FIJI LAW SOCIETY ANNUAL CONVENTION 2003

SHANGRI-LA FIJI RESORT

FIJI, 2 AUGUST 2003

JUDICIAL INTEGRITY - INTERNATIONAL GUIDELINES[*]

The Hon Justice Michael Kirby AC CMG[**]

PASSING YEARS

My first visit to Fiji was in 1962 as a young law student. My next was in 1969. I was here when the first landing was made on the Moon. At that time the Union Jack still flew here. From time to time, after my appointment as a judge in 1975, I returned to Fiji and made many friends here.

In the years since my last visit, great have been the changes that have occurred in Fiji and the world. I am grateful to the Law Society of

---

[*] This paper draws on and updates a lecture by the author on "Judicial Accountability" for the Commonwealth Legal Association, Brisbane, 6 October 2001 and his address at the opening session of the third meeting of the Judicial Group, held in Colombo, Sri Lanka on 10 January 2003.

[**] Justice of the High Court of Australia. Rapporteur of the international Judicial Group on Strengthening Judicial Integrity.

Fiji for the invitation to return to Fiji for this conference. I am also grateful to AusAID and the Fiji sponsors for making my visit possible.

In Fiji, an unhappy period of constitutional turmoil appears to have concluded. Fiji's friends earnestly pray that constitutionalism and the rule of law have returned with blessings for all Fiji's peoples. In the world at large many of the changes that have happened in the world have been positive. Many have reinforced freedom. The Cold War has ended. The Berlin Wall has been dismantled. The move to democratic governance has occurred in many lands formerly controlled by totalitarian autocracies. The work of the international agencies for the protection of human rights and of civil society organisations has expanded.

Technology has brought many changes. 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. AIDS and SARS have 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 countries of the world despite the fact that the great religions share the basic lesson that teaches us to love one another.

CONSTITUTIONAL FOUNDATIONS

It used to be said that a judge of the common law was accountable only to the law and to the judge's conscience. This was an aphorism designed to emphasise the essential attributes of the judicial function. Nowadays, those attributes would commonly be expressed in terms of the basic principles contained in international statements of fundamental human rights.

The judge, as citizen, is subject to the ordinary laws of the land. It is law that governs the appointment of judges to their offices[1]. The law will also define the circumstances in which a judge may be removed from office. Since the *Act of Settlement* of 1701, first in England and, after the colonial period in most countries of the Commonwealth of

---

[1] *Saffron v Delaney* (1953) 53 SR (NSW) 80; *Re Aldridge* (1893) 13 NZLR 361; *Buckley v Edwards* [1892] AC 387 (PC).

Nations, such removal can only occur following a parliamentary vote finding proved incapacity or misconduct against the judge[2].

The law also governs conduct by a judge in the performance of the judicial office. From beginning to end, whether the end be by retirement, death in office or extraordinary removal, a judge is surrounded by law. Save for the judges of the highest courts sitting in appeals, from whose judgments there is no appeal, a judge is, by law, accountable through the appellate process[3] and, in the case of judges of inferior courts (or officers of the Commonwealth under the Australian Constitution[4]) through judicial review.

Yet answerability to the law, although covering many acts and omissions, leaves many others untouched. How does one deal with the rude judge? The slow judge? The ignorant judge? The prejudiced judge? The sleeping judge? The absentee judge? The eccentric judge?

---

2 *Act of Settlement* 1701 (Engl) (12 & 13 Will 3, c 2); Australian Constitution, s 72: *Re Reid; Ex parte Bienstein* (2001) 182 ALR 473.

3 Australian Constitution s 73.

4 Australian Constitution, s 75(v). Federal judges in Australia have been held to be subject to the constitutional writs: *The Tramways Case [No 1]* (1914) 18 CLR 54 at 62, 66-67, 82-83, 86; *The King v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 399.

For some of these problems, the law does afford answers, as in the case of the law that governs bias, actual or imputed, on the part of official decision-makers[5]. Particular jurisdictions may enact special legislation and create institutions to receive complaints against judges and to determine the more serious of them in public[6]. Courts may institute internal procedures for handling such complaints. But to say that a judge is answerable only to his or her conscience and the law may hide a multitude of sins, literally. That is why, in recent years, more attention has been paid to judicial accountability. How can it be improved but in a way that does not weaken the adherence of the judge, and society, to the principles of judicial independence? That is the topic of this contribution.

In the course of the past century the law has generally enlarged the accountability of all those who wield public power. Legislators are rendered accountable by periodic election. With the expansion of the franchise, they have been made answerable to all citizens. In Australia, it was not so at the beginning of the last century. At the time of the adoption of the Australian Constitution in 1901, women had the vote in only two colonies, namely South Australia and Western Australia. However, the Constitution[7], by assuring the franchise to all who enjoyed

---

[5] In Australia see *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Johnson v Johnson* (2000) 201 CLR 488; *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337.

[6] eg *Judicial Officers Act* 1986 (NSW), ss 22.

[7] Australian Constitution, s 41.

it under State law, envisaged an enlargement of the Australian electorate. Before long, women enjoyed the vote in every part of the country.

Under the Australian Constitution, the Executive Government, in the form of Ministers of the Crown, is rendered accountable to the legislature by convention and by the constitutional requirement that Ministers must sit in the Parliament[8]. Gradually, the public service has been made more accountable for its decisions[9]. The enactment of legislation to increase the answerability of officials to persons affected by their decisions is one of the most notable achievements of the last quarter of the twentieth century in Australia[10]. Beyond legislation, the common law has expanded to provide judicial remedies in respect of administrative decisions found to have been unlawful, unreasonable or irrational.

My point is that the accountability of the judiciary cannot now be seen in isolation. It must be viewed in the context of a general trend to render governors answerable to the people in ways that are transparent,

---

8 Australian Constitution, s 64.

9 eg *Hot Holdings Pty Ltd v Greasey* (2002) 77 ALJR 70; 193 ALR 90; *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179.

10 *Reg v The IRC; ex parte Federation of Self-Employed* [1982] AC 617 at 641 per Lord Diplock. In Australia see *Administrative Appeals Tribunal Act* 1975 (Cth); *Ombudsman Act* 1976; (Cth); *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

accessible and effective[11]. Behind this notion is a concept that the wielders of power - legislative, executive and judicial - are entrusted to perform their functions on condition that they account for their stewardship to the people who authorise them to exercise such power. Behind this notion, in turn, is a more fundamental one. It involves the concept that public power, of its character, derives from the source of all lawful coercive power: the sovereign people.

JUDICIAL DISCIPLINE AND REMOVAL

In the field of the conduct of judges, increasing attention is being paid in Australia to the possible development of guidelines which could afford a structure of basic rules to which all judicial officers could have resort[12]. In many countries, such rules are contained in statutory or professional codes. In Australia, there are rules. But they are mostly found in a multitude of sources - some in legislation, many in court decisions, conventions of conduct, professional ethics, habits and traditions of particular institutions and books about judicial ethics[13].

---

[11] P D Finn, "The Abuse of Public Power in Australia: Making our Governors our Servants" (1994) 5(1) *Public Law Review* 43.

[12] See Australian Institute of Judicial Administration (AIJA) *Guide to Judicial Conduct* (2002). This guide was published in June 2002 for the AIJA and the Council of Chief Justices of Australia.

[13] Such as J B Thomas, *Judicial Ethics in Australia* (2nd ed, 1997).

The increasing numbers of the judiciary in recent years suggests that the provision of an available book of basic rules or guidelines might be useful as a source of information and as a guide that could ensure more uniform practices than would otherwise exist.

International attention to judicial codes of conduct has followed increasing dissatisfaction with widespread complaints about alleged judicial corruption in many countries[14]. Now, the United Nations has initiated moves, within its Global Programme Against Corruption, to develop international principles (presently called guidelines) to state the basic rules for the judiciary world-wide.

A group of eight chief justices or senior judges from Commonwealth countries - four in Africa and four in Asia - has been established. It is chaired by Judge Christopher Weeramantry of Sri Lanka, formerly Vice-President of the International Court of Justice. I am rapporteur of the group. It works closely with the United Nations Centre for International Crime Prevention, the Office of the High Commissioner for Human Rights and Transparency International, a non-governmental organisation committed to the fight against corruption.

---

[14] See report of the work of the Centre for the Independence of Judges and Lawyers Workshop in (2000) 74 ALJ 418.

AN ALTERNATIVE VISION FOR HUMANITY

In a sense, the work of the United Nations in this regard and specifically of 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 in Australia and Fiji. But it is not so common in most countries of the world.

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 reads[15]:

---

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

> "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 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 I am familiar.

THE HELPING ORGANS OF THE UNITED NATIONS

The *Charter* of the United Nations establishes the International Court of Justice. The work of the International Court is well established. But in recent times other judicial and quasi 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 in peaceful, systematic and lawful ways.

Between 1993 and 1996 I served as Special Representative for the Secretary-General for Human Rights in Cambodia. One of my tasks was to try to help the rebuilding of the judiciary in that country. Re-establishing a judiciary of integrity in a land so afflicted was a first priority. 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, these trainees raised some of the issues that have been studied by the international Judicial Group:

- Could judges 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 by the Khmers Rouges 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 who were 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 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.

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. At least now there is an international body, comprising judges themselves, working towards the establishment of global principles and the institution of a mechanism to uphold those principles so as to advance judicial integrity in every nation of the world. When we in Australia and Fiji think of the serious problems that face our judiciaries, we should spare a thought for countries like Cambodia where the problems are much more grave and urgent.

WORK OF THE INTERNATIONAL JUDICIAL GROUP

The first meeting of the Judicial Group took place in April 2000 in Vienna. From the start, Dr Nihal Jayawickrama, a past Secretary of Justice of Sri Lanka acted as co-ordinator of the Group. At the 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 Judicial Group took place in February 2001 in Bangalore, India. A draft "Code" was considered. 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" must be subject to their municipal law. In the event of any inconsistency with the Code, it was accepted that a judge owed his or her first duty to that law. The *Bangalore Principles on Judicial Integrity* were adopted. The *Principles* so accepted have been widely published and distributed[16]. 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 that 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 had come from Australia,

---

[16] 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. The present draft of the *Bangalore Principles* is an annexure to this paper.

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 to the civil law judges something much 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 global 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 by judges in partisan 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 in the Hague. 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.

The third regular meeting of the Judicial Group took place in Colombo in January 2003, the judicial participants examined the progress made so far . They studied the reports of case studies from Nigeria[17], Sri Lanka[18] and Uganda[19]. They considered the question whether surveys about the judiciary were useful as recording the *acuality* of loss of integrity in the judiciary or whether they simply chronicled *perceptions* and *beliefs*. They examined 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, the hope of the Judicial Group was that the process of consultation and engagement would be continued and expanded. In the end, the product of these labours may be an international instrument of some kind - whether it will be a declaration or a binding treaty remains to

---

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

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

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

be seen. I annex to this paper a copy of the present draft of the *Bangalore Principles on Judicial Conduct*.

CONTINUING PROBLEMS

I do not pretend that the work of the Judicial Group has addressed 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 difficult problems of judicial integrity. Ours is merely the beginning of a 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, less formalistic and less 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 *Clenae Pty Ltd v ANZ Banking Group Ltd* 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. In her will 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 value of 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 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 conclude. They decided 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 authority[20] and on the footing of my understanding of Australian law, as informed by fundamental human rights principles[21]. The case simply goes to illustrate the fact that questions about judicial integrity can give rise to sincere and genuine differences of opinion. Many are not wholly straight-forward. 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.

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 court furniture signalled the different status that a prosecutor traditionally

---

[20] *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.

[21] *Cleanae v ANZ banking Group Ltd* (2000) 205 CLR 337 at 382-384 [143]-[149].

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 serving judges 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, designed for countries like Fiji, cut across attempts to secure a special statement of principle for the global judiciary remains to be worked out. In functional terms, many governments 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 about the special status and responsibilities of the judiciary and their general level of public respect and trust. 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. The outcomes 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 cases, 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 approach to the law and the Constitution. Most judges are not 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. 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, efficiency 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, such as Australia and Fiji, the provisions for sanctions for judicial misconduct or incapacity are very limited. In most cases, effectively, they are confined, in the higher judiciary, to removal from office. Obviously, this remedy is only appropriate in a clear, serious and properly proved case. This procedure sets a deliberately high barrier against such discipline of judges. That barrier is designed to defend the judges' tenure and independence essential to their having the necessary courage and immunity to perform the duties of their office.

Designing a better and more flexible system for deciding complaints is a challenge before both our countries. We must observe our Constitutions, defend a fearless judiciary but also move with the times and enhance proper systems of accountability. The work of the international Judicial Group is a contribution on an international scale to help governments and the judiciary itself to tackle these problems. It is a further indication of the wisdom of a useful motto for the twenty-first century: Think globally; act locally.

FIJI LAW SOCIETY ANNUAL CONVENTION 2003

SHANGRI-LA FIJI RESORT

FIJI, 2 AUGUST 2003

JUDICIAL INTEGRITY - INTERNATIONAL GUIDELINES

The Hon Justice Michael Kirby AC CMG