prosecution process.

The rule, stated in the *Bangalore Principles*, that judges do not practise law is also one that may need adaptation for civil law countries. Thus, in Denmark and doubtless other countries of the civil tradition, judges may, whilst holding judicial office, undertake private legal arbitration. In the common law, whilst judges or former judges may sometimes be appointed as court assisted mediators or arbitrators, there are strict limits upon the extraneous legal and other activities in which they can be engaged. These differences need to be resolved if a truly international statement of principles on judicial integrity is to be achieved.

A fourth difficulty arises from the proliferation of international statements on judicial integrity. For example, within the Commonwealth of Nations, initiatives are being taken in the Pacific Forum to promote national leadership codes designed to uphold governmental integrity, and to confront corruption in senior office-holders in politics, the administration and the judiciary. How such initiatives cut across attempts to secure a special statement of principle for the judiciary remains to be worked out. In functional terms, many governments would view the judiciary as simply a part of the administration. But in terms of principle, the judiciary, which holds the balance between the citizen and the government, has an inescapably special status.

It will be important for the Judicial Group to secure the support of the Commonwealth Secretariat if it is to influence the development of principles on judicial integrity throughout the Commonwealth of Nations. In the Commonwealth, and in other international and regional groupings, it should not be thought that the needs and opinions of the judiciary will always necessarily coincide with those of the executive government and administration. The latter are sometimes jealous of the special status and responsibilities of the judiciary. Yet one of the reasons for the success of the work of the Judicial Group to date has been that it has been undertaken by judges themselves, and senior judges at that.

A fifth problem arises from the dangers of false complaints against judges. It is in the nature of judicial office that virtually every day a judge or magistrate will disappoint people. Decisions in hotly contested cases that might be decided one way or the other will leave many litigants discontented and others suspicious. In such circumstances the judge may be subjected to personal attack. In some circumstances, quite falsely (but in others with justification) it will be considered, and even stated, that the judge has decided in a particular way because of corruption. The problem is one of upholding a transparent process of scrutiny of complaints whilst at the same time defending the vulnerable judiciary from harassment, mistaken, false and fraudulent complaints designed to undermine the courageous performance of judicial duty by all such office-holders.

In Australia I am now one of the two longest serving judges. Inevitably, during my service, I have made decisions that have upset powerful and opinionated people. That possibility goes with the job. Like most other judges I have been attacked and criticised, both publicly and privately. Sometimes the attacks on judges are based on litigants' feelings. On other occasions, they are based upon opposition to the judge's view of the law and the Constitution. Most experienced judges are no strangers to complaints of such kinds. Most realise that they have to endure false complaints and accusations as an inescapable feature of their public service.

Nevertheless, there is a clear need to protect the judiciary from the abuse of any complaints mechanism and to separate complaints that need further investigation and a formal process from those that are vexatious, frivolous, misconceived or put forward as a substitute to appellate procedures. One of the participants in the Judicial Group, Chief Justice Odoki of Uganda, has called attention to this problem of differentiating between malicious and warranted complaints against judges. Indeed, this is a universal problem. The *Bangalore Principles* do not purport to solve that problem. After the meeting with the civil law judges in the Hague, detailed provisions in an earlier draft concerning implementation have been deleted. Instead implantation has been left to the process of each country. It has been emphasised that, at least in the first instance, the procedures for investigating complaints against judges should be dealt with within the judicial branch of government. Of course, in the case of allegations of criminal conduct, a judge, like anyone else, is subject to the law of the land.

The judiciary has to perform strong and difficult functions, often against powerful and opinionated interests and to do so on behalf of everyone in society. On the one hand, this is what makes it essential that judges have integrity and that complaints about them (or related personnel) should be handled with vigilance, care and prudence applying clear rules. On the other hand, the judicial function renders judges susceptible to false and malicious complaints. Reconciling these two elements to the problem is a task

requiring wisdom and adherence to basic constitutional principles. In many constitutions, at least in Commonwealth countries, the provisions for sanctions for judicial misconduct or incapacity are very limited and effectively confined to removal from office. Obviously, this remedy is only available in a clear, serious and properly proved case. This procedure sets a deliberately high barrier against such discipline of judges, designed to defend their tenure and independence essential to their having the necessary courage to perform the duties of their office.

FOR THEIR WORK CONTINUETH

The quandary presented by the need at the one time to sustain integrity, strength and courage in the judiciary can be illustrated by two final observations.

As to integrity, it is worth recalling the writings of the great contemporary philosopher, John Rawls, who died in November 2002. His most important work was *A Theory of Justice*. In that work, Rawls placed himself squarely in the social contract tradition of other philosophers who had gone before - such as Locke in his *Second Treatise on Government*, Rousseau in *The Social Contract* and Kant in *The Foundation of the Metaphysics of Morals*. Rawls propounded a theory of "justice as fairness". He maintained that human society was basically a cooperative venture undertaken for mutual advantage. This idea led him to the notion that the

maintenance of the basic structure of society was the primary subject of justice because of the profound effects that the administration of justice can have on the lives of people and their individual chances from birth to death. On this footing Rawls' theory of justice conceived of a well ordered society as one in which people were associated, recognising certain rules of conduct as binding in relation to one another and acting in accordance with those rules. Thus, for Rawls the fundamental institutions of society - which certainly include a competent, independent and impartial judiciary - represent one aspect of the basic understanding between the State and the individual. The individual gives loyalty to the State. In return, the individual expects that the basic organs of the State will act with integrity in all dealings with the individual. In no organ is this more central than in the judiciary. Whatever expectations and tolerances may exist in other branches of government and in other walks of life, the very essence of the nature of a judiciary is incompatible with the existence of corruption, partiality, lack of competence, and dependance on mere power¹⁰.

John Rawls set himself the task:

¹⁰ See eg J Rawls, *A Theory of Justice* discussed in J Rawls (ed E Kelly) *Justice as Fairness - A Restatement* (2001); R P Wolff, *Understanding Rawls* (1998), 176-179. See Kukathas and P Pettit, *Rawls - A Theory of Justice and Its Critics* (1997) 47-51 ("Just institutions"); S Sedley, *Freedom, Law and Justice* (Hamlyn Lectures, 1999) 47-49.

"... to generalise and carry to a higher order of abstraction the traditional doctrine of the social contract. I hope to work out more clearly the chief structural features of this conception ... and to develop it as an alternative systematic account of justice that is superior to utilitarianism. I thought this alternative conception was, of the traditional moral conceptions, the best approximation to our considered conviction of justice"¹¹.

If there is some truth in Rawls' analysis, as I believe there is, it becomes essential that the organs of governance of the State - including relevantly the judiciary - should undertake their own vigilant endeavours to ensure to every person integrity, efficiency, competence and justice in the performance of judicial functions. If they do not, the loyalty of the citizen to the State will be undermined. Powerful individuals will seek out ways to advance their interests outside the principles of constitutionalism and the rule of law.

It is thoughts like these that make the insistence by the Prime Minister of Sri Lanka (the Hon Ranil Wickremesinghe), in his opening address, specially pertinent to the work of the Judicial Group. The issue of judicial integrity cannot be seen in isolation from the other great themes of our time. Judicial integrity is bound up in the larger issues of human governance. It is connected with the success of efforts to uphold human rights, economic equity and peace and security. It is central to the advancement of the economic

¹¹ J Rawls, *Political Liberalism - With a New Introduction and the "Reply to Habermas"* (1996), xvii.

objectives of world trade. It therefore lies at the core of the concerns of governments of all nations, rich and poor. More fundamentally, it lies at the centre of the concerns of individual human beings everywhere.

Over the recent Vacation I read Sebastian Haffner's book *Defying Hitler*¹². Haffner fled Nazi Germany in the 1930s. He was not himself Jewish. However, he hated the discrimination he saw against Jews and other minorities perpetrated by Hitler and the Nazi state apparatus. He changed his name and went to Britain where he became a leading journalist. In Berlin, before his flight, he was training to be a judge as a *Referendar*. He worked in the famous court in Berlin, the *Kamersgericht* of Prussia, that had enjoyed a long tradition of integrity.

When Frederick the Great built his palace of Sans Souci, he demanded that a nearby mill-owner demolish his mill that obstructed the King's view from the palace. The mill-owner would not do so. The king threatened the mill owner with his power and wealth. The mill owner relied "May it please Your Majesty. But there is still the *Kamersgericht* in Berlin". That court upheld the law in favour of the mill-owner against the king. The mill remained in position. It was a case of judicial integrity in action.

¹² 2002 Wiedenfeld & Nicholson, London. Previously published in 2000 in Munich as *Geschichte eines Deutschen*.

When Hitler took power in Germany the day arrived when the Brown Shirts of the SA stormed the same Berlin court. They rushed into the judges' chambers. Meekly and subserviently, out of fear, the judges filed down the staircase watched by their trainees, including the young Haffner¹³. He knew that it was time to go.

He recorded these themes with passion as they were happening. His book, in manuscript form, was found unpublished in his desk after his death. It was later published and held the top place for non-fiction for almost a year, especially in Germany where it helped to explain how institutions, even old and respected ones, could be destroyed overnight by carelessness and by those who failed to cherish them.

Similar events have happened in our own time. In November 2000, in Harare, Zimbabwe, hundreds of "veterans" stormed the Supreme Court of Zimbabwe after that court delivered a decision against the government on a land claim. Doubtless, as in many countries (including my own) there is a need for a readjustment of land rights in Zimbabwe as in other post imperial, settler societies. But the process of lawful change stands in marked contrast with the reports of violence, the effective removal of judges and midnight

¹³ *Ibid*, 122.

arrests of former judges that have come from that unhappy country in recent times. All of us share the pain caused by such assaults on constitutionalism, the rule of law and human rights. Only a courageous judiciary will stand against such wrongs. And to be respected when they do, the judiciary must have the competence, independence and impartiality promised by international human rights law.

In his address to open this meeting, the Prime Minister of Sri Lanka mentioned the poet Kipling. As he said, Kipling is now somewhat out of vogue. Yet elements of his poetry capture enduring ideas. In one poem, drawing upon a biblical text, Kipling wrote in praise of his teachers. His words have just as much application to fine politicians who work in the cause of peace. They also apply to judges who, with integrity and courage, pursue the cause of justice and the rule of law:

*"Bless and praise we famous men
From whose bays we borrow
They who set aside today all the joys of their
today
And by toil of their today, bought for us tomorrow
Bless and praise we famous men. Men of little
showing
For their work continueth
And their work continueth
Broad and deep continueth,
Great beyond their knowing".*