

COMMENTARY

ON

THE BANGALORE PRINCIPLES

OF JUDICIAL CONDUCT

THE JUDICIAL INTEGRITY GROUP

March 2007

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PREFACE

A judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law. Even when all other protections fail, it provides a bulwark to the public against any encroachments on its rights and freedoms under the law.

These observations apply both domestically within the context of each nation State and globally, viewing the global judiciary as one great bastion of the rule of law throughout the world. Ensuring the integrity of the global judiciary is thus a task to which much energy, skill and experience must be devoted.

This is precisely what the Judicial Group on Strengthening Judicial Integrity (The Judicial Integrity Group) has sought to do since it set out on this task in 2000. It commenced as an informal group of Chief Justices and Superior Court Judges from around the world who combined their experience and skill with a sense of dedication to this noble task. Since then, its work and achievements have grown to a point where they have made a significant impact on the global judicial scene.

The principles tentatively worked out originally have received increasing acceptance over the past few years from the different sectors of the global judiciary and from international agencies interested in the integrity of the judicial process. In the result, the Bangalore Principles are increasingly seen as a document which all judiciaries and legal systems can unreservedly accept. In short, these principles give expression to the highest traditions relating to the judicial function as visualised in all the world's cultures and legal systems.

The task of reaching agreement on these core principles has been a difficult one but the Judicial Integrity Group, through its unwavering commitment to achieving a result which would command universal acceptance, has surmounted the barriers that appeared in the way of a universal draft.

Not only have some States adopted the Bangalore Principles but others have modelled their own Principles of Judicial Conduct on them. International organisations have also looked at it with favour and given it their endorsement. The United Nations Social and Economic Council, by resolution 2006/ 23, has invited member States consistent with their domestic legal systems to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct when reviewing or developing rules with respect to the professional and ethical conduct of the members of the judiciary. The United Nations Office on Drugs and Crime has actively supported it and it has also received recognition from bodies such as the American Bar Association and the International Commission of Jurists. The judges of the member States of the Council of Europe have also given it their favourable consideration.

A detailed commentary had been prepared on each of the Bangalore Principles, and the Principles along with the Draft Commentary have received careful discussion and consideration from an Open-Ended Intergovernmental Expert Group

Meeting held in Vienna on 1st and 2nd March 2007, attended by participants from over 35 countries. The Draft and proposed amendments also received detailed consideration at the 5th Meeting of the Judicial Integrity Group.

At these meetings the Bangalore Principles and the Commentary as amended have been adopted, thereby giving them increased weight and authority. The Commentary has given depth and strength to the Principles. In the result, we now have a widely accepted and carefully researched set of Principles with a Commentary thereon which has considerably advanced the Principles along the road towards their global adoption as a Universal Declaration of Judicial Ethics.

It needs to be noted also that just as all traditional systems of law are unanimous in their insistence on the highest standards of judicial rectitude, so also do all the great religious systems of the world endorse this principle in all its integrity. In recognition of this, the Commentary also contains, in the appendix, a brief outline of religious teachings on the subject of judicial integrity.

We have in the Bangalore Principles an instrument of great potential value not only for the judiciaries but also for the general public of all nations and for all who are concerned with laying firm foundations for a global judiciary of unimpeachable integrity.

C G WEERAMANTRY

Chairperson
Judicial Integrity Group

ACKNOWLEDGMENTS

In the preparation of this Commentary, reference has been made to, and inspiration drawn from, numerous sources. These include international instruments, national codes of judicial conduct and commentaries thereon, judgments and decisions of international, regional and national courts, opinions of judicial ethics advisory committees, and learned treatises. Where citations have been used, these have been acknowledged in the footnotes. Where opinions and comments have been borrowed from a national or regional context and often adapted to a degree of generality appropriate for use by all judicial systems, the original source is not mentioned in the text. However, all sources to which reference was made are included in the chapter on *Drafting History* and in the *Select Bibliography*, and their invaluable contribution is most gratefully acknowledged. Particular mention must be made of three sources: Canadian Judicial Council, *Ethical Principles for Judges (1998)*; Council of Europe, *Opinions of the Consultative Council of European Judges (2001-2006)*; and Hong Kong Special Administrative Region of China, *Guide to Judicial Conduct (2004)*.

The Judicial Integrity Group gratefully acknowledges the assistance it received from the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, Germany, which facilitated both the research and the writing of this Commentary; and from the United Nations Office on Drugs and Crime, Vienna, which convened an Intergovernmental Expert Group to review the Draft Commentary and whose contributions have enriched the content of this document.

DRAFTING HISTORY

Background

In April 2000, on the invitation of the United Nations Centre for International Crime Prevention, and within the framework of the Global Programme Against Corruption, a preparatory meeting of a group of Chief Justices and senior justices was convened in Vienna, in conjunction with the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The objective of the meeting was to address the problem that was created by evidence that, in many countries, across all the continents, many people were losing confidence in their judicial systems because they were perceived to be corrupt or otherwise partial. This evidence had emerged through service delivery and public perception surveys, as well as through commissions of inquiry established by governments. Many solutions had been offered, and some reform measures had been tried, but the problem persisted. This was intended to be a new approach. It was the first occasion under the auspices of the United Nations when judges were invited to put their own house in order; to develop a concept of judicial accountability that would complement the principle of judicial independence, and thereby raise the level of public confidence in the Rule of Law. At the initial stage, recognizing the existence of different legal traditions in the world, it was decided to limit the exercise to the common law legal system. Accordingly, the initial participants were from nine countries in Asia, Africa and the Pacific, which applied a multitude of different laws but shared a common judicial tradition.

The Judicial Integrity Group

The first meeting of the Judicial Group on Strengthening Judicial Integrity (or the Judicial Integrity Group, as this body has come to be known), was held at the United Nations Office in Vienna on 15 and 16 April 2000. It was attended by Chief Justice Latifur Rahman of Bangladesh, Chief Justice Y. Bhaskar Rao of Karnataka State in India, Justice Govind Bahadur Shrestha of Nepal representing the Chief Justice of that country, Chief Justice M.L. Uwais of Nigeria, Deputy President Pius Langa of the Constitutional Court of South Africa, recently retired Chief Justice F.L. Nyalali of Tanzania, and Justice B.J. Odoki, Chairman of the Judicial Service Commission of Uganda, under the chairmanship of Judge Christopher Gregory Weeramantry, Vice-President of the International Court of Justice. Justice Michael Kirby of the High Court of Australia functioned as Rapporteur. Dato' Param Cumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers), Justice (Dr) Ernst Markel, Vice-President of the International Association of Judges, and Dr Giuseppe di Gennaro participated as Observers.

At this meeting, the Judicial Integrity Group took two decisions. First, they agreed that the principle of accountability demanded that the national judiciary should assume an active role in strengthening judicial integrity by effecting such systemic reforms as is within its competence and capacity. Second, they recognized the urgent need for a universally acceptable statement of judicial standards which, consistent with the principle of judicial independence, would be capable of being respected and

ultimately enforced at the national level by the judiciary, without the intervention of either the executive or legislative branches of government. The participating judges emphasized that by adopting and enforcing appropriate standards of judicial conduct among its members, the judiciary had it within its power to take a significant step towards earning and retaining the respect of the community. Accordingly, they requested that codes of judicial conduct which had been adopted in some jurisdictions be analysed, and a report be prepared by the Co-ordinator of the Judicial Integrity Group, Dr Nihal Jayawickrama, concerning: (a) the core considerations which recur in such codes; and (b) the optional or additional considerations which occur in some, but not all, such codes and which may or may not be suitable for adoption in particular countries.

Source Material

In preparing a draft code of judicial conduct in accordance with the directions set out above, reference was made to several existing codes and international instruments including, in particular, the following:

National codes

- (a) The Code of Judicial Conduct adopted by the House of Delegates of the American Bar Association, August 1972.
- (b) Declaration of Principles of Judicial Independence issued by the Chief Justices of the Australian States and Territories, April 1997.
- (c) Code of Conduct for the Judges of the Supreme Court of Bangladesh, prescribed by the Supreme Judicial Council in the exercise of power under Article 96(4)(a) of the Constitution of the People's Republic of Bangladesh, May 2000.
- (d) Ethical Principles for Judges, drafted with the cooperation of the Canadian Judges Conference and endorsed by the Canadian Judicial Council, 1998.
- (e) The Idaho Code of Judicial Conduct 1976.
- (f) Restatement of Values of Judicial Life adopted by the Chief Justices Conference of India, 1999.
- (g) The Iowa Code of Judicial Conduct.
- (h) Code of Conduct for Judicial Officers of Kenya, July 1999.
- (i) The Judges' Code of Ethics of Malaysia, prescribed by the Yang di-Pertuan Agong on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts, in the exercise of powers conferred by Article 125(3A) of the Federal Constitution of Malaysia, 1994.
- (j) The Code of Conduct for Magistrates in Namibia.
- (k) Rules Governing Judicial Conduct, New York State, USA.
- (l) Code of Conduct for Judicial Officers of the Federal Republic of Nigeria.
- (m) Code of Conduct to be observed by Judges of the Supreme Court and of the High Courts of Pakistan.
- (n) The Code of Judicial Conduct of the Philippines, September 1989.
- (o) The Canons of Judicial Ethics of the Philippines, proposed by the Philippines Bar Association, approved by the Judges of First Instance of Manila, and adopted for the guidance of and observance by the judges under the

administrative supervision of the Supreme Court, including municipal judges and city judges.

- (p) Yandina Statement: Principles of Independence of the Judiciary in Solomon Islands, November 2000.
- (q) Guidelines for Judges of South Africa, issued by the Chief Justice, the President of the Constitutional Court, and the Presidents of High Courts, the Labour Appeal Court, and the Land Claims Court, March 2000.
- (r) Code of Conduct for Judicial Officers of Tanzania, adopted by the Judges and Magistrates Conference, 1984.
- (s) The Texas Code of Judicial Conduct
- (t) Code of Conduct for Judges, Magistrates and Other Judicial Officers of Uganda, adopted by the Judges of the Supreme Court and the High Court, July 1989.
- (u) The Code of Conduct of the Judicial Conference of the United States.
- (v) The Canons of Judicial Conduct for the Commonwealth of Virginia, adopted and promulgated by the Supreme Court of Virginia, 1998.
- (w) The Code of Judicial Conduct adopted by the Supreme Court of the State of Washington, USA, October 1995.
- (x) The Judicial (Code of Conduct) Act, enacted by the Parliament of Zambia, December 1999.

Regional and international instruments

- (y) Draft Principles on the Independence of the Judiciary ("Siracusa Principles"), prepared by a committee of experts convened by the International Association of Penal Law, the International Commission of Jurists, and the Centre for the Independence of Judges and Lawyers, 1981.
- (z) Minimum Standards of Judicial Independence adopted by the International Bar Association, 1982.
- (aa) United Nations Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly, 1985.
- (bb) Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration") prepared by Mr L.V. Singhvi, UN Special Rapporteur on the Study on the Independence of the Judiciary, 1989.
- (cc) The Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, adopted by the 6th Conference of Chief Justices, August 1997.
- (dd) The Latimer House Guidelines for the Commonwealth on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles, 1998.
- (ee) The European Charter on the Statute for Judges, Council of Europe, July 1998.
- (ff) The Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System, adopted by the expert group convened by the Centre for the Independence of Judges and Lawyers, February 2000.

The Bangalore Draft Code of Judicial Conduct

The second meeting of the Judicial Integrity Group was held in Bangalore, India, on 24, 25 and 26 February 2001. It was facilitated by the Department for International Development (DfID), United Kingdom, hosted by the High Court and the Government of Karnataka State, India, and supported by the United Nations High Commissioner for Human Rights. At this meeting the Group, proceeding by way of examination of the draft placed before it, identified the core values, formulated the relevant principles, and agreed on the Bangalore Draft Code of Judicial Conduct (the Bangalore Draft). The Group recognized, however, that since the Bangalore Draft had been developed by judges drawn principally from common law countries, it was essential that it be scrutinized by judges of other legal traditions to enable it to assume the status of a duly authenticated international code of judicial conduct.

This meeting was attended by Chief Justice Mainur Reza Chowdhury of Bangladesh, Chief Justice P.V. Reddi of Karnataka State in India, Chief Justice Keshav Prasad Upadhyay of Nepal, Chief Justice M.L. Uwais of Nigeria, Deputy Chief Justice Pius Langa of South Africa, Chief Justice S.N. Silva of Sri Lanka, Chief Justice B.A. Samatta of Tanzania, and Chief Justice B.J. Odoki of Uganda. Justice Claire L'Heureux Dube of the Supreme Court of Canada, President of the International Commission of Jurists, was a special invitee. Judge Weeramantry served as chairperson, and Justice Kirby as Rapporteur. In addition, the UN Special Rapporteur on the Independence of Judges and Lawyers, Dato Param Cumaraswamy, and the Chairman of the UN Human Rights Committee, Justice P.N. Bhagwati, participated as Observers, the latter representing the United Nations High Commissioner for Human Rights.

Consultation Process

In the following twenty months, the Bangalore Draft was widely disseminated among judges of both common law and civil law systems. It was presented to, and discussed at, several judicial conferences and meetings, involving the participation of Chief Justices and senior judges from over 75 countries of both common law and civil law systems. On the initiative of the American Bar Association's offices in Central and Eastern Europe, the Bangalore Draft was translated into the national languages of Bosnia-Herzegovina, Bulgaria, Croatia, Kosovo, Romania, Serbia and Slovakia, and then reviewed by judges, judges' associations, and constitutional and supreme courts of the region. Their comments offered a useful perspective.

In June 2002, at a meeting held in Strasbourg, the Bangalore Draft was reviewed by the Working Party of the Consultative Council of European Judges (CCJE-GT) in a full and frank discussion from the perspective of the civil law system. The participants at that meeting included Vice-President Gerhard Reissner of the Austrian Association of Judges, Judge Robert Fremr of the High Court in the Czech Republic, President Alain Lacabarats of the Cour d'Appel de Paris in France, Judge Otto Mallmann of the Federal Administrative Court of Germany, Magistrate Raffaele Sabato of Italy, Judge Virgilijus of the Lithuanian Court of Appeal, Premier Conseiller Jean-Claude Wiwinius of the Cour d'Appel of Luxembourg, Judge Conseiller Orlando Afonso of the Court of Appeal of Portugal, Justice Dusan Ogrizek of the Supreme Court of Slovenia, President Johan Hirschfeldt of the Svea Court of Appeal in Sweden, and Lord Justice Mance of the United Kingdom (Chairman). The published comments of

CCJE-GT on the Bangalore Draft, together with other relevant Opinions of the Consultative Council of European Judges – in particular, Opinion no.1 on standards concerning the independence of the judiciary – made a significant contribution to the evolving form of the Bangalore Draft.

The Bangalore Draft was further revised in the light of the draft Opinion of CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality; and by reference to more recent codes of judicial conduct including the Guide to Judicial Conduct published by the Council of Chief Justices of Australia in June 2002, the Model Rules of Conduct for Judges of the Baltic States, the Code of Judicial Ethics for Judges of the People's Republic of China, and the Code of Judicial Ethics of the Macedonian Judges Association.

The Bangalore Principles of Judicial Conduct

A revised version of the Bangalore Draft was next placed before a Round-Table Meeting of Chief Justices (or their representatives) from civil law countries held in the Japanese Room of the Peace Palace in The Hague, Netherlands - the seat of the International Court of Justice - on 25 and 26 November 2002. The meeting was facilitated by the Department for International Development, United Kingdom; supported by the United Nations Centre for International Crime Prevention, Vienna, and the Office of the High Commissioner for Human Rights, Geneva; and organized with the assistance of the Director-General of the Carnegie Foundation at The Hague.

Judge Weeramantry, former Vice-President and Judge Ad-Hoc of the International Court of Justice, presided at the meeting at which the participants included Judge Vladimir de Freitas of the Federal Court of Appeal of Brazil, Chief Justice Iva Brozova of the Supreme Court of the Czech Republic, Chief Justice Mohammad Fathy Naguib of the Supreme Constitutional Court of Egypt (assisted by Justice Dr Adel Omar Sherif), Conseillere Christine Chanet of the Cour de Cassation of France, President Genaro David Gongora Pimentel of the Suprema Corte de Justicia de la Nacion of Mexico, President Mario Mangaze of the Supreme Court of Mozambique, President Pim Haak of the Hoge Raad der Nederlanden, Justice Trond Dolva of the Supreme Court of Norway, and Chief Justice Hilario Davide of the Supreme Court of the Philippines (assisted by Justice Reynato S. Puno). Also participating in one session were the following Judges of the International Court of Justice: Judge Raymond Ranjeva (Madagascar), Judge Geza Herczegh (Hungary), Judge Carl-August Fleischhauer (Germany), Judge Abdul G. Koroma (Sierra Leone), Judge Rosalyn Higgins (United Kingdom), Judge Francisco Rezek (Brazil), Judge Nabil Elaraby (Egypt), and Ad-Hoc Judge Thomas Frank (USA). The UN Special Rapporteur on the Independence of Judges and Lawyers, Dato Param Cumaraswamy, was in attendance.

There was a significant consensus among judges of the common law and the civil law systems participating in the meeting concerning the core values, although there was some disagreement on the scheme and order in which they ought to be placed. For instance,

- (a) the question was raised whether Independence, Impartiality, and Integrity (in that order) ought not to have precedence over Propriety (which the Bangalore Draft had placed first) and Equality.
- (b) concern was expressed by civil law judges on the use of the word ‘code’ (which for legal professionals in continental Europe usually signified a legal instrument which was complete and exhaustive), particularly since standards of professional conduct are different from statutory and disciplinary rules.
- (c) the preambular statement in the Bangalore Draft that the ‘real source of judicial power is public acceptance of the moral authority and integrity of the judiciary’ was questioned. It was argued that the ‘real source’ was the constitution; and that too great an emphasis on the ultimate dependence of the judicial power upon general acceptance could in some circumstances even be dangerous.

On the application of the values and principles, civil law judges:

- (a) questioned why judges should be under a general duty (as the Bangalore Draft required) to keep themselves informed of the financial interests of their family, unrelated to any possible risk to their actual or apparent impartiality.
- (b) considered it inappropriate that a judge who would otherwise be disqualified might, instead of withdrawing from the proceedings, continue to participate if the parties agreed that he or she should do so (which the common law judges thought might be permissible).
- (c) questioned the width and appropriateness of the direction from which the Bangalore Draft approached quite common situations such as marriage or a close personal relationship with a lawyer, and suggested instead that the focus in such cases should not be on prohibiting the relationship, but on the judge’s need to withdraw in any case where the other party to the relationship was involved.
- (d) questioned whether it was wise to have a list of ‘permitted’ non-legal activities, and did not believe that prohibitions on fund-raising activities on behalf of a charitable organization, on serving as an executor, administrator, trustee, guardian or other fiduciary, on accepting appointment to a commission of inquiry, or on testifying as a character witness, should be generally accepted as an international standard.

It was, however, in respect of political activity that the principal divergence occurred. In one European country, judges are elected on the basis of their party membership. In some other European countries, judges have the right to engage in politics and be elected as members of local councils (even while remaining as judges) or of parliament (their judicial status being in this case suspended). Civil law judges, therefore, argued that at present there was no general international consensus that judges should either be free to engage in, or should refrain from, political

participation. They suggested that it would be for each country to strike its own balance between judges' freedom of opinion and expression on matters of social significance and the requirement of neutrality. They conceded, however, that even though membership of a political party or participation in public debate on the major problems of society might not be prohibited, judges must at least refrain from any political activity liable to compromise their independence or jeopardize the appearance of impartiality.

The Bangalore Principles of Judicial Conduct emerged from that meeting. The core values recognized in that document are *Independence, Impartiality, Integrity, Propriety, Equality, Competence and Diligence*. These values are followed by the relevant principles and more detailed statements of their application.

Commission on Human Rights

The Bangalore Principles of Judicial Conduct were annexed to the report presented to the 59th Session of the United Nations Commission on Human Rights in April 2003 by the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Dato Param Cumaraswamy. On 29 April 2003, the Commission, by a resolution adopted without dissent, noted the *Bangalore Principles of Judicial Conduct* and brought those *Principles* "to the attention of Member States, the relevant United Nations organs and intergovernmental and non-governmental organizations for their consideration"¹.

In April 2004, in his report to the Sixtieth session of the Commission on Human Rights, the new UN Special Rapporteur on the Independence of Judges and Lawyers, Dr Leandro Despouy, noted that:

The Commission has frequently expressed concern over the frequency and the extent of the phenomenon of corruption within the judiciary throughout the world, which goes far beyond economic corruption in the form of embezzlement of funds allocated to the judiciary by Parliament or bribes (a practice that may in fact be encouraged by the low salaries of judges). It may also concern administration within the judiciary (lack of transparency, system of bribes) or take the form of biased participation in trials and judgments as a result of the politicisation of the judiciary, the party loyalties of judges or all types of judicial patronage. This is particularly serious in that judges and judicial officials are supposed to be a moral authority and a reliable and impartial institution to whom all of society can turn when its rights are violated.

Looking beyond the acts themselves, the fact that the public in some countries tends to view the judiciary as a corrupt authority is particularly serious: a lack of trust in justice is lethal for democracy and development and encourages the perpetuation of corruption. Here, the rules of judicial ethics take on major importance. As the case law of the European Court of Human Rights stresses, judges must not only meet objective criteria of impartiality but must also be seen to be impartial; what is at stake is the

¹ Commission on Human Rights resolution 2003/43.

trust that the courts must inspire in those who are brought before them in a democratic society. Thus one can see why it is so important to disseminate and implement the Bangalore Principles of Judicial Conduct, whose authors have taken care to base themselves on the two main legal traditions (customary law and civil law) and which the Commission noted at its fifty-ninth session.

The Special Rapporteur recommended that the *Bangalore Principles* be made available, preferably in national languages, in all law faculties and professional associations of judges and lawyers.

Commentary on the Bangalore Principles of Judicial Conduct

At its fourth meeting held in Vienna in October 2005, the Judicial Integrity Group noted that, at several meetings of judges and lawyers as well as of law reformers, the need for a commentary or an explanatory memorandum in the form of an authoritative guide to the application of the *Bangalore Principles* had been stressed. The Group agreed that such a commentary or guide would enable judges and teachers of judicial ethics to understand not only the drafting and cross-cultural consultation process of the *Bangalore Principles* and the rationale for the values and principles incorporated in it, but would also facilitate a wider understanding of the applicability of those values and principles to issues, situations and problems that might arise or emerge. Accordingly, the Group decided that, in the first instance, the Coordinator would prepare a draft commentary, which would then be submitted for consideration and approval by the Group.

Commission on Crime Prevention and Criminal Justice

In April 2006, the fifteenth Session of the Commission on Crime Prevention and Criminal Justice, meeting in Vienna, in a resolution co-sponsored by the Governments of Egypt, France, Germany, Nigeria and the Philippines entitled ‘Strengthening basic principles of judicial conduct’ and adopted without dissent, recommended that the Economic and Social Council of the United Nations, inter alia,

- (a) invite Member States, consistent with their domestic legal systems, to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct (which were annexed to the resolution) when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary;
- (b) emphasize that the Bangalore Principles of Judicial Conduct represent a further development and are complementary to the Basic Principles on the Independence of the Judiciary;
- (c) acknowledge the important work carried out by the Judicial Integrity Group under the auspices of the United Nations Office on Drugs and Crime (UNODC), as well as other international and regional judicial forums that

contribute to the development and dissemination of standards and measures to strengthen judicial independence, impartiality and integrity;

- (d) request the UNODC to continue to support the work of the Judicial Integrity Group;
- (e) express appreciation to Member States that have made voluntary contributions to the UNODC in support of the work of the Judicial Integrity Group;
- (f) invite Member States to make voluntary contributions, as appropriate, to the United Nations Crime Prevention and Criminal Justice Fund to support the work of the Judicial Integrity Group, and to continue to provide, through the Global Programme against Corruption, technical assistance to developing countries and countries with economies in transition, upon request, to strengthen the integrity and capacity of their judiciaries;
- (g) invite Member States to submit to the Secretary-General their views regarding the Bangalore Principles of Judicial Conduct and to suggest revisions, as appropriate;
- (h) request the UNODC to convene an open-ended intergovernmental expert group, in cooperation with the Judicial Integrity Group and other international and regional judicial forums, to develop a commentary on the Bangalore Principles of Judicial Conduct, taking into account the views expressed and the revisions suggested by Member States; and
- (i) request the Secretary-General to report to the Commission on Crime Prevention and Criminal Justice at its sixteenth session on the implementation of this resolution.

Economic and Social Council

In July 2006, the United Nations Economic and Social Council adopted the above resolution without a vote.²

Intergovernmental Expert Group Meeting

In March 2006, the Draft Commentary on the Bangalore Principles of Judicial Conduct prepared by the Co-ordinator of the Judicial Integrity Group, Dr Nihal Jayawickrama, was submitted to a joint meeting of the Judicial Integrity Group and of the Open-ended Intergovernmental Expert Group convened by UNODC. The meeting was chaired by Judge Weeramantry and Chief Justice Pius Langa of South Africa. Other members of the Judicial Integrity Group who attended the meeting were Chief Justice B J Odoki of Uganda, Chief Justice B A Samatta of Tanzania, Deputy Chief Justice Dr Adel Omar Sherif of Egypt, and former Chief Justice M L

² ECOSOC 2006/23.

Uwais of Nigeria. Justice M D Kirby of the High Court of Australia, who was unable to be present, had submitted his observations in writing.

The Intergovernmental Expert Group comprised judges and senior officials nominated by the Governments of Algeria, Azerbaijan, Dominican Republic, Finland, Germany, Hungary, Indonesia, The Islamic Republic of Iran, Latvia, The Great Socialist People's Libyan Arab Jamahiriya, Moldova, Morocco, Namibia, The Netherlands, Nigeria, The Islamic Republic of Pakistan, Panama, Romania, Republic of Korea, Serbia, Sri Lanka, Syrian Arab Republic and United States of America. Also participating were representatives of UNODC, UNDP, Council of Europe, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), Istituto Superiore Internazionale di Scienze Criminali (ISISC), Istituto di Ricerca sui Sistemi Giudiziari (IRSIG-CNR), and the American Bar Association.

In addition to the members of the Judicial Integrity Group, other judges who participated in the meeting included Lord Mance, House of Lords, United Kingdom and former Chairman of the Consultative Council of European Judges; Judge Christine Chanet, Conseillère, Cour de Cassation, France and Chairman of the UN Human Rights Committee; Dra. Elena Highton de Nolasco, Vice-President of the Supreme Court of Argentina; Prof. Dr Paulus Effendie Lotulung, Deputy Chief Justice of Indonesia; Justice Mohammed Aly Seef and Justice Elham Naguib Nawar, Judges of the Supreme Constitutional Court of Egypt; Justice Ram Kumar Prasad Shah, Judge of the Supreme Court of Nepal; Justice Ignacio Sancho Gargallo, President of the Commercial Division of the Court of Appeal of Barcelona, Spain; Justice Ursula Vezekenyi, Supreme Court of Hungary; Justice Collins Parker, High Court of Namibia; Justice Hansjorg Scherer, District Court, Germany; Judge Riitta Kiiski, District Court of Helsinki, Finland; Judge Nora Hachani, Magistrate, Algeria; and Justice Timothy Adepoju Oyeyipo, Administrator of the National Judicial Institute of Nigeria.

The Draft was considered in detail, each of the paragraphs being examined separately. Amendments, including certain deletions, were agreed upon. The Commentary that follows has been approved and authorized for publication and dissemination by the Judicial Integrity Group in the hope and expectation that it would contribute to a better understanding of the Bangalore Principles of Judicial Conduct.

Preamble

WHEREAS the *Universal Declaration of Human Rights* recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.

Commentary

Universal Declaration of Human Rights

1. Article 19 of the Universal Declaration of Human Rights (UDHR), which was proclaimed by the United Nations General Assembly on 10 December 1948, provides that:

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.

2. The UDHR was adopted without a dissenting vote, and represents ‘a common understanding’ of those rights which the member states of the United Nations had pledged in the Charter of the United Nations to respect and to observe. It is the first comprehensive statement of human rights of universal applicability. The UDHR was not in itself intended to be a legally binding instrument; it is a declaration, not a treaty. However, it is regarded as the legitimate aid to the interpretation of the expression ‘human rights and fundamental freedoms’ in the Charter. Indeed, as early as 1971, it was judicially recognized that ‘although the affirmations in the Declaration are not binding *qua* international convention . . . they can bind the states on the basis of custom . . . whether because they constituted a codification of customary law . . . or because they have acquired the force of custom through a general practice accepted as law.’³

³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, separate opinion of Vice-President Ammoun, at 76.

WHEREAS the *International Covenant on Civil and Political Rights* guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Commentary

International Covenant on Civil and Political Rights

3. Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) states, inter alia, that:

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.

4. The ICCPR was adopted unanimously by the United Nations General Assembly on 16 December 1966, and came into force on 23 March 1976, three months after the deposit of the thirty-fifth instrument of ratification. As on 8 May 2006, 156 states had either ratified or acceded to it, thereby accepting its provisions as binding obligations under international law.

State obligations

5. When a state ratifies or accedes to the ICCPR, it undertakes three domestic obligations. The first is ‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction’ the rights recognized in the ICCPR, ‘without discrimination of any kind, such as race, colour, sex, language religion, political or other opinion, national or social origin, property, birth or other status’. The second is to take the necessary steps, in accordance with its constitutional processes and with the provisions of the ICCPR, to adopt such legislative measures as may be necessary to give effect to these rights and freedoms. The third is to ensure that any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by the legal system, and to develop the possibilities of judicial review; and to ensure that the competent authorities shall enforce such remedies when granted.

Status of International Law

6. The status of international law within a municipal legal system is generally determined by municipal law. Consequently, different rules apply in different

jurisdictions. Where the monist theory is followed, international law and municipal law on the same subject operate concurrently and, in the event of a conflict, the former prevails. Where the dualist theory is favoured, international law and municipal law are regarded as two separate systems of law, regulating different subject matter. They are mutually exclusive, and the former has no effect on the latter unless and until incorporation takes place through domestic legislation. One reason for this view is because the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. However, in many of those states in which the dualist theory is preferred, the recognition and observance of fundamental human rights and freedoms is nevertheless now generally accepted as obligatory, or certainly as influential in the ascertainment and expression of domestic law.

WHEREAS the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions.

Commentary

European Convention on Human Rights

7. Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 provides, inter alia, that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

American Convention on Human Rights

8. Article 8(1) of the American Convention on Human Rights 1969 provides, inter alia, that:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature.

African Charter on Human and Peoples' Rights

9. Article 7(1) of the African Charter on Human and Peoples' Rights 1981 provides that:

Every individual shall have the right to have his cause heard. This comprises:

(e) the right to be tried within a reasonable time by an impartial court or tribunal,

while Article 26 affirms that:

States Parties to the present Charter have the duty to guarantee the independence of the courts . . .

WHEREAS the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice.

WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law.

Commentary

Constitutionalism

10. The concept of constitutionalism has been explained in the following terms:

The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bounded by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content. Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.⁴

Rule of Law

11. The relevance of an independent and impartial judiciary in upholding the rule of law has been articulated thus:

The reason why judicial independence is of such public importance is that a free society exists only so long as it is governed by the rule of law . . . the rule which binds the governors and the governed, administered impartially and treating equally all those who seek its remedies or against whom its remedies are sought. However vaguely it may be perceived, however inarticulated may be the thought, there is an aspiration in the hearts of all men and women for the rule of law. That aspiration depends for its fulfilment on the competent and impartial application of the law by judges. In order to discharge that responsibility, it is essential that judges be, and be seen to be, independent. We have become accustomed to the notion that judicial independence includes independence from the dictates of Executive Government. . . But modern decisions are so varied and important that independence must be predicated of any influence that might tend, or be thought reasonably to tend, to a want of impartiality in decision making.

⁴ S.A. de Smith, *The New Commonwealth and its Constitutions*, London, Stevens, 1964, p.106.

Independence of the Executive Government is central to the notion, but it is no longer the only independence that is relevant.⁵

Independent and Impartial Judiciary

12. The concept of an independent and impartial judiciary is now broader in scope:

Any mention of judicial independence must eventually prompt the question: independent of what? The most obvious answer is, of course, independent of government. I find it impossible to think of any way in which judges, in their decision-making role, should not be independent of government. But they should also be independent of the legislature, save in its law-making capacity. Judges should not defer to expressions of parliamentary opinion, or decide cases with a view to either earning parliamentary approbation or avoiding parliamentary censure. They must also, plainly, ensure that their impartiality is not undermined by any other association, whether professional, commercial, personal or whatever.⁶

⁵ Sir Gerard Brennan, Chief Justice of Australia, 'Judicial Independence', The Australian Judicial Conference, 2 November 1996, Canberra, www.hcourt.gov.au.

⁶ Lord Bingham of Cornhill, Lord Chief Justice of England, 'Judicial Independence', *Judicial Studies Board Annual Lecture 1996*, www.jsboard.co.uk.

WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

Commentary

Public confidence in the judiciary

13. It is public confidence in the independence of the courts, the integrity of its judges, and in the impartiality and efficiency of its processes that sustain the judicial system of a country. As has been observed by a judge:

The Court's authority . . . possessed of neither the purse nor the sword . . . ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.⁷

⁷ *Baker v. Carr*, Supreme Court of the United States, (1962) 369 US 186, per Frankfurter J.

WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.

Commentary

Collective responsibility

14. A judge must consider it his or her duty not only to observe high standards of conduct, but also to participate in collectively establishing, maintaining and upholding those standards. Even one instance of judicial misconduct may irreparably damage the moral authority of the court.

The judicial office

15. The following remarks were once addressed by a Chief Justice to newly-appointed judges in his jurisdiction:

A judge's role is to serve the community in the pivotal role of administering justice according to law. Your office gives you that opportunity and that is a privilege. Your office requires you to serve, and that is a duty. No doubt there were a number of other reasons, personal and professional, for accepting appointment, but the judge will not succeed and will not find satisfaction in his or her duties unless there is continual realization of the importance of the community service that is rendered. Freedom, peace, order and good government – the essentials of the society we treasure – depend in the ultimate analysis on the faithful performance of judicial duty. It is only when the community has confidence in the integrity and capacity of the judiciary that the community is governed by the rule of law. Knowing this, you must have a high conceit of the importance of your office. When the work loses its novelty, when the case load resembles the burdens of Sisyphus, when the tyranny of reserved judgments palls, the only permanently sustaining motivation to strive onwards is in the realization that what you are called on to do is essential to the society in which you live.

You are privileged to discharge the responsibilities of office and you are obliged to leave it unsullied when the time comes to lay it down. What you say and what you do, in public and to some extent, in private, will affect the public appreciation of your office and the respect which it ought to command. The running of the risk of being arrested while driving home from a dinner party or a minor understatement of income in a tax return could have public significance. The standards of Caesar's wife are the standards that others will rightly apply to what you say and do and, having a high conceit of your judicial office, they are the standards you will apply to yourself. These standards apply to matters great and small. In some respects, the management of petty cash or the acquittal of expenditure can be a matter of great moment.

Hand in hand with a high conceit of the office is a humility about one's capacity to live up to the standards set by one's predecessors and expected of the present incumbent. There are few judges who are sufficiently self-confident not to entertain a doubt about their ability to achieve the expected level of performance - and, so far as I know, none of those possessed of that self-confidence has done so. Of course, with growing experience the anxiety about one's capacity to perform the duties of office abates. But this is not attributable so much to self-satisfaction as it is to a realistic acceptance of the limits of one's capacity. Provided one does one's best, anxiety about any shortfall in capacity can be counter-productive. Intellectual humility (even if it does not show), a sense of duty and self-esteem, the exposure of every step in the judicial process to public examination and peer group pressure are the factors which inspire a judge to the best achievement of which he or she is capable.

. You have joined or you are joining that elite – an elite of service, not of social grandeur – and your membership of it can be a source of great personal satisfaction and no little pride. You will not grow affluent on the remuneration that you will receive; you will work harder and longer than most of your non-judicial friends; your every judicial word and action and some other words and actions as well will be open to public criticism and the public esteem of the judiciary may be eroded by attacks that are both unjustified and unanswered. But if, at the end of the day, you share with my colleagues whom you highly esteem a sense of service to the community by administering justice according to law, you will have a life of enormous satisfaction. Be of good and honourable heart, and all will be well.⁸

⁸ Sir Gerard Brennan, Chief Justice of Australia, addressing the National Judicial Orientation Programme, Wollongong, Australia, 13 October 1996. The full text of the speech is available at www.hcourt.gov.au.

WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country.

Commentary

Drafting a code of judicial conduct

16. It is desirable that any code of conduct or like expression of principles for the judiciary should be formulated by the judiciary itself. That would be consistent with the principle of judicial independence and with the separation of powers. For instance, in many countries, the legislature and the executive regulate how their members are expected to behave and what their ethical duties are. It would be appropriate for the judiciary to do the same. If the judiciary fails or neglects to assume responsibility for ensuring that its members maintain the high standards of judicial conduct expected of them, public opinion and political expediency may lead the other two branches of government to intervene. When that happens, the principle of judicial independence upon which the judiciary is founded and by which it is sustained, is likely to be undermined to some degree, perhaps seriously.

AND WHEREAS the *United Nations Basic Principles on the Independence of the Judiciary* are designed to secure and promote the independence of the judiciary, and are addressed primarily to States.

Commentary

UN Basic Principles on the Independence of the Judiciary

17. The *United Nations Basic Principles on the Independence of the Judiciary* were adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders in September 1985 in Milan, and ‘endorsed’ by the United Nations General Assembly in November 1985.⁹ In the following month, the General Assembly ‘welcomed’ the Principles and invited governments ‘to respect them and to take them into account within the framework of their national legislation and practice’.¹⁰ The Basic Principles, which were ‘formulated to assist Member States in their task of securing and promoting the independence of the judiciary’ are the following:

INDEPENDENCE OF THE JUDICIARY

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all governments and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

⁹ S/RES/40/32 of 29 November 1985.

¹⁰ A/RES/40/146 of 13 December 1985.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

FREEDOM OF EXPRESSION AND ASSOCIATION

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly, provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

QUALIFICATIONS, SELECTION AND TRAINING

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.

11. The terms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their terms of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

PROFESSIONAL SECRECY AND IMMUNITY

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

DISCIPLINE, SUSPENSION AND REMOVAL

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter in its initial stage shall be kept confidential unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

THE FOLLOWING PRINCIPLES are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.

Commentary

Fundamental and universal values

18. The statement of principles which follow, which are based on six fundamental and universal values, and the statements of the application of each principle, are intended to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct, whether through a national code of conduct or other mechanism. The statements of the application of each principle have been designed so as not to be of too general a nature as to be of little guidance, or too specific as to be irrelevant to the numerous and varied issues which a judge faces in his or her daily life. They may, however, need to be adapted to suit the circumstances of each jurisdiction.

Not every transgression warrants disciplinary action

19. While the principles of judicial conduct are designed to bind judges, it is not intended that every alleged transgression of them should result in disciplinary action. Not every failure of a judge to conform to the principles will amount to misconduct (or misbehaviour). Whether disciplinary action is, or is not, appropriate may depend on other factors, such as the seriousness of the transgression, whether or not there is a pattern of improper activity, and on the effect of the improper activity on others and on the judicial system as a whole.

Understanding the role of the judiciary

20. The understanding of the role of the judiciary in democratic states, especially the understanding that the judge's duty is to apply the law in a fair and even-handed manner with no regard to contingent social or political pressures, varies considerably in different countries. The levels of confidence in the courts' activity are consequently not uniform. Adequate information about the functions of the judiciary and its role can therefore effectively contribute towards an increased understanding of the courts as the cornerstones of democratic constitutional systems, as well as of the limits of their activity. These principles are intended to assist members of the legislature and the executive, as well as lawyers, litigants and members of the public, to better understand the nature of the judicial office, the high standards of conduct which

judges are required to maintain both in and out of court, and the constraints under which they necessarily perform their functions.

Necessity for standards of conduct

21. The necessity to identify standards of conduct appropriate to judicial office has been explained by a judge himself in the following terms:

No one doubts that judges are expected to behave according to certain standards both in and out of court. Are these mere expectations of voluntary decency to be exercised on a personal level, or are they expectations that a certain standard of conduct needs to be observed by a particular professional group in the interests of itself and the community? As this is a fundamental question, it is necessary to make some elementary observations.

We form a particular group in the community. We comprise a select part of an honourable profession. We are entrusted, day after day, with the exercise of considerable power. Its exercise has dramatic effects upon the lives and fortunes of those who come before us. Citizens cannot be sure that they or their fortunes will not some day depend upon our judgment. They will not wish such power to be reposed in anyone whose honesty, ability or personal standards are questionable. It is necessary for the continuity of the system of law as we know it, that there be standards of conduct, both in and out of court, which are designed to maintain confidence in those expectations.¹¹

¹¹ J.B. Thomas, *Judicial Ethics in Australia*, Sydney, Law Book Company, 1988, p.7.

Value 1:
INDEPENDENCE

Principle:

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Commentary

Not privilege of, but responsibility attached to, judicial office

22. Judicial independence is not a privilege or prerogative of the individual judge. It is the responsibility imposed on each judge to enable him or her to adjudicate a dispute honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone. The core of the principle of judicial independence is the complete liberty of the judge to hear and decide the cases that come before the court; no outsider – be it government, pressure group, individual or even another judge should interfere, or attempt to interfere, with the way in which a judge conducts a case and makes a decision.¹²

Individual and institutional independence

23. Judicial independence refers to both the individual and the institutional independence required for decision-making. Judicial independence is, therefore, both a state of mind and a set of institutional and operational arrangements. The former is concerned with the judge's independence in fact; the latter with defining the relationships between the judiciary and others, particularly the other branches of government, so as to assure both the reality and the appearance of independence. The relationship between these two aspects of judicial independence is that an individual judge may possess that state of mind, but if the court over which he or she presides is not independent of the other branches of government in what is essential to its functions, the judge cannot be said to be independent.¹³

Independence distinguished from impartiality

24. The concepts of 'independence' and 'impartiality' are very closely related, yet are separate and distinct. 'Impartiality' refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word 'impartial' connotes absence of bias, actual or perceived. The word 'independence' reflects or embodies the traditional constitutional value of independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial

¹² See *R v Beauregard*, Supreme Court of Canada, [1987] LRC (Const) 180 at 188, per Dickson CJ.

¹³ See *Valente v The Queen*, Supreme Court of Canada, [1985] 2 SCR 673.

functions, but a status or relationship to others, particularly to the executive branch of government that rests on objective conditions or guarantees.

Judges not beholden to government of the day

25. The adoption of constitutional proclamations of judicial independence do not automatically create or maintain an independent judiciary. Judicial independence must be recognized and respected by all three branches of government. The judiciary, in particular, must recognize that judges are not beholden to the government of the day.

They see governments come like water and go with the wind. They owe no loyalty to ministers, not even the temporary loyalty which civil servants owe. . . Judges are also lions under the throne but that seat is occupied in their eyes not by the Prime Minister but by the law and their conception of the public interest. It is to that law and to that conception that they owe allegiance. In that lies their strength and their weakness, their value and their threat.¹⁴

As a judge observed during the Second World War,¹⁵

In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law.

Conditions for judicial independence

26. In order to establish whether the judiciary can be considered ‘independent’ of the other branches of government, regard is usually had, amongst other things, to the manner of appointment of its members, to their term of office, to their conditions of service; to the existence of guarantees against outside pressures; and to the question whether the court presents an appearance of independence.¹⁶ Three minimum conditions for judicial independence are:

(a) Security of tenure: i.e. a tenure, whether for life, until an age of retirement, or for a fixed term, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner.

(b) Financial security: i.e. the right to salary and pension which is established by law and which is not subject to arbitrary interference by the executive in a manner that could affect judicial independence. Within the limits of this requirement, however, governments may retain the authority to design specific plans of

¹⁴ J.A.G. Griffith, *The Politics of the Judiciary*, 3rd ed., 1985, p.199.

¹⁵ *Liversidge v. Anderson* [1942] AC 206 at 244, per Lord Atkin.

¹⁶ *Langborge v Sweden*, European Court of Human Rights, (1989) 12 EHRR 416.

remuneration that are appropriate to different types of courts. Consequently, a variety of schemes may equally satisfy the requirement of financial security, provided the essence of the condition is protected.

(c) Institutional independence: i.e. independence with respect to matters of administration that relate directly to the exercise of the judicial function. An external force must not be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges,¹⁷ sittings of the court and court lists. Although there must of necessity be some institutional relations between the judiciary and the executive, such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the constitution.¹⁸

¹⁷ In *The Queen v Liyanage* (1962) 64 NLR 313, the Supreme Court of Ceylon held that a law which empowered the Minister of Justice to nominate judges to try a particular case was ultra vires the Constitution in that it interfered with the exercise of judicial power which was vested in the judiciary.

¹⁸ See *Valente v The Queen*, Supreme Court of Canada, [1985] 2 SCR 673.

Application:

1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

Commentary

Outside influences must not colour judgment

27. Confidence in the judiciary is eroded if judicial decision-making is perceived to be subject to inappropriate outside influences. It is essential to judicial independence and to maintaining the public's confidence in the justice system that neither the executive nor the legislature nor the judge should create a perception that the judge's decisions could be coloured by such influences. The influences to which a judge may be subjected are of infinite variety. The judge's duty is to apply the law as he or she understands it, on an assessment of the facts he or she has made, without fear or favour and without regard to whether the eventual decision is likely to be popular or not. For example, responding to a submission that South African society did not regard the death sentence for extreme cases of murder as a cruel, inhuman or degrading form of punishment, the President of the Constitutional Court of South Africa said:¹⁹

The question before us, however, is not what the majority of South Africans believe a proper sentence should be. It is whether the Constitution allows the sentence. Public opinion may have some relevance to the inquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication . . . The Court cannot allow itself to be diverted from its duty to act as the independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.

A judge must act irrespective of popular acclaim or criticism

28. A case may excite public controversy with extensive media publicity, and the judge may find himself or herself in what may be described as the eye of the storm. Sometimes the weight of the publicity may tend considerably towards one desired result. However, in the exercise of the judicial function, the judge must be immune from the effects of such publicity. A judge must have no regard to whether the laws to be applied, or the litigants before the court, are popular or unpopular with the public, the media, government officials, or the judge's own friends or family. A judge

¹⁹ *S v. Makwanyane*, Constitutional Court of South Africa, 1995 (3) S.A. 391, per Chaskalson P.

must not be swayed by partisan interests, public clamour, or fear of criticism. Judicial independence encompasses independence from all forms of outside influence.

Any attempt to influence a judgment must be rejected

29. Any attempt to influence a court must only be made publicly in a court room by litigants or their advocates. A judge may occasionally be subjected to efforts by others outside the court to influence his or her decisions in matters pending before the court. Whether the source be ministerial, political, official, journalistic, family or other, all such efforts must be firmly rejected. These threats to judicial independence may sometimes take the form of subtle attempts to influence how a judge should approach a certain case or to curry favour with the judge in some way. Any such extraneous attempt, direct or indirect, to influence the judge, must be rejected. In some cases, particularly if the attempts are repeated in the face of rejection, the judge should report the attempts to the proper authorities. A judge must not allow family, social or political relationships to influence any judicial decision.

Determining what constitutes undue influence

30. It may be difficult to determine what constitutes undue influence. In striking an appropriate balance between, for example, the need to protect the judicial process against distortion and pressure, whether from political, press or other sources, and the interests of open discussion of matters of public interest in public life and in a free press, a judge must accept that he or she is a public figure and must not be of too susceptible or of too fragile a disposition. Criticism of public office holders is common in a democracy. Within limits fixed by law, judges should not expect immunity from criticism of their decisions, reasons, and conduct of a case.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

Commentary

Complete isolation neither possible nor beneficial

31. How independent of society is a judge expected to be? The vocation of a judge was once described as being ‘something like a priesthood’.²⁰ Another judge wrote that ‘the Chief Justice goes into a monastery and confines himself to his judicial work’.²¹ Such constraints may be considered to be far too demanding today, although the regime imposed on a judge is probably ‘monastic in many of its qualities’²². While a judge is required to maintain a form of life and conduct more severe and restricted than that of other people, it would be unreasonable to expect him or her to retreat from public life altogether into a wholly private life centred around home, family and friends. The complete isolation of a judge from the community in which the judge lives is neither possible nor beneficial.

Contact with the community is necessary

32. If a judge is not to be sealed hermetically in his or her home after working hours, the judge will be exposed to opinion-shaping forces, and may even form opinions as a consequence of exposure to friends, colleagues, and the media. Indeed, knowledge of the public is essential to the sound administration of justice. A judge is not merely enriched by knowledge of the real world; the nature of modern law requires that a judge ‘live, breathe, think and partake of opinions in that world’.²³ Today, the judge’s function extends beyond dispute resolution. Increasingly, the judge is called upon to address broad issues of social values and human rights, and to decide controversial moral issues, and to do so in increasingly pluralistic societies. An out of touch judge is less likely to be effective. Neither the judge’s personal development nor the public interest will be well served if the judge is unduly isolated from the community he or she serves. Legal standards frequently call for the application of the reasonable person test. Judicial fact-finding, an important part of a judge’s work, calls for the evaluation of evidence in the light of commonsense and experience. Therefore, a judge should, to the extent consistent with the judge’s special role, remain closely in touch with the community.

²⁰ Lord Hailsham, Lord Chancellor of England, cited in A.R.B. Amerasinghe, *Judicial Conduct Ethics and Responsibilities*, Sri Lanka, Vishvalekha Publishers, 200, p.1.

²¹ William H. Taft, Chief Justice of the United States Supreme Court, cited in David Wood, *Judicial Ethics: A Discussion Paper*, Australian Institute of Judicial Administration Incorporated, Victoria, 1996, p.3.

²² Justice Michael D. Kirby, Judge of the High Court of Australia, cited in David Wood, *Judicial Ethics*, 3.

²³ See Supreme Court of Wisconsin, Judicial Conduct Advisory Committee, *Opinion 1998-10R*.

The ethical dilemma

33. This ethical dilemma has been summed up very succinctly:²⁴

Can judicial officers be expected on the one hand to be imbued with, or have developed to a high degree, qualities such as tact, humility, decisiveness, sensitivity, common sense and intellectual rigour, without on the other hand appearing aloof, inhibited, mechanical, hidebound, humourless or smug? Surely, to simultaneously occupy the roles of the exemplary and the ordinary citizen has all the appearance of an impossible double act. Conduct which some commend as civil and courteous others will denigrate as stiff and formal. Conversely, what some condemn as undignified behaviour, displaying lack of respect for judicial office, others will applaud for showing that judicial officers possess a sense of humour and the capacity not to take themselves too seriously.

Oliver Wendell Holmes was perhaps well ahead of his time when he advised judges to ‘share the passion and action of [their] time at the peril of being judged not to have lived’.

An example of good practice

34. The manner in which a judge should respond to community demands in general is exemplified in the following guidelines which were recommended by a judicial conduct advisory committee in a jurisdiction where judges are often contacted by members of special interest groups for in-chambers meetings:²⁵

1. It is not mandatory for a judge to entertain a request for a private meeting.
2. The judge would be well advised to inquire as to the purpose of the meeting before deciding whether to grant the request.
3. The judge might consider whether the meeting should include members of the prosecution and defence bar. Frequently, the requested meeting involves matters in the criminal branch of court. (e.g. representatives of “Mothers Against Drunk Driving”).
4. The request from the special interest group should be in written form so that no misunderstanding could arise, and the judge should confirm the meeting and the ground rules for discussion in writing.
5. The absolute prohibition against ex parte communications about particular cases must be observed and must be made clear to the requestor before the meeting begins.

²⁴ David Wood, *Judicial Ethics*, p.2.

²⁵ See Supreme Court of Wisconsin, Judicial Conduct Advisory Committee, *Opinion 1998-13*.

6. The judge might consider whether a court reporter should be present during the meeting. That would avoid any future misunderstanding of what transpired during the course of the meeting. It would also protect the judge from embarrassment if he or she were later misquoted.

The trust of society is essential

35. Judicial independence pre-supposes total impartiality on the part of a judge. When adjudicating between any parties, a judge must be free from any connection, inclination or bias which affects – or may be seen as affecting – his or her ability to adjudicate independently. In this regard, judicial independence is an elaboration of the fundamental principle that ‘no man may be judge in his own case’. This principle also has significance well beyond that affecting the particular parties to any dispute since society as a whole must be able to trust the judiciary.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

Commentary

Separation of powers or functions

36. At the core of the concept of judicial independence is the theory of the separation of powers: that the judiciary, which is one of three basic and equal pillars in the modern democratic state, should function independently of the other two: the legislature and the executive. The relationship between the three branches of government should be one of mutual respect, each recognizing and respecting the proper role of the others. This is necessary because the judiciary has an important role and functions in relation to the other two branches. It ensures that the government and the administration are held to account for their actions, and, with regard to the legislature, it is involved in ensuring that duly enacted laws are enforced and, to a greater or lesser extent, in ensuring that they comply with the national constitution and, where appropriate, with regional and international treaties that form part of municipal law. To fulfill its role in these respects, and to ensure a completely free and unfettered exercise of its independent legal judgment, the judiciary must be free from inappropriate connections with and influences by the other branches of government. Independence thus serves as the guarantee of impartiality.

Public perception of judicial independence

37. It is important that the judiciary should be perceived as independent, and that the test for independence should include that perception. It is a perception of whether a particular tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees. An individual who wishes to challenge the independence of a tribunal need not prove an actual lack of independence, although that, if proved, would be decisive for the challenge. Instead, the test for this purpose is the same as the test for determining whether a decision-maker is biased. The question is whether a reasonable observer would (or in some jurisdictions “might”) perceive the tribunal as independent. Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, the test for independence is thus whether the tribunal may be reasonably perceived as independent.

Some examples of ‘inappropriate connections with and influence by’

38. The following are some examples of ‘inappropriate connections with and influence by’ the executive and legislative branches of government, as determined by courts or judicial ethics advisory committees. These are offered as guidelines. In each

case the outcome depends on all the circumstances of the case tested according to how those circumstances might be viewed by the reasonable observer:

(a) Where a legislator writes to a judge informing the judge of the legislator's interest on behalf of a constituent for an expeditious and just result in the constituent's divorce and custody case, the judge may not respond to the inquiry other than to inform the legislator, or preferably have someone on the judge's behalf inform the legislator, that the principles of judicial conduct prohibit the judge from receiving, considering or responding to such communication. The scope of the prohibition includes responding to a legislator's inquiry about the status of a case or the date when a decision may be forthcoming, because to do so creates the appearance that the legislator is able to influence the judge to expedite a decision and thereby obtain preferential consideration for a litigant.²⁶

(b) Acceptance by a judge during a period of long leave of full-time employment at a high, policy-making level of the executive or legislative branch (as special adviser on matters related to reform of the administration of justice) is inconsistent with the independence of the judiciary. The movement back and forth between high executive and legislative positions and the judiciary promotes the very kind of function-blending that the concept of separation of powers is intended to avoid. That blending is likely to affect the judge's perception, and the perception of the officials with whom the judge serves, regarding the judge's independent role. Even if it does not, such service will adversely affect the public perception of the independence of the courts from the executive and legislative branches of government. Such employment is different from a judge serving in the executive or legislative branch before becoming a judge, and serving in those positions after leaving judicial office. In these cases, the appointment and the resignation processes provide a clear line of demarcation for the judge, and for observers of the judicial system, between service in one branch and service in another.²⁷

(c) Where a judge's spouse is an active politician, the judge must remain sufficiently divorced from the conduct of members of his or her family to ensure that there is not a public perception that the judge is endorsing a political candidate. While the spouse may attend political gatherings, the judge may not accompany him or her. No such gatherings should be held in the judge's home. If the spouse insists on holding such events in the judge's home, the judge must take all reasonable measures to dissociate himself or herself from the events, including steps to avoid being seen by those in attendance during the events, which if necessary would include leaving the premises for the duration of the events. Any political contributions made by the spouse must be made in the spouse's name from the spouse's own, separately maintained, funds, and not, for example, from a joint account with the judge. It must be noted that such activities do not enhance the public image of the courts or of the administration of justice.²⁸ On the other hand, in such a case, the attendance of the judge with his or her spouse at a purely ceremonial function, for example, the opening of parliament or a reception to a visiting Head of State, may not be improper, depending on the circumstances.

²⁶ See Commonwealth of Virginia Judicial Ethics Advisory Committee, *Opinion 2000-7*.

²⁷ See The Massachusetts Committee on Judicial Ethics, *Opinion No.2000-15*.

²⁸ See The Massachusetts Committee on Judicial Ethics, *Opinion No.1998-4*.

(d) A practice whereby the Minister of Justice awards, or recommends the award, of an honour to a judge for his or her judicial activity, violates the principle of judicial independence. The discretionary recognition of a judge's judicial work by the executive without the substantial participation of the judiciary, at a time when he or she is still functioning as a judge, jeopardizes the independence of the judiciary.²⁹ On the other hand, the award to a judge of a civil honour by, or on the recommendation of, a body established as independent of the government of the day may not be regarded as inappropriate, depending on the circumstances.

(e) The payment by the executive of 'premium' (i.e. a particular incentive) to a judge in connection with the administration of justice is incompatible with the principle of judicial independence.³⁰

(f) Where, in proceedings before a court, a question arises in respect of the interpretation of an international treaty, and the court declares that the interpretation of treaties fall outside the scope of its judicial functions and seeks the opinion of the minister of foreign affairs thereon, and then proceeds to give judgment accordingly, the court has in effect referred to a representative of the executive for a solution to a legal problem before it. The minister's involvement, which is decisive for the outcome of the legal proceedings, and is not open to challenge by the parties, means that the case has not been heard by an independent tribunal with full jurisdiction.³¹

²⁹ Decision of the Constitutional Court of Hungary, 18 October, 1994, Case No.45/1994, (1994) 3 *Bulletin on Constitutional Case-Law*, 240.

³⁰ Decision of the Constitutional Court of Lithuania, 6 December 1995, Case No.3/1995, (1995) 3 *Bulletin on Constitutional Case-Law*, 323.

³¹ *Beaumont v France*, European Court of Human Rights, (1984) 19 EHRR 485.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

Commentary

A judge must be independent of other judges

39. The task of judging implies a measure of autonomy which involves the judge's conscience alone.³² Therefore, judicial independence requires not only the independence of the judiciary as an institution from the other branches of government; it also requires judges being independent from each other. In other words, judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence which might in some situations come from the actions or attitudes of other judges. A judge may sometimes find it helpful to 'pick the brain' of a colleague on a hypothetical basis. However, judicial decision-making is the responsibility of the individual judge, including each judge sitting in a collegiate appellate court.

The hierarchical organization of the judiciary is irrelevant

40. In the performance of his or her functions, a judge is no-one's employee. He or she is a servant of, and answerable only to, the law and to his or her conscience which the judge is obliged to constantly examine. It is axiomatic that, apart from any system of appeal, a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary. Any hierarchical organization of the judiciary and any difference in grade or rank shall, in no way, interfere with the right of a judge to pronounce the judgment freely, uninfluenced by extrinsic considerations or influences.

Judge not obliged to report on merits of a case

41. Liability to answer to anyone, particularly to one who might be aggrieved by the action of the judge, is inconsistent with the independence of the judiciary. Except by way of judicial reasons or other procedures lawfully provided, a judge is not obliged to report on the merits of a case even to other members of the judiciary. If a decision were to be so incompetent as to evidence a disciplinary offence, that might be different, but in that very remote instance the judge would not be 'reporting', but answering a charge or formal investigation carried out according to law.

³² Roger Perrot, "The role of the Supreme Court in guaranteeing the uniform interpretation of the law", Sixth Meeting of the Presidents of European Supreme Courts, Warsaw, October 2000.

Due consideration of a case takes precedence over 'productivity'

42. Court inspection systems, in countries where they exist, should not concern themselves with the merits or the correctness of particular decisions and should not lead a judge, on grounds of efficiency, to favour productivity over the proper performance of his or her role, which is to come to a carefully considered decision in each case in keeping with the law and merits of the case.

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

Commentary

Attempts to undermine judicial independence should be resisted

43. A judge should be vigilant with respect to any attempts to undermine his or her institutional or operational independence. While care must be taken not to risk trivializing judicial independence by invoking it indiscriminately in opposition to every proposed change in the institutional arrangements affecting the judiciary, a judge should be a staunch defender of his or her own independence.

Public awareness of judicial independence should be encouraged

44. A judge should recognize that not everyone is familiar with these concepts and their impact on judicial responsibilities. Public education with respect to the judiciary and judicial independence thus becomes an important function, both of the government and its institutions and of the judiciary itself, for misunderstanding can undermine public confidence in the judiciary. The public may not get a completely balanced view of the principle of judicial independence from the media which may portray it incorrectly as protecting judges from review of and public debate concerning their actions. A judge should, therefore, in view of the public's own interest, take advantage of appropriate opportunities to help the public understand the fundamental importance of judicial independence.

1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

Commentary

High standard of judicial conduct necessary to retain public confidence

45. Public acceptance of, and support for, court decisions depends upon public confidence in the integrity and independence of the judge. This, in turn, depends upon the judge upholding a high standard of conduct in court. The judge should, therefore, demonstrate and promote a high standard of judicial conduct as one element of assuring the independence of the judiciary.

Minimum requirements of a fair trial

46. This high standard of judicial conduct requires the observance of the minimum guarantees of a fair trial. For example, a judge must recognize that a party has the right to:³³

- (a) adequate notice of the nature and purpose of the proceedings;
- (b) be afforded an adequate opportunity to prepare a case;
- (c) present arguments and evidence, and meet opposing arguments and evidence, either in writing, orally or by both means;
- (d) consult and be represented by counsel or other qualified persons of his or her choice during all stages of the proceedings;
- (e) consult an interpreter during all stages of the proceedings, if he or she cannot understand or speak the language used in the court;
- (f) have his or her rights or obligations affected only by a decision based solely on evidence known to the parties to public proceedings;
- (g) have a decision rendered without undue delay and as to which the parties are provided adequate notice thereof and the reasons therefor; and
- (h) except in the case of the final appellate court, appeal, or seek leave to appeal, decisions to a higher judicial tribunal.

³³ See Draft UN Body of Principles on the Right to a Fair Trial and a Remedy, UN document E/CN.4/Sub.2/1994/24 of 3 June 1994.

Deprivation of liberty must be in accordance with law

47. A judge should not deprive a person of his liberty except on such grounds and in accordance with such procedures as are established by law. Accordingly, a judicial order depriving a person of his liberty should not be made without an objective assessment of its necessity and reasonableness. Similarly, detention ordered in bad faith, or through neglect to apply the relevant law correctly, is arbitrary, as is committal for trial without an objective assessment of the relevant evidence.

Rights of accused persons:

48. ICCPR 14(1) defines the right to a fair trial. It recognizes that ‘all persons’ are ‘equal’ before the courts and are entitled to a ‘fair and public hearing’ in the determination of any ‘criminal charge’ or of ‘rights and obligations in a suit at law’ by a ‘competent, independent and impartial’ tribunal ‘established by law’.³⁴

49. ICCPR 14(2) to (7) and ICCPR 15 contain the following specific applications, in respect of criminal proceedings, of the general principle of a fair trial stated in ICCPR 14(1). They apply at all stages of a criminal proceeding, including the preliminary process, if one exists, committal proceedings, and at all stages of the trial itself. These, however, are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing.

- (a) The right to be presumed innocent until proved guilty according to law.
- (b) The right not to be tried again for an offence for which he has already been finally convicted or acquitted.
- (c) The right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.
- (d) The right to have adequate time and facilities for the preparation of his defence.
- (e) The right to communicate with counsel of his own choosing.
- (f) The right to be tried without undue delay.
- (g) The right to be tried in his presence.

³⁴ For an authoritative interpretation of ICCPR 14, see Human Rights Committee, General Comment 13 (1984). A more extensive general comment is expected shortly. For a comparative analysis of the jurisprudence on the right to a fair trial, see Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, 2002, pp.478-594.

- (h) The right to defend himself in person or through legal assistance of his own choosing; and to be informed, if he does not have legal assistance, of this right.
- (i) The right to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.
- (j) The right to examine, or have examined, the witnesses against him.
- (k) The right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.
- (l) The right to have the assistance of an interpreter if he cannot understand or speak the language used in court.
- (m) The right not to be compelled to testify against himself or to confess guilt.
- (n) The right of a juvenile person to a procedure that takes account of his age and the desirability of promoting his rehabilitation.
- (o) The right not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.
- (p) The right to a judgment rendered in public.
- (q) The right of a person convicted of a crime to have his conviction and sentence reviewed by a higher tribunal according to law.

Rights relating to sentencing

50. ICCPR 6(5), ICCPR 7, ICCPR 14(7), and ICCPR 15 recognize the following rights of convicted persons:

- (a) The right not to be imposed a heavier penalty than the one that was applicable at the time when the criminal offence was committed.
- (b) The right not to be punished again for an offence for which he has already been finally convicted or acquitted.
- (c) The right not to be subjected to cruel, inhuman or degrading punishment.
- (d) In those countries which have not yet abolished the death penalty, the right not to be sentenced to death if below 18 years of age, and then only for the most serious crimes, and if prescribed by the law in force at the time of the commission of the crime.

Value 2:
IMPARTIALITY

Principle:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Commentary

Independence is necessary precondition to impartiality

51. Independence and impartiality are separate and distinct values. They are nevertheless linked together as attributes of the judicial office that reinforce each other. Independence is the necessary precondition to impartiality. It is a prerequisite for attaining the objective of impartiality. A judge could be independent and yet not be impartial (on a specific case by case basis), but a judge who is not independent cannot by definition be impartial (on an institutional basis).³⁵

Perception of impartiality

52. Impartiality is the fundamental quality required of a judge and the core attribute of the judiciary. Impartiality must exist both as a matter of fact and as a matter of reasonable perception. If partiality is reasonably perceived, that perception is likely to leave a sense of grievance and of injustice having been done, thereby destroying confidence in the judicial system. The perception of impartiality is measured by the standard of a reasonable observer. The perception that a judge is not impartial may arise in a number of ways, for instance, by a perceived conflict of interest, by the judge's behaviour on the bench, or by the judge's out-of-court associations and activities.

Requirements of impartiality

53. The European Court has explained that there are two aspects to the requirement of impartiality. First, the tribunal must be subjectively impartial, i.e. no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is to be presumed unless there is evidence to the contrary. Secondly, the tribunal must also be impartial from an objective viewpoint, i.e. it must offer sufficient guarantees to exclude any legitimate doubt in this respect.³⁶ Under this test, it must be determined whether, irrespective of the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect, even

³⁵ See *Reference re: Territorial Court Act (NWT)*, Northwest Territories Supreme Court, Canada, (1997) DLR (4th) 132 at 146, per Vertes J.

³⁶ *Gregory v United Kingdom*, European Court of Human Rights, (1997) 25 EHRR 577.

appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public, including an accused person. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.³⁷

Apprehensions of an accused person

54. In deciding whether in a criminal case there is legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held to be objectively justified before the reasonable observer who represents society.

³⁷ *Castillo Algar v Spain*, European Court of Human Rights, (1998) 30 EHRR 827.

Application:

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

Commentary

Perception of partiality erodes public confidence

55. If a judge appears to be partial, public confidence in the judiciary is eroded. Therefore, a judge must avoid all activity that suggests that the judge's decision may be influenced by external factors such as a judge's personal relationship with a party or interest in the outcome.

Apprehension of bias

56. Impartiality is not only concerned with perception, but more fundamentally with the actual absence of bias and prejudgment. This dual aspect is captured in the often repeated words that justice must not only be done, but must manifestly be seen to be done.³⁸ The test usually adopted is whether a reasonable observer, viewing the matter realistically and practically, would (or might) apprehend a lack of impartiality in the judge. Whether there is an apprehension of bias is to be assessed from the point of view of a reasonable observer.

Meaning of 'bias or prejudice'

57. Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view, which sways or colours judgment and renders a judge unable to exercise his or her functions impartially in a particular case.³⁹ However, this cannot be stated without regard to the bias. If, for example, a judge is inclined towards upholding fundamental human rights, unless the law clearly and validly requires a different course, that will not give rise to a reasonable perception of partiality forbidden by law.

Manifestations of bias or prejudice

58. Bias may manifest either verbally or physically. Epithets, slurs, demeaning nicknames, negative stereotyping, attempted humour based on stereotypes, perhaps

³⁸ *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259, per Lord Hewart CJ; *Johnson v Johnson* (2000) 201 CLR 488 at 502.

³⁹ *R v Bertram* [1989] OJ No.2133 (QL), quoted by Cory J in *R v S*, Supreme Court of Canada, [1997] 3 SCR 484, paragraph 106.

related to gender, culture or race, threatening, intimidating or hostile acts, suggesting a connection between race or nationality and crime, and irrelevant references to personal characteristics, are some examples. Bias or prejudice may also manifest themselves in body language, or appearance or behaviour in or out of court. Physical demeanour may indicate disbelief of a witness, thereby improperly influencing a jury. Facial expression can convey to parties or lawyers in the proceeding, jurors, the media and others an appearance of bias. The bias or prejudice may be directed against a party, witness or advocate.

Abuse of contempt powers is a manifestation of bias or prejudice

59. The contempt jurisdiction, where it exists, enables a judge to control the courtroom and to maintain decorum. Because it carries penalties which are criminal in nature and effect, contempt should be used as a last resort, only for legally valid reasons, and in strict conformity with procedural requirements. It is a power that should be used with great prudence and caution. The abuse of contempt power is a manifestation of bias. This may occur when a judge has lost control of his or her own composure and attempts to settle a personal score, especially in retaliation against a party, advocate or witness with whom the judge has been drawn into personal conflict.

What may not constitute bias or prejudice

60. A judge's personal values, philosophy, or beliefs about the law, may not constitute bias. The fact that a judge has a general opinion about a legal or social matter directly related to the case does not disqualify the judge from presiding.⁴⁰ Opinion, which is acceptable, should be distinguished from bias, which is unacceptable. It has been said that 'proof that a judge's mind is a *tabula rasa* (blank slate) would be evidence of a lack of qualification, not lack of bias'.⁴¹ Judicial rulings or comments on the evidence made during the course of proceedings also do not fall within the prohibition, unless it appears that the judge has a closed mind and is no longer considering all the evidence.⁴²

⁴⁰ Shaman et al, *Judicial Conduct and Ethics*, s.5.01 at 105. See also *Laird v Tatum*, (1972) 409 US 824.

⁴¹ *Laird v Tatum*, (1972) 409 US 824.

⁴² *United Nuclear* 96 NM at 248, P. 2nd at 324.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

Commentary

Judge must maintain fine balance

61. A judge is obliged to ensure that judicial proceedings are conducted in an orderly and efficient manner and that the court's process is not abused. An appropriate measure of firmness is necessary to achieve this end. A fine balance has to be drawn by the judge who is expected both to conduct the process effectively and to avoid creating in the mind of a reasonable observer any impression of a lack of impartiality. Any action which, in the mind of a reasonable observer, would (or might) give rise to a reasonable suspicion of a lack of impartiality in the performance of judicial functions must be avoided. Where such impressions are created, they affect not only the litigants before the court but public confidence in the judiciary generally.

Conduct that should be avoided in court

62. The expectations of litigants are high. Some will be quick to perceive bias quite unjustifiably when a decision is not in their favour. Therefore, every effort should be made to ensure that reasonable grounds for such a perception are avoided or minimized. A judge must be alert to avoid behaviour that may be perceived as an expression of bias or prejudice. Unjustified reprimands of advocates, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgments and intemperate and impatient behaviour may destroy the appearance of impartiality, and must be avoided.

Constant interference with conduct of trial should be avoided

63. A judge is entitled to ask questions by way of clarification of issues. But where the judge constantly interferes and virtually takes over the conduct of a civil case or the role of the prosecution in a criminal case and uses the results of his or her own questioning to arrive at the conclusion in the judgment in the case, the judge becomes advocate, witness and judge at the same time, and the litigant does not receive a fair trial.

Ex parte communications must be avoided

64. The principle of impartiality generally prohibits private communications between the judge and any of the parties, their legal representatives, witnesses or jurors. If the court receives such a private communication, it is important for it to ensure that the other parties concerned are fully and promptly informed and the court record noted accordingly.

Conduct that should be avoided out of court

65. Outside court too, a judge should avoid deliberate use of words or conduct that could reasonably give rise to a perception of an absence of impartiality. Everything from his or her associations or business interests to remarks which the judge may consider to be ‘harmless banter’ may diminish the judge’s perceived impartiality. All partisan political activity and association should cease upon the assumption of judicial office. Partisan political activity or out of court statements concerning issues of a partisan public controversy by a judge may undermine impartiality. They may lead to public confusion about the nature of the relationship between the judiciary on the one hand and the executive and legislative branches on the other. Partisan actions and statements, by definition, involve a judge in publicly choosing one side of a debate over another. The perception of partiality will be reinforced if, as is almost inevitable, the judge’s activities attract criticism and/or rebuttal. In short, a judge who uses the privileged platform of judicial office to enter the partisan political arena puts at risk public confidence in the impartiality of the judiciary. There are some exceptions. These include comments by a judge on an appropriate occasion defensive of the judicial institution, or explaining particular issues of law or decisions to the community or to a specialized audience, or defence of fundamental human rights and the rule of law. However, even on such occasions, a judge must be careful, as far as possible, to avoid entanglements in current controversies that may reasonably be seen as politically partisan. The judge serves all people, regardless of politics or social viewpoints. That is why the judge must endeavour to maintain the trust and confidence of all people, so far as that is reasonably possible.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

Commentary

Frequent recusals should be avoided

66. A judge must be available to decide the matters that come before the court. However, to protect the rights of litigants and preserve public confidence in the integrity of the judiciary, there will be occasions when disqualification is necessary. On the other hand, frequent disqualification may bring public disfavour to the bench and to the judge personally, and impose unreasonable burdens upon the judge's colleagues. It may be open to the appearance that a litigant can pick and choose the judge who will decide its case and this would be undesirable. It is necessary, therefore, that a judge should organize his or her personal and business affairs to minimize the potential for conflict with judicial duties.

Conflict of interest

67. The potential for conflict of interest arises when the personal interest of the judge (or of those close to him or her) conflicts with the judge's duty to adjudicate impartially. Judicial impartiality is concerned both with impartiality in fact and impartiality in the perception of a reasonable observer. In judicial matters, the test for conflict of interest must include both actual conflicts between the judge's self interest and the duty of impartial adjudication and circumstances in which a reasonable observer would (or might) reasonably apprehend a conflict. For example, although members of a judge's family have every right to be politically active, the judge should recognize that such activities of close family members may, even if erroneously, sometimes adversely affect the public perception of the judge's impartiality.

Duty to reduce conflicts of interest arising from financial activity

68. Similarly, a judge must not allow his or her financial activities to interfere with the duty to preside over cases that come before the court. Although some disqualifications will be unavoidable, a judge must reduce unnecessary conflicts of interest that arise when the judge retains financial interests in organizations and other entities that appear regularly in court, by divesting himself or herself of such interests. For example, the mere ownership of one percent (1%) or less of the outstanding stock in a publicly held corporation is usually considered to be a *de minimis* interest not requiring the disqualification of a judge in a case involving that corporation. But often the issue of recusal implicates several considerations, any of which might require disqualification. The stock owned by a judge may be of such significance to him, regardless of its *de minimis* value when viewed in light of the size of the corporation, that recusal is warranted. Likewise, the judge should be conscious that the public might view stock ownership as a disqualifying interest. Nevertheless, the judge should

not use obviously *de minimis* stock holdings as a means to avoid the trial of cases. If stock ownership results in a judge's frequent recusal, he should divest himself or herself of such stock.⁴³

Duty to restrain activities of family members

69. A judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This is necessary to avoid creating an appearance of exploitation of office or favouritism and to minimize the potential for disqualification.

⁴³ Commonwealth of Virginia Judicial Ethics Advisory Committee, *Opinion 2000-5*. See *Ebner v Official Trustee in Bankruptcy*, High Court of Australia, [2001] 2 LRC 369, (2000) 205 CLR 337.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

Commentary

When is a proceeding ‘before a judge’?

70. A proceeding is before the judge until completion of the appellate process. A proceeding could be regarded as being before the judge whenever there is reason to believe that a case may be filed; for example, when a crime is being investigated but no charges have yet been brought, when someone has been arrested but not yet charged, or where a person’s reputation has been questioned and proceedings for defamation threatened but not yet commenced.

Example of an improper statement

71. An announcement by judges that they have agreed to sentence all offenders convicted of a particular offence to a prison sentence, but that the length of the sentence would be left to the individual judge’s discretion depending on the facts and the law applicable to that offence, without making any distinction between a first offence and a subsequent offence, would, depending on the circumstances, usually entitle a defendant to disqualify a judge on the ground that he or she has announced a fixed opinion about the proper sentence for the offence with which the defendant is charged. The announcement would create an appearance of impropriety by suggesting that judges were being swayed by public clamour or fear of public criticism. It would also be an impermissible public comment about pending proceedings.⁴⁴

Permissible statements

72. This prohibition does not extend to public statements made in the course of the judge’s official duties, to the explanation of court procedures, or to a scholarly presentation made for the purposes of legal education. Nor does it prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in judicial review proceedings where the judge is a litigant in an official capacity, the judge should not comment beyond the record.

⁴⁴ See Advisory Committee on the Code of Judicial Conduct, New Mexico, *Judicial Advisory Opinion 1991-2*.

Correspondence with litigants

73. If after the conclusion of a case, the judge receives letters or other forms of communication from disappointed litigants or others, criticising the decision or decisions made by colleagues, the judge should not enter into contentious correspondence with the authors of such communications.

Media criticism

74. It is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence. This principle should only be departed from in the circumstances envisaged in the International Covenant on Civil and Political Rights. If there is media criticism of a decision or criticism mounted by interested members of the public, the judge should refrain from answering such criticism by writing to the press or making incidental comments about such criticism when sitting on the bench. A judge should speak only through his or her reasons for judgments in dealing with cases being decided. It is generally inappropriate for a judge to defend judicial reasons publicly.

Media misreporting

75. If there is media misreporting of court proceedings or a judgment and a judge considers that the error should be corrected, the registrar may issue a press release to state the factual position or take steps for an appropriate correction to be made.

Relations with the media

76. Although not specifically referred to in paragraph 2.4, the issue of relations with the media is relevant. Three possible aspects of concern may be identified.

- (a) The first is the use of the media (in or out of court) to promote a judge's public image and career, or conversely, the possibility of concern on the part of a judge as to possible media reaction to a particular decision. For a judge to allow himself or herself to be influenced in either such direction by the media would almost certainly infringe paragraph 1.1, if not other paragraphs such as 4.1, 3.1, 3.2, 2.1 and 2.2.
- (b) The second aspect is the question of contact out of court with the media. In most jurisdictions, the media gains information from court records and documents which are open to them, and from the public nature of proceedings in court. In some countries (particularly those where court files are secret), a system exists whereby a particular judge in each court is deputed to inform the media of the actual position relating to any particular case. Apart from the provision of information of this nature, any out of court comment by a judge on cases before him or her or before other judges would normally be inappropriate

- (c) A third aspect concerns comment, even in an academic article, on the judge's own or another judge's decision. This would usually be permissible only if the comment is on a purely legal point of general interest decided or considered in a particular case. However, the conventions on the discussion of past decisions in a purely academic context appear to be in the process of some degree of modification. Different judges will hold different views about the subject and absolute rules cannot be laid down. Generally speaking, it is still a rule of prudence that a judge does not enter into needless controversy over past decisions, especially where the controversy may be seen as an attempt to add reasons to those stated in the judge's published judgment.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.

Commentary

The reasonable observer

77. The Bangalore Draft referred to a ‘reasonable, fair-minded and informed person’ who ‘might believe’ that the judge is unable to decide the matter impartially. The present formulation – ‘may appear to a reasonable observer’ - was agreed upon at The Hague meeting on the basis that ‘a reasonable observer’ would be both fair-minded and informed.

‘One may not be a judge in one’s own cause’

78. The fundamental principle is that one may not be a judge in his or her own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has an economic interest in its outcome then he or she is indeed sitting as a judge in his or her own cause. In that case, the mere fact that the judge is a party to the action or has an economic interest in its outcome is sufficient to cause the judge’s disqualification. The second application of the principle is where a judge is not a party to the suit and does not have an economic interest in its outcome, but in some other way the judge’s conduct or behaviour may give rise to a suspicion that he or she is not impartial; for example, because of friendship with a party. This second type of case is not strictly speaking an application of the principle that one must not be a judge in his or her own cause, since the judge himself or herself will not normally be benefiting, but providing a benefit for another by failing to be impartial.⁴⁵

Consent of parties irrelevant

79. The consent of the parties will not justify a judge continuing in a situation in which he or she felt that disqualification was the proper path. There is another interest in such decisions, namely, the public’s interest in the manifestly impartial administration of justice. Nevertheless, in most countries it is competent to the parties to make a formal waiver of any issue of impartiality. Such a waiver, if properly informed, will remove the objection to the disclosed basis of potential disqualification.

⁴⁵ *Ex p. Pinochet Ugarte (No.2)*, House of Lords, United Kingdom, [1999] 1 LRC 1.

When judge should make disclosure

80. The judge should make disclosure on the record and invite submissions from the parties in two situations. The first arises if the judge has any doubt about whether there are arguable grounds for disqualification. The second is if an unexpected issue arises shortly before or during a proceeding. The judge's request for submissions should emphasize that it is not the consent of the parties or their advocates that is being sought but assistance on the question whether arguable grounds exist for disqualification and whether, for example, in the circumstances, the doctrine of necessity applies. If there is real ground for doubt, that doubt should ordinarily be resolved in favour of recusal.

Reasonable apprehension of bias

81. The generally accepted criterion for disqualification is the reasonable apprehension of bias. Different formulae have been applied to determine whether there is an apprehension of bias or prejudgment. These have ranged from 'a high probability' of bias to 'a real likelihood', 'a substantial possibility', and 'a reasonable suspicion' of bias. The apprehension of bias must be a reasonable one, held by reasonable, fair minded and informed persons, applying themselves to the question and obtaining thereon the required information. The test is 'what would such a person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would such person think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly'.⁴⁶ The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasize that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by other judges of the capacity or performance of a colleague.

82. The Supreme Court of Canada has observed⁴⁷ that determining whether the judge will bring prejudice into consideration as a matter of fact is rarely an issue. Of course, where this can be established, it will inevitably lead to the disqualification of the judge. But most arguments for disqualification typically begin with an acknowledgment by all parties that there is no actual bias, and move on to a consideration of the reasonable apprehension of bias. Occasionally, this is expressed formally simply because a party, while suspecting actual bias, cannot prove it and therefore contents himself or herself with submitting the reasonable apprehension of bias which is easier to establish. Since the two propositions go hand in hand, to understand what is meant by reasonable apprehension of bias, it is helpful to consider what it means to say that disqualification is not argued on the basis of actual bias. Saying that there is no 'actual bias' can mean three things: that actual bias need not be established because reasonable apprehension of bias can be viewed as a surrogate for

⁴⁶ See *Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451, [2000] 3 LRC 482; *Re Medicaments and Related Classes of Goods (No.2)* [2001] 1 WLR 700; *Porter v Magill* [2002] 2 AC 357; *Webb v The Queen* (1994) 181 CLR 41; *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)* [1992] 89 DLR (4th) 289; *R v Gough* [1993] AC 646; *R v Bow Street Magistrates, Ex parte Pinochet (No.2)* [2001] 1 AC 119.

⁴⁷ *Wewaykum Indian Band v. Canada*, Supreme Court of Canada, [2004] 2 LRC 692, per McLachlin CJ.

it; that unconscious bias can exist even where the judge is acting in good faith; or that the presence or absence of actual bias is not the relevant inquiry.

83. *First*, when parties say that there is no actual bias on the part of the judge, they may mean that the current standard for disqualification does not require that they prove it. In that sense, the ‘reasonable apprehension of bias’ can be seen as a surrogate for actual bias, on the assumption that it may be unwise or unrealistic to require that kind of evidence. It is obviously impossible to determine the precise state of mind of the judge, particularly because the law does not countenance the questioning of a judge about extraneous influences affecting his or her mind; and the policy of the law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

84. *Second*, when parties say that there is no actual bias on the part of the judge, they may be conceding that the judge is acting in good faith, and is not consciously biased. Bias is or may be an unconscious thing and a judge may honestly say that he or she is not actually biased and does not allow his or her interest to affect his or her mind, although, nevertheless, he or she may allow it unconsciously to do so.

85. *Finally*, when parties concede that there is no actual bias, they may be suggesting that looking for real bias is simply not the relevant inquiry. They rely on the aphorism that ‘it is not merely of some importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done’. To put it differently, in cases where disqualification is argued, the relevant inquiry is not whether there was *in fact* either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. In that sense, the reasonable apprehension of bias is not just a surrogate for unavailable evidence, or an evidentiary device to establish the likelihood of unconscious bias, but the manifestation of a broader preoccupation about the image of justice, namely, the overriding public interest that there should be confidence in the integrity of the administration of justice.

86. Of the three justifications for the objective standard of reasonable apprehension of bias, the last is the most stringent for the judicial system, because it countenances the possibility that justice might not be seen to be done, even where it is undoubtedly done – that is, it envisions the possibility that the judge may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias, requiring the judge’s disqualification. But, even where the principle is understood in these terms, the criterion of disqualification still goes to the judge’s state of mind, albeit viewed from the objective perspective of the reasonable person. The reasonable person is asked to imagine the judge’s state of mind, under the circumstances. In that sense, the oft-stated idea that ‘justice must be seen to be done’ cannot be severed from the standard of reasonable apprehension of bias.

A judge should not be unduly sensitive when recusal is sought

87. A judge should not be unduly sensitive and ought not to regard an application for recusal as a personal affront. If the judge were to do so, his or her judgment is likely to become clouded with emotion and, should the judge openly convey that resentment to the parties, the result will most probably be to fuel the applicant's suspicion. Where a reasonable suspicion of bias is alleged, a judge is primarily concerned with the *perceptions* of the applicant for his or her recusal. It is equally important that the judge should ensure that justice is seen to be done, which is a fundamental principle of law and public policy. The judge should therefore so conduct the trial that open-mindedness, impartiality and fairness are manifest to all those who are concerned in the trial and its outcome, especially the applicant. A judge whose recusal is sought should accordingly bear in mind that what is required, particularly in dealing with the application for recusal, is conspicuous impartiality.⁴⁸

Previous political affiliations may not be ground for disqualification

88. In assessing the impartiality of a judge, account may be taken of the responsibilities and interests which the judge may have had during the course of a professional career which had preceded appointment to the judiciary. In those countries where judges are drawn from the private profession of advocate, a judge is likely to have held an office or appointment in which he or she may have given public expression to particular points of view or acted for particular parties or interests. This will necessarily be so where he or she had been involved in political life. Experience outside the law, whether in politics or in any other activity, may reasonably be regarded as enhancing a judicial qualification rather than disabling it. But it has to be recognized and accepted that a judge is expected to leave behind and put aside political affiliations or partisan interests when he or she takes the judicial oath or affirmation to perform judicial duties with independence and impartiality. That has to be one of the considerations which should weigh in the mind of a reasonable, fair-minded and informed person in deciding whether or not there is a reasonable apprehension of bias.⁴⁹

Irrelevant grounds

89. A judge's religion, ethnic or national origin, gender, age, class, means or sexual orientation may not, as such, usually form a sound basis of an objection. Nor, ordinarily, can an objection be soundly based on the judge's social, educational, service or employment background; a judge's membership of social, sporting or charitable bodies; previous judicial decisions; or extra curricular utterances. However, these general observations depend on the circumstances of the particular case and the case has fallen for decision by the judge.

Friendship, animosity and other relevant grounds for disqualification

⁴⁸ See *Cole v Cullinan et al*, Court of Appeal of Lesotho, [2004] 1 LRC 550.

⁴⁹ See *Panton v Minister of Finance*, Privy Council on appeal from the Court of Appeal of Jamaica, [2001] 5 LRC 132; *Kartinyeri v Commonwealth of Australia*, High Court of Australia, (1998) 156 ALR 300.

90. Depending on the circumstances, a reasonable apprehension of bias might be thought to arise (a) if there is personal friendship or animosity between the judge and any member of the public involved in the case; (b) if the judge is closely acquainted with any member of the public involved in the case, particularly if that person's credibility may be significant in the outcome of the case; (c) if, in a case where the judge has to determine an individual's credibility, he had rejected that person's evidence in a previous case in terms so outspoken that they throw doubt on the judge's ability to approach that person's evidence with an open mind on a later occasion; (d) if the judge has expressed views, particularly in the course of the hearing, on any question at issue in such strong and unbalanced terms that they cast reasonable doubts on the judge's ability to try the issue with an objective judicial mind; or (e) if, for any other reason, there might be a real ground for doubting the judge's ability to ignore extraneous considerations, prejudices and predilections, and the judge's ability to bring an objective judgment to bear on the issues. Other things being equal, the objection will become progressively weaker with the passage of time between the event which allegedly gives rise to a danger of bias and the case in which the objection is made.⁵⁰

Offers of post-judicial employment may disqualify the judge

91. Related issues, requiring similar approaches, may arise in relation to overtures to the judge while still on the bench for post-judicial employment. Such overtures may come from law firms or prospective employers, from the private sector or the government. There is a risk that the judge's self-interest and duty may appear to conflict in the eyes of a reasonable, fair-minded and informed person considering the matter. A judge should examine such overtures in this light; particularly since the conduct of former judges often affects the public perception of the serving judiciary whom the judge has left behind in the judgment seat.

⁵⁰ *Locabail (UK) Ltd v Bayfield Properties Ltd*, Court of Appeal of England, [2000] 3 LRC 482.

Such proceedings include, but are not limited to, instances where:

- 2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;**

Commentary

Actual bias or prejudice

92. The actual bias must be personal, and directed towards one of the parties, either individually or as a representative of a class. For a judge to be disqualified because of bias, there should be objective proof that the judge cannot preside with impartiality: would a reasonable observer, knowing all the circumstances, harbour doubts about the judge's impartiality?

Personal knowledge of disputed facts

93. This rule applies to information gained before the case is assigned to the judge, as well as knowledge acquired from an extra-judicial source or personal inspection by the judge while the case is on-going. It applies even where such knowledge has been acquired through independent research undertaken for a purpose unrelated to the litigation (e.g. writing a book),⁵¹ and not called to the notice where that would be appropriate, for the submission of the parties affected. Recusal is not required if the knowledge comes from prior rulings in the same case, or through adjudicating a case of related parties to the same transaction, or because the party had appeared before the judge in a previous case. However, ordinarily, unless the information is obvious, is well-known, is of a type that has been discussed or represents common knowledge, such knowledge should be placed on the record for the submissions of the parties. There are obvious limits to what may be reasonably required in this respect. A judge cannot, for example, in the course of hearing a matter, be expected to disclose every item of law of which he is aware relevant to the case or every fact of common knowledge which may be relevant to judgment. The yardstick to be applied is what might be reasonable according to the perception of a reasonable observer.

⁵¹ See *Prosecutor v Sesay*, Special Court for Sierra Leone (Appeals Chamber), [2004] 3 LRC 678.

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy;

Commentary

Advocate has no responsibility for other members of chambers

94. Where the judge had previously been engaged in private practice as an advocate, his or her independent self-employed status as an advocate practising in chambers relieves the judge of any responsibility for, and usually any detailed knowledge of, the affairs of other members of the same chambers.

Lawyers responsible for professional acts of partners

95. A solicitor or similar lawyer practicing in a firm or company of lawyers may be legally responsible for the professional acts of the other partners. He or she may therefore owe a duty as partner to clients of the firm even though he or she had never acted for them personally and knows nothing of their affairs. Accordingly, a judge who had previously been a member of such a firm or company should not sit on any case in which the judge or the judge's former firm was directly involved in any capacity before the judge's appointment, at least for a period of time after which it is reasonable to assume that any perception of imputed knowledge is spent.

Previous employment in government or legal aid office

96. In assessing the potential for bias arising from a judge's previous employment in a government department or legal aid office, account should be taken of the characteristics of the legal practice within the department or office concerned, and of the administrative, consultative or supervisory role previously played by the judge.

Material witness in the matter in controversy

97. The reason for this rule is that a judge cannot make evidentiary rulings on his own testimony and should not be put in a position of embarrassment arising where this is, or might be seen to be, raised..

2.5.3

the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy;

Commentary

When 'economic interest' disqualifies judge

98. The judge must ordinarily recuse himself or herself from any case in which the judge (or a member of the judge's family) is in a position to gain or lose financially from its resolution. This may be so, for example, where the judge has a substantial shareholding in one of the parties and the outcome of the case might be such as could realistically affect the judge's interest or reasonably appear to do so. Where a publicly listed company is a party and the judge holds a relatively small part of its total shareholding, the judge may not be disqualified since the outcome of the case would usually not affect the judge's interest. It may, however, be different where the litigation involves the viability and survival of the company itself in which case, depending on the circumstances, the outcome may be regarded as realistically affecting the judge's interest.

What is not an 'economic interest'

99. An economic interest does not extend to such holdings or interests as a judge might have, for example, in mutual or common investments funds, deposits a judge might maintain in financial institutions, mutual savings associations or credit unions, or government securities owned by a judge, unless the proceeding could substantially affect the value of such holdings or interests. Nor is disqualification required where a judge is merely involved as a customer dealing in the ordinary course of business with a bank, insurance company, credit card company, or the like, which is a party in a case, without there being pending any dispute or special transaction involving the judge. The fact that securities might be held by an educational, charitable, or civic organization in whose service a judge's spouse, parent or child may serve as a director, officer, advisor or other participant does not, depending on the circumstances, thereby give a judge an economic interest in such an organization. Similarly, in cases involving financial implications which are highly contingent and remote at the time of the decision, one would expect the application of the test generally not to result in disqualification. Nevertheless, it may be a rule of prudence in such cases for the judge to give notice to the parties of any such circumstances and place the substance on the record in open court so that the parties and not just the lawyers are made aware of them. Sometimes lay clients are more suspicious and less trusting than professional colleagues of the judge may be.

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

Commentary

Doctrine of necessity

100. Extraordinary circumstances may require departure from the principle discussed above. The doctrine of necessity enables a judge who is otherwise disqualified to hear and decide a case where failure to do so may result in an injustice. This may arise where there is no other judge reasonably available who is not similarly disqualified, or where an adjournment or mistrial will work extremely severe hardship, or where if the judge in question does not sit a court cannot be constituted to hear and determine the matter in issue.⁵² Such cases will, of course, be rare and special. However, they may arise from time to time in final courts of small numbers charged with important constitutional and appellate functions that cannot be delegated to other judges.

⁵² See *The Judges v Attorney-General of Saskatchewan*, Privy Council on appeal from the Supreme Court of Canada, (1937) 53 TLR 464; *Ebner v Official Trustee in Bankruptcy*, High Court of Australia, [2001] 2 LRC 369; *Panton v Minister of Finance*, Privy Council on appeal from the Court of Appeal of Jamaica, [2002] 5 LRC 132.

Value 3:
INTEGRITY

Principle:
Integrity is essential to the proper discharge of the judicial office.

Commentary

Concept of 'integrity'

101. Integrity is the attribute of rectitude and righteousness. The components of integrity are honesty and judicial morality. A judge should always, not only in the discharge of official duties, act honourably and in a manner befitting the judicial office, and be free from fraud, deceit and falsehood, and be good and virtuous in behaviour and in character. There are no degrees of integrity as so defined. Integrity is absolute. In the judiciary, integrity is more than a virtue; it is a necessity.

Relevance of community standards

102. While the ideal of integrity is easy to state in general terms, it is much more difficult and perhaps even unwise to be more specific. The effect of conduct on the perception of the community depends considerably on community standards that may vary according to place and time. This requires consideration of how particular conduct would be perceived by reasonable, fair minded and informed members of the community, and whether that perception is likely to lessen respect for the judge or the judiciary as a whole. If conduct is likely to diminish respect in the minds of such persons, that conduct should be avoided.

Application

3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

Commentary

High standard required in both private and public life

103. A judge must maintain high standards in private as well as public life. The reason for this lies in the broad range of human experience and conduct upon which a judge may be called upon to pronounce judgment. If the judge is to condemn publicly what he or she practices privately, the judge will be seen as a hypocrite. This must inevitably lead to a loss of public confidence in the judge concerned, which may rub off upon the judiciary more generally.

Community standards should ordinarily be respected in private life

104. A judge should not violate universally accepted community standards or engage in activities that clearly bring disrepute to the courts or the legal system. In attempting to strike the right balance, the judge must consider whether in the eyes of a reasonable, fair-minded and informed member of the community, the proposed conduct is likely to call his or her integrity into question or to diminish respect for him or her as a judge. If so, the proposed course of conduct should be avoided.

No uniform community standard

105. In view of cultural diversity and the constant evolution in moral values, the standards applying to a judge's private life cannot be laid down too precisely.⁵³ This

⁵³ This is particularly evident in respect of sexual activity. For example, in the Philippines, a judge who flaunted an extra-marital relationship was found to have failed to embody judicial integrity, warranting dismissal from the judiciary (*Complaint against Judge Ferdinand Marcos*, Supreme Court of the Philippines, A.M. 97-2-53-RJC, 6 July 2001). In the United States, in Florida, a judge was reprimanded for engaging in sexual activities with a woman who was not his wife, in a parked motor car (*In re Inquiry Concerning a Judge*, 336 So. 2d 1175 (Fla. 1976), cited in Amerasinghe, *Judicial Conduct*, 53). In Connecticut, a judge was disciplined for having an affair with a married court stenographer (*In re Flanagan*, 240 Conn. 157, 690 A. 2d 865 (1997), cited in Amerasinghe, *Judicial Conduct*, 53). In Cincinnati, a married judge who was separated from his wife was disciplined for taking a girl friend (whom he since married) on three foreign visits, although they did not ever occupy the same room (*Cincinnati Bar Association v Heitzler*, 32 Ohio St. 2d 214, 291 N.E. 2d 477 (1972); 411 US 967 (1973), cited in Amerasinghe, *Judicial Conduct*, 53). But in Pennsylvania, also in the United States, the Supreme Court declined to discipline a judge who had engaged in an extra marital sexual relationship which included overnight trips and a one-week vacation abroad (*In re Dalessandro*, 483 Pa. 431, 397 A. 2d 743 (1979), cited in Amerasinghe, *Judicial Conduct*, 53). Some of the foregoing examples would not be viewed in some societies as impinging on the judge's public duties as a judge but relevant only to the private zone of consensual non-criminal adult behaviour.

principle, however, should not be interpreted so broadly as to censure or penalize a judge for engaging in a non-conformist lifestyle or for privately pursuing interests or activities that might be offensive to segments of the community. Judgments on such matters are closely connected to the society and times in question. Few universal applications can be stated so far as such subjects are concerned.

An alternative test

106. It has been suggested that the proper inquiry is not whether an act is moral or immoral according to some religious or ethical beliefs, or whether it is acceptable or unacceptable by community standards (which could lead to arbitrary and capricious imposition of narrow morality), but how the act reflects upon the central components of the judge's ability to do the job for which he or she has been empowered: fairness, independence and respect for the public, and on the public perception of his or her fitness to do the job. Accordingly, it has been suggested that in making a judgment in such a matter, six factors must be considered:

- i. the public or private nature of the act and specifically whether it is contrary to a law that is actually enforced;
- ii. the extent to which the conduct is protected as an individual right;
- iii. the degree of discretion and prudence exercised by the judge;
- iv. whether the conduct was specifically harmful to those most closely involved or reasonably offensive to others;
- v. the degree of respect or lack of respect for the public or individual members of the public that the conduct demonstrates;
- vi. the degree to which the conduct is indicative of bias, prejudice, or improper influence.

It has been argued that the use of these and like factors would assist in striking a balance between public expectations and the judge's rights.⁵⁴

Conduct in court

107. In court, depending on any applicable judicial conventions, a judge should not ordinarily alter the substance of reasons for a decision given orally. On the other hand, the correction of slips, poor expression, grammar or syntax and the inclusion of citations omitted at the time of delivery or oral reasons for judgment are acceptable. Similarly, the transcript of a summing up to a jury should not be altered in any way unless the transcribed text does not correctly record what the judge actually said. A judge should not communicate privately with an appellate court or appellate judge in respect of any pending appeal from that judge's determination. A judge should

⁵⁴ See Shaman, Lubet and Alfani, *Judicial Conduct and Ethics*, pp.335-353.

consider whether it is proper to employ a relative as a clerk and should ensure that proper employment principles are observed before giving any preference to a relative in official employment.

Scrupulous respect for the law is required

108. When a judge transgresses the law, the judge may bring the judicial office into disrepute, encourage disrespect for the law, and impair public confidence in the integrity of the judiciary itself. This rule too cannot be stated absolutely. A judge in Nazi Germany might not offend the principles of the judiciary by mollifying the application of the Nuremberg Law on racial discrimination. Likewise, the judge in apartheid South Africa. Sometimes a judge may, depending on the nature of the judge's office, be confronted by the duty to enforce laws that are contrary to basic human rights and human dignity. If so confronted, the judge may be duty bound to resign the judicial office rather than compromise the judicial duty to enforce the law. A judge is obliged to uphold the law. He or she should not therefore be placed in a position of conflict in observance of the law. What in others may be seen as a relatively minor transgression may well attract publicity, bringing the judge into disrepute, and raising questions regarding the integrity of the judge and of the judiciary.

3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

Commentary

Personal conduct of judge affects judicial system as a whole

109. Confidence in the judiciary is founded not only on the competence and diligence of its members, but also on their integrity and moral uprightness. He or she must not only be a 'good judge', but must also be a 'good person', although views about what that means may vary in different quarters of society. From the public's perspective, a judge has not only pledged to serve the ideals of justice and truth on which the rule of law and the foundations of democracy are built, but has also promised to embody them. Accordingly, the personal qualities, conduct and image that a judge projects affects those of the judicial system as a whole and, therefore, the confidence that the public places in it. The public demands from the judge conduct which is far above what is demanded of their fellow citizens, standards of conduct much higher than those of society as a whole; in fact, virtually irreproachable conduct. It is as if the judicial function, which is to judge others, has imposed a requirement that the judge remain beyond the reasonable judgment of others in matters that can in any reasonable way impinge on the judicial role and office..

Justice must be seen to be done

110. Because appearance is as important as reality in the performance of judicial functions, a judge must be beyond suspicion. The judge must not only be honest, but also appear to be so. A judge has the duty to not only render a fair and impartial decision, but also to render it in such a manner as to be free from any suspicion as to its fairness and impartiality, and also as to the judge's integrity. Therefore, while a judge should possess proficiency in law in order to competently interpret and apply the law, it is equally important that the judge should act and behave in such a manner that the parties before the court should have confidence in the judge's impartiality.

Value 4:
PROPRIETY

Principle:
**Propriety, and the appearance of propriety, are essential to the performance
of all of the activities of a judge.**

Commentary

How will this look in the eyes of the public?

111. Propriety and the appearance of propriety, both professional and personal, are essential elements of a judge's life. What matters more is not what a judge does or does not do, but what others think the judge has done or might do. For example, a judge who speaks at length privately with a litigant in a pending case will appear to be giving that party an advantage, even if in fact the conversation is completely unrelated to the case. Since the public expects a high standard of conduct on the part of a judge, he or she must, when in doubt about attending an event or receiving a gift, however small, ask the question, 'How might this look in the eyes of the public?'

Application:

4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

Commentary

The test for impropriety

112. The test for impropriety is whether the conduct compromises the ability of the judge to carry out judicial responsibilities with integrity, impartiality, independence and competence, or is likely to create, in the mind of a reasonable observer, a perception that the judge's ability to carry out judicial responsibilities in that manner is impaired. For example, treating a state official differently from any other member of the public by giving that official preferential seating, creates the appearance to the average observer that the official has special access to the court and its decision-making processes. On the other hand, school children often tour the courts and are seated in special places, at times on the bench. Children are not in a position of power and, therefore, do not create an appearance of improper influence especially when their presence is explained to be for an educational purpose.

Inappropriate contacts

113. The judge must be sensitive to avoid contacts that may give rise to speculation that there is a special relationship with someone upon whom the judge may be tempted to confer an advantage. For example, a judge must ordinarily avoid being transported by police officers or lawyers and, when using public transport, must avoid sitting next to a litigant or witness.

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

Commentary

A judge must accept restrictions on his or her activities

114. A judge must expect to be the subject of constant public scrutiny and comment, and must therefore accept restrictions on his or her activities – even activities that would not elicit adverse notice if carried out by other members of the community or even of the profession - that might be viewed as burdensome by the ordinary citizen, and should do so freely and willingly. This applies to both the professional and the personal conduct of a judge. The legality of a judge’s conduct, although relevant, is not the full measure of its propriety.

Requirement of an exemplary life

115. A judge is required to live an exemplary life off the bench as well. A judge must behave in public with the sensitivity and self-control demanded by judicial office, because a display of injudicious temperament is demeaning to the processes of justice and inconsistent with the dignity of judicial office.

Visits to public bars, etc

116. In contemporary circumstances, at least in most countries, there is no prohibition against a judge visiting pubs, bars, or similar venues, but discretion should be exercised. The judge should consider how such visits are likely to be perceived by a reasonable observer in the community in the light, for example, of the reputation of the place visited, the persons likely to frequent it, and any concern that may exist as to the place not being operated in accordance with law.

Gambling

117. There is no prohibition against a judge engaging in occasional gambling as a leisure activity, but discretion should be exercised, bearing in mind the perception of a reasonable observer in the community. It is one thing to pay an occasional visit to the horse races, or to a casino when abroad during a holiday, or to play cards with friends and family. It may be quite another for a judge to stand too frequently at the betting windows of race tracks, become an inveterate gambler, or a dangerously heavy punter.

Frequenting clubs

118. A judge should exercise care in relation to using clubs and other social facilities. For example, care should be exercised in attending venues run by or for members of the police force, the anti-corruption agency and customs and excise department which are, or whose members are, likely to appear frequently before the courts. While there is no objection to a judge accepting an occasional invitation to dine at a police mess, it would be undesirable for the judge to frequent or become a member of such clubs or to be a regular user of such facilities. In most societies it is normal for judges to attend venues organized by the practising legal profession and mixing with advocates on a social basis.

4.3. A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

Commentary

Social contact with the legal profession

119. Social contact between members of the judiciary and members of the legal profession is a long-standing tradition and is proper. However, as a matter of common sense, depending on the circumstances, a judge should exercise caution. Since judges do not live in ivory towers but in the real world, they cannot be expected to sever all of their ties with the legal profession upon assuming judicial office. Nor would it be entirely beneficial to the judicial process for judges to isolate themselves from the rest of society which includes some who may have been schoolfriends, former associates, or colleagues in the legal profession. Indeed, a judge's attendance at social functions with lawyers offers some benefits. The informal exchanges that such functions allow may help reduce tensions between the judiciary and advocates and alleviate some of the isolation from former colleagues that a judge experiences upon elevation to the judicial office. However, as a matter of commonsense, a judge should exercise caution.

Social relationships with individual lawyers

120. Having a social relationship with a lawyer who regularly appears before a judge is fraught with danger and entails a balancing process. On the one hand, the judge should not be discouraged from having social or extrajudicial relationships. On the other hand, the obvious problem of the appearance of bias and favouritism exists when a friend or associate appears before the judge. The judge is the ultimate arbiter of whether he or she has an excessively close or personal relationship with a lawyer, or has created that appearance. Where that line is to be drawn is a decision that the judge will have to make. The test is whether the social relationship interferes with the discharge of judicial responsibilities, and whether a disinterested observer, fully informed of the nature of the social relationship, might reasonably entertain significant doubt that justice would be done. The judge must also be mindful of the enhanced danger of inadvertently being exposed to extrajudicial information concerning a case that the judge is hearing or one with which the judge may become involved. A judge would therefore be wise to avoid recurring contact with a lawyer in circumstances that would create a reasonable perception that the judge and the lawyer have a close personal relationship whilst a particular case is proceeding or pending in which the lawyer is appearing before the judge.

Social relationship with a lawyer neighbour

121. Where a judge's immediate residential neighbour is a lawyer who appears regularly in the court in which the judge sits, the judge is not required to abstain from all social contact with the lawyer, except perhaps when the lawyer is appearing before the judge in an ongoing case. Depending on the circumstances, some degree of socializing is acceptable, provided the judge does not create either the need for frequent recusal or the reasonable appearance that his or her impartiality might be compromised.

Participation in occasional gatherings of lawyers

122. There could be no reasonable objection for a judge to attend a large cocktail party given, for example, by newly appointed senior advocates to celebrate professional attainments. At such a function, although advocates appearing before the judge are likely to be present, direct social contact can readily be avoided whilst a case is pending. If such contact does take place, talk of the case should be avoided and, depending on the circumstances, the other parties to the hearing might be informed of the contact at the earliest opportunity. The overriding consideration is whether such social activity will create or contribute to the perception that the lawyer has a special relationship with the judge, and that this special relationship implies a special willingness on the part of the judge to accept and rely on the lawyer's representations.

Ordinary social hospitality

123. A judge is ordinarily permitted to receive ordinary social hospitality from advocates and other lawyers. Socializing with advocates under these circumstances is to be encouraged because of the benefits which come from the informal discussions which take place at social events. However, a judge may not receive a gift from a lawyer who might appear before the judge, and may not attend a social function given by a law firm where the hospitality exceeds ordinary and modest social hospitality. The criterion is how the event might appear to a reasonable observer who may not be as tolerant of the conventions of the legal profession as those members themselves are.

Guest of a law firm

124. Whether a judge may attend a party given by a law firm depends upon who is giving the party and who may be in attendance, as well as the nature of the party. In deciding whether to attend, the judge will have to rely upon his or her knowledge of local custom and past events. Depending on the circumstances, it might be necessary to ask the host to identify those invited and the extent of the hospitality to be given. Especial care should be taken where a particular firm may be seen as marketing itself or its services to clients or potential clients. There is also an obvious distinction between entertainment by professional associations (to which judges may indeed often be invited to speak on matters of general interest) and by particular law firms.

The judge must ensure that presence at a law firm party will not affect the judge's appearance of impartiality.

Visits to former chambers, firm or office

125. Care should be taken in assessing the appropriate degree to which social visits to the judge's old chambers or law firm should be made. For example, it would ordinarily be appropriate for a judge to visit the old chambers or law firm to attend a function, such as an annual party or an anniversary party or a party to celebrate the appointment of a member of chambers as senior counsel or elevation to judicial office. However, depending on the circumstances, excessively frequent visits by a judge to his or her old chambers in order to socialize with former colleagues might not be appropriate. Similarly a judge who had previously been a prosecutor should avoid being too close to former fellow prosecutors and to police officers who previously were his or her clients. Even to give the appearance of cronyism would be unwise.

Social relationships with litigants

126. A judge should be careful to avoid developing excessively close relationships with frequent litigants – such as government ministers or their officials, municipal officials, police prosecutors, district attorneys, and public defenders – in any court where the judge often sits, if such relationships could reasonably tend to create either an appearance of partiality or the likely need for later disqualification. In making the decision, it is appropriate for the judge to consider the frequency with which the official or lawyer appears before him or her, the nature and degree of the judge's social interaction, the culture of the legal community in which the judge presides, and the sensitivity and controversy of present or foreseeable litigation.

Membership of secret societies

127. It is inadvisable for a judge to belong to a secret society where lawyers who appear before him or her are also members, since it may be inferred that favours might be given to those particular lawyers as part of the brotherhood code.

4.4 A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

Commentary

When recusal is mandatory

128. A judge is ordinarily required to recuse himself or herself in a case in which any member of the judge's family (including a fiancé or fiancée) has participated or has entered an appearance as counsel.

Where family member is affiliated to law firm

129. Members of a law firm normally share profits or expenses in some manner and are motivated to acquire clients, in part, through the successful conclusion of their cases. However, the fact that a lawyer in a proceeding is affiliated with a law firm with which a member of the judge's family is affiliated may not of itself require the judge's recusal. Under appropriate circumstances, the fact that the judge's impartiality may reasonably be questioned or that the relative is known by the judge to have an interest in the law firm that could be substantially affected by the outcome of the proceeding will require the judge's recusal. Additionally, factors that a judge may consider in a case by case analysis include but are not limited to the following:

- (a) the appearance to the general public of the failure to recuse;
- (b) the appearance to other lawyers, judges and members of the public of the failure to recuse;
- (c) the administrative burden of the recusal on the courts; and
- (d) the extent of the financial, professional, or other interest of the relative in the matter.

Where family member is employed in government department

130. Although government lawyers are paid a salary and no economic or profit motive is usually involved in the outcome of criminal or civil cases, the desire to achieve professional success is a factor to be considered. Therefore, even if a family member who is employed in a public prosecutor's or public defender's office does not hold any supervisory or administrative position in that office, caution should be exercised and recusal from all cases from that office considered for two reasons. First, because members in that office may share information on pending cases, there is a risk that the judge's family member would inadvertently be involved in, or influence, other cases coming from that office, even without direct supervisory responsibility. Coupled with this concern is a second reason for considering recusal, namely, that the

judge's impartiality might reasonably be questioned. The test is: might a reasonable observer have significant doubt over whether the judge might have a conscious or subconscious bias towards the professional success of the office in which the judge's family member serves on a regular basis?

Dating relationship with a lawyer

131. Where a judge is socially involved in a dating relationship with a lawyer, the judge should ordinarily not sit on cases involving that lawyer, unless the appearance of the lawyer is purely formal or otherwise put on the record. However, the judge is not ordinarily required to recuse himself or herself in cases involving other members of that lawyer's firm or office.

Circuits in which there is only one judge and one lawyer

132. In those judicial circuits or districts where there is only one judge on the bench and one lawyer in the prosecutor's or defender's office, if that lawyer happens to be the son or daughter or other close relative of the judge, a mandatory disqualification would result in the judge being disqualified in all criminal cases. This would impose hardship, not only on the other judges in the region who would be called upon to sit for the disqualified judge, but also on the defendants. It would also become difficult to guarantee a speedy trial, to which defendants are entitled, if a substitute judge has to be found in all such criminal cases. While disqualification may not be an absolute requirement in these circumstances, situations such as these should, so far as reasonably practicable, be avoided.

4.5 A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

Commentary

Use of judge's residence or telephone

133. It is inappropriate for the judge to permit a lawyer to use the judge's residence to meet clients or lawyers in connection with that lawyer's legal practice. Where the judge's spouse or other member of the judge's family is a lawyer, the judge should not share a home telephone line with that person's legal practice since to do so could lead to the perception that the judge is also practising law, and potentially to inadvertent ex parte communications or the appearance or suspicion of such communications.

4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

Commentary

Judge enjoys rights in common with other citizens

134. A judge on appointment does not surrender the rights to freedom of expression, association and assembly enjoyed by other members in the community, nor does the judge abandon any former political beliefs and cease having any interest in political issues. However, restraint is necessary to maintain public confidence in the impartiality and independence of the judiciary. In defining the appropriate degree of involvement of the judiciary in public debate, there are two fundamental considerations. The first is whether the judge's involvement could reasonably undermine confidence in his or her impartiality. The second is whether such involvement may unnecessarily expose the judge to political attack or be inconsistent with the dignity of judicial office. If either is the case the judge should avoid such involvement.

Incompatible activities

135. A judge's duties are incompatible with certain political activities, such as membership of the national parliament or local council.

Judge should not be involved in public controversies

136. A judge should not involve himself or herself inappropriately in public controversies. The reason is obvious. The very essence of being a judge is being able to approach the various problems that are the subject of disputes in an objective and judicial manner. It is equally important that the judge should be seen by the public as exhibiting that detached, unbiased, unprejudiced, impartial, open-minded, and even-handed approach which is the hallmark of a judge. If a judge enters into the political arena and participates in public debates, either by expressing opinions on controversial subjects, entering into disputes with public figures in the community, or publicly criticizing the government, the judge will not be seen to be acting judicially when presiding as a judge in court and deciding disputes which either touch the subjects in respect of which the judge has expressed public opinions, or perhaps more importantly, when the public figures or government departments that the judge has previously criticized publicly are parties or litigants or even witnesses in cases that he or she as a judge is adjudicating upon.

Criticism of the judge by others

137. Members of the public, of the legislature, and of the executive, may comment publicly concerning what they may view to be the limitations, faults or errors of a judge and his or her judgments. The judge concerned, because of the convention of political silence, does not ordinarily reply. While the right to criticize a judge is subject to the rules relating to contempt, these are invoked more rarely today than in former times to suppress or punish expression critical of the judiciary or a particular judge. The better and wiser course is to ignore any scandalous attack rather than exacerbate the publicity by initiating contempt proceedings. As has been observed, ‘justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even if outspoken, comments of ordinary men’.⁵⁵

Judge may speak out on matters that affect the judiciary

138. There are limited circumstances in which a judge may properly speak out about a matter that is politically controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice, or the personal integrity of the judge. However, even with respect to these matters, a judge should act with great restraint. While a judge may properly make public representations to the government on these matters, the judge must not be seen as ‘lobbying’ government or as indicating how he or she would rule if particular situations were to come before the court. Moreover, a judge must remember that his or her public comments may be taken as reflecting the views of the judiciary; it may sometimes be difficult for a judge to express an opinion that will be taken as purely personal and not that of the judiciary generally.

Judge may participate in discussion of the law

139. A judge may participate in discussion of the law for educational purposes or in pointing out weaknesses in the law. In certain special circumstances, a judge’s comments on draft legislation may be helpful and appropriate, provided that the judge avoids offering informal interpretations or controversial opinions on constitutionality. Normally, judicial commentary on proposed legislation or on other questions of government policy should relate to practical implications or drafting deficiencies and should avoid issues of political controversy. In general, such judicial commentary should be made as part of a collective or institutionalised effort by the judiciary, not that of an individual judge.

⁵⁵ *Ambard v. Attorney General for Trinidad and Tobago*, [1936]AC 322 at 335, per Lord Atkin.

When judge may feel it a moral duty to speak

140. Occasions may arise in a judge's life when, as a human being with a conscience, morals, feelings and values, the judge considers it to be a moral duty to speak out. For example, in the exercise of the freedom of expression, a judge might join a vigil, hold a sign or sign a petition to express opposition to war, support for energy conservation or independence or funding for an anti-poverty agency. These are expressions of concern for the local and global community. If any of these issues were to arise in the judge's court, and if the judge's impartiality might reasonably be questioned, the judge must disqualify himself or herself from any proceedings that follow where the past participation casts doubt on the judge's impartiality and judicial integrity.

4.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

Commentary

Duty to be aware of financial interests

141. If consequent to his or her decision in a proceeding before the court, it appears that the judge, or a member of the judge's family, or other person in respect of whom the judge is in a fiduciary relationship, is likely to benefit financially, the judge has no alternative but to stand down. Therefore, it is necessary that the judge should be always aware of his or her personal and fiduciary financial interests as well as those of his or her family. 'Fiduciary' includes such relationships as executor, administrator, trustee, and guardian.

Financial interest

142. 'Financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of an institution or organization, except that:

- (i) ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in securities held by that organization;
- (ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a 'financial interest' in securities held by that organization;
- (iii) the proprietary interest of a policy holder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a 'financial interest' in the organization only if the outcome of any proceeding could substantially affect the value of the interest;
- (iv) ownership of government securities is a 'financial interest' in the issuer only if the outcome of any proceeding could substantially affect the value of the securities.

4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.

Commentary

Duty to avoid being improperly influenced

143. The judge's family, friends, and social, civic and professional colleagues with whom he or she associates regularly, communicates on matters of mutual interest or concern, and shares trust and confidence, are in a position to improperly influence, or to appear to influence, the judge in the performance of his or her judicial functions. They may seek to do so on their own account or as peddlers of influence to litigants and counsel. A judge will need to take special care to ensure that his or her judicial conduct or judgment is not even sub-consciously influenced by these relationships.

Duty to avoid pursuing self-interest

144. A judge abuses power when he or she takes advantage of the judicial office for personal gain or retaliation. A judge must avoid all activity that suggests that the judge's decisions are affected by self-interest or favouritism, since such abuse of power profoundly violates the public's trust in the judiciary.

4.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

Commentary

Duty to distinguish between proper and improper use of judicial office

145. A judge is generally regarded by members of the public as a very special person, and treated in court, and probably outside too, with a measure of subservience and flattery. A judge should, therefore, distinguish between proper and improper use of the prestige of the judicial office. It is improper for a judge to use or attempt to use his or her position to gain personal advantage or preferential treatment of any kind. For example, a judge should not use judicial letterhead to gain an advantage in conducting his or her personal business. Nor should a judge use the fact of holding judicial office in an attempt, or what might reasonably be seen to be an attempt, to extricate himself or herself from legal or bureaucratic difficulties. If stopped for an alleged traffic offence, a judge should not volunteer his or her judicial status to the law enforcement officer. A judge who telephones a prosecutor to inquire 'whether anything could be done' about a ticket that had been given to a court clerk for a traffic violation, is giving the appearance of impropriety even if no attempt is made to use the judicial position to influence the outcome of the case.

No necessity to conceal fact of holding judicial office

146. A judge does not need to conceal the fact of holding judicial office. But a judge should take care to avoid giving any impression that the status of judge is being used in order to obtain some form of preferential treatment. For example, if a son or daughter were to be arrested, a judge would be subject to the same human emotions as any other parent, and is entitled, as a parent, to respond to any felt injustice about the treatment of a child. But if the judge, directly or through intermediaries, were to contact law enforcement officials, referring to his position as a judge, and demand that the arresting officer should be disciplined, the line between parent and judge is being blurred. While the judge, as any parent, is entitled to provide parental help for the son or daughter, and has the right to take legal action to protect the child's interests, the judge has no right to engage in any conduct that would be unavailable to a parent who does not hold judicial office. To use the judicial office in an attempt to influence other public officials in the performance of their lawful duties is to cross the line of reasonable parental protection and intercession, and to misuse the prestige of the judicial office.

Use of judicial stationery

147. Judicial stationery should not be used in a way that amounts to an abuse of the prestige of judicial office. In general, judicial stationery is intended for use when a judge wishes to write in an official capacity. Care should be taken in the use of judicial stationery when writing in a private capacity. For example, depending on the circumstances, it would not be objectionable to send a ‘thank you’ note after a social occasion using such stationery. On the other hand, it would not be appropriate to use judicial stationery where there may be a reasonable perception that the judge is seeking to draw attention to the fact of his or her being a judge in order to influence the recipient of the letter, for example, when writing to complain regarding a disputed claim on an insurance policy.

Letters of reference

148. There is no objection to a judge providing a letter of reference, but caution should be exercised. A person seeking such a letter may do so not because he or she is well known to the judge but solely to benefit from the judge’s status. In relation to letters of reference, judicial stationery should generally only be used when the judge’s personal knowledge of the individual has arisen in the course of judicial work. The following guidelines are offered:

1. A judge should not write a letter of reference for a person whom he or she does not know.
2. A judge may write a letter of reference if it is one which would be written in the ordinary course of business (eg. a court employee seeking a reference with regard to the employee’s work history). The letter should include a statement of the source and extent of the judge’s personal knowledge, and should ordinarily be addressed and mailed directly to the person or organization for whose information it is being written. In the case of a personal employee of the judge, such as a law clerk who is seeking other employment, a general letter of reference might be provided and addressed ‘To whom it may concern’.
3. A judge may write a letter of reference for someone whom the judge knows personally but not professionally, such as a relative or close friend, if it is one which he or she would normally be requested to write as a result of personal relationship.

Providing character testimony

149. The testimony of a judge as a character witness injects the prestige of the judicial office into the proceeding in which the judge testifies and may be misunderstood to be an official testimonial. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in an awkward position of cross-examining the judge. Therefore, ordinarily, a judge should not volunteer to give character evidence in court. If requested, a judge should only

agree to do so when to refuse would be manifestly unfair to the person seeking that character evidence; for example, for another judicial officer entitled to have evidence of his character from his or her peers. This, however, does not afford the judge a privilege against testifying in response to a binding summons.

150. To voluntarily write or telephone officials of the Bar in a disciplinary proceeding involving a lawyer is, in effect, to testify as a character witness and thereby lend the prestige of judicial office in support of the private interests of the lawyer. Similarly, to voluntarily contact a committee on behalf of a judicial candidate without an official request from that committee is tantamount to testifying as a character witness and lending the prestige of judicial office to advance the private interests of another.

Contributing to publications

151. Special considerations arise when a judge writes or contributes to a publication, whether related or unrelated to the law. A judge should not permit anyone associated with the publication to exploit the judge's office. In contracts for publication of a judge's writings, the judge should retain sufficient control over advertising to avoid exploitation of the judge's office.

Appearance on commercial radio or television

152. The appearance of a judge on a commercial radio or television network might be seen as advancing the financial interests of that organization or its sponsors. Care should therefore be taken in doing so. On the other hand, many citizens secure their knowledge about events, social affairs and the law from such outlets. Depending on the arrangements, therefore, participation in a programme connected with the law could be appropriate. Several factors need to be considered in determining whether or not a judge should participate in such programmes: the frequency of appearance, the audience, the subject matter, and whether the programme is commercial or non-commercial. For example, depending on the circumstances, a discussion of the role of the judiciary in government or the court's relationship with community education and treatment facilities could be appropriate.

Former judges

153. Depending on local convention, a former judge might refer to past appointment as a 'judge' or 'justice' in an advertisement offering mediation or arbitration services since the information indicates the former judge's experience as a fact-finder. However, it is desirable that the title is accompanied by the words 'retired' or 'former' to indicate that he or she no longer serves as a sitting judge. Former judges should not use 'Honourable' or 'Hon.' in advertisements offering these services.

4.10 Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

Commentary

Confidential information not to be used for personal gain or communicated to others

154. In the course of performing judicial duties, a judge may acquire information of commercial or other value that is unavailable to the public. The judge must not reveal or use such information for personal gain or for any purpose unrelated to judicial duties.

Essence of prohibition

155. This prohibition is principally concerned with the improper use of undisclosed evidence; for example, evidence subject to a confidentiality order in large scale commercial litigation.

4.11 Subject to the proper performance of judicial duties, a judge may:

4.11.1 write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;

Commentary

Participation in community education

156. A judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, both within and outside the judge's jurisdiction. Such contributions may take the form of speaking, writing, teaching or participating in other extra-judicial activities. Provided that this does not detract from the discharge of judicial obligations, and to the extent that time permits, a judge is to be encouraged to undertake such activities.

Participation in legal education

157. A judge may contribute to legal and professional education by delivering lectures, participating in conferences and seminars, judging student training hearings and acting as an examiner. A judge may also contribute to legal literature as an author or editor. Such professional activities by judges are in the public interest and are to be encouraged. However, the judge should, where necessary, make it clear that comments made in an educational forum are not intended as advisory opinions or a commitment to a particular legal position in a court proceeding, particularly because judges do not express opinions or give advice on legal issues which are not properly before a court. Until evidence is presented, argument heard, and, when necessary, research completed, a judge cannot weigh impartially the competing evidence and arguments and form a definitive judicial opinion. Prior to accepting any compensation, the judge must satisfy himself or herself that the amount of compensation does not exceed the amount that another teacher who is not a judge would receive for comparable teaching responsibilities and is compatible with any constitutional or legal obligations governing the receipt of additional remuneration.

4.11.2 appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

Commentary

Appearance before an official body as a judge

158. A judge may appear and give evidence before an official body to the extent that it would generally be perceived that the judge's judicial experience provides special expertise in the area to do so.

Appearance before an official body as a private citizen

159. A judge may appear as a private citizen to give evidence or make submissions before governmental bodies on matters that are likely to have special effect upon him or her privately, such as zoning proposals that will affect the judge's real property, or proposals having to do with the availability of local health services. The judge must exercise care, however, not to lend the prestige of judicial office to advance general causes in such public inquiries with respect to which the judge possesses no special judicial competence.

4.11.3 serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge;

Commentary

Membership of a commission of inquiry

160. Because of the reputation which the judiciary enjoys in the community and the weight accorded to judicial findings of fact, judges are often called upon to conduct inquiries and make reports on matters which are, or are deemed to be, of public importance but which fall outside the scope of the functions of the judiciary. In considering such a request, a judge should think carefully about the implications for judicial independence of accepting the assignment. There are examples of judges becoming embroiled in public controversy and being criticized and embarrassed following the publication of reports of commissions of inquiry on which they have served. The terms of reference and other conditions such as time and resources should be examined carefully so as to assess their compatibility with the judicial function. There is often no obligation on the judge to undertake a commission of inquiry, except perhaps in a matter of national importance arising in a time of national emergency; it is then done as an act of grace. In some countries, for constitutional reasons, judges are forbidden to undertake enquiries for the executive government⁵⁶ and, even if permitted, are discouraged from doing so, depending on the subject matter and procedures for nominating the judge concerned.

161. While cogent arguments may be advanced for the view that the public or national interest demands a full, clear and searching inquiry into a matter that vitally affects the public, and that the task can best be performed by a judge who has acquired by experience over many years, as a judge and as a legal practitioner, the ability to sift evidence and to assess the credibility of witnesses, it is necessary to bear in mind that:

- (i) The legitimate function of a judge is to judge. It is a function which very few people in the community are equipped to do, and the number of people who are qualified and available to perform that function at any given time, apart from those already appointed to judicial office, is necessarily very limited. There are, on the other hand, sufficient men and women of ability and experience who are competent to serve with distinction as commissioners without calling on the judiciary to undertake that task;⁵⁷ and
- (ii) The function of a commission of inquiry ordinarily belongs not to the judicial but to the executive sphere. That function is one of investigating and ascertaining for the information of the executive facts on which appropriate action may be taken. Such action may well involve proceedings in the courts

⁵⁶ *Wilson v Minister for Aboriginal Affairs*, High Court of Australia, (1997) 189 CLR 1.

⁵⁷ Sir Murray McInerney, "The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities", (1978) *The Australian Law Journal*, vol.52, pp 540-553.

of a civil or criminal nature against individuals whose conduct has been investigated by the commission. Alternatively, the investigation might be concerned with a controversial proposal such as the building of an airport or a highway, the investigation of an air-crash, the reform of some particular aspect of the law or policy, the legal needs of special groups and so forth. Like all executive action, the proceedings and findings of a commission of inquiry may properly be, and frequently are, the subject of public controversy.

162. In 1998, the Canadian Judicial Council declared its position on the appointment of federally-appointed judges to commissions of inquiry.⁵⁸ The procedure which it approved included the following steps:

- (i) Every request that a judge serve on a commission of inquiry should in the first instance be made to the chief justice;
- (ii) The request should be accompanied by the proposed terms of reference for the inquiry and an indication as to the time limit, if any, to be imposed on the work of the commission;
- (iii) The chief justice, in consultation with the judge in question, should consider whether the absence of the judge would significantly impair the work of the court;
- (iv) The chief justice and the judge will wish to consider whether the acceptance of the appointment to the commission of inquiry could impair the future work of the judge as a member of the court. In this respect, they may consider:
 - (a) Does the subject-matter of the inquiry either essentially require advice on public policy or involve issues of an essentially partisan nature?
 - (b) Does it essentially involve an investigation into the conduct of agencies of the appointing government?
 - (c) Is the inquiry essentially an investigation of whether particular individuals have committed a crime or a civil wrong?
 - (d) Who is to select commission counsel and staff?
 - (e) Is the proposed judge through particular knowledge or experience specially required for this inquiry? Or would a retired judge or a supernumerary judge be as suitable?
 - (f) If the inquiry requires a legally-trained commissioner, should the court feel obliged to provide a judge or could a senior lawyer perform this function equally well?

⁵⁸ *Position of the Canadian Judicial Council on the Appointment of Federally-Appointed Judges to Commissions of Inquiry*, approved at its March 1998 meeting, www.cjc-ccm.gc.ca

In the absence of extraordinary circumstances, it is the position of the Canadian Judicial Council that no federally-appointed judge should accept appointment to a commission of inquiry until the chief justice and the judge in question have had sufficient opportunity to consider all the above matters and are satisfied that such acceptance will not significantly impair either the work of the court or the future judicial work of the judge.

163. A judge should ordinarily be cautious about accepting appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice, unless the appointment of a judge is required by law. A judge should not, in any event, accept such an appointment if the judge's governmental duties would interfere with the performance of judicial duties or tend to undermine public confidence in the integrity, impartiality, or independence of the judiciary. Moreover, if the judge remains away from regular duties for very long periods, he or she may find that the task of getting back to normal life and of adjusting his or her outlook and habits of mind to judicial work is by no means easy.

Involvement in governmental activities

164. While exercising functions as a judge, the judge should not at the same time be involved in executive or legislative activities. However, if the system permits, a judge may, after leaving his or her functions in the judiciary, exercise functions in an administrative department of a ministry (for example, a civil or criminal legislation department in the ministry of justice). The matter is more delicate with regard to a judge who becomes part of the staff of a minister's private office. While this would never be regarded as a proper appointment for a judge in a common law country, the position is different in some civil law jurisdictions. In such circumstances, before a judge enters into service in a minister's private office in a civil law country, an opinion should necessarily be obtained from the organ responsible for the appointment of judges and from judicial colleagues so that the rules of conduct applicable in each individual case could be established. Before returning to the judiciary, a judge should quit all his or her involvement in executive or legislative functions.

Representation of the State

165. A judge may represent the judge's country, state, or locality on ceremonial occasions or in connection with national, regional, historical, educational, or cultural activities.

4.11.4 engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

Commentary

Participation in extra-judicial activities

166. A judge may engage in appropriate extra-judicial activities so as not to become isolated from the community. A judge may therefore write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such activities do not detract from the dignity of the judge's office or interfere with the performance of the judge's judicial duties. Indeed, working in a different field offers a judge an opportunity to broaden his or her horizons and gives the judge an awareness of problems in society which supplements the knowledge acquired from the exercise of duties in the legal profession. However, a reasonable balance needs to be struck between the degree to which judges may be involved in society and the need for them to be, and to be seen as, independent and impartial in the discharge of their duties. In the final analysis, the question must always be asked whether, in the particular social context and in the eyes of a reasonable observer, the judge has engaged in an activity which could objectively compromise his or her independence or impartiality or which might appear to do so.

Membership in a non-profit making organization

167. A judge may participate in community, non-profit-making organizations of various types by becoming a member of an organization and its governing body. Examples include charitable organizations, university and school councils, lay religious bodies, hospital boards, social clubs, sporting organizations, and organizations promoting cultural or artistic interests. However, in relation to such participation, the following matters should be borne in mind:

- (a) It would not be appropriate for a judge to participate in an organization if its objects are political or if its activities are likely to expose the judge to public controversy, or if the organization is likely to be regularly or frequently involved in litigation;
- (b) A judge should ensure that it does not make excessive demands on his or her time;
- (c) A judge should not serve as legal adviser. This does not prevent a judge from expressing a view, purely as a member of the body in question, on a matter which may have legal implications; but it should be made clear that such views must not be treated as legal advice. Any legal advice required by the body should be professionally sought;

- (d) A judge should be cautious about becoming involved in, or lending his or her name to, any fund raising activities; and
- (e) A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

168. A judge should not hold membership in any organization that practices discrimination on the basis of race, sex, religion, national origin, or other irrelevant cause contrary to fundamental human rights, because such membership might give rise to perceptions that the judge's impartiality is impaired. Whether an organization's practices are invidiously discriminatory is often a complex question. In general, an organization is said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, gender, national origin, ethnicity or sexual orientation those individuals who would otherwise be admitted. A judge may, however, become a member of an organization dedicated to the preservation of religious, ethnic or legitimate cultural values of common interest to its members. Similarly, a judge should not arrange a meeting at a club that the judge knows practises invidious discrimination; nor may the judge use such a club regularly.

Financial activities

169. A judge has the rights of an ordinary citizen with respect to his or her private financial affairs, except for any limitations required to safeguard the proper performance of the judge's duties. A judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, active partner, manager, advisor, or employee of any business other than a business closely held and controlled by members of the judge's family. A judge's participation in a closely held family business, while generally permissible, should be avoided if it involves too much time, or involves misuse of judicial prestige, or if the business is likely to come before a court. It is, however, inappropriate for a judge to serve on the board of directors of a commercial enterprise, that is, a company whose objects are profit related. This applies to both public and private companies, whether the directorship is executive or non-executive, and whether it is remunerated or not.

Membership in a residents' association

170. Where a judge owns or occupies premises in a building which has an owners' or residents' association, then he or she may serve on its management committee but should not give legal advice. However, this does not prevent a judge from expressing a view, purely as a member of the body in question, on a matter which may have legal implications; but it should be made clear that such views must not be treated as legal advice. Any legal advice required by the body should be professionally sought. If it appears that an issue arising may be or become controversial, it would ordinarily be prudent for the judge to express no opinion on contested matters. Such opinions are bound to be circulated to the possible embarrassment of the judge and the court concerned.

Acting in a fiduciary capacity

171. Depending on the circumstances, a judge may act as executor, administrator, trustee, guardian or other fiduciary of the estate, trust or person of a family member or close friend if such service will not interfere with the proper performance of judicial duties, provided the judge does so without remuneration. While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to the judge in a personal capacity.

4.12 A judge shall not practise law whilst the holder of judicial office.

Commentary

Meaning of ‘practice law’

172. Practice of law consists also of work performed outside of any court and having no immediate relation to proceedings in court. It includes conveyancing, the giving of legal advice on a large variety of subjects, and the preparation and execution of legal instruments covering an extensive field of business and trust relations and other affairs. A sabbatical year spent by a judge in full-time employment as special adviser in a branch of the government on matters related to courts and the administration of justice, may amount to being engaged in the ‘practice of law’. Views about the ambit of this prohibition vary according to different local traditions. In some civil law countries judges, even in a final court, are allowed to perform work as arbitrators or mediators. Sometimes, in anticipation of retirement, a judge in a common law country has been permitted to participate in remunerated work as an international arbitrator in a body established by a foreign government.

Acting as an arbitrator or mediator

173. Ordinarily, at least in common law jurisdictions, a judge should not act as arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law. It will commonly be considered that the integrity of the judiciary will be undermined if a judge takes financial advantage of the judicial office by rendering private dispute resolution services for pecuniary gain as an extra-judicial activity. Even when performed without charge, such services may interfere with the proper performance of judicial functions.

Legal advice to family members

174. A judge should not give legal advice. However, in the case of close family members or close friends, the judge may offer personal advice on a friendly, informal basis, without remuneration, but making it clear that he or she must not be treated as giving legal advice and that, if necessary, any legal advice needed should be professionally sought.

Protection of judge’s own interests

175. A judge has the right to act in the protection of his or her rights and interests, including by litigating in the courts. However, a judge should be circumspect about becoming involved in personal litigation. A judge, as a litigant, runs the risk of appearing to take advantage of his or her office and, conversely, of having his or her credibility adversely affected by findings made by judicial colleagues.

4.13 A judge may form or join associations of judges or participate in other organisations representing the interests of judges.

Commentary

Membership in trade union

176. In the exercise of the freedom of association, a judge may join a trade union or professional association established to advance and protect the conditions and salaries of judges or, together with other judges, form a trade union or association of that character. However, restrictions may be placed on the right to strike, given the public and constitutional character of the judge's service.

4.14 A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

4.15 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

Commentary

Duty to inform family members and court staff of ethical constraints

177. A gift, bequest, loan or favour to a member of the judge's family or other persons residing in the judge's household might be, or appear to be, intended to influence the judge. Accordingly, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage the family members from violating them. A judge cannot, however, reasonably be expected to know, still less control, all of the financial or business activities of all the family members residing in the judge's household.

178. The same considerations apply to court staff and others who are subject to the judge's influence, direction or authority.

What may be accepted

179. This prohibition does not include:

- (a) Ordinary social hospitality that is common in the judge's community, extended for a non-business purpose, and limited to the provision of modest items such as food and refreshments;
- (b) Items with little intrinsic value intended solely for presentation, such as plaques, certificates, trophies and greeting cards;
- (c) Loans from banks and other financial institutions on the normal terms that are available, based on the usual factors, without regard to judicial status;
- (d) Opportunities and benefits, including favourable rates and commercial discounts, that are available based on factors other than judicial status;
- (e) Rewards and prizes given to competitors in random drawings, contests or other events that are open to the public and awarded based on factors other than judicial status;

- (f) Scholarships and fellowships awarded on the same terms and based on the same criteria applied to any non-judge applicants;
- (g) Reimbursement or waiver of charges for travel-related expenses, including the cost of transportation, lodging, and meals for the judge and a relative, incident to the judge's attendance at a function or activity devoted to the improvement of the law, the legal system, or the administration of justice.
- (h) Reasonable compensation for legitimate and permitted extra-judicial activities.

Social hospitality

180. The line between 'ordinary social hospitality' and an improper attempt to gain the judge's favour is sometimes difficult to draw. The context is important, and no one factor will usually determine whether it is proper for the judge to attend the event. One question that should be asked is whether acceptance of such hospitality would adversely affect the judge's independence, integrity, the obligation to respect the law, impartiality, dignity, the timely performance of judicial duties, or appear to involve infractions of the foregoing. Others should be: Is the person making the social contact an old friend or recent acquaintance? Does the person have an unfavourable reputation in the community? Is the gathering large or intimate? Is it spontaneous or prearranged? Does anyone attending have a case pending before the judge? Is the judge receiving a benefit not offered to others that will reasonably excite suspicion or criticism?

4.16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

Commentary

Gifts of excessive value may not be accepted

181. A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and may require disqualification of the judge where disqualification would not otherwise be required. Therefore, such gifts should not be accepted. It is possible for a judge to politely refuse such a gift or offer of a gift. Sometimes such gifts are offered spontaneously without an appreciation of the rules and conventions binding on a judge. The offer of a subscription to a health club after a judge performs a marriage or citizenship ceremony where this act is permitted by law, may be well intentioned but the judge should refuse the offer explaining that acceptance might be represented as involving receipt of a fee or reward for the performance of a public function. On the other hand, the presentation of a bottle of whisky or of a couple of CDs of the judge's favourite music would probably occasion no offence.

Acceptance of reasonable honoraria

182. A judge is not prohibited from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not appear to use his or her judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial in matters coming before him or her as a judge.

Value 5:
EQUALITY

Principle:
Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Commentary

International standards

183. A judge should have knowledge of the international and regional instruments that prohibit discrimination against vulnerable groups in the community, such as the International Convention on the Elimination of All Forms of Racial Discrimination 1965, the International Convention on the Elimination of All Forms of Discrimination against Women 1979, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief 1981, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992. Equally, a judge must recognize that ICCPR 14(1) guarantees that ‘All persons are equal before the courts’. ICCPR 2(1) read with ICCPR 14(1) recognizes the right of every individual to a fair trial without any distinction whatsoever as regards race, colour, sex, language, religion, political or other convictions, national or social origin, means, status or other circumstances. The phrase ‘other circumstances’ (or “other status”) has been interpreted to include, for example, illegitimacy, sexual orientation, economic status, disability, and HIV status. It is, therefore, the duty of a judge to discharge the judicial functions with due respect for the principle of equal treatment of parties, by avoiding any bias and any discrimination, maintaining a balance between the parties and ensuring that each receives a fair hearing.

Judge must avoid stereotyping

184. Fair and equal treatment has long been regarded as an essential attribute of justice. Equality according to law is not only fundamental to justice, but is a feature of judicial performance strongly linked to judicial impartiality. A judge who, for example, reaches a correct result but engages in stereotyping does so at the expense of the judge’s impartiality, actual or perceived. A judge should not be influenced by attitudes based on stereotype, myth or prejudice. The judge should, therefore, make every effort to recognize, demonstrate sensitivity to, and correct such attitudes.

Gender discrimination

185. The judge has a role to play in ensuring that the court offers equal access to men and women. This obligation applies to a judge’s own relationships with parties, lawyers and court staff, as well as the relationship of court staff and lawyers with

others. Overt instances of gender bias by judges towards lawyers may not today occur frequently in court, although speech, gestures or other conduct may sometimes be perceived as sexual harassment; for example, using terms of condescension in addressing female lawyers (*'sweetie', 'honey', 'little girl', 'little sister'*) or commenting on such a lawyer's physical appearance or dress in a way that would not be ventured in relation to a male counterpart. Patronizing conduct by a judge (*'this pleading must have been prepared by a woman'*) affects the effectiveness of women as lawyers by sometimes diminishing self-esteem or decreasing the level of confidence in their skills. Insensitive treatment of female litigants (*'that stupid woman'*) may also directly affect their legal rights both in actuality and appearance. Sexual harassment of court staff, advocates, litigants or colleagues will often be illegal as well as unethical.

Application

5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

Commentary

Duty to be responsive to cultural diversity

186. It is the duty of a judge not only to recognize, and be familiar with, cultural, racial and religious diversity in society, but also to be free of bias or prejudice on any irrelevant grounds. A judge should attempt by appropriate means to remain informed about changing attitudes and values in society, and to take advantage of suitable educational opportunities (which ought to be made reasonably available) that will assist the judge to be, and appear to be, impartial. However, it is necessary to take care that these efforts enhance, and do not detract from, the judge's perceived impartiality.

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

Commentary

Duty to refrain from making derogatory comments

187. A judge should strive to ensure that his or her conduct is such that any reasonable observer would have justifiable confidence in the impartiality of the judge. A judge should avoid comments, expressions, gestures or behaviour which may reasonably be interpreted as showing insensitivity to, or disrespect for, anyone. Examples include irrelevant or derogatory comments based on racial, cultural, sexual or other stereotypes, and other conduct implying that persons before the court will not be afforded equal consideration and respect. A judge's disparaging comments about ethnic origins, including the judge's own, are also undignified and discourteous. A judge should be particularly careful that his or her remarks do not have a racist overtone, or even unintentionally, do not offend minority groups in the community.

Judicial remarks must be tempered with caution and courtesy

188. A judge must not make improper and insulting remarks about litigants, advocates, parties and witnesses. There have been occasions when a judge, on sentencing a convicted person, has showered the prisoner with insulting remarks. While the judge may, depending on local convention, properly represent the outrage of the community concerning a serious crime, judicial remarks should always be tempered with caution, restraint and courtesy. Sentencing an accused person who has been convicted of a crime is a heavy responsibility involving the performance of a legal act on behalf of the community. It is not an occasion for the judge to give vent to personal emotion that has a tendency to diminish the essential qualities of the judicial office.

5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

Commentary

Court users must be treated with dignity

189. It is the judge who sets the tone and creates the environment for a fair trial in his or her court. Unequal or differential treatment of court users, whether real or perceived, is unacceptable. All who appear in court, legal practitioners, litigants and witnesses, are entitled to be dealt with in a way that respects their human dignity and fundamental human rights. The judge must ensure that all such persons are protected from any display of prejudice based on race, gender, religion, or other irrelevant grounds.

5.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned in a matter before the judge on any irrelevant ground.

Commentary

Duty to ensure that court staff conform to prescribed standards

190. The first contact that a member of the public has with the judicial system is often with court staff. It is therefore especially important that the judge should ensure to the fullest extent within his or her power that the conduct of court personnel, subject to the judge's direction and control, is consistent with the foregoing standards of conduct. Such conduct should always be beyond reproach and, in particular, court staff should refrain from gender insensitive language, as well as behaviour which could be regarded as abusive, offensive, menacing, overly familiar, or otherwise inappropriate by reference to any prohibited ground.

5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

Commentary

Duty to prevent lawyers engaging in racist, sexist or other inappropriate conduct

191. The judge must address clearly irrelevant comments made by lawyers in court or otherwise in the presence of the judge which are sexist or racist or otherwise offensive or inappropriate. Speech, gestures, or inaction that could reasonably be interpreted as implicit approval of such comments is also prohibited. This does not require that proper advocacy or admissible testimony be curtailed where, for example, matters of gender, race or other similar factors are properly before the court as issues in the litigation. This is consistent with the judge's general duty to listen fairly but, when necessary, to assert control over the proceeding and to act with appropriate firmness to maintain an atmosphere of equality, decorum and order in the courtroom. 'Appropriate firmness' will depend on the circumstances. In some instances, a polite correction might be sufficient. However, deliberate or particularly offensive conduct will require more significant action, such as a specific direction from the judge, a private admonition, an admonition on the record or, if the lawyer repeats the misconduct after being warned, so far as the law permits, dealing with the offending lawyer for contempt of court.

Value 6
COMPETENCE AND DILIGENCE

Principle:

Competence and diligence are prerequisites to the due performance of judicial office.

Commentary

Competence

192. Competence in the performance of judicial duties requires legal knowledge, skill, thoroughness and preparation. A judge's professional competence should be evident in the discharge of his or her duties. Judicial competence may be diminished and compromised when a judge is impaired by drugs, alcohol or other mental or physical impairments. In a smaller number of cases, it may be a product of inadequate experience, problems of personality and temperament, and the appointment to judicial office of a person who is unsuitable to exercise it and demonstrates that unsuitability in the performance of the judicial office. In some cases, this may be the product of the incapacity or disability, for which the only solution, an extreme one, may be constitutional removal from office.

Diligence

193. To consider soberly, to decide impartially, and to act expeditiously are all aspects of judicial diligence. Diligence also includes striving for the impartial and even-handed application of the law, and the prevention of the abuse of process. The ability to exhibit diligence in the performance of judicial duties may depend on the burden of work, the adequacy of resources, including the provision of support staff and technical assistance, and time for research, deliberation, writing and other judicial duties, apart from sitting in court.

Relevance of rest, relaxation and family life

144. The importance of a judge's responsibility to his or her family has to be recognized. A judge should have sufficient time to permit the maintenance of physical and mental well-being and reasonable opportunities to enhance the skill and knowledge necessary for the effective performance of judicial functions. The stress of performing the judicial office is now increasingly recognized. In appropriate cases, facilities of counselling and therapy will need to be afforded to a judge suffering from stress. In the past, judges and legal professionals tended to disparage or dismiss these considerations. In recent times empirical research and notorious cases of judicial breakdown have brought such matters to general attention.⁵⁹

⁵⁹ M.D. Kirby, "Judicial Stress – An Update", (1997) 71 *Australian Law Journal* 774, at 791.

Application

6.1 The judicial duties of a judge take precedence over all other activities.

Commentary

A judge's primary obligation is to the court

195. A judge's primary duty is the due performance of the judicial function, the principal elements of which involve the hearing and determination of cases requiring the interpretation and application of the law. If called upon by the government to undertake a task which takes him or her away from the regular work of the court, a judge should not accept such an assignment without consulting the presiding judge and other judicial colleagues to ensure that acceptance of the extra-curricular assignment will not unduly interfere with the effective functioning of the court or unduly burden its other members. A judge should resist any temptation to devote excessive attention to extra-judicial activities where this reduces the judge's capacity to discharge the judicial office. There is obviously a heightened risk of excessive attention being devoted to such activities, if they are performed for reward. In such cases, reasonable observers might suspect that the judge has accepted the extra-curricular duties in order to enhance his or her official income. The judiciary is an institution of service to the community. It is not just another segment of the competitive market economy.

6.2 A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.

Commentary

Professional competence in judicial administration necessary

196. At least to some degree, every judge must manage as well as decide cases. The judge is responsible for the efficient administration of justice in his or her court. This involves case management, including the prompt disposition of cases, record-keeping, management of funds, and supervision of court staff. If the judge is not diligent in monitoring and disposing of cases, the resulting inefficiency will increase costs and undermine the administration of justice. A judge should therefore maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of court officials.

Disappearance of court records

197. The judge must take all reasonable and necessary steps to prevent court records from disappearing or being withheld. Such steps may include the computerisation of court records. The judge should also institute systems for the investigation of the loss and disappearance of court files. Where wrong-doing is suspected, the judge should ensure the independent investigation of the loss of files, which is always to be regarded as a serious default on the part of the court concerned. In the case of lost files, the judge should institute, so far as reasonably practicable, action to reconstruct the record and institute procedures to avoid such loss.

Unofficial payments

198. Having regard to reports from many jurisdictions of unofficial payments being demanded, particularly or ostensibly by court staff, for purposes such as the calling up of files, the issuing of summons, the service of summons, the issuing of a copy of the evidence, the obtaining of bail, the provision of a certified copy of a judgment, the expedition of cases, the delaying of cases, the fixing of convenient dates and the rediscovery of lost files, the judge should consider:

- (a) the display of notices in the court building and elsewhere where they might be seen by relevant persons, forbidding all such payments and providing confidential procedures for complaints about such practices;
- (b) the appointment of court vigilance officers and users' committees together with appropriate systems of inspection to combat such informal payments;

- (c) the introduction of computerisation of court records including of the court hearing schedule;
- (d) the introduction of fixed time limits for the legal steps required to be taken in the preparation of a case for hearing; and
- (e) the prompt and effective response by the court to public complaints.

6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.

Commentary

Every judge should undertake forms of training

199. The independence of the judiciary confers rights on a judge, but also imposes ethical duties. The latter include the duty to perform judicial work professionally and diligently. This implies that the judge should have substantial professional ability, acquired, maintained and regularly enhanced by the training which the judge has a duty, as well as a right, to undergo. It is highly desirable, if not essential, that upon first appointment a judge should receive detailed, in-depth, diversified training appropriate to the judge's professional experience, so that he or she is able to perform the judicial duties satisfactorily. The knowledge that is required may extend not only to aspects of substantive and procedural law, but also to the real life impact of the law and the courts.

200. The trust that citizens place in the judicial system will be strengthened if a judge has a depth and diversity of knowledge which extends beyond the technical field of law to areas of important social concern, as well as courtroom and personal skills and understanding enabling the judge to manage cases and deal with all persons involved appropriately and with sensitivity. Training is, in short, essential for the objective, impartial and competent performance of judicial functions, and to protect judges from inappropriate influences. Thus, a contemporary judge will usually receive training on appointment in such courses as sensitivity to issues of gender, race, indigenous cultures, religious diversity, sexual orientation, HIV/AIDS status, disability and so forth. In the past it was often assumed that a judge picked up such knowledge in the course of daily practice as a lawyer. However, experience has taught the value of such training – especially by allowing members of such groups and minorities to speak directly to judges so that they have hearings and materials to help them handle such issues when they arise in practice later on.

201. While a judge who is recruited at the commencement of his or her professional career needs to be trained, usually in a university, the same is true for a judge who is selected from among the best and most experienced lawyers. “A good lawyer may make a bad judge, and an indifferent lawyer may make a good judge. The quality of judgment and demeanour in court may be far more important than being learned in the law.”⁶⁰

⁶⁰ Sir Robert Megarry VC, ‘The Anatomy of Judicial Appointment: Change But Not Decay’, The Leon Ladner Lecture for 1984, 19:1 *University of British Columbia Law Review*, p.113 at p.114.

Content of judicial training curricula

202. The performance of judicial duties is a new profession for both the young recruit and the experienced lawyer, and involves a particular approach in many areas, notably with respect to the professional ethics of judges, court procedure, and relations with all persons involved in court proceedings. Depending on the levels of professional experience of new recruits, the training should not consist only of instruction in the techniques involved in the handling of cases by judges, but should also take into consideration the need for social awareness and an extensive understanding of different subjects reflecting the complexity of life in society. On the other hand, it is important to take the specific features of recruitment methods into account so as to target and adapt the training programmes appropriately. An experienced lawyer needs to be trained only in what is required for the new profession. He or she may have a full knowledge of court procedures, the law of evidence, ordinary conventions and what is expected of a judge. However, such a person may never have met a person living with HIV/AIDS or considered the special legal and other needs of such a person. In this sense, continuing judicial education can be an eye-opener. Although relatively new in many common law jurisdictions, experience teaches that, if controlled by the judiciary itself, it can be very beneficial for new judges and lay a good foundation for a successful life as a judge.

In-service training for all levels of the judiciary

203. In addition to the basic knowledge which a judge needs to acquire at the commencement of his or her judicial career, a judge is committed, on appointment, to perpetual study and learning. Such training is made indispensable by constant changes in the law, technology and the possibility that in many countries a judge will acquire new responsibilities when he or she takes up a new post. In-service programmes should therefore offer the possibility of training in the event of a career change, such as a move between criminal and civil courts or cases, the assumption of a specialist jurisdiction (eg. in a family or juvenile court) or the assumption of a post such as the presidency of a chamber or court. It is desirable that continuous training should embrace all levels of the judiciary. Whenever feasible, the different levels should all be represented at the same sessions, giving the opportunity for an exchange of views between them. This assists to break-down of excessive hierarchical tendencies, keeps all levels of the judiciary informed of each other's problems and concerns, and promotes a more cohesive and consistent approach to the service throughout the judiciary.

Judiciary to be responsible for judicial training

204. While the State has a duty to provide the necessary resources and to meet the costs, with the support of the international community if required, the judiciary should play a major role in, or itself be responsible for, organising and supervising judicial training. These responsibilities should, in each country, be entrusted, not to the ministry of justice or any other authority answerable to the legislature or the executive, but to the judiciary itself or another independent body such as a Judicial Service Commission. Judges' associations can also play a valuable role in

encouraging and facilitating ongoing training for judges once in office. Given the complexities of modern society, it cannot now be assumed that the experience of sitting in court nearly every day will prepare the judge for all of the problems that arise and how they may best be answered. Technological changes in information systems have presented even highly experienced judges with the need for re-training and support which they should be encouraged to acknowledge and themselves accept.

Training authority to be different from disciplinary or appointing authority

205. In order to ensure a proper separation of roles, it is desirable that the same authority should not be directly responsible for both training and disciplining judges. Those responsible for training should not also be directly responsible for appointing or promoting judges. Under the authority of the judiciary or other independent body, training should be entrusted to a special autonomous establishment with its own budget, which is thus able, in consultation with judges, to devise training programmes and ensure their implementation. It is important that the training should be carried out by judges and by experts in each discipline. Trainers should be chosen from among the best in their profession and carefully selected by the body responsible for training, taking into account their knowledge of the subjects being taught and their teaching skills.

6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

Commentary

Relevance of international human rights law

206. In the context of the growing internationalisation of societies and the increasing relevance of international law in relations between the individual and the State, it is necessary that the powers entrusted to a judge must be exercised, not only in accordance with domestic law, but also, to the full extent that domestic law permits, in a way consistent with the principles of international law recognized in modern democratic societies. Subject to any requirements of local law, whatever the nature of his or her duties, a judge cannot properly ignore, or claim ignorance of, international law, including the international law of human rights, be it derived from customary international law, the applicable international treaties or the regional human rights conventions, where applicable. In order to promote this essential facet of a judge's obligations, the study of human rights law should desirably be included in the initial and in-service training programmes offered to new judges, with particular reference to the practical application of such law in the regular work of a judge to the full extent that domestic law permits.

6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

Commentary

Duty to dispose of matters with reasonable promptness

207. In disposing of matters efficiently, fairly and promptly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their dispute resolved by the courts. The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. A judge can be efficient and businesslike while being patient and deliberate.

Duty to be punctual

208. Prompt disposition of the court's business requires a judge to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end. Irregular or non-existent hours contribute to delay and create a negative impression of the courts. Thus, in jurisdictions where regular sitting hours are prescribed or expected, judges should observe these punctiliously, at the same time as ensuring the expeditious despatch of out of court business.

Duty to deliver reserved decisions without delay

209. A judge should deliver his or her reserved decisions, having due regard to the urgency of the matter and other special circumstances, as soon as reasonably possible, taking into account the length or complexity of the case and other work commitments. In particular, the reasons for a decision should be published by the judge without unreasonable delay.

Importance of transparency

210. A judge should institute transparent mechanisms to allow lawyers and litigants to know the status of court proceedings. Courts should themselves introduce publicly known protocols by which lawyers or self-represented litigants may make enquiries about decisions that appear to them to be unduly delayed. Such protocols should make allowance for complaint to an appropriate authority within the court where the delay is unreasonable or seriously prejudicial to a party.

6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

Commentary

The role of the judge

211. The role of the judge has been summed up by a senior judge in the following terms:⁶¹

The judge's part . . . is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure, to see that the advocates behave themselves seemly and keep to the rules laid down by law, to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. . . Such are our standards.

Duty to maintain order and decorum in court

212. 'Order' refers to the level of regularity and civility required to guarantee that the business of the court will be accomplished in conformity with the rules governing the proceeding. 'Decorum' refers to the atmosphere of attentiveness and earnest endeavour which communicates, both to the participants and to the public, that the matter before the court is receiving serious and fair consideration. Individual judges may have differing ideas and standards concerning the appropriateness of particular behaviour, language and dress for the lawyers and litigants appearing before them. What one judge may perceive to be an obvious departure from propriety, another judge may deem a harmless eccentricity, an irrelevancy or no departure at all. Also, some proceedings call for more formality than others. Thus, at any given time, courtrooms across a country will inevitably manifest a broad range of 'order' and 'decorum'. It is undesirable, and in any case impossible, to suggest a uniform standard of what constitutes 'order' and 'decorum'. Instead, what is required is that a judge should take reasonable steps to achieve and maintain that level of order and decorum in court necessary to accomplish the business of the court in a manner that is both regular and manifestly fair, while at the same time giving lawyers, litigants and the public assurance of that regularity and fairness.

⁶¹ *Jones v. National Coal Board*, [1957] 2 QB p.55 at p.64, per Lord Denning.

Conduct towards litigants

213. A judge's demeanour is crucial to maintaining his or her impartiality, because it is what others see. Improper demeanour can undermine the judicial process by conveying an impression of bias or indifference. Disrespectful behaviour towards a litigant infringes on the litigant's right to be heard, and compromises the dignity and decorum of the courtroom. Lack of courtesy also affects a litigant's satisfaction with the handling of the case. It creates a negative impression of courts in general.

Conduct towards lawyers

214. A judge must channel anger appropriately. No matter what the provocation, the judicial response must be a judicious one. Even if provoked by a lawyer's rude conduct, the judge must take appropriate steps to control the courtroom without retaliating. If a reprimand is warranted, it will sometimes be appropriate that it take place separately from the disposition of the hearing of the matter before the court. It is never appropriate for a judge repeatedly to interrupt a lawyer without justification, or be abusive or ridiculing of the lawyer's conduct or argument. On the other hand, no judge is required to listen without interruption to abuse of the court's process or arguments manifestly without legal merit or abuse directed at the judge or other advocates, parties or witnesses..

Patience, dignity and courtesy are essential attributes

215. In court and in chambers, a judge should always act courteously and respect the dignity of all who have business there. A judge should also require similar courtesy from those who appear before him or her, and from court staff and others subject to the judge's direction or control. A judge should be above personal animosities, and must not have favourites amongst advocates appearing before the court. Unjustified reprimands of counsel, offensive remarks about litigants or witnesses, cruel jokes, sarcasm, and intemperate behaviour by a judge undermines both order and decorum in the court. When a judge intervenes, he or she should ensure that impartiality, and the perception of impartiality, are not adversely affected by the manner of the intervention.

6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

Commentary

Fair and equitable distribution of work in court

216. A judge who is responsible for the distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetical order or some similar system. Alternatively, a presiding judge who distributes judicial work should do so in consultation with colleagues and perform the task with integrity and fairness. Where necessary, arrangements may be made to recognize the specific needs and situations of individual judges but, as far as possible, the allocation and distribution of work to each member of the court should be equal in both quantitative and qualitative terms and should be known by all judges.

Withdrawal of a case from a judge

217. A case should not be withdrawn from a particular judge without valid reasons, such as serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law or rules of court, and may not be influenced by any interest or representation of the executive or any other external power but only so as to secure the performance of the judicial function in accordance with law and conformity with international human rights norms.

Unprofessional conduct of another judge or lawyer

218. A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by another judge or lawyer. Appropriate action may include direct communication with the judge or lawyer who is alleged to have committed the violation, other direct action if available, and reporting the violation to the appropriate authorities.

Misuse of court staff

219. The inappropriate use of court staff or facilities is an abuse of judicial authority that places the employee or facilities in an extremely difficult situation. Court staff should not be directed to perform inappropriate and excessive personal services for a judge beyond minor matters that conform to established conventions.

IMPLEMENTATION

By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

Commentary

220. The Judicial Integrity Group is now engaged in preparing a statement of procedures for the effective implementation of the Bangalore Principles of Judicial Conduct. As with the Principles themselves, such procedures are not intended to be regarded as binding on any national judiciary. They will be offered as guidelines and as constituting benchmarks.

DEFINITIONS

In this statement of principles, unless the context otherwise permits or requires, the following meanings shall be attributed to the words used:

"Court staff" includes the personal staff of the judge including law clerks.

"Judge" means any person exercising judicial power, however designated.

"Judge's family" includes a judge's spouse, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household.

"Judge's spouse" includes a domestic partner of the judge or any other person of either sex in a close personal relationship with the judge.

Commentary

221. In the definition of "*Judge's family*", the expression "and who lives in the judge's household" applies only to "any other close relative or person who is a companion or employee of the judge", and not to a judge's spouse, son, daughter, son-in-law or daughter-in-law.

CULTURAL AND RELIGIOUS TRADITIONS

From earliest times, in all cultural and religious traditions, the judge has been perceived as an individual of high moral stature, possessing qualities distinct from those of ordinary individuals, subject to more rigorous constraints than others, and required to observe a form of life and conduct more severe and restricted than that of the rest of the community.

THE ANCIENT MIDDLE EAST

In or about 1500 BC, King Thutmose III is recorded as having issued the following instructions to Chief Justice Rekhmire of Egypt:⁶²

“Take heed to thyself for the hall of the chief judge; be watchful over all that is done therein. Behold, it is a support of the whole land; . . . Behold, he is not one setting his face toward the officials and councillors neither one making brethren of all the people.

. . . Mayest thou see to it for thyself, to do everything after that which is in accordance with law; to do everything according to the right thereof . . . lo, it is the safety of an official to do things according to the law, by doing that which is spoken by the petitioner . . .

It is an abomination of the god to show partiality. This is the teaching: thou shalt act alike to all, shalt regard him who is known to thee like him who is unknown to thee, and him who is near . . . like him who is far . . . An official who does this, then shall he flourish greatly in the place.

Be not enraged toward a man unjustly, but be thou enraged concerning that about which one should be enraged.”

HINDU LAW

The most comprehensive ancient code in Hindu law was *The Laws of Manu* (circa 1500 BC). In his commentaries, Narada (circa 400 AD), a leading Hindu jurist, basing himself on the *Laws of Manu*, wrote thus of Courts of Justice:⁶³

⁶² J.H. Breasted, *Ancient Records of Egypt*, Vol II (The Eighteenth Dynasty) University of Chicago Press, 1906, pp.268-270, cited in C.G. Weeramantry, *An Invitation to the Law*, Butterworths, Melbourne, Australia, 1982, pp. 239-240.

⁶³ *Sacred Books of the East*, Max Muller (ed), Motilal Banarsidass, 1965, Vol XXXIII, (The Minor Law Books) pp 2, 3, 5, 16, 37-40, cited in Weeramantry, *An Invitation to the Law*, pp. 244-245.

1. *The members of a royal court of justice must be acquainted with the sacred law and with rules of prudence, noble, veracious, and impartial towards friend and foe.*
2. *Justice is said to depend on them, and the king is the fountain head of justice.*
3. *Where justice, having been hit by injustice, enters a court of justice, and the members of the court do not extract the dart from the wound, they are hit by it themselves.*
4. *Either the judicial assembly must not be entered at all, or a fair opinion delivered. That man who either stands mute or delivers an opinion contrary to justice is a sinner.*
5. *Those members of a court who, after having entered it, sit mute and meditative, and do not speak when the occasion arises, are liars all of them.*
6. *One quarter of the iniquity goes to the offender; one quarter goes to the witness; one quarter goes to all the members of the court; one quarter goes to the king.*

Stressing the need for virtuous personal conduct, Manu required that a judge should not be ‘voluptuous’, since punishment cannot be justly inflicted by ‘one addicted to sensual pleasure’.⁶⁴

Kautilya, in the best known ancient Indian treatise on the principles of law and government, *Arthashastra* (circa 326-291 BC), refers to the judiciary thus:⁶⁵

“When a judge threatens, browbeats, sends out, or unjustly silences any one of the disputants in his court, he shall first of all be punished with the first amercement. If he defames or abuses any one of them, the punishment shall be doubled. If he does not ask what ought to be asked, or asks what ought not to be asked, leaves out what he himself has asked, or teaches, reminds, or provides any one with previous statements, he shall be punished with the middlemost amercement.

When a judge does not inquire into necessary circumstances, inquires into unnecessary circumstances, makes unnecessary delay in discharging his duty, postpones work with spite, causes parties to leave the court by tiring them with delay, evades or causes to evade statements that lead to the settlement of a case, helps witnesses, giving them clues, or resumes cases already settled or disposed of, he shall be punished with the highest amercement.”

⁶⁴ ‘The Laws of Manu’, *Sacred Books of the East*, 50 vols., ed. F.Max Muller, Motilal Banarsidass, Delhi, 3rd reprint (1970), vol xxv, vii.26.30, cited in A.R.B. Amerasinghe, *Judicial Conduct and Ethics and Responsibilities*, Sri Lanka, Vishva Lekha Publishers, 2002, p.50.

⁶⁵ *The Arthashastra*, R.Shamasastri (trans.), Mysore Printing and Publishing House, 1967, pp.254-255, cited in Weeramantry, *An Invitation to the Law*, p 245.

BUDDHIST PHILOSOPHY

The Buddha (circa 500 BC) taught the need to recognize rightness in every aspect of human conduct – the ‘noble eight-fold path’ of Buddhism. This comprises right vision, right thoughts, right speech, right action, right livelihood, right efforts, right mindfulness and right concentration, all of which in combination provides a code of conduct covering all human activity. Justice for the Buddhist means the observance of all these facets, each of which has been the subject of meticulous philosophical analysis down the centuries of Buddhist thought. This concept of right conduct is integral to Buddhist governments and legal systems.⁶⁶

The king, who is the real dispenser of the law, is *primus inter pares* and, therefore, not above the law. The code of conduct applicable to the king includes the following principles:⁶⁷

- *He should not have craving and attachment to wealth and property;*
- *He must be free from fear or favour in the discharge of his duties, be sincere in his intentions, and must not deceive the public;*
- *He must possess a genial temperament;*
- *He must lead a simple life, and should not indulge in a life of luxury, and must have self-control;*
- *He should bear no grudge against anybody;*
- *He must be able to bear hardships, difficulties and insults without losing his temper.*

When a dispute arises, the king (or other judge) is expected to ‘pay equal attention to both parties’, to ‘hear arguments of each side and decide according to what is right’. Throughout the investigation, the judge is expected to scrupulously avoid the ‘four avenues to injustice’. These are prejudice, hatred, fear and ignorance.⁶⁸

The importance of the rule of natural justice is evident in the following conversation between the Buddha and his disciple, the Venerable Upali.⁶⁹

⁶⁶ Weeramantry, *An Invitation to the Law*, p 23.

⁶⁷ Walpola Rahula, *What the Buddha Taught*, The Gordon Fraser Gallery Ltd, Bedford, 1959, 1967 edition, 85.

⁶⁸ *Human Rights and Religions in Sri Lanka*, Sri Lanka Foundation, Colombo, 1988, p 67.

⁶⁹ I.B. Horner (trans), *The Book of the Discipline (Vinaya-Pitaka)*, Vo. IV: *Mahavagga or the Great Division IX*, Luzac & Co Ltd, London, 1962, pp 466-468, cited in Nihal Jayawickrama, *The Judicial Application of Human Rights Law: International, Regional and National Jurisprudence*, Cambridge University Press, Cambridge, 2002, p 7-8.

Q: Does an Order, Lord, that is complete carry out an act that should be carried out in the presence of an accused monk if he is absent? Lord, is that a legally valid act?

A: Whatever Order, Upali, that is complete carries out an act that should be carried out in the presence of an accused monk. If he is absent, it thus comes to be not a legally valid act, not a disciplinarily valid act, and thus the Order comes to be one that goes too far.

Q: Does an Order, Lord, that is complete carry out an act that should be carried out by the interrogation of an accused monk if there is no interrogation?

A: Whatever Order, Upali, that is complete carries out an act which should be carried out on the interrogation of an accused monk. If there is no interrogation, it thus comes to be not a legally valid act, not a disciplinarily valid act, and thus the Order comes to be one that goes too far.

The same principles applied to lay persons:

'One who is not thereby righteous because one arbitrates hastily. He who is wise investigates both right and wrong. The wise man who guides others with due deliberation, with righteous and just judgment, is called a true guardian of the law'.⁷⁰

Applying the principles of Buddhist philosophy, the prince regent of Japan, Shotoku Taishi (604 AD) formulated Seventeen Maxims. These included the following:

'deal impartially with the suits which are submitted to you. Of complaints brought by the people there are a thousand in one day. If in one day there are so many, how many will there be in a series of years? If the man who is to decide suits at law makes gain his ordinary motive, and hears causes with a view to receiving bribes, then will the suits of the rich man be like a stone flung into water, while the complaints of the poor will resemble water cast upon a stone. Under these circumstances the poor man will not know whither to betake himself. Here too there is a deficiency in the duty of the Minister.'⁷¹

ROMAN LAW

The Twelve Tables (450 BC) contains the following injunction:⁷²

'The setting of the sun shall be the extreme limit of time within which a judge must render his decision.'

⁷⁰ *Dhammapada*, verses 256, 257.

⁷¹ W.G. Aston (trans), *Nihongi, Chronicles of Japan from the Earliest Times to AD 697*, Kegan Paul, Trench, Trubner & Co, 1896, cited in Weeramantry, *An Invitation to the Law*, pp 249-250.

⁷² *The Civil Law*, S.P. Scott (Trans), Central Trust Co., Cincinnati, 1932, Vol 1, pp 57-59, cited in Weeramantry, *An Invitation to the Law*, pp 265-266.

CHINESE LAW

Hsun Tzu, an eminent Chinese elder and respected magistrate (circa 312 BC) wrote thus:⁷³

'Fair mindedness is the balance in which to weigh proposals; upright harmoniousness is the line by which to measure them. Where laws exist, to carry them out; where they do not exist, to act in the spirit of precedent and analogy – that is the best way to hear proposals. To show favouritism and partisan feeling and be without any constant principles – this is the worst you can do. It is possible to have good laws and still have disorder in the state.'

In contrast, Han Fai Tzu, a prince of the royal family (circa 280 BC) propounded a more legalist approach:⁷⁴

'Though a skilled carpenter is capable of judging a straight line with his eye alone, he will always take his measurements with a rule; though a man of superior wisdom is capable of handling affairs by native wit alone, he will always look to the law of the former kings for guidance. Stretch the plumb line, and crooked wood can be planed straight; apply the level, and bumps and hollows can be shaved away; balance the scales, and heavy and light can be adjusted; get out the measuring jars, and discrepancies of quantity can be corrected. In the same way one should use laws to govern the state, disposing of all matters on their basis alone.'

The law no more makes exceptions for men of high station than the plumb line bends to accommodate a crooked place in the wood. What the law has decreed the wise man cannot dispute nor the brave man venture to contest. When faults are to be punished, the highest minister cannot escape; when good is to be rewarded, the lowest peasant must not be passed over. Hence, for correcting the faults of superiors, chastising the misdeeds of subordinates, restoring order, exposing error, checking excess, remedying evil, and unifying the standards of the people, nothing can compare to law.'

AFRICAN LAW

It has been noted⁷⁵ that many civilizations and legal systems flourished in Africa – some of them contemporaneous with Greece and Rome and some contemporary with the European Middle Ages. Among a vast array of legal concepts was that of reasonableness in conduct. "The Barotse concept of the reasonable man is twofold – the generally reasonable person and the *'reasonable incumbent of a particular social*

⁷³ *Basic Writings of Mo Tzu, Hsun Tzu and Han Fei Tzu*, Burton Watson (trans), Columbia University Press, 1967, p 35, cited in Weeramantry, *An Invitation to the Law*, p 253.

⁷⁴ *Basic Writings of Mo Tzu, Hsun Tzu and Han Fei Tzu*, Burton Watson (trans), Columbia University Press, 1967, pp 28-29, cited in Weeramantry, *An Invitation to the Law*, pp 253-254.

⁷⁵ Weeramantry, *An Invitation to the Law*, pp 35-36.

position'. When, for example, there is an allegation that the man holding the distinguished office of councillor did not behave in accordance with the dignity of his office, the judges ask themselves whether the man in question behaved in the circumstances as a reasonable councillor ought to behave. The community has its own ideas of the behaviour expected of such a person – dignity, patience, courtesy to the complainant. A councillor who does not give a complainant a seat and listen to his grievances, is not a 'reasonable councillor' in Barotse eyes. In this way all the felt standards of the community, which are not themselves matters of law, creep into the process of judgment, providing a flexibility of approach which enables a reconsideration of ancient standards to meet the conditions of modern life. The concept of the reasonable man, a late introduction into the common law, gives it a flexibility which traditional African law has long enjoyed, and the common law has as yet no integrated concept of reasonableness."

JEWISH LAW

The following is an extract from *Mishneh Torah*⁷⁶, the work of Moses Maimonides, an outstanding Jewish scholar (1135-1205).

1. *The Divine Presence dwells in the midst of any competent Jewish tribunal. Therefore it behoves the judges to sit in court enwrapped (in fringed robes) in a state of fear and reverence and in a serious frame of mind. They are forbidden to behave frivolously, to jest, or to engage in idle talk. They should concentrate their minds on matters of torah and wisdom.*

2. *A Sanhedrin, or king . . . , who appoints to the office of judge one who is unfit for it (on moral grounds), or one whose knowledge of the torah is inadequate to entitle him to the office, though the latter is otherwise a lovable person, possessing admirable qualities – whoever makes such an appointment transgresses a negative command, for it is said: "You shall not respect persons in judgment". It is learned by tradition that this exhortation is addressed to one who is empowered to appoint judges.*

Said the rabbis: "Say not, 'So-and-So is a handsome man, I will make him a judge: So-and-So is a man of valor, I will make him a judge: So-and-So is related to me, I will make him a judge: So-and-So is a linguist, I will make him a judge.' If you do it he will acquit the guilty and condemn the innocent, not because he is wicked, but because he is lacking in knowledge."

3. *It is forbidden to rise before a judge who procured the office he holds by paying for it. The rabbis bid us slight and despise him, regarding the judicial robe in which he is enwrapped as the packsaddle of an ass.*

⁷⁶ I. Twersky (ed), *A Maimonides Reader*, Behram House Inc., 1972, pp 193-194, cited in Weeramantry, *An Invitation to the Law*, pp 257-258.

CHRISTIANITY

In the Bible, Exodus 1.14 refers to people pointing a finger of scorn at a judge who has gone astray:

Who made thee a prince and a judge over us?

Roman 2.1 says:

*Therefore thou art inexcusable, O man,
whosoever thou art that judgest another,
thou condemnest thyself; for
thou that judgest does the same thing.*

In his Sermon on the Mount, Christ stated: (Matthew 7:12):

Therefore, whatever you want men to do to you, do also to them, for this is the Law and the Prophets.

This saying encapsulates the teaching in the Old Testament about civil justice. For example, Leviticus 19:15 reads:

Do not pervert justice; do not show partiality to the poor or favouritism to the great, but judge your neighbour fairly.

Deuteronomy 1:16 reads:

Hear the disputes between your brothers and judge fairly, whether the case is between brother Israelites or between one of them and an alien. Do not show partiality in judging; hear both small and great alike. Do not be afraid of any man.

Since all who are not in a position to improperly influence the judge would prefer to be judged on this basis this standard is the only one that they should apply when judging others.

ISLAMIC LAW

Islamic jurists have identified several qualifications that a judge should meet in order that he may properly perform his duties. These include the following:⁷⁷

1. *Maturity*: A minor cannot be appointed as a judge. A person who does not have custody over himself cannot be granted authority over others. A

⁷⁷ *The Judicial System in Islam*, The Discover Islam Project, www.islamtoday.com

judge must have not only a sound mind and body, but needs also to be deeply insightful. It is not necessary for a judge to be advanced in years, but age increases the dignity and prestige of the judge.

2. *Sanity*: A person whose judgment is impaired on account of old age or sickness should not act as a judge. To meet this qualification, a person's mind must be sound enough for him to be legally accountable for his actions. He must be intelligent and able to perceive what is necessary to be able to discriminate between things. He must not be absent-minded and neglectful.
3. *Freedom*: A judge must enjoy complete freedom.
4. *Upright character*: The judge must be honest, have apparent integrity, be free from sinful and licentious behaviour, keep away from dubious activities, conform to social norms, and be a model of good behaviour in his religious and worldly affairs.
5. *Capacity for independent juristic reasoning*: A judge should be capable of deriving the law from its sources. He must be capable of juristic analogy.
6. *Full sensory perception*: A judge must have the ability to see, hear and speak. A deaf person is not able to hear others when they speak. A blind person cannot distinguish the plaintiff from the defendant by sight, nor the one admitting another's right, nor the witness from the one being witnessed for or against. A person who cannot speak cannot pronounce judgement and his sign language will not be understandable to the majority of people.

To ensure that a judge's behaviour and conduct is acceptable to the public, and does not provide an opportunity for people to doubt his integrity or impartiality, Islamic jurists record that:⁷⁸

1. *A judge is not allowed to engage in business. If he were to do so, it cannot be assured that he will not receive favours and preferential treatment from some people that might, in turn, cause him to give preferential treatment to them in the courtroom.*
2. *A judge is not permitted to accept gifts. All forms of benefit that a judge may receive from another person within his jurisdiction should be treated in the same way as gifts.*
3. *A judge should not engage in any socially unacceptable behaviour. He should not socialize excessively with others. This protects him from being affected by them, which could compromise his impartiality. Likewise, he should not stay away from public gatherings where his attendance is appropriate. He should avoid jesting and making other people laugh, whether he is in their*

⁷⁸ *The Judicial System in Islam*, The Discover Islam Project, www.islamtoday.com

company or they in his. When he speaks, he should maintain the highest standard of speech possible, free from errors and defects. It should also be free from the ridicule of others and haughtiness.

4. *A courtroom is a place of seriousness, sobriety and respect. It is not a place for frivolous behaviour, protracted speeches and bad manners. This applies equally to litigants, witnesses and everyone else present in the courtroom. When the judge takes his seat, he should be in a presentable state, completely prepared to hear the cases that will come before him and to consider all the evidence that will be presented to him. The judge should not be in a state of anger, and should be free from severe thirst, excessive joy or grief, and extreme worry. He should not be in need of relieving himself or be overly tired. All of these things can compromise his mental state and his ability to properly consider the testimony of litigants.*
5. *A judge should not let his gaze wander. He should speak as little as possible, limiting himself to the relevant questions and answers. He should not raise his voice except when necessary to check impertinence. He should keep a serious expression at all times, but without showing anger. He should sit in a calm and stately manner. He should neither jest nor speak about matters unrelated to the case at hand.*
6. *A judge should present himself in a manner that commands the respect of others, even in his manner of dressing and grooming.*
7. *A judge must treat the litigants equally in every possible way, whether they be father and son, the Caliph and one of his subjects, or a Muslim and a disbeliever. This includes the way he looks at them, addresses them, and deals with them. He should not smile at one and frown at the other. He should not show more concern for one than he does for the other. He should not address one of them in a language that the other cannot understand if he is able to speak in a language known to both litigants.*
8. *A judge may use only the evidence legally recognized in a court of law. He may not pass judgment on the basis of his personal knowledge.*
9. *A judge must be prompt in delivering his judgment. The purpose for appointing a judge in the first place is to resolve people's disputes and put an end to their conflicts. The quicker a proper judgment can be given, the quicker people can receive what is rightfully their's.*

To maintain the appearance of judicial independence, Islamic Law does not permit the political authority to remove a just judge from office unless the public welfare requires it. A valid reason might be to appease a large sector of the population, or to

appoint another person who is much better qualified for the post. If a judge is removed without a valid reason, his appointment remains intact.⁷⁹

A judge must be totally preoccupied with the duties of his office. He is prohibited from earning through commerce, and has to maintain the highest standards of decorum and decency in his frequent dealings with other people. Therefore, he must receive a salary from the public treasury commensurate with his standard of living so that he will not be forced to earn an income in a manner that is inappropriate for a person of his standing.⁸⁰

Court hearings should be open to the public. If, however, the judge sees it to be in the best interest of those concerned to exclude the public, he may do so, even to the exclusion of the court officials, keeping before him only the litigants themselves. This is allowed in cases where the issue is of a nature best kept secret, like scandalous behaviour between men and women. It is also allowed in absurd situations that could incite the public to laughter if they were to attend.⁸¹

In the *Qur'an*, justice does not discriminate on the grounds of race, rank, colour, nationality, status or religion. All humans are the servants of God, and as such should be treated equally in courts of law, and all are accountable for their deeds.⁸² The *Adab al-Qadi* (The Judge's Etiquette) by Abu Bakr Ahmad ibn al-Shaybani al-Khassaf, an eminent jurist, is a manual designed to enable judges to administer justice on the foundations of revealed law granted by the Prophet Muhammad. This ethical code includes, inter alia, the following rules for judges.⁸³

Affirmative Rules

1. He should possess a commanding personality and knowledge, and should display patience in court.
2. He should ensure that every person has easy access to the court.
3. He should consider a previous decision of the court as null and void when the falsehood of a case is apparent to him.
4. He should know the manners and customs of the people to whom he has been appointed *qadi*.
5. He should keep a close watch on the day-to-day affairs of his court officials.
6. He should be acquainted with the jurists, as well as with the pious, trustworthy and *udul* (just people) of the town.
7. He may attend funerals and visit sick persons, but while doing so he should not discuss the judicial affairs of litigants.

⁷⁹ *The Judicial System in Islam*, The Discover Islam Project, www.islamtoday.com

⁸⁰ *The Judicial System in Islam*, The Discover Islam Project, www.islamtoday.com

⁸¹ *The Judicial System in Islam*, The Discover Islam Project, www.islamtoday.com

⁸² Muhammad Ibrahim H.I. Surty, "The Ethical Code and Organised Procedure of Early Islamic Law Courts, with Reference to al-Khassaf's *Adab al-Qadi*", in Muhammad Abdel Haleem, Adel Omar Sherif and Kate Daniels (eds), *Criminal Justice in Islam*, I.B. Tauris & Co Ltd, London and New York, 2003, pp 149-166 at 151-153.

⁸³ Muhammad Ibrahim H.I. Surty, "The Ethical Code and Organised Procedure of Early Islamic Law Courts, with Reference to al-Khassaf's *Adab al-Qadi*", in Muhammad Abdel Haleem, Adel Omar Sherif and Kate Daniels (eds), *Criminal Justice in Islam*, pp 149-166 at 163.

8. He may attend general banquets. According to al-Sarakhsi, 'If the banquet can take place without the presence of the *qadi*, then this banquet would be taken as "general". But if at a banquet the attendance of the *qadi* is inevitable, then such a banquet would be called "special", that is, arranged especially for the *qadi*.

Negative Rules

1. He must not give judgment in anger, nor when under emotional strain. This is because, when a *qadi* is mentally or emotionally upset, his reasoning power and judgment may be impaired.
2. He must not decide a case when sleep overcomes him, nor when he is unduly tired or overjoyed.
3. He must not give judgment when he is hungry or has overeaten.
4. He must not accept any bribe.
5. He must not laugh at litigants, nor should he make fun of them.
6. He must not weaken himself with non-obligatory fasting when he is deciding cases.
7. He must not put words into the mouth of a victim, nor should he suggest answers, nor should he point at any of the litigants.
8. He must not permit a litigant to enter his home, although men who are not concerned with a case may visit a *qadi* in order to greet him and for other purposes.
9. He must not entertain one of the litigants at his residence. He may, however, entertain both litigants together.
10. He must not persist in ignorance of something, but must ask those who have knowledge.
11. He must not crave wealth, nor should he be a slave to his lust.
12. He must not fear anyone.
13. He must not fear dismissal, nor must he eulogize, nor should he hate his critics.
14. He must not accept gifts, although he may accept gifts from his relatives, except for those awaiting trial. He may also continue to accept gifts from those who gave him gifts before his appointment as *qadi*, but, if they increase the value of the gift after his appointment then it is not permissible for him to accept.
15. He must not deviate from the truth for fear of someone's anger, and must not walk in the street alone. In this way, his dignity will be maintained and he will not be exposed to the undue approaches of interested parties.
16. He must give no consideration to the emotions of litigants.

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