COMMENTARY

ON

THE BANGALORE PRINCIPLES

OF JUDICIAL CONDUCT

THE JUDICIAL INTEGRITY GROUP

March 2007

CONTENTS

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 fur 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 fur Technische Zesammerarbeit (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, Conseillere, 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 discretional 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] *Beaumartin 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 in 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 impermissable 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 observed[47] 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 Alfini, *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' on '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 citize*n**

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 government[56] 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 AboriginalAffairs*, 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 condescention 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 appointmen, 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 requirments 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.

Appendix

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, *Arthasastra* (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 Arthasastra*, R.Shamasastry (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 Buddhistic 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 plaints 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 handing 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 noted[75] 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 MaimonidesReader*, 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, Leviticus19:15 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.

SELECT BIBLIOGRAPHY

Books and Monographs

Amerasinghe, A.R.B., *Judicial Conduct Ethics and Responsibilities*, Colombo, 2002.

Shaman, Jeffrey, Lubet, Steven and Alfini, James, *Judicial Conduct and Ethics*, 1990

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

Wood, David, *Judicial Ethics: A Discussion Paper*, Australian Institute of Judicial Administration Incorporated, 1996.

Standards and Reports

American Bar Association, *Model Code of Judicial Conduct,* preliminary draft, 2005.

Arab Centre for the Independence of the judiciary and the Legal Profession, *Beirut Declaration for Justice*, 1999.

Australian Bar Association, *Charter of Judicial Independence*, 2004.

Australian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct*, 2002.

Canadian Judicial Council, *Commentaries on Judicial Conduct*, Quebec, 1991.

Canadian Judicial Council, *Ethical Principles for Judges*, 1998.

Canadian Judicial Council, *Model Policy on Equality within the Court*, 1998.

Consultative Council of European Judges:

Opinion No.9 PROV (2006): The Role of National Judges in Ensuring an Effective Application of International and European Law

Opinion No.7 (2005): Justice and Society; Opinion No.6 (2004): Fair Trial within a Reasonable Time;

Opinion No.4 (2003): Appropriate Initial and In-Service Training for Judges at National and European Levels;

Opinion No.3 (2002): Principles and Rules governing Judges' Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality.

Opinion No.2 (2001): Funding and Management of Courts with reference to the Efficiency of the Judiciary and to Article 6 of the European Convention on Human Rights;

Opinion No.1 (2001): Standards concerning the Independence of the Judiciary and the Irremovability of Judges.

Hong Kong Special Administrative Region of China, *Guide to Judicial Conduct*, 2004.

IFES, *Global Best Practices: Judicial Integrity Standards and Consensus Principles*, 2004.

International Association of Judges, *The Universal Charter of the Judge*, 1999.

International Centre for Ethics, Justice and Public Life, *Toward the Development of Ethics Guidelines for International Courts*, Report of a workshop held at the Brandeis Institute for International Judges, Salzburg, Austria, 2003.

International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, Geneva, 2004.

Judicial Ethics in South Africa, issued by the Chief Justice, President of the Constitutional Court, Judges President of the High Courts and the Labour Appeal Court, and the President of the Land Claims Court, 2000.

Madrid Principles on the Relationship between the Media and Judicial Independence, 1994.

Suva Statement of Principles on Judicial Independence and Access to Justice, 2004.

Opinions of Judicial Ethics Advisory Committee

Advisory Opinions of:

The United States Judicial Conference

Alabama Judicial Inquiry Commission
Alaska Commission on Judicial Conduct
Arizona Judicial Ethics Advisory Committee
Arkansas Judicial Ethics Advisory Committee
Colorado Judicial Ethics Board
Delaware Judicial Ethics Advisory Committee
Florida Judicial Ethics Advisory Committee
Georgia Judicial Qualifications Commission
Illinois Judicial Ethics Committee
Indiana Commission on Judicial Qualifications
Kansas Judicial Ethics Advisory Committee
Ethics committee of the Kentucky Judiciary

Maryland Judicial Ethics Committee
Massachusetts Supreme Judicial Court Committee on Judicial Ethics
Nebraska Ethics Advisory Committee
Nevada Standing Committee on Judicial Ethics
New Hampshire Advisory Committee on judicial Ethics
New Mexico Advisory Committee on the Code of Judicial Conduct
New York Advisory Committee on Judicial Ethics
Oklahoma Judicial Ethics Advisory Panels
Pennsylvania Conference of State Trial Judges Judicial Ethics Committee
South Carolina Advisory Committee on Standards of judicial Conduct
Tennessee Judicial Ethics Committee
Texas Committee on Judicial Ethics
Utah Judicial Ethics Advisory Committee
Vermont Judicial Ethics Committee
Virginia Judicial Ethics Advisory Committee
Washington Ethics Advisory Committee
West Virginia Judicial Investigation Commission
Wisconsin Supreme Court Judicial Conduct Advisory Committee

INDEX [84]

[84] The numbers in this index refer to paragraphs.

MEASURES FOR THE

EFFECTIVE IMPLEMENTATION OF

THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT

(The Implementation Measures)

Adopted by the Judicial Integrity Group
at its Meeting held in
Lusaka, Zambia

21 and 22 January 2010

CONTENTS

INTRODUCTION

The Bangalore Principles of Judicial Conduct identify six core values of the judiciary – Independence, Impartiality, Integrity, Propriety, Equality, Competence and Diligence. They are intended to establish standards of ethical conduct for judges. They are designed to provide guidance to judges in the performance of their judicial duties 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 the judicial role, and to offer the community a standard by which to measure and evaluate the performance of the judicial sector. The Commentary on the Bangalore Principles is intended to contribute to a better understanding of these Principles.

The section on "Implementation" in the Bangalore Principles of Judicial Conduct states that:

> 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.

In some jurisdictions mechanisms and procedures are already in existence, having been instituted by law or rules of court, to establish ethical standards of conduct for judges. In others they are not. Accordingly, this statement of measures is offered by the Judicial Integrity Group as guidelines or benchmarks for the effective implementation of the Bangalore Principles.

This statement is in two parts. Part One describes the measures that are required to be adopted by the judiciary. Part Two describes the institutional arrangements that are required to ensure judicial independence and which are exclusively within the competence of the State. While judicial independence is in part a state of mind of members of the judiciary, the State is required to establish a set of institutional arrangements that will enable the judge and other relevant office holders to enjoy that state of mind. The protection of the administration of justice from political influence or interference cannot be achieved by the judiciary alone. While it is the responsibility of the judge to be free of inappropriate connections with the executive and the legislature, it is the responsibility of the State to establish the institutional arrangements that would secure the independence of the judiciary from the other two branches of government.[1]

[1] In its General Comment No.32 (2007), the Human Rights Committee states that the requirement of independence in article 14(1) of the International Covenant on Civil and Political Rights refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. Accordingly, States are required to take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of members of the judiciary and disciplinary sanctions taken against them.

In preparing this statement of measures, reference was made to several national constitutions and to regional and international initiatives to ensure that they reflect a broad national and international consensus. The latter include:

(a) The Draft Principles on the Independence of the Judiciary ("Siracusa Principles") formulated by a representative committee of experts in 1981;

(b) The Minimum Standards of Judicial Independence adopted by the International Bar Association in 1982;

(c) The United Nations Basic Principles on the Independence of the Judiciary 1985;

(d) The Draft Universal Declaration on the Independence of Justice 1988 (the "Singhvi Declaration");

(e) Recommendation No.R (94) 12 of the Committee of Ministers of the Council of Europe on the Independence, Efficiency and Role of Judges, 1994;

(f) The Beijing Statement of Principles of the Independence of the Judiciary adopted by a conference of Chief Justices of the Asia-Pacific region in 1995;

(g) The European Charter on the Statute for Judges adopted in 1998;

(h) The Universal Charter of the Judge adopted by the International Association of Judges in 1999;

(i) The Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence for the Commonwealth adopted in 2001;

(j) Opinions of the Consultative Council of European Judges (CCJE):

Opinion No.1 (2001): Standards concerning the Independence of the Judiciary and the Irremovability of Judges;

Opinion No.2 (2002): Principles and Rules governing Judges' Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality;

Opinion No.3 (2003): Appropriate Initial and In-Service Training for Judges at National and European Levels;

Opinion No.10 (2007): A Council for the Judiciary.

(k) The Blantyre Rule of Law/Separation of Powers Communique issued by representatives of all three branches of government in the Southern African Development Community (SADC) region in 2003;

(l) The Cairo Declaration on Judicial Independence adopted by the participants of the Second Arab Justice Conference held in 2003;

(m) The Suva Statement on the Principles of Judicial Independence and Access to Justice adopted at a judicial colloquium in 2004.

(n) "Justice Matters" – the report of the Irish Council for Civil Liberties on Independence, Accountability and the Irish Judiciary, 2007;

(o) General Comment No.32 (2007) of the Human Rights Committee on Article 14 of the International Covenant on Civil and Political Rights.

(p) The Venice Commission Report on Judicial Appointments, 2007;

(q) The United Nations Office on Drugs and Crime (UNODC), Draft Guide on Strengthening Judicial Integrity and Capacity, October 2009.

Part One

RESPONSIBILITIES OF THE JUDICIARY

1. Formulation of a Statement of Principles of Judicial Conduct

1.1 The judiciary should adopt a statement of principles of judicial conduct, taking into consideration the Bangalore Principles of Judicial Conduct.

1.2 The judiciary should ensure that such statement of principles of judicial conduct is disseminated among judges and in the community.

1.3 The judiciary should ensure that judicial ethics, based on such statement of principles of judicial conduct, are an integral element in the initial and continuing training of judges.

2. Application and Enforcement of Principles of Judicial Conduct

2.1 The judiciary should consider establishing a judicial ethics advisory committee of sitting and/or retired judges to advise its members on the propriety of their contemplated or proposed future conduct.[2]

2.2 The judiciary should consider establishing a credible, independent judicial ethics review committee to receive, inquire into, resolve and determine complaints of unethical conduct of members of the judiciary, where no provision exists for the reference of such complaints to a court. The committee may consist of a majority of judges, but should preferably include sufficient lay representation to attract the confidence of the community. The committee should ensure, in accordance with law, that protection is accorded to complainants and witnesses, and that due process is secured to the judge against whom a complaint is made, with confidentiality in the preliminary stages of an inquiry if that is requested by the judge. To enable the committee to confer such privilege upon witnesses, etc., it may be necessary for the law to afford absolute or qualified privilege to the proceedings of the committee.

[2] In many jurisdictions in which such committees have been established a judge may request an advisory opinion about the propriety of his or her own conduct. The committee may also issue opinions on its own initiative on matters of interest to the judiciary. Opinions address contemplated or proposed future conduct and not past or current conduct unless such conduct relates to future conduct or is continuing. Formal opinions set forth the facts upon which the opinion is based and provide advice only with regard to those facts. They cite the rules, cases and other authorities that bear upon the advice rendered and quote the applicable principles of judicial conduct. The original formal opinion is sent to the person requesting the opinion, while an edited version that omits the names of persons, courts, places and any other information that might tend to identify the person making the request is sent to the judiciary, bar associations and law school libraries. All opinions are advisory only, and are not binding, but compliance with an advisory opinion may be considered to be evidence of good faith.

The committee may refer sufficiently serious complaints to the body responsible for exercising disciplinary control over the judge.[3]

3. Assignment of Cases

3.1 The nomination of judges to sit on a bench is an inextricable part of the exercise of judicial power.

3.2 The division of work among the judges of a court, including the distribution of cases, should ordinarily be performed under a predetermined arrangement provided by law or agreed by all the judges of the relevant court. Such arrangements may be changed in clearly defined circumstances such as the need to have regard to a judge's special knowledge or experience. The allocation of cases may, by way of example, be made by a system of alphabetical or chronological order or other random selection process.

3.3 A case should not be withdrawn from a particular judge without valid reasons. Any such reasons and the procedures for such withdrawal should be provided for by law or rules of court.

4. Court Administration

4.1 The responsibility for court administration, including the appointment, supervision and disciplinary control of court personnel should vest in the judiciary or in a body subject to its direction and control.

4.2 The judiciary should adopt and enforce principles of conduct for court personnel, taking into consideration the Principles of Conduct for Court Personnel formulated by the Judicial Integrity Group in 2005.

4.3 The judiciary should endeavour to utilize information and communication technologies with a view to strengthening the transparency, integrity and efficiency of justice.

---

[3] In many jurisdictions in which such committees have been established, complaints into pending cases are not entertained, unless it is a complaint of undue delay. A complaint is required to be in writing and signed, and include the name of the judge, a detailed description of the alleged unethical conduct, the names of any witnesses, and the complainant's address and telephone number. The judge is not notified of a complaint unless the committee determines that an ethics violation may have occurred. The identity of the person making the complaint is not disclosed to the judge unless the complainant consents. It may be necessary, however, for a complainant to testify as a witness in the event of a hearing. All matters before the committee are confidential. If it is determined that there may have been an ethics violation, the committee usually handles the matter informally by some form of counselling with the judge. If the committee issues a formal charge against the judge, it may conduct a hearing and, if it finds the charge to be well-founded, may reprimand the judge privately, or place the judge on a period of supervision subject to terms and conditions. Charges that the committee deems sufficiently serious to require the retirement, public censure or removal of the judge are referred to the body responsible for exercising disciplinary control over the judge.

4.4 In exercising its responsibility to promote the quality of justice, the judiciary should, through case audits, surveys of court users and other stakeholders, discussion with court-user committees and other means, endeavour to review public satisfaction with the delivery of justice and identify systemic weaknesses in the judicial process with a view to remedying them.

4.5 The judiciary should regularly address court users' complaints, and publish an annual report of its activities, including any difficulties encountered and measures taken to improve the functioning of the justice system.

5. Access to Justice

5.1 Access to justice is of fundamental importance to the rule of law. The judiciary should, within the limits of its powers, adopt procedures to facilitate and promote such access.

5.2 When there is no sufficient legal aid publicly available, the high costs of private legal representation make it necessary for the judiciary to consider, where appropriate and desirable, such initiatives as the encouragement of *pro bono* representation of selected litigants by the legal profession of selected litigants, the appointment of *amici curiae* (friend of the court), alternative dispute resolution, and community justice procedures, to protect interests that would otherwise be unrepresented in court proceedings; and the provision of permission to appropriate non-qualified persons (including paralegals) to represent parties before a court.

5.3 The judiciary should institute modern case management techniques to ensure the just, orderly and expeditious conduct and conclusion of court proceedings.[4]

6. Transparency in the Exercise of Judicial Office

[4] Traditionally, the parties to a dispute control the movement of a case, with judges and court personnel merely acting as facilitators. It is now recognized in many jurisdictions that the judiciary should actively monitor and control the progress of a case, especially in the original courts, from institution to judgment, including the completion of all the post-judgment steps. The active management by the court of the progress of a case is designed to encourage the just, orderly and expeditious resolution of disputes. This may involve the case being handled by the same judge from beginning to end; the early fixing of a near-immutable trial date; the judge himself fixing the timetable and giving relevant directions in the pre-trial period; and the same judge trying the case if it goes to trial. The active involvement of the judge enables him or her to deal effectively with the critical areas of litigation, such as defective pleadings, excessive discovery of documents and other techniques frequently employed to delay the proceedings. It may also facilitate the continuous hearing of a case instead of short and incomplete hearings spread over several weeks or months.

6.1 Judicial proceedings should, in principle, be conducted in public. The publicity of hearings ensures the transparency of proceedings. The judiciary should make information regarding the time and venue of hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the hearing.[5]

6.2 The judiciary should actively promote transparency in the delivery of justice, and ensure that, subject to judicial supervision, the public, the media and court users have reliable access to all information pertaining to judicial proceedings, both pending and concluded, whether on a court website or through appropriate and accessible records. Such information should include reasoned judgments, pleadings, motions and evidence, but affidavits or like evidentiary documents that have not yet been accepted by the court as evidence may be excluded.

6.3 To facilitate access to the judicial system, the judiciary should ensure that standard, user-friendly forms and instructions, and clear and accurate information on matters such as filing fees, court procedures and hearing schedules are made available to potential court users.

6.4 The judiciary should ensure that witnesses, other court users and interested members of the public have access to easily readable signs and publicly displayed courthouse orientation guides. Sufficient court personnel should be provided to respond to questions through public information services. They should be available close to court entrances. Customer service and resource centres should be provided in an accessible place. Court users should have access to safe, clean, convenient and user-friendly court premises, with comfortable waiting areas, adequate public space, and amenities for special-need users, such as children, victims, and the disabled.

6.5 The judiciary should consider initiating outreach programmes designed to educate the public on the role of the justice system in society and to address common uncertainties or misconceptions about the justice system.[6]

---

[5] The requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations, or to pre-trial decisions. Article 14(1) of the International Covenant on Civil and Political Rights acknowledges that a court has the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.

[6] In a departure from the traditional belief that judges should remain isolated from the community to ensure their independence and impartiality, judicial outreach now involves proactive measures by

6.6 The judiciary should afford access and appropriate assistance to the media in the performance of its legitimate function of informing the public about judicial proceedings, including decisions in particular cases.

7. Judicial Training

7.1 To the full extent of its powers, the judiciary itself should organize, conduct or supervise the training of judges.

7.2 In jurisdictions that do not have adequate training facilities, the judiciary should, through the appropriate channels, seek the assistance of appropriate national and international bodies and educational institutions in providing access to such facilities or in developing the local knowledge capacity.

7.3 All appointees to judicial office should have or acquire, before they take up their duties, appropriate knowledge of relevant aspects of substantive national and international law and procedure. Duly appointed judges should also receive an introduction to other fields relevant to judicial activity such as management of cases and administration of courts, information technology, social sciences, legal history and philosophy, and alternative dispute resolution.

7.4 The training of judicial officers should be pluralist in outlook in order to guarantee and strengthen the open-mindedness of the judge and the impartiality of the judiciary.

7.5 While it is necessary to institute training programmes for judges on a regular basis, in-service training should normally be based on the voluntary participation of members of the judiciary.

7.6 Where the language of legal literature (i.e. law reports, appellate judgments, etc) is different from the language of legal education, instruction in the former should be provided to both lawyers and judges.

7.7 The training programmes should take place in, and encourage, an environment in which members of different branches and levels of the judiciary may meet and exchange their experiences and secure common insights from dialogue with each other.

---

judges and direct interaction with the communities they serve. Experience suggests that increased public knowledge about the law and court processes promote not only judicial transparency but also public confidence. Recent outreach approaches have included town hall meetings, the production of radio and television programmes, and the dissemination of awareness-raising materials such as court user guides in the form of short pamphlets providing basic information on arrest, detention and bail, criminal and civil procedures, and useful contacts for crime victims, witnesses and other users.

8. Advisory Opinions

8.1 A judge or a court should not render advisory opinions to the executive or the legislature except under an express constitutional or statutory provision permitting that course.

9. Immunity of Judges

9.1 A judge should be criminally liable under the general law for an offence of general application committed by him or her and cannot therefore claim immunity from ordinary criminal process.

9.2 A judge should enjoy personal immunity from civil suits for conduct in the exercise of a judicial function.

9.3 The remedy for judicial errors (whether in respect of jurisdiction, substance or procedure) should lie in an appropriate system of appeals or judicial review.

9.4 The remedy for injury incurred by reason of negligence or misuse of authority by a judge should lie only against the State without recourse by the State against the judge.

9.5 Since judicial independence does not render a judge free from public accountability, and legitimate public criticism of judicial performance is a means of ensuring accountability subject to law, a judge should generally avoid the use of the criminal law and contempt proceedings to restrict such criticism of the courts.

Part Two

RESPONSIBILITIES OF THE STATE

10. Constitutional Guarantee of Judicial Independence

10.1 The principle of judicial independence requires the State to provide guarantees through constitutional or other means:

(a) that the judiciary shall be independent of the executive and the legislature, and that no power shall be exercised as to interfere with the judicial process;

(b) that everyone has the right to be tried with due expedition and without undue delay by the ordinary courts or tribunals established by law subject to appeal to, or review by, the courts;

(c) that no special ad hoc tribunals shall be established to displace the normal jurisdiction otherwise vested in the courts;

(d) that, in the decision-making process, judges are able to act without any restriction, improper influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason, and exercise unfettered freedom to decide cases impartially, in accordance with their conscience and the application of the law to the facts as they find them;

(e) that the judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature, and that no organ other than the court may decide conclusively its own jurisdiction and competence, as defined by law;

(f) that the executive shall refrain from any act or omission that preempts the judicial resolution of a dispute or frustrates the proper execution of a court decision;

(g) that a person exercising executive or legislative power shall not exercise, or attempt to exercise, any form of pressure on judges, whether overt or covert;

(h) that legislative or executive powers that may affect judges in their office, their remuneration, conditions of service or their resources, shall not be used with the object or consequence of threatening or bringing pressure upon a particular judge or judges;

(i) that the State shall ensure the security and physical protection of members of the judiciary and their families, especially in the event of threats being made against them; and

(j) that allegations of misconduct against a judge shall not be discussed in the legislature except on a substantive motion for the removal or censure of a judge of which prior notice has been given.

11. Qualifications for Judicial Office

11.1 Persons selected for judicial office should be individuals of ability, integrity and efficiency with appropriate training or qualifications in law.

11.2 The assessment of a candidate for judicial office should involve consideration not only of his or her legal expertise and general professional abilities, but also of his or her social awareness and sensitivity, and other personal qualities (including a sense of ethics, patience, courtesy, honesty, commonsense, tact, humility and punctuality) and communication skills. The political, religious or other beliefs or allegiances of a candidate, except where they are proved to intrude upon the judge's performance of judicial duties, should not be relevant.

11.3 In the selection of judges, there should be no discrimination on irrelevant grounds. A requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory on irrelevant grounds. Due consideration should be given to ensuring a fair reflection by the judiciary of society in all its aspects.

12. The Appointment of Judges

12.1 Provision for the appointment of judges should be made by law.

12.2 Members of the judiciary and members of the community should each play appropriately defined roles in the selection of candidates suitable for judicial office.

12.3 In order to ensure transparency and accountability in the process, the appointment and selection criteria should be made accessible to the general public, including the qualities required from candidates for high judicial office. All judicial vacancies should be advertised in such a way as to invite applications by, or nominations of, suitable candidates for appointment.

12.4 One mechanism which has received particular support in respect of States developing new constitutional arrangements consists in the creation of a Higher Council for the Judiciary, with mixed judicial and lay representation, membership of which should not be dominated by political considerations.

12.5 Where an independent council or commission is constituted for the appointment of judges, its members should be selected on the basis of their competence, experience, understanding of judicial life, capacity for appropriate discussion and appreciation of the importance of a culture of independence. Its non-judge members may be selected from among outstanding jurists or citizens of acknowledged reputation and experience chosen by an appropriate appointment mechanism.

12.6 The promotion of judges, when not based on seniority, should be made by the independent body responsible for the appointment of judges, and should be based on an objective appraisal of his or her performance, having regard to the expertise, abilities, personal qualities and skills required for initial appointment.

12.7 The procedure in certain states of the Chief Justice or President of the Supreme Court being elected, in rotation, from among the judges of that court by the judges themselves, is not inconsistent with the principle of judicial independence and may be considered for adoption by other states.

13. Tenure of Judges

13.1 It is the duty of the State to provide a full complement of judges to discharge the work of the judiciary.

13.2 A judge should have a constitutionally guaranteed tenure until a mandatory retirement age or the expiry of a fixed term of office.[7] A fixed term of office should not ordinarily be renewable unless procedures exist to ensure that the decision regarding re-appointment is made according to objective criteria and on merit.

13.3 The engagement of temporary or part-time judges should not be a substitute for a full complement of permanent judges. Where permitted by local law, such temporary or part-time judges should be appointed on conditions, and accompanied by guarantees, of tenure or objectivity regarding the continuation of their engagement which eliminate, so far as possible, any risks in relation to their independence.

13.4 Because the appointment of judges on probation could, if abused, undermine the independence of the judiciary, the decision whether or

[7] National practice appears to favour a specified retirement age for judges of superior courts. The constitutionally prescribed retirement age for judges of the highest court ranges from 62 in Belize, Botswana and Guyana to 65 in Greece, India, Malaysia, Namibia (with the possibility of extension to 70), Singapore, Sri Lanka and Turkey, 68 in Cyprus, 70 in Australia, Brazil Ghana, Peru and South Africa, to 75 in Canada and Chile. In some of these jurisdictions (for example, Belize and Botswana), however, provision exists to permit a judge who has reached retirement age to continue in office "as long as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age".

not to confirm such appointment should only be taken by the independent body responsible for the appointment of judges.

13.5 Except pursuant to a system of regular rotation provided by law or formulated after due consideration by the judiciary, and applied only by the judiciary or by an independent body, a judge should not be transferred from one jurisdiction, function or location to another without his or her consent.[8]

14. Remuneration of Judges

14.1 The salaries, conditions of service and pensions of judges should be adequate, commensurate with the status, dignity and responsibilities of their office, and should be periodically reviewed for those purposes.

14.2 The salaries, conditions of service and pensions of judges should be guaranteed by law, and should not be altered to their disadvantage after appointment.

15. Discipline of Judges

15.1 Disciplinary proceedings against a judge may be commenced only for serious misconduct.[9] The law applicable to judges may define, as far as possible in specific terms, conduct that may give rise to disciplinary sanctions as well as the procedures to be followed.

15.2 A person who alleges that he or she has suffered a wrong by reason of a judge's serious misconduct should have the right to complain to the person or body responsible for initiating disciplinary action.

15.3 A specific body or person should be established by law with responsibility for receiving complaints, for obtaining the response of the judge and for considering in the light of such response whether or not there is a sufficient case against the judge to call for the initiation of disciplinary action. In the event of such a conclusion, the body or person should refer the matter to the disciplinary authority.[10]

---

[8] The transfer of judges has been addressed in several international instruments since transfer can be used to punish an independent and courageous judge, and to deter others from following his or her example.

[9] Conduct that gives rise to disciplinary sanctions must be distinguished from a failure to observe professional standards. Professional standards represent best practice, which judges should aim to develop and towards which all judges should aspire. They should not be equated with conduct justifying disciplinary proceedings. However, the breach of professional standards may be of considerable relevance, where such breach is alleged to constitute conduct sufficient to justify and require disciplinary sanction.

[10] Unless there is such a filter, judges could find themselves facing disciplinary proceedings brought at the instance of disappointed litigants.

15.4 The power to discipline a judge should be vested in an authority or tribunal which is independent of the legislature and executive, and which is composed of serving or retired judges but which may include in its membership persons other than judges, provided that such other persons are not members of the legislature or the executive.

15.5 All disciplinary proceedings should be determined by reference to established standards of judicial conduct, and in accordance with a procedure guaranteeing full rights of defence.

15.6 There should be an appeal from the disciplinary authority to a court.

15.7 The final decision in any proceedings instituted against a judge involving a sanction against such judge, whether held in camera or in public, should be published.

15.8 Each jurisdiction should identify the sanctions permissible under its own disciplinary system, and ensure that such sanctions are, both in accordance with principle and in application, proportionate.

16. Removal of Judges from Office

16.1 A judge may be removed from office only for proved incapacity, conviction of a serious crime, gross incompetence, or conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary.

16.2 Where the legislature is vested with the power of removal of a judge, such power should be exercised only after a recommendation to that effect of the independent authority vested with power to discipline judges.

16.3 The abolition of a court of which a judge is a member should not be accepted as a reason or an occasion for the removal of the judge. Where a court is abolished or restructured, all existing members of that court should be re-appointed to its replacement or appointed to another judicial office of equivalent status and tenure. Where there is no such judicial office of equivalent status or tenure, the judge concerned should be provided with full compensation for loss of office.

17. Budget of the Judiciary

17.1 The budget of the judiciary should be established in collaboration with the judiciary, care being taken that neither the executive nor legislature authorities is able to exert any pressure or influence on the judiciary when setting its budget.

17.2 The State should provide the judiciary with sufficient funds and resources to enable each court to perform its functions efficiently and without an excessive workload.

17.3 The State should provide the judiciary with the financial and other resources necessary for the organization and conduct of the training of judges.

17.4 The budget of the judiciary should be administered by the judiciary itself or by a body independent of the executive and the legislature and which acts in consultation with the judiciary. Funds voted for the judiciary should be protected from alienation and misuse.

DEFINITIONS

In this statement of implementation measures, the following meanings shall be attributed to the words used:

"irrelevant grounds" means race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes.

"judge" means any person exercising judicial power, however designated, and includes a magistrate and a member of an independent tribunal.

[2009] UKPC 43
Privy Council No 0016 of 2009

HEARING ON THE REPORT OF THE CHIEF JUSTICE OF GIBRALTAR

REFERRAL UNDER SECTION 4 OF THE JUDICIAL COMMITTEE ACT 1833

before

Lord Phillips
Lord Hope
Lord Rodger
Lady Hale
Lord Brown
Lord Judge
Lord Clarke

ADVICE DELIVERED

ON

12 November 2009

Heard on 15,16, 17, and 18 June 2009

Chief Justice of Gibraltar
Michael Beloff QC
Paul Stanley
(Instructed by Charles Gomez & Co and Carter Ruck)

Governor of Gibraltar
Timothy Otty QC
(Instructed by Clifford Chance LLP)

Government of Gibraltar
James Eadie QC
(Instructed by R J M Garcia)

LORD PHILLIPS :

1. The task of the Committee is to advise Her Majesty whether The Hon. Mr Justice Schofield, Chief Justice of Gibraltar, should be removed from office by reason of inability to discharge the functions of his office or for misbehaviour. The independence of the judiciary requires that a judge should never be removed without good cause and that the question of removal be determined by an appropriate independent and impartial tribunal. This principle applies with particular force where the judge in question is a Chief Justice. In this case the latter requirement has been abundantly satisfied both by the composition of the Tribunal that conducted the initial enquiry into the relevant facts and by the composition of this Committee. This is the advice of the majority of the Committee, namely, Lord Phillips, Lord Brown, Lord Judge and Lord Clarke.

Security of tenure of judicial office under the Constitution

2. Gibraltar has two senior judges, the Chief Justice and a second Puisne Judge. The Gibraltar Constitution Order 2006 ("the 2006 Order") provides:

> "Tenure of office of judges
>
> 64 (1) Subject to the provisions of this section, a person holding the office of Chief Justice or of Puisne Judge shall vacate that office when he attains the age of 67…
>
> (2) The Chief Justice … may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour…
>
> (3) The Chief Justice… shall be removed from office by the Governor if the question of the removal of that judge from office has, at the request of the Governor made in pursuance of subsection (4),been referred by Her Majesty to the Judicial Committee

of Her Majesty's Privy Council under section 4 of the Judicial Committee Act 1833 or any other enactment enabling Her Majesty in that behalf, and the Judicial Committee has advised Her Majesty that the judge ought to be removed from office for inability as aforesaid or misbehaviour.

(4) If the Governor considers that the question of removing the Chief Justice…from office for inability as aforesaid or for misbehaviour ought to be investigated, then –

(a) the Governor shall appoint a tribunal…;

(b) the tribunal shall inquire into the matter and report on the facts thereof to the Governor and advise the Governor whether he should request that the question of the removal of that judge should be referred by Her Majesty to the Judicial Committee [of Her Majesty's Privy Council]; and

(c) if the tribunal so advises, the Governor shall request that the question should be referred accordingly.

. . .

(6) If the question of removing the Chief Justice…has been referred to a tribunal under subsection (4), the Governor may suspend him from performing the functions of his office…

. . .

(8) The powers of the Governor under this section shall be exercised by him in accordance with the advice of the Judicial Service Commission."

3. These provisions, other than those in subsection (8), reproduced provisions to the same effect in section 60 of the Gibraltar Constitution Order 1969 ("the 1969 Order").

Procedural background

4. On 17 April 2007 all the Queen's Counsel in Gibraltar, with the exception of the Speaker in the House of Assembly, were among the signatories ("the Signatories") to a Memorandum to the Governor that expressed on behalf of themselves and their respective firms "their deep concern at a state of affairs which has developed seriously affecting the administration of justice and the reputational image of Gibraltar". They stated that they had lost confidence in the ability of the Chief Justice to discharge the functions of his office. At the request of the Governor they submitted a Supplementary Memorandum ("the Second Memorandum") dated 21 May which set out in detail the reasons for their dissatisfaction with the Chief Justice. One firm, Hassans & Co, wrote dissociating themselves from those parts of the Second Memorandum that related to matters in respect of which they had professionally represented the Chief Justice or his wife.

5. Copies of the two Memoranda were supplied to the Chief Justice and his solicitors sent a preliminary response to the Governor. All of these documents were considered by the Judicial Service Commission, which advised the Governor to appoint a Tribunal under section 64(4) of the 2006 Order. The Governor did so on 14 September 2007 and on 17 September he suspended the Chief Justice, pursuant to section 64(6) of the Order.

6. One member of the Tribunal recused himself and was replaced, whereupon the Tribunal consisted of the Rt Hon Lord Cullen of Whitekirk, the Rt Hon Sir Peter Gibson and the Rt Hon Sir Jonathan Parker.

7. There were two directions hearings. These were attended by representatives of the Chief Justice and of the Government of Gibraltar, the Governor of Gibraltar and the signatories to the Memoranda ("the Signatories") as interested parties. At the second hearing all agreed

> "that in making its report to the Governor the Tribunal should express its own view on whether the facts found by the Tribunal showed any inability on the part of the Chief Justice to discharge the functions of his office or any misbehaviour on his part and, if so, to reach its own conclusion as to whether such inability or misbehaviour should warrant his removal from office."

The parties agreed a Statement of Issues that set out 23 episodes between 1999 and 2007 where the conduct of the Chief Justice had been the subject of criticism.

8. The Tribunal sat from 7 to 28 July to hear evidence of fact. 18 witnesses gave oral evidence. The Tribunal also had regard to written statements by a further 11 witnesses who

did not give oral evidence. These included Mrs Schofield, the wife of the Chief Justice, who had been expected to give evidence. She declined to give evidence on the ground that she did not consider satisfactory the terms on which funding had been provided to her to enable her to obtain legal advice in relation to certain matters relating to her appearance before the Tribunal. The Tribunal indicated that it did not consider that this justified her failure to appear to give evidence. They were right to do so. Had Mrs Schofield wished to give evidence there was no reason why she should not have done so.

The Report of the Tribunal

9. The Report of the Tribunal to the Governor is dated 12 November 2008. It was provided to the Chief Justice on 3 December and published on the following day. The Report makes findings of primary fact in relation to each of the 23 episodes identified in the Statement of Issues. In relation to all but one of these it criticises the conduct of the Chief Justice. Some of these criticisms are based on inferences drawn from the primary facts as to the knowledge, perception or motive of the Chief Justice. In making findings of fact the Tribunal has applied the civil standard of proof of balance of probability. The Tribunal commented that in a number of instances the conduct of the Chief Justice amounted to impropriety, giving four examples of this, but added that no single instance of misbehaviour showed that the Chief Justice was unfit to hold office.

10. The conclusions of the Tribunal were set out in the following final paragraphs of its Report:

> "7.36 The conduct of the Chief Justice which we have summarised earlier in this chapter directly affected the way in which he discharged part of the responsibilities of his office, such as his relations with the Governor and the Government (covering such matters as funding, proposed legislation and appointments), and his relations with the representatives of the Bar. The conduct stemmed, in our view, from a number of characteristics of his personality and attitude, as follows.
>
> 7.37 First, the Chief Justice did not seem to be alive to the boundary between what was and what was not proper for someone in his position to do or say. He repeatedly showed a lack of judgment in this respect. He also showed the lack of a sense of proportion, and tended to over-react to perceived slights. He did not observe appropriate restraint or respect for accuracy in his public pronouncements.
>
> 7.38 Secondly, he showed a pre-occupation, bordering on an obsession, with judicial independence. He claimed that it was under threat when this was not the case. This led to his responding in an improper or excessive manner to executive

action of which he disapproved. Allied to this was his pre-occupation with the status of his office and his continuance in office. This showed itself in a number of ways ranging from petty discourtesy to the Chief Minister to the unfounded accusation that the Government had long sought to have him removed from office.

7.39 Fourthly, he showed himself to be unable to restrain himself from supporting his wife in her attack of the members of the Bar Council or her libel action against its Chairman. Although he affected a lack of interest in her communications with the Bar Council he was more than content that his silence should be interpreted as support for her communications. He knew that it would have been improper for him to have sent them. He was unable to grasp that his association with them would have been seen by a fair minded and well informed observer as improper.

7.40 Fifthly, the perceptions arising from the conduct of the Chief Justice inevitably rendered it impossible for the Chief Justice to sit in a significant number of cases.

7.41 At the same time the Chief Justice showed himself to be indifferent as to the effect, or the perceived effect, of his conduct on his relations with the Government and the Bar, the standing of the judiciary and the administration of justice in Gibraltar. This would inevitably affect the reputation of his office. In the particular context of Gibraltar, which is a small jurisdiction as a number of witnesses reminded us, the significance of public perception is inevitably magnified. In his witness statement Mr Neish observed: 'The public in Gibraltar is much closer to public figures than in the case of say, England. Their scrutiny is more intense and their actions more directly felt'. While it is true that public opinion in Gibraltar is not unanimous in its disapproval of the conduct of the Chief Justice we are in no doubt that its effect has been to polarise public opinion in a way which is damaging to the reputation of the office, and hence to the interests of good governance of Gibraltar. By his conduct he has antagonised a large number of those who practise before him.

7.42 In these circumstances we conclude that the Chief Justice is unable to discharge the functions of his office. We are satisfied that this inability warrants the removal of the Chief Justice from office.

Our advice

7.43 Accordingly, in terms of section 64(4)(c) we advise the Governor that he should request that the question of the

> removal of the Chief Justice should be referred by Her Majesty to the Judicial Committee of the Privy Council."

The parties

11. The Chief Justice has been represented before the Committee by Mr Michael Beloff QC and Mr Paul Stanley, neither of whom appeared for him before the Tribunal. The other parties have been the Government of Gibraltar, represented by Mr James Eadie QC, the Governor of Gibraltar, represented by Mr Timothy Otty QC, and the Signatories, who submitted a written case but were not represented at the hearing. These parties have supported the conclusions of the Tribunal.

The significance of the Tribunal's Report

12. The Constitution Order does not expressly provide for the Tribunal to express a view as to whether a judge's conduct justifies removal. All parties sensibly agreed, nonetheless, that it should do so for the Tribunal's view, if not expressed, was likely to be implicit in its advice to the Governor. On 17 May 2008 an Application Notice filed on behalf of the Chief Justice submitted:

> "The Tribunal has been entrusted with a duty to determine and report on the facts and there will be no rehearing in relation to the facts if the matter progresses to the Privy Council. The Tribunal therefore has a crucial determinative role in the removal of a Chief Justice."

Before the Committee Mr Beloff QC submitted that the Committee was exercising its own original jurisdiction under section 64 of the Constitution and section 4 of the Judicial Committee Act 1833 in advising Her Majesty whether the Chief Justice should be removed and could, if it chose, conduct its own hearing of the evidence. He accepted, however, that as master of its own procedure, the Committee was unlikely to do so, unless it accepted his submission that the Tribunal had erred in its approach to fact-finding by applying the civil rather than the criminal standard of proof.

13. Section 64(4) of the 2006 Order provides for an inquiry into the facts by a Tribunal of three present or past holders of high judicial office. This Committee is not bound by the findings of fact of that Tribunal but can properly act upon them. In the present case the primary findings of fact are not challenged. In some cases secondary findings, or inferences from the primary findings, have been challenged. In those cases the Committee has reviewed the secondary findings in the light of the primary findings upon which they have been based.

14. In the event it is not surprising that the hearing before us was treated by the parties as if it were an appeal against the conclusions of the Tribunal. While the jurisdiction of the Committee is indeed original, it is convenient to follow the course taken by the parties and to consider the respects in which the conclusions of the Tribunal have been challenged by Mr Beloff, taking the issues of fact in chronological order. For convenience we annexe the Report of the Tribunal[1] to this advice. This advice will not refer to all the evidence that is set out in detail in the Tribunal's Report, and the two should be read together. Before turning to the facts there are, however, a number of preliminary matters to consider.

Standard of proof

15. The Tribunal applied the civil standard of proof when resolving issues of fact. It gave its reasons for applying this standard in the Fifth Schedule to its Report. It held that the proceedings before the Tribunal were not to be equated with disciplinary proceedings where the criminal burden of proof was applicable. They were concerned with the public interest that called, on the one hand, for the protection of a judge against unfounded or illegitimate interference with his tenure of office and, on the other, for his removal should he show unfitness for office that need not necessarily be based on misbehaviour. In these circumstances it was appropriate to apply the civil standard of proof.

16. We have not found the issue of standard of proof an easy one. Judicial independence is of cardinal importance. There is a case for saying that a judge should not be removed for misconduct unless this is proved to the criminal standard – see the comments of Lord Mustill at paragraphs 81 to 83 of the Report of the Tribunal of 14 December 2007 into the question of removing from office the Chief Justice of Trinidad and Tobago pursuant to provisions of the Constitution of the Republic of Trinidad and Tobago that are similar to section 64 of the 2006 Order. The present proceedings are not, however, concerned with disciplining the Chief Justice for misconduct but with deciding whether he is fit to perform his office and the Committee has decided, as did the Tribunal, that issues of fact that bear on that question should be determined according to the civil standard of proof. That said, this is not a case where our advice is going to turn on the standard of proof applied to fact finding. Most of the primary facts are a matter of record and not disputed. The challenge made by Mr Beloff is to the inferences drawn by the Tribunal from the primary facts and to the Tribunal's conclusion that the Chief Justice's conduct amounted to impropriety and that it justified his removal on the ground of his inability to perform the functions of his office. The latter is not a question of fact subject to a standard of proof but a matter for judicial assessment.

17. The Tribunal applied the civil standard of proof according to what it described as the "flexible approach" that "the more improbable the event, the stronger must be the evidence that it did occur" – see *In re D (Secretary of State for Northern Ireland intervening)* [2008] 1 WLR 1499, per Lord Carswell at paras 23 and 25. That approach is no more than the rational

[1] www.jcpc.gov.uk/ja_gibraltar.pdf

way of determining facts on a balance of probabilities. The more improbable the event the greater the weight of the evidence that must exist before the scales tilt in favour of a finding that the event occurred. There is one area in relation to which we consider that this approach is particularly important. In their written case the signatories have drawn attention to 21 instances (after allowing for the fact that two appear twice in their list) where the Tribunal made findings adverse to the Chief Justice's credibility. The signatories rely on these as demonstrating "mendacity" on his part. A firm basis is required for any finding that the Chief Justice was deliberately untruthful when giving evidence, albeit that in assessing any individual aspect of the Chief Justice's evidence the Tribunal could properly have regard to the content of his evidence overall and the manner in which he gave that evidence.

Procedural fairness

18. Mr Beloff submitted that the procedure before the Tribunal had not been fair in as much as the case against the Chief Justice had not been clearly spelt out at the start of the proceedings and some of the adverse findings made by the Tribunal were in respect of matters that formed no part of the Statement of Issues. He also submitted that there was a lack of clarity in the reasons given by the Tribunal for concluding that the Chief Justice's behaviour showed that he was unfit to remain in office. In general we reject this submission. The Tribunal took great care to ensure that the Chief Justice had proper notice of the allegations that were made against him. As Mr Eadie QC for the Government pointed out in his printed case:

i) The procedure was inquisitorial, not adversarial;

ii) The Terms of Reference referred to the Memorandum and the Supplementary Memorandum of the signatories that contained substantial and specific allegations against him;

iii) A list of issues was prepared and amended that identified the case against the Chief Justice in some detail;

iv) There were opening statements by all concerned, including Counsel to the Tribunal;

v) Witness statements were prepared and circulated before witnesses gave evidence.

19. Mr Beloff referred to two specific episodes in relation to which findings adverse to the Chief Justice were made that had not been foreshadowed in the Statement of Issues. We will deal with Mr Beloff's submissions when considering the episodes in question.

The Office of Chief Justice of Gibraltar

20. The Tribunal recorded at the outset (1.21) that no criticism was made of the Chief Justice's ability as a lawyer to decide the cases before him. The criticisms levelled against the Chief Justice related, with one important exception, to his behaviour outside court and to the manner in which he discharged other responsibilities of the office of Chief Justice of Gibraltar. What did that office involve?

21. Gibraltar is a self-governing British overseas territory of a modest size, covering a little less than 7 square kilometres. It has a population of approximately 29,000. It has two major political parties, the Gibraltar Social Democrats, headed by Mr Peter Caruana QC, which was at all material times in power, and the Gibraltar Socialist Labour Party, headed by Mr Joe Bossano. The unicameral Parliament consists of seventeen elected members.

22. The permanent professional judiciary of Gibraltar is very small. Apart from the Chief Justice and one Puisne Judge, who is the only other member of the Supreme Court, there is one Stipendiary Magistrate. The court is staffed by civil servants, who are headed by the Registrar. There is a Deputy Registrar and a small body of court staff, including three bailiffs.

23. The fused legal profession, as at January 2008, consisted of 26 firms comprising 166 lawyers. Firms that undertook a substantial amount of litigation included Hassans (54 lawyers), Triay & Triay (20 lawyers), Triay Stagnetto Neish (12 lawyers) and Attias & Levy (9 lawyers). The Gibraltar Bar is regulated by the Gibraltar Bar Council.

24. There was when the Chief Justice was appointed no formal position of head of the judiciary of Gibraltar, but we consider that, as the senior resident judge, the Chief Justice could properly regard himself as occupying that position. He was responsible for the day to day administration of justice by the local judiciary. He presided over the formal ceremony of the Opening of the Legal Year and spoke at it. He was responsible for negotiating with the Gibraltar Government the provision of an adequate infrastructure for the administration of justice.

25. In a jurisdiction as small as Gibraltar there is bound to be interrelation between those in the different arms of State and, indeed, in every aspect of life. In his first witness statement the Chief Justice commented:

> "By way of context, it is important to remember how closely connected are lawyers and members of the government. The Chief Minister is the son in law of J E Triay QC whose cousin is Louis Triay. Freddie Vasquez is a cousin of the Chief Minister as is Robert Vasquez. The Chief Minister was a partner in Triay and Triay until he went into politics. Guy Stagnetto is also a cousin of the Chief Minister and James Neish is a close friend of the Chief Minister. Daniel Feetham, Minister for Justice in this Government was until recently a partner in Hassans. His brother and sister in law are still partners in Hassans. Keith Azopardi, a partner in Attias and Levy was Deputy Chief Minister to Peter Caruana until his resignation and was a member of the select committee on the draft constitution."

26. In his written representation Mr Neish QC, the Chairman of the Bar, remarked:

> "The seriousness of the matters complained of must be judged from the standpoint of Gibraltar and not from that of a larger jurisdiction. In, say, London with its large number of judges the conduct of individual judges would not have the same impact on the judiciary, or on the operation of the principle of the separation of powers or on the justice system generally as would the conduct of a Chief Justice in a two judge jurisdiction like Gibraltar. Office holders in Gibraltar have to be particularly sensitive to the need to maintain the respect and confidence of the public, which are as necessary, if not more so than institutional safeguards, for the proper discharge of their functions. The public in Gibraltar is much closer to public figures than in the case of say, England. Their scrutiny is more intense and their actions more directly felt."

Similar comments were made by a number of other witnesses.

27. Gibraltar has a particularly lively press, anxious for copy and, in common with the media in other jurisdictions, eager to identify any actual or supposed conflict between the judiciary and the executive. As the senior first instance judge the Chief Justice would normally preside over the trial of any dispute, whether of public or private law, that involved the Government. While it is entirely appropriate for a Chief Justice to take a firm stand in any matter that affects the independence of the judiciary or the due administration of justice, to the extent of making robust public pronouncement on these matters, both as de facto head of the judiciary and as the judge who would be dealing with actions involving the Government, in this small jurisdiction, the Chief Justice needed to exercise particular sensitivity and discretion in his dealings with Government.

Standards of judicial conduct

28. Mr Beloff did not challenge submissions made by other parties that the Bangalore Principles of Judicial Conduct 2002 and the Guide to Judicial Conduct, published by the Judges' Council of England and Wales in October 2004 provided guidance as to the standard of conduct to be expected of a judge. The following provisions of the Bangalore Principles are of particular relevance.

> "**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.
>
> Application:
>
> 2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.
>
> 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.
>
> 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.
>
> . . .
>
> **PROPRIETY**
>
> Principle:
>
> Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.
>
> Application:
>
> 4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.
>
> 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.

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.

. . .

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 matter as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

. . .

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."

29. To like effect, the Guide to Judicial Conduct advises:

"**JUDICIAL INDEPENDENCE**

2.1 . . . The judiciary, whether viewed as an entity or by its individual membership, is and must be seen to be, independent of the legislative and executive arms of government. The relationship between the judiciary and the other arms should be one of mutual respect, each recognising the proper role of the others.

. . .

IMPARTIALITY

3.1 A judge should strive to 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 or the judge and of the judiciary.

3.2 Because the judge's primary task and responsibility is to discharge the duties of office, it follows that a judge should, so far as is reasonable, avoid extra-judicial activities that are likely to cause the judge to have to refrain from sitting on a case because of a reasonable apprehension of bias or because of a conflict of interest that would arise from the activity."

Later the Guide deals with "Personal relationships and perceived bias" and warns that "Personal friendship with, or personal animosity towards, a party is …a compelling reason for disqualification" and warns under the heading "Activities outside the court" that judges should exercise their freedom to talk to the media "with the greatest circumspection".

30. A summary of the standard of behaviour to be expected from a judge was given by Gonthier J when delivering the judgment of the Supreme Court of Canada in *Therrien v Canada (Ministry of Justice) and another* [2001] 2 SCR 3:

> "The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens."

31. While the highest standards are expected of a judge, failure to meet those standards will not of itself be enough to justify removal of a judge. So important is judicial independence that removal of a judge can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function. As Gonthier J put it at paragraph 147 of the same case:

> "…before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office."

We will revert to this topic when considering the statutory criteria for removal of a judge under section 64 of the 2006 Order in the concluding section of this advice. There are, however, two matters that call for further comment at this stage.

Freedom of expression

32. Gibraltar is subject to the European Convention on Human Rights. Mr Beloff submitted that the Tribunal had wrongly held the Chief Justice at fault for public statements made by him or his wife that were no more than the exercise by them of the right of freedom of expression that is recognised by article 10 of the Convention. He argued that this freedom of expression could only lawfully be restricted by clear provisions of law that satisfied the requirements of article 10(2) and that none such had been demonstrated. We do not accept this argument. So far as any judge is concerned, the proper exercise of judicial office

necessarily circumscribes the freedom of expression open to those who do not have to ensure that they are seen to be acting without fear or favour, affection or ill will. There is an abundance of jurisprudence, to some of which we have already referred, that defines the requirements of judicial office in this respect. The position of the wife of the Chief Justice calls for further comment.

Statements by the wife of the Chief Justice

33. The wife of the Chief Justice made a large number of public statements or allegations, including allegations in a libel action that she started against the Chairman of the Bar. The Tribunal found that the majority of these were made with the knowledge and approval of the Chief Justice, sometimes rejecting evidence that he gave to the contrary on the ground that it was not credible. These allegations included attacks on the Bar Council which would have been improper if made by the Chief Justice himself. The Tribunal held that the Chief Justice's implicit support of those attacks constituted misbehaviour. The Tribunal further found that on a number of occasions the Chief Justice should have publicly dissociated himself from his wife's comments and criticised him for his failure to do so. Mr Beloff submitted that these findings on the part of the Tribunal were unsound. He submitted that there was no basis for doubting the Chief Justice when he said that he was not aware of his wife's activities. The Chief Justice's wife was and should have been treated as being independent of the Chief Justice. He could not properly be associated with her actions and was under no obligation to dissociate himself from them.

34. The Chief Justice married his wife, Anne Kariuki when he was serving as an acting judge of the High Court of Kenya. She was a practising member of the Kenyan Bar. They have two children. It appears plainly from the evidence that the Chief Justice and his wife were and are devoted to one another. It is equally plain that Mrs Schofield has a strong, indeed headstrong, personality. When she believed that her husband was being attacked she made her feelings plain in coming to his defence. On a number of occasions she said in her witness statements that she was acting independently of her husband and that he was unaware of her actions. In general the Tribunal rejected such evidence as incredible.

35. When reviewing the Tribunal's conclusions we have borne the following matters in mind. Neither the Chief Justice nor his wife suggested that they had a deliberate policy of not discussing certain matters. They did not seek to build a "Chinese wall" in their home. In these circumstances the inevitable inference was that they would discuss matters that were of serious concern to either, or both. Indeed, on occasion the Chief Justice gave evidence that such discussions had occurred. It might have been the case that Mrs Schofield had a deliberate policy of concealing from her husband actions that she proposed to take of which she knew her husband would disapprove, but neither of them suggested that this was so. Such a policy would have been almost certain to result in marital discord, but there is no hint of this in the evidence. Nor did the Chief Justice suggest that he ever sought to dissuade his wife from action that she proposed to take.

36. We will review the findings made by the Tribunal that associated the Chief Justice with the public statements made by his wife. What is clear on the evidence is that others associated the Chief Justice with those statements. In so far as it was reasonable for them to do so, this was likely to impact on the standing of the Chief Justice and on his performance of his judicial duties, as indeed it did when applications were made that he should recuse himself from certain cases. Dissociating himself from his wife's actions and statements would have been an appropriate step to take in an attempt to avoid the implication that they had his approval, but the question would have remained, and does remain, as to how it was that his wife came to make public statements that were bound professionally to embarrass her husband if he was opposed to her doing so.

37. When giving evidence on 23 July 2008 the Chief Justice was asked by Lord Cullen whether his wife considered that his prosecution for the MOT offence was politically motivated. He did not answer that question because he said that he might be breaching confidences between himself and his wife. The failure of Mrs Schofield to give evidence left a number of questions unanswered. It may be that the answers to those questions would not have assisted her husband's case.

The conclusions of the Tribunal

38. The Tribunal found that the Chief Justice's public behaviour "fell far short of what befitted the dignity of his office" (7.7). That office required him to have and to be seen to have "the detached, unbiased, unprejudiced, impartial, open-minded and even-handed approach which is the hallmark of a judge" (7.9). The Chief Justice failed so to conduct himself in his relationship with the Governor, with the Government and with the legal profession. He addressed what he claimed to be threats to judicial independence in a manner that was "confrontational", "improper…inappropriate and disproportionate" (7.8 to 7.11). He showed "hostility" towards the Government, the Chief Minister and members of the legal profession including making "serious and unfounded allegations against the Government" (7.12 to 7.15, 7.35 (iv)). He associated himself with, or failed to dissociate himself from, conduct by his wife that he could not himself have committed without impropriety [7.16 to 7.27].

39. Mr Beloff challenged the conclusion of the Tribunal that the conduct of the Chief Justice in the individual episodes justified these descriptions. He also challenged the Tribunal's conclusion that the conduct of the Chief Justice, when taken as a whole, amounted to inability to discharge the functions of his office or misbehaviour within section 64(2) of the 2006 Order justifying his removal.

40. We propose first to examine the individual episodes in the light of the attacks made by Mr Beloff on the Tribunal's findings in relation to these. In doing so it will consider, in

particular, the findings relied upon by the signatories as demonstrating mendacity on the part of the Chief Justice. In the light of its conclusions it will then consider Mr Beloff's challenge to the Tribunal's finding that the Chief Justice has shown himself unable to perform the functions of his office.

41. The episodes considered by the Tribunal stretch back as far as 1999. If any of these episodes constituted serious impropriety on the part of the Chief Justice they might be capable, for this reason, of demonstrating his unfitness to remain in office despite their antiquity. The Tribunal included two of the early episodes in its four examples of misbehaviour, while not suggesting that they fell into this category (7.35). The early episodes have, however, this additional significance:

> i) An important part of the case against the Chief Justice is that he publicly accused the government, and in particular the Chief Minister, of improperly attempting to drive him from office, when that accusation was unfounded and should not have been made. By the end of the hearing before the Tribunal the Chief Justice accepted that the accusation was unfounded, but contended that he had had reasonable grounds for believing in its justification. He himself relied upon the episodes stretching back to 1999 in support of this contention. Insofar as the reasonableness of the Chief Justice's belief that there were attempts improperly to oust him from office is relevant to the assessment of his behaviour it is necessary to look at the earlier episodes.
>
> ii) The Tribunal's conclusion that the Chief Justice was unfit to remain in office was based in part on the "characteristics of his personality and attitude" manifested by his conduct (7.36). Insofar as these characteristics are significant, the early episodes have relevance to their assessment.

The address by the Chief Justice at the Opening of the Legal Year in October 1999.

42. This is dealt with in paragraphs 2.1 to 2.24 of the Tribunal's Report. The Tribunal criticised a passage at the end of the Chief Justice's address. He referred to attending the Commonwealth Law Conference in Malaysia and there discussing the draft Latimer House Guidelines. He drew attention to principles set out in that draft including:

> "'Sufficient funding to enable the judiciary to perfume its functions to the highest standards should be provided' and
>
> 'The administration of monies allocated to the judiciary should be under the control of the judiciary'.

He then continued:

> 'The judiciary has encountered one or two instances in the past year where the denial or delay of the release of funds by the Government has had the potential to affect adversely the administration of justice. The matter is one of practical importance, but there is also a fundamental principle involved. The Chief Justices of the Commonwealth were all agreed that those who control the judiciary's purse strings exercise enormous influence and have the capacity to undermine the judiciary's independence. That is why the Latimer House Guidelines are expressed as they are. A system should be in place which on the one hand enables the judiciary to administer justice properly whilst on the other subjects the judiciary's budget to proper controls, but which enables the judiciary to function independently and without improper restraint. It is a matter which I shall be addressing in the coming year.'"

43. In making this statement the Chief Justice was subsequently to explain that he had two instances in mind. One related to the provision of funding for a proposal made by the Chief Justice that a number of members of the Bar should be permitted to sit as part time Stipendiary Magistrates for a period of three weeks in the coming year. The other related to the provision of funding to enable the Chief Justice to travel to Warwick to attend a Judicial Studies Board Conference on Lord Woolf's reforms to civil procedure at the beginning of February 2000. The Chief Justice had told the Government that he considered that it was "vital" that he should attend this.

44. The Tribunal expressed a number of "serious concerns" about this part of the Chief Justice's address. The first was that it was "seriously inaccurate and misleading". As to the funding of the Stipendiary Magistrates' scheme, the Government had agreed to fund the scheme. The reason why the scheme was not put into operation was not lack of funding but disagreement between the Government and the Chief Justice as to how the candidates should be selected. The Committee agrees that this incident could not properly be relied on by the Chief Justice in support of his comment that there had been "one or two instances."

45. As to the failure to fund the Chief Justice's travel to the Conference, the Tribunal commented that it was questionable whether it was "vital" for him to attend this, that he did not disclose the fact that funding had subsequently been provided by the UK Government to enable him to attend the Conference and that the request had been for funding in excess of the judicial budget which the Government had met in full.

46. It seems to us that there was probably more to the refusal of the Government to provide funding for the Chief Justice's travel than met the eye. The facts are as follows. On

10 November Mrs Dawson, the Registrar of the Supreme Court, made a request to the Chief Secretary for funding to enable the Chief Justice to attend the Conference. She sent a chaser on the 20 November, which crossed with a request from the Assistant to the Chief Secretary for further details of the Conference. Mrs Dawson replied on 23 November:

> "Lord Woolf (Master of the Rolls) has put forward proposals for a complete overhaul of the system of procedures in the Civil Courts and this could impact heavily on our Supreme Court. I understand that the changes are imminent.
>
> The English Judicial Studies Board is holding a series of seminars to familiarise Judges with the proposed new procedures and the Chief Justice has managed to secure a place for himself on one such seminar.
>
> He considers it vital that he attend."

On December 1 Mrs Dawson wrote stating that the Chief Justice was anxious to know whether approval had been given for the funding. The Assistant to the Chief Secretary replied:

> "The Government does not consider that the subject matter of this conference is of sufficient value to Gibraltar at this stage. Fund cannot be approved for this purpose. Please not that funds under the Sub-head for conferences are now fully committed for the remainder of the financial year."

47. In a parliamentary debate on judicial independence on 20 November 2000 the Chief Minister stated that with hindsight it would have been a much better decision to have allowed the Chief Justice to go to the Conference. He explained that towards the end of the year requests for supplementary funding are turned down except in the case of "enormous necessity" and that is what happened on this occasion.

48. In paragraph 13 of his witness statement Mr Garcia, who took over the office of Chief Secretary in March 2007, gave the following explanation of the Government's refusal to provide funding for the Chief Justice's visit to Warwick.

> "It transpired that indeed the Government had refused to provide the requested funds for the Chief Justice's attendance at the Warwick University course in 1998. This was because the Chief Justice had that year taken 66 working days leave of absence, at a time when his contractual annual leave entitlement was 30 days. Although there was an element of absence relating to official business (6 working days at seminars and conferences) and possibly some sick leave, the Government felt that there was a significant excess over the annual leave entitlement."

49. When he gave oral evidence, Mr Garcia was not asked about this statement but we consider it possible that it explains what, on the face of it, appears a surprising unwillingness to make available the small sum needed to cover the expenses of the Chief Justice's visit to Warwick. Mrs Dawson in her witness statement, while not doubting the Chief Justice's professional ability as a judge, was critical of various aspects of his behaviour out of court. In particular she criticised the Chief Justice for taking too much leave and attending too many conferences. She stated that she had a good relationship with Mr Montado, Mr Garcia's predecessor as Chief Secretary, and would often call or write to him to tell him things which the Chief Justice had done which she thought might potentially cause embarrassment. In oral evidence she agreed that she knew that there were people who were unhappy with the Chief Justice, including the Chief Minister. We consider it at least possible that the refusal to fund the Chief Justice's visit to Warwick was influenced by a perception that he had been spending too much of his time outside Gibraltar.

50. Whether or not this is correct, it was a serious rebuff to the Chief Justice, after he had stated that he considered it "vital" that he should go to the Warwick conference, to have his request for funding turned down on the ground that the Government did not consider that the conference was of sufficient value to Gibraltar. In the circumstances it would not have been surprising if the Chief Justice had made a passing reference to this in his speech at the opening of the legal year. While it did not fully justify the statement that he made about funding, we do not consider that the Tribunal was justified in describing as "seriously inaccurate and misleading" the statement that there had been "one or two instances in the past year where the denial or delay of the release of funds by the Government had had the potential effect to affect adversely the administration of justice". The wording implied that it had not, in fact, had that effect, and we do not see that the fact that the U.K. Government subsequently provided the funds for the visit to Warwick had, of itself, any bearing on the accuracy of the Chief Justice's statement. The Tribunal also described the Chief Justice's statement as "highly critical of the Government", said that it demonstrated "a complete lack of judgment in his choice of language" and that the "language, tone and manner of his remarks were inappropriate for the holder of his office". Once again we do not consider the severity of these criticisms to be justified.

51. The remarks were made in the context of an account of the draft Latimer House Guidelines on the Supremacy of Parliament and the Independence of the Judiciary. These included a principle that the administration of monies allocated to the judiciary for the running of the courts should be under the control of the judiciary. This somewhat ambitious aspiration did not ultimately form part of the Latimer House Guidelines. We consider, however, that it was legitimate for the Chief Justice to make reference to this in his address. It was also legitimate for him to remark, that the Chief Justices of the Commonwealth were all agreed that those who control the judiciary's purse strings exercise enormous influence and have the capacity to undermine the judiciary's independence.

52. What can be said about the Chief Justice's remarks is that they were injudicious in that they were unspecific and open to misinterpretation. This was particularly the case having regard to the juxtaposition of his reference to the one or two instances of denial or

delay of release of funds and the reference to undermining the judiciary's independence. He said that he did not anticipate the reaction that greeted his remarks. The Tribunal did not express any reservations about that assertion. They did, however, criticise the Chief Justice for doing nothing to assuage the furore that his remarks created. Furore it certainly was. On 15 October the *Gibraltar Chronicle* reported as the major news item on the front page that Dr Garcia, the leader of the Liberal Party, was calling for a public inquiry into "claims of potential or perceived interference by the Government with the judiciary" made by the Chief Justice. It reported that when asked to comment on the exact meaning of his comments, a spokesman had replied that if the Chief Justice had wished to elaborate, he would have done so in his speech. The Chief Justice confirmed that he instructed the response to be given in these terms. The *New People* published on the same day had a banner headline "Chief Justice warns of Government interference in Judiciary".

53. The Chief Justice said that he was surprised, albeit not horrified, at the manner in which his remarks had been distorted. The Tribunal criticised him for not taking steps to put the record straight. We consider that this criticism was merited. Having been responsible for an unjustified political attack on the Government the obvious course would have been to do his best to defuse the situation. The Government issued a press release contending that Dr Garcia had distorted the Chief Justice's remarks and identifying what it claimed to have been the only two occasions on which it had refused to provide the judiciary with funding, one being funds for social entertaining and the other "international conferences including one by the Chief Justice in Malaysia".

54. The Chief Justice said that he formed the view that the Government was "trivialising" his complaint and indulging in "spin" and that this called for a public response from himself. This was not a rational reaction. Nor was the press release that the Chief Justice issued on 18 October, his subsequent public exchanges with the Government, his consultation of Mr Causer in relation to constraints that he feared that the law might impose on disclosing details of the two incidents to which he had referred in his address, and his public and unwarranted challenge to the Government's statement in relation to the practice of consultation with the Chief Minister before making judicial appointments. This unhappy chapter demonstrated lack of judgment and inappropriate behaviour of a high order that brought the Chief Justice into unnecessary public confrontation with the Government that was of the Chief Justice's own making and that had no justification.

55. The Tribunal held that the Chief Justice was "determined to embarrass the Government publicly" (2.21) and that his concern about confidentiality and the Official Secrets Act was "an irrelevant diversion from answering the substance of the point against him, namely that he had not told the Government about his concerns privately, so that it could be seen whether they truly had the potential to affect adversely the administration of justice." (2.24) We do not consider that these findings of bad faith are justified. We see no ground for concluding that the Chief Justice's consultation of Mr Causer was a charade. It was, however, a further demonstration of bad judgment. There was no reason to think that the Government would object to the Chief Justice clarifying the concerns to which he had

referred and, had he had any doubt, he could simply have explained the position and asked them if they minded.

56. The conduct of the Chief Justice in fanning the flames caused by his comments at the 1999 opening of the legal year has relevance to the question of whether defects of character and personality have resulted in a current inability to perform the functions of his office. We do not consider, however, that the Tribunal should have treated this matter as an incident of misbehaviour that formed part of the justification for removing him from office ten years later.

The Maids Issue

57. This is dealt with in paragraphs 3.1 to 3.27 of the Tribunal's Report.

58. In 1996 and 1997 the Chief Justice was guilty of a number of breaches of the criminal law in relation to the employment of a Jamaican woman, Ms Jackie Williams as a domestic. The Tribunal criticised the Chief Justice (i) for these breaches of the law and (ii) for failing to give the Governor, David Durie CMG, a true account of the position in 2002.

59. Ms Williams began to work for the Chief Justice in or about September 1996 and her employment was terminated in October 1997. In breach of Regulation 7 of the Employment Regulations 1994 he failed to obtain a work permit for her. What he did was to sign in blank three forms, one of which was an application for a work permit, leaving it to Ms Williams to fill these in and submit them. Ms Williams filled them in as his agent, but she deliberately inserted false information as to her terms of employment in order to obtain the work permit that was subsequently issued. Ms Williams stated that she was employed for 39 hours per week at £3.15 per hour. In fact her working hours were significantly less than this – the Chief Justice's evidence was that she worked less than 15 hours a week and earned £150 month.

60. The following account of the Chief Justice's obligations in relation to tax and PAYE is based on a note provided to the Committee by Mr Beloff. Although Ms Williams' pay was too low to attract liability to income tax she failed to obtain a certificate to that effect. In these circumstances the Chief Justice was under a liability under PAYE regulations to deduct tax at a "default" rate called Code X. The Chief Justice made no such deductions. While under the Social Security Regulations Ms Williams was, because of the short hours that she worked, exempt from some aspects of the social security scheme, the Chief Justice was under an obligation to make social security payments to cover insurance against accident. The Chief Justice made no such payments. It was the Chief Justice's evidence that he had assumed that PAYE was not payable and was unaware of the social security obligation. He

only became aware of his errors as a result of evidence given to the Tribunal. He would have expected the authorities to make demands for payments if any payments were due.

61. By a written contract dated 9 October 1997 the Chief Justice employed Ms Danvers as a housekeeper/cook at a salary of £450 a month. He obtained a work permit in respect of her. Her employment terminated in April 2000. At that point she lodged a complaint with the Ombudsman and with the TGWU that she had been paid less than the minimum wage. That complaint does not appear to have been well-founded. At this point the Chief Justice contacted both the tax and the social security authorities. He was informed that there were outstanding social security obligations and he paid these. He was also informed of outstanding PAYE obligations and entered into negotiations to determine the amount of these. On 28 June he paid £990.30 in relation to these obligations.

62. On 26 May 2000 under a headline "M'Lord you have broken the law" *Vox* devoted its front page to the story of Ms Danvers' employment by the Chief Justice and his failure to pay PAYE and Social Insurance contributions. Correspondence ensued with the Governor, which related initially only to Ms Danvers. The Governor made a public statement that he was personally looking into the matter.

63. On 9 June *Vox* published an article under the headline "The Chief Justice must now resign" in which it was suggested that the Governor should widen his enquiry to cover Ms Williams. The article raised the question of whether her social insurance and income tax was paid up. On 16 June the Chief Justice wrote a lengthy letter to the Governor which largely related to Ms Danvers but also referred to Ms Williams. This included the statement that his recent researches had disclosed that he might be liable to pay social security contributions in respect of Ms Williams.

64. On 3 July the Chief Justice wrote to the Governor:

> "I have placed the matter of Ms Williams (now Mrs Moreno) before leading counsel. Having perused the legislation with some care counsel is satisfied that by reason of its terms and the hours she worked she does not come within the legislation. I am thus advised that there is no liability upon me.
>
> Mrs Moreno did not earn sufficient wages to come within the P.A.Y.E legislation."

65. One of the duties of the Attorney General, Mr Rhoda QC, was to give legal advice to the Governor. By 12 July 2000, after discussions between the Attorney General and Mr Desmond de Silva QC, who was advising the Chief Justice an exchange of letters between the

Governor and the Chief Justice had been agreed. That from the Governor was to read as follows:

> "Thank you for the information you have provided in response to my letter to you of 1 June. I have also received information from the relevant public authorities.
>
> I note that you registered your employment of Ms Danvers with the Employment Training Board and that you have recently settled your outstanding obligations for PAYE and for social security in her regard. I find it regrettable that you did not make more effort to regularise this matter earlier, but I accept that you did not deliberately seek to avoid your obligations.
>
> You will appreciate, I know, that someone in your position should be particularly careful to fulfil your legal obligations in good time and I would be grateful for your assurance that you will do so in future.
>
> As far as your earlier employment of Ms Williams is concerned, I take your letter of 3 July to mean that your considered view is that no liability falls to you in respect of either PAYE or social security.
>
> As you must be aware, I am not in a position to take an independent view of that matter. You will appreciate therefore that if in the event it turned out that there was an outstanding liability this could have the effect of calling the whole issue to be revisited."

66. The letter to be written by the Chief Justice in reply read:

> "Thank you for your letter of 12 July. I do regret, that through oversight, I did not make greater efforts to meet my obligations in time in respect of social security and PAYE in my employment of Ms Danvers. I, of course, accept that I should be particularly careful to fulfil my obligations in good time and I can assure you that this situation will not arise again. I can also confirm that I have no reason to believe that I have any outstanding liabilities in respect of Ms Williams."

67. These letters were not in fact released. Delay in bringing the matter to a conclusion was attributable, at least in part, to the MOT prosecution, to which we will shortly turn. On 16 August 2000 the Chief Justice wrote a letter to the Governor which asked, among other things, whether he had taken advantage of the delay that had occurred to reach a conclusion in relation to the Jacqueline Williams matter. On 23 August the Chief Justice wrote a further letter in the course of which he observed that the Governor had determined the issue in

relation to Ms Danvers and invited him to do the same in relation to Ms Williams. On 31 August the Governor replied in relation to this:

> "In your letter of 23 August you raised the matter of Ms Williams. Since at an earlier date you chose not to provide me the extra information for which I asked in relation to Ms Williams, I continue to rely on the assurance which you gave me on 12 July in respect of her. I have conducted no separate investigation in her regard."

It is not clear from the evidence what extra information was sought or in what circumstances.

68. Ultimately on 4 October the Governor made an announcement of his decision. It stated that he had received full cooperation from all concerned, including from the relevant authorities. It continued:

> "The information I have received shows that Ms Danvers' employment was registered with the Employment Training Board and that all outstanding PAYE payments and social security contributions have now been met. It is regrettable that matters were not regularised at an earlier stage but I have accepted that the Chief Justice did not deliberately seek to avoid his obligations.
>
> The Chief Justice has also assured me, in relation to another former employee of his, Ms Williams, that he has no outstanding liabilities.
>
> I have concluded, in view of the information and assurances which I have received, that it would not be appropriate for me to take any formal action in exercise of my constitutional powers."

69. On 9 October the Government issued a press release that stated that as the decision was constitutionally for the Governor the Government did not consider it necessary or appropriate to comment on his conclusions. It then said that since the Governor's statement only stated part of the facts in relation to the Chief Justice's two maids the Government considered that the public interest required the facts of the two cases to be put into the public domain. The facts then set out in relation to Ms Williams included the following:

> "Miss Williams herself registered her employment with the Department of Social Services for the purposes of Social Insurance. The Department of Social Security has no record of social insurance contributions having been paid in respect of Ms Williams' employment. The Commissioner of Income Tax has no record of tax having been paid in respect of Ms Williams' employment and has no record of her employment.

> It is clear from the Governor's statement that the Chief Justice does not, in these circumstances, consider that he has any outstanding liability."

70. The Maids Issue was the second of the four examples of misbehaviour itemised by the Tribunal at the end of its report. There the Tribunal summarised the misbehaviour as persisting "in a reckless disregard for compliance with the law" and making "a less than frank disclosure to the Governor" (7.35).

71. As the Chief Justice accepted, his position required that he should show a scrupulous regard for the law. In these circumstances leaving Ms Williams, without supervision, to fill in forms for the accuracy of which he was responsible and his failure to make any or adequate enquiries in relation to his obligations in respect of PAYE and social security payments were reprehensible, particularly in the case of Ms Danvers. The false assumption that no obligations arose in relation to Ms Williams was perhaps more understandable. These failings were, however, water long under the bridge. The Governor had decided to draw a line under the Chief Justice's failings in relation to Ms Danvers. Although he had not been informed of the true position in relation to Ms Williams we do not consider that it would or should have affected his decision. In these circumstances we do not consider that these breaches of the Chief Justice's legal obligations should, in 2009, have weighed against him in the scale as significant misbehaviour. Potentially more significant were the following matters relied upon by the signatories as part of their case that the Chief Justice was mendacious:

> "a) the Tribunal's rejection of the Chief Justice's assertion in oral evidence that he must have mentioned Ms Williams to the Commissioner of Income Tax;"
>
> b) the Tribunal's finding that the statement in the Chief Justice's fourth witness statement that he had given "a full explanation" to the Governor in relation to Ms Williams was "plainly untrue";

72. In the course of cross-examination the Chief Justice said:

> "I discussed these issues with the Collector of Income Tax in relation to Ms Danvers, and it is inconceivable I did not mention Ms Williams at the time, and there was no comment by him to my recollection that I had fallen foul of the law".

73. This statement was made in the context of discussion of a statement made by the Chief Justice when giving evidence in chief that there was a relaxed attitude to matters such as PAYE in Gibraltar. The statement was not challenged. The Chief Justice was reconstructing what he believed must have been said in 2000 rather than asserting a positive recollection of what was said. It may well be that there was an element of wishful thinking in

the reconstruction. It would not be right, however, to treat this as an example of deliberate mendacity.

74. The question of whether the Chief Justice had misinformed the Governor as to the advice that he had received from counsel was not included in the Statement of Issues. That he had done so was put to him, vigorously, by Mr Eadie in cross-examination. Mr Beloff submitted, with some justification, that it was not fair to expect the Chief Justice to meet this allegation without notice of it. He placed before the Committee an 18 page analysis of the evidence in relation to the maids' issue. This demonstrated that the Chief Justice professed no longer to remember the details of the advice that he sought or received. He identified the leading counsel to whom he had referred as either Mr Stagnetto or Mr de Silva. His evidence was that he had been sure that the letter that he had sent to the Governor was accurate.

75. Mr Stagnetto sent an e-mail dated 21 July 2008 to the Chief Justice's solicitors, which was put in evidence before the Tribunal. It stated:

> "The issue of the employment of Jacqueline Williams arose in the context of a press release by the Governor the terms of which had been negotiated by Mr Desmond de Silva QC on behalf of the Chief Justice and the Attorney General/Governor in relation to the employment of Mrs Danvers. Before the agreed date of publication it emerged that the Chief Justice had also employed Jacqueline Williams and the Governor wanted to be satisfied that the Chief Justice had complied with all his obligations in relation to her employment before publishing his report. I was informed of this by the Chief Justice and he told me that her pay did not reach the threshold to bring her within the PAYE legislation. I replied to the effect that if that was so he had nothing to worry about and he should inform the Governor accordingly. He may have taken advice from Mr De Silva as indeed he did in the case of Mrs Danvers. I was never asked by the Chief Justice nor indeed did I give my opinion in writing on the matter."

76. In his fifth witness statement the Chief Justice said that the Government's press release of 9 October:

> "whilst being strictly accurate, seems to suggest that contributions were due in respect of Ms. Williams. This is a misleading innuendo since no contributions were due and unpaid in respect of her. Furthermore, on my understanding the tax situation of Ms. Williams was unlawfully released to the public. If it was being suggested at the time, or if it is

> suggested now, that I had any liability in respect of Ms. Williams it would be astonishing indeed, given that at no time either before or since her departure from our employment in October 1997 has there been any communication to me of any existing claim from any Government Department."

Mr de Silva had no recollection of advising on this matter.

77. The submission made by Mr Eadie on behalf of the Government is that the Chief Justice in 2000 instructed his lawyers to ascertain his position in 2000 rather than the position in 1996 to 1997 when Ms Williams was working for him and then gave a misleading description of the position so as to lead the Governor to believe that he had been advised that he had committed no breach of the law during the earlier period. Implicit in this submission is that the Chief Justice believed that there was a difference between his legal obligations in 1996 to 1997 and in 2000 and that he was or might be in breach of an obligation to pay PAYE in the earlier period that did not persist to 2000. We can see no basis for drawing such a conclusion. Right up to the time that he made his 5th witness statement the Chief Justice gave every indication of believing that no PAYE obligation could have arisen in relation to Ms Williams. That was not an unreasonable belief, albeit erroneous. In fact, as a matter of strict law, the obligation that he had been under to make PAYE deductions while Ms Williams had worked for him had persisted to 2000. We do not consider that there is any basis for holding that the Chief Justice set out in 2000 deliberately to deceive the Governor. Because of the passage of time there is a question mark over the advice sought and given by leading counsel, but no case of mendacity on the part of the Chief Justice has been made out.

Dissatisfaction with the Chief Justice

78. On 28 June 2000 five Queen's Counsel sent a memorandum to the Governor expressing regret at his delay in announcing whether he had found any grounds for establishing a Tribunal of Inquiry which was the limit of his powers in relation to the conduct of members of the judiciary under the constitution. They stated that:

> "the delay has resulted in division between those whose views on the quality and integrity of the administration of justice permit them to regard the allegations as a storm in a teacup and those who cannot so regard them."

It is clear that there was in Gibraltar, at least by this stage, a significant body of opinion, both at the Bar and outside it, critical of the conduct of the Chief Justice. Whilst the Chief Justice was not justified in alleging that the Government's Press Release of 9 October made a "misleading innuendo", the fact and terms of the release suggested that the dissatisfaction was felt within the Government. Lord Luce, who was Governor between February 1997 and March 2000, spoke of noticing a growing strain in the relationship between the Chief Justice and the Chief Minister and said that when he renewed the Chief Justice's contract in 1999 he was "not entirely happy with the lack of leadership of the Chief Justice in that capacity". At

the ceremony of the opening of the legal year Mr Robert Vasquez, the Chairman of the Bar, who had been dissuaded from making a speech critical of the Chief Justice, instead, in breach of tradition, refrained from making any speech at all. The Chief Justice responded, angrily, by saying to him "Robert, don't rape the Constitution". The Tribunal commented that this language was not consistent with the dignity and status of the office of Chief Justice. We do not attach significance to this sentence, spoken no doubt in a moment of tension.

Instructions to the Registrar of the Supreme Court in respect of expenditure in May 2000.

79. This issue is dealt with in paragraphs 3.28 to 3.31 of the Tribunal's Report. It relates to a request by the Chief Justice to the Registrar for the use of funds earmarked "for general and office expenses" to cover the costs of a party that the Chief Justice had organised at his residence on 9 May 2000 to introduce the new Governor to the Bench and Bar. The Tribunal concluded that this issue was of "only limited significance" to the general issues falling for its consideration. We agree.

Allegations of interception of the Chief Justice's telephone in 1999 and 2000

80. In 1999 the Chief Justice and his wife became concerned that there might be interference with their telephones. The Chief Justice reported this concern to the police. On 30 May 2000 the Gibraltar newspaper *Panorama* carried an article under a front page headline that stated "Police asked to investigate phone tapping, claim at home of Chief Justice. 'Campaign to hound my husband out of office' – Mrs Schofield". The article referred to the Maids Issue. It reported an interview with Mrs Schofield in which she had said "I am not the Chief Justice and I am going to fight for what I think is an unfairness…They are trying to discredit my husband. They are trying to hound him out of office." On the same day an article in *Sunday Business*, which is not published in Gibraltar, reported that the Chief Justice had told friends that he believed that he was under surveillance because of a clash with the Chief Minister over claims of political interference in the judiciary's independence.

81. The Chief Justice denied the truth of the article in *Sunday Business*. He said that he and his wife had never regarded the telephone tapping to be in any way the responsibility of the Government of Gibraltar. His wife, in her second statement, accepted her responsibility for the article in *Panorama*. She said that her intention was to raise awareness in a matter of public interest.

82. The Chief Justice was asked whether he considered that the Maids Issue was part of an attempt to discredit him or drive him from office and he said that he did not, either at the time or in 2007. The Chief Justice was asked whether he discussed the article with his wife

at about the time that it was published and he said that he had. He was not asked about the nature of the discussion. He was asked whether he considered making a public statement that it was not his view that he was being hounded from office and he said that he did not. The Tribunal commented:

> "His unwillingness to correct what had been attributed to him and to dissociate himself from his wife's comments on this issue was not satisfactorily explained by him. He must have been aware of the damage thereby caused to Gibraltar's financial and legal reputation."

83. The Chief Justice at other points of his evidence made plain that it was not his policy to join issue with the press on misleading press reports as once one started such a dialogue there was uncertainty as to where it would lead. We accept that there are dangers in engaging in dialogue with the press, and would not on this occasion criticise the Chief Justice for not publicly dissociating himself from his wife's comments to the press. Those comments were made, however, after statements made by his wife that she would be prepared to fight for her husband "in the gutter" – (3.20 – 3.22). We consider that the Chief Justice should have been concerned by his wife's conduct. He should have made plain such concern to his wife. He should have explained to her that her conduct was damaging both to Gibraltar and to his position as Chief Justice.

The MOT prosecution

84. The Tribunal's Report 3.39 – 3.52 describes the series of events relating to the prosecution of the Chief Justice for failing to have a valid MOT certificate for his car. We shall not repeat that exercise. The Report criticises the Chief Justice for behaviour which was not "consonant with the proper conduct of a Chief Justice in a small jurisdiction and with the dignity of his office". While we agree with that criticism the Report does not place this incident in its context nor set out the full story of this matter.

85. The Chief Justice's MOT certificate expired on 11 January 2000. He overlooked the need to renew it. In May 2000 his road tax licence was about to expire. Mr Mendez, the Deputy Registrar, drew this to his attention. He could not re-tax his car until he had obtained a new MOT certificate. The car's log book had been lost, and a duplicate had to be obtained before he could seek a new MOT certificate. A booking was made for an MOT inspection at the end of August. Mr Mendez received an assurance on the telephone from a woman police officer that, if the Chief Justice had an appointment for an MOT he could continue to drive pending that appointment. At the same time the police had announced a general amnesty for anyone driving a car that was untaxed that would expire on 31 July. Mrs Dawson, the Registrar, advised the Chief Justice that he should not drive after that date.

86. On 28 July the Chief Justice was stopped by police constable Perera, who was carrying out routine checks on vehicle documents. He explained why he did not have a valid MOT certificate or road tax licence. He then went on holiday.

87. On 31 July his lawyer, Mr Stagnetto, was contacted by the Attorney General who said that the matter had been drawn to the attention of the Governor who wished to seek an explanation from the Chief Justice as the matter affected the agreed disposal of the maids issue.

88. On his return from holiday, on 16 August, the Chief Justice was seen at his residence in the presence of his lawyer, Mr Stagnetto, by PC Perera and PS Vinales. He was asked to produce evidence of the appointment that had been made for the MOT test, which he did. He was then told that he would be reported for not being in possession of an MOT certificate and a road tax licence.

89. On 21 August the Chief Justice received a letter from the Governor, which ended as follows:

> "Whilst the allegations relate to motoring matters, they also relate to a failure to comply in a proper and timely fashion with obligations of a public nature. I am mindful of the fact that the allegations in respect of the Danvers affair related to a failure on your part to make proper and timely contributions to the public revenue.
>
> Two issues in particular require to be clarified, first whether the allegations relating to 28 July are true, and in the event that they are true, how it was that in the light of those matters you were prepared to give me assurances which were contained in your letter of 12 July. Unless, and until, I am satisfied by your explanations in relation to these matters, I cannot make a public statement in the terms which were initially envisaged, namely my continuing support for your position. It is for this reason that I want to discuss matters with you and would welcome the opportunity to do so later today."

90. The Chief Justice, through his lawyer, challenged the suggestion that the MOT matter had any bearing on the resolution of the Maids Issue. On 23 August the Chief Justice received a formal written caution signed on behalf of the Commissioner of Police indicating that it had been decided to issue him with a caution. The letter ended "This caution has been recorded for further reference".

91. On 25 August the Attorney General, Mr Rhoda, wrote to Mr Stagnetto in the following terms:

> "I have now had the benefit of seeing both the Governor's letter of 21 August 2000 to the Chief Justice, and the Chief Justice's reply of 23 August 2000.
>
> The matter has progressed and that my understanding is that a Formal Caution has now been issued by the Commissioner of Police to the Chief Justice.
>
> Until such time as I know whether or not the Chief Justice is prepared to accept the decision to caution him, thereby acknowledging the truth of the allegations, it would not be right for me to comment upon the causal connection between the events of 28 July 2000 and the assurances given by the Chief Justice in his letter of 12 July 2000.
>
> As you firm is now acting for the Chief Justice in respect of events of 28 July 2000, perhaps you would let me know whether or not your client is prepared to accept the caution."

92. The Attorney General explained the subsequent course of events in his witness statement:

> "I was not involved in issuing the first caution notice to the Chief Justice. The first caution notice that was issued was defective in that it did not require him to accept his guilt. Had the Chief Justice accepted the caution, matters might have ended there. Instead the Chief Justice's lawyers became involved and quibbled about the wording of the caution. At that point, the Commissioner of Police sought legal advice and the defect in the first caution was identified. A new caution was therefore issued which did require the Chief Justice to accept his guilt. The Chief Justice did not respond to this caution notice until the eleventh hour and effectively did not accept his guilt. In the circumstances, I made the decision as Director of Public Prosecutions to prosecute him."

93. Ultimately, on October 4th, the Governor published his decision on the Maids Issue without reference to the MOT matter, as this was *sub judice.*

94. The Chief Justice has always considered that his prosecution was "grossly unfair". We can understand that reaction. The evidence indicates that the first written caution that he received was the informal way that a trivial motor vehicle offence was normally dealt with at the time in Gibraltar. The subsequent action taken by the Attorney General was, so it seems

to us, taken by the Attorney General because he wished to be in a position to advise the Governor on the Chief Justice's position with an unequivocal acceptance by the Chief Justice of the offences that he had committed.

95. The Chief Justice said in his fifth witness statement that he felt that the MOT matter could be used to try to pressurise him out of office or at least seriously embarrass him. His wife in her first statement said that it was her view that the matter was a "set up" intended to provide the Governor with further evidence to seek the removal of the Chief Justice.

96. The Chief Justice told the Tribunal that he did not consider that his prosecution was politically motivated. When asked whether his wife had thought the prosecution politically motivated, he replied that he did not wish to breach any confidences between himself and his wife.

97. Mr Beloff submitted that the Tribunal erred in making any criticism of the Chief Justice in relation to the MOT affair. He could not be criticised for permitting international observers to be present at his trial, nor for raising defences that his lawyers had advised were arguable.

98. We do not agree. The conduct of the Chief Justice demonstrated a serious lack of judgment that was calculated to bring his office into disrepute, to put a heavy and unnecessary burden on the Stipendiary Magistrate of having to try his own Chief Justice in the full glare of publicity and to cast aspersions over the fairness of that trial, which was, in fact, meticulously conducted.

99. Given that the Chief Justice did not consider it fair that the Commissioner of Police sought an express admission that he had committed the MOT offence and given that the Governor had indicated that this might have relevance to the disposal of the maids affair, it still made no sense at all not to admit that he had committed what was, in the circumstances, a trivial offence; there was, after all, no doubt that he had done so. Fighting the prosecution on technical defences was patently an absurd thing to do and one that, accordingly, brought his office into disrepute.

100. When being questioned by the Tribunal the Chief Justice said that he had no knowledge of any briefing that his wife made to the international observers. That answer was not challenged. The Tribunal none the less said that they did not accept that he did not know the content of the observers' briefing. We do not consider that adverse finding to be justified. That said it can properly be inferred that the Chief Justice knew that his wife had arranged the attendance of international observers because she thought that his prosecution was politically motivated. He said that he did not share that view. Whether he did or not, there was no

possible justification for observers at the trial unless there was a suggestion that the trial itself would be unfair. Their presence necessarily carried an inference adverse to the Stipendiary Magistrate that was unwarranted. The Chief Justice could and should have made it plain to the international observers that he did not consider that there was any justification for their presence.

101. The Chief Justice was asked about his view of the motivation for the MOT prosecution:

> "Q. Do you suggest that this prosecution was politically motivated?
>
> A. No, but it was instituted against a background of what was going on between Governor Durie and the Attorney General and myself vis-à-vis the Maids Issue. I did consider that it was strange indeed that the Governor knew that a formal caution had been issued before me before ever I did.
>
> Q. Did you –
>
> A. And I put it no higher than that. I can put it no higher than that.
>
> Q. Did you discuss that strangeness with your wife in 2000?
>
> A. Undoubtedly."

In the course of the discussion Mrs Schofield must have expressed her view that the prosecution was politically motivated. This passage suggests that the Chief Justice was not convinced that she was wrong.

102. In August 2000 a conversation took place between the Attorney General and Mr De Silva, who had acted for the Chief Justice in connection with the Maids Issue, at Sotogrande where they were both on holiday. There was a degree of conflict of evidence about what was said at that meeting. It is common ground, however, that the Attorney General agreed that it "would be a good idea if the Chief Justice could be found something elsewhere". The Chief Justice did not suggest that this view in any way affected the action taken by the Attorney General in relation to the MOT prosecution. Had he had any doubts as to this they should have been assuaged by (i) the fact that the Attorney General offered to drop the prosecution and permit the Chief Justice to make a statement if he accepted that he had committed the offence; (ii) the statement by the Attorney General after his conviction that if he dropped an appeal this would, in his opinion, have no effect on the tenure of his office and (iii) the fact that his conviction had no adverse consequences on his tenure of office.

The one year warrant

103. In paragraphs 4.7 to 4.26 of the Tribunal's Report the Tribunal deals with the reaction of the Chief Justice to the issue by the Governor on 7 February 2002 of a warrant renewing his appointment for a period of only one year in place of the customary three year warrant. The Chief Justice was given no warning of this, nor explanation for it. Nor was any explanation put before the Tribunal or the Committee. The Tribunal speculated that it may be that the Governor was dissatisfied with the Chief Justice's conduct and wished to mark his disapproval in some way. This seems a likely explanation. The Tribunal described the Chief Justice's letter of response of 11 February as "Notable for its hostility and threat". We consider that it is not surprising that the Chief Justice responded in strong terms. The letter accused the Governor of an "intention to purport to limit my tenure of office".

104. The Governor replied on 13 February, giving no explanation for the one year warrant and stating somewhat equivocally:

> "You raise the question of security of tenure and your independence as a judge. I know your views on the effect of the Constitution which are that, in accordance with the terms of Section 60 of the Gibraltar Constitution Order 1969, the Chief Justice of Gibraltar has security of tenure until he attains the age of 67 years.
>
> The long-standing practice of issuing time-limited Warrants is not intended to, nor could it, affect the provisions of the Constitution.
>
> I hope that this is clear, and that it will set your mind as rest."

105. Meanwhile, on 12 February the Chief Justice had raised the question of the effect of the one year warrant in a chambers hearing in a criminal trial in which Mr David Hughes was appearing for the defendants. A note of the hearing taken by Mr Mendez, the Deputy Registrar, includes the following statement by the Chief Justice:

> "Chief Justice: I have told the Governor that he may not offend the Constitution or violate my independence. If the Governor has not withdrawn his purported action by close of business today, I shall want the Attorney General to be here, to address me on the validity of the Governor's purported action. I may feel that I must abandon this case and indeed suspend all sittings of the Supreme Court.
>
> Hughes: You are right. An opposite view to yours would not even be arguable.

…

This is a grave matter. We may have to run arguments on this. You are correct in your views.

Chief Justice: Hughes, how did you know so much about this? Is it out?

Hughes: It was discussed at the Bar Council. Maybe you should ask the Chairman of the Bar to be present tomorrow as amicus curiae."

On the following day in open court he raised the question of whether his independence might be challenged, referring to the Scottish case of *Starrs v Ruxton* [2000] SLT 42. Counsel reassured him that no such suggestion would be made.

106. What had happened in chambers was reported in the *Gibraltar Chronicle* on the following day. On 15 February the *New People* carried an article headed "Chief Justice in constitutional row with UK." It quoted verbatim from an angry letter that Mrs Schofield had written to the Foreign Secretary alleging attempts to hound her children out of their home and harassment aimed at inducing the Chief Justice to depart of his own accord.

107. The Chief Justice challenged the accuracy of Mr Mendez's note. We agree with the Tribunal that it provides the best evidence of how the Chief Justice reacted in court to the receipt of the one year warrant save that, having considered the oral evidence given to the Tribunal, it finds it more likely that the Chief Justice threatened to suspend all his own sittings rather than all the sittings of the court. We consider that the Chief Justice's behaviour in Court once again showed lack of judgment or a sense of proportionality. If the terms of the warrants issued by the Government in fact impacted on the Chief Justice's term of office, the *Starrs v Ruxton* issue of whether the Chief Justice had the necessary independence already existed. The Chief Justice did not, however, believe that the terms of the warrants affected his security of tenure, nor did anyone else suggest that they did.

108. The Chief Justice said that he had no knowledge of how the *Gibraltar Chronicle* obtained its information about the matter. He said that his wife told him about the letter that she had written to the Foreign & Commonwealth Office after she had written it. He did not think to dissociate himself from her letter as she was ploughing an independent furrow, talking about family rights. He said that he was not concerned about these because he did not feel that the warrant of appointment had any legal effect.

109. This was a further example of the Chief Justice's "laissez faire" approach to actions of his wife that had implications for his own position. The Tribunal pointed out, with justification, that there was an appearance of collusion between his wife and himself.

110. Mr Beloff attacked, in particular, a finding of the Tribunal that the Chief Justice had colluded with Mr Hughes in raising the possible implication of the one year warrant in court. He submitted first that it was procedurally unfair for this finding to have been made when the Chief Justice had had no notice that such an allegation was to be made. Secondly he submitted that the finding was not justified on the evidence.

111. We agree with both points. This was a serious allegation of bad faith and one that required notice if it were to be properly addressed. On a full analysis of the evidence the finding of the Tribunal is not justified. That finding was that Mr Hughes called on the Chief Justice in his chambers and between them they agreed that Mr Hughes would raise the matter. It necessarily follows from this that the Chief Justice's question "Hughes, how did you know so much about this? Is it out?" And his reply "It was discussed at the Bar Council..." was a dishonest charade, designed to conceal their collusion. We have considered with care the detailed analysis of the evidence prepared by those acting for the Chief Justice and concluded that it does not support the finding of collusion made by the Tribunal.

Summary thus far

112. These matters, some of them significant, form the background to the more immediate events that led to the appointment of the Tribunal. They reflect badly on the judgment of the Chief Justice, leading to inappropriate behaviour on a number of occasions. They also establish a propensity on the part of Mrs Schofield to take ill-advised action in support of her husband that was capable of carrying the implication that he associated himself with it and that was damaging to his standing as Chief Justice. There followed, however, a period of some four years without relevant incident. During this period, as the Chief Minister pointed out, nothing occurred capable of suggesting dissatisfaction on the part of the Government with the Chief Justice. On the contrary, the Government treated the Chief Justice generously by the provision of some financial assistance beyond that to which he was entitled under his terms of service. Equally during this period there were no events that, on the findings of the Tribunal, were cause for criticism of the Chief Justice.

The swearing in of the Deputy Governor in July 2006

113. This matter is dealt with in paragraphs 4.32 to 4.37 of the Tribunal's Report. It was a single incident of thoroughly unattractive behaviour by the Chief Justice. He lost his temper because, in accordance with the wishes of the outgoing Governor, Sir Francis Richards, the

Chief Minister had been given precedence over him in the grouping of those bidding him farewell at the Naval Dockyard. He took this out on the Deputy Governor whom he considered responsible for the arrangements. The Tribunal was justified in describing this as disgraceful behaviour, governed by pique that was inconsistent with the dignity of his office. It could properly be described as misbehaviour, albeit not of major consequence.

The debate over the 2006 Constitution

114. This matter is covered by paragraphs 4.38 to 4.63 of the Tribunal's Report. The facts can be summarised as follows: In 1999 a Select Committee had been established by the Gibraltar House of Assembly to consider reform of the Constitution. There was a consultation period which closed in February 2001. The first reaction of the Gibraltar judiciary was a paper submitted by the Chief Justice to the Governor, with a copy to the Chief Minister in March 2005, making recommendations for amendments to the Constitution. Although the Chief Justice described these as "made after extensive consultation with my colleagues and are those of the whole judiciary" this overstated the position. The recommendations included the institution of a Judicial Service Commission ("JSC") to make judicial appointments. Modified recommendations were made by a letter of 21 February 2006, inspired by the provisions of the United Kingdom Constitutional Reform Act 2005. These recommended a Judicial Appointments Commission made up of the Chief Justice, the President of the Court of Appeal, the Chairman of the Justices of the Peace, a member of the Bar proposed by the Bar, one appointee of the Chief Minister and one appointee of the Governor.

115. On 17 March a UK delegation and a Gibraltar cross-party delegation reached agreement on a new draft Constitution. The Chief Justice did not press for a copy of this. On 5 July it was placed on the Government website. The Chief Justice did not obtain a copy until 4 August. On 11 August, following an earlier short letter of concern, he wrote to the Chief Minister enclosing "the submissions of the Chief Justice, the Puisne Judge, the Stipendiary Magistrate and the Registrar on the draft Constitution" ("the submission"). Article 57(1) of the draft Constitution provided for the creation of a JSC consisting of the President of the Court of Appeal as Chairman, the Chief Justice, the Stipendiary Magistrate, two members appointed by the Governor in accordance with the advice of the Chief Minister and two members appointed by the Governor acting in his discretion. The submission objected that the majority of the JSC would be appointed by the executive and suggested that it should include a member of the legal profession and a lay member. It also suggested that the Chief Justice should be the chair of the JSC, or should not be a member at all.

116. The submission took particular objection to Article 57(3) which provided:

> " The Governor, with the prior approval of the Secretary of State, may disregard the advice of the Judicial Service

> Commission in any case where he judges that compliance with that advice would prejudice Her Majesty's Service."

This, it was said, was in conflict with the requirements of judicial independence. A similar objection to Article 57(3) was to be made by the Bar Council.

117. The submission concluded with a statement that the judiciary would consider all possible steps that it might take to prevent these errors of principle being promulgated including "reluctantly but if necessary, a petition to Her Majesty through Her Privy Council".

118. These objections to the draft Constitution received media coverage. This included an article in Panorama on 15 August headed "Chief Justice in campaign against new Constitution."

119. On 25 August Hassans wrote on behalf of the Chief Justice to the Acting Governor and the Chief Minister stating that some of the provisions of the draft Constitution would adversely affect judicial independence and the rule of law in Gibraltar and public confidence in due administration of justice by the courts. The letter complained of lack of consultation and called for consultation before any referendum on the Constitution, failing which it would be necessary to have recourse to the Judicial Committee of the Privy Council. This was followed by a letter on 5 September threatening that the Chief Justice would petition the Privy Council directly and unilaterally unless by 8 September the Gibraltar and UK Governments confirmed that they would refer the matter to the Judicial Committee.

120. The Chief Secretary replied to the Chief Justice on 7 September in a lengthy letter which refuted the points made by Hassans. So far as Article 57(3) was concerned it gave the following explanation:

> "Section 57(3) was included in the draft Constitution at the behest of the UK side. It was said by HMG to form an important element of the UK position in the negotiating process, as part of the UK's agreement to the establishment of the new Judicial Service Commission (which significantly reduces the Governor's powers in this area in comparison to the present Constitution and those of other Overseas Territories). According to HMG it requires the provision to reflect the continuing constitutional relationship between the United Kingdom and Gibraltar and the UK's interest in the good administration of justice. The UK Government does not, therefore, accept that the provision is objectionable. Even though the Gibraltar Government does not consider the provision to be necessary, it does not consider it objectionable on the grounds that you allege.

> The UK Government has informed the Gibraltar Government, and the Bar Council that it would only envisage the power being used in extremely rare and exceptional circumstances. These might include a case where the UK Government had information on a recommended candidate that could not be shared with the Judicial Service Commission for reasons of confidentiality, or where a wholly unqualified or unsuitable candidate were recommended for appointment to a particular office;
>
> The section is not intended to, and does not, give the Governor an enabling power. It is deliberately drafted as a veto power only. This was clearly agreed between the delegations during the negotiations on the text when the words 'and act in his own discretion' (which were in a previous draft) were removed at the request of the Gibraltar side. The effect in practice is that, if the veto power were exercised, the Judicial Service Commission would have to reconsider the matter and tender such further advice to the Governor as it thought appropriate;"

A similar undertaking had been given in a letter sent on the previous day by the Chief Minister and the Acting Governor to the Bar Council.

121. The Assistant Deputy Governor also wrote on the 7 September refuting Hassans' contentions and offering the Chief Justice a meeting with officials in London who would explain in more detail the UK Government's position on the judicial aspects of the draft Constitution.

122. The Chief Justice's speech at the opening of the legal year on 6 October was devoted almost entirely to the draft Constitution. The Tribunal's criticisms of the Chief Justice focus on this. In essence the criticism is that the Chief Justice improperly used this speech to enter the political arena by making in public an attack on parts of the draft constitution that had been agreed by the Governments of the United Kingdom and of Gibraltar and on which a referendum was shortly to be held. The consequence was that the press had a field day and the opposition seized on his remarks to justify opposing the proposed constitution, so that "consensus turned to dissent". Six specific criticisms were made of his speech. Underlying those criticisms were express or implicit criticisms of the earlier conduct of the Chief Justice in relation to the draft Constitution. We will deal with each criticism in turn.

123. The first criticism is that in his speech the Chief Justice purported to be speaking on behalf of the locally based judiciary when he had not properly consulted them in relation to the various steps that he had taken, or in relation to the text of his address. He was acting on his own initiative.

124. The judiciary in question consisted of Mr Justice Dudley, the puisne judge, Mr Pitto, the stipendiary magistrate and Miss Desoiza, the Registrar. Mr Justice Dudley did not give evidence or make a witness statement, so there is no direct evidence on his views. Miss Desoiza's attitude was that she did not want to get involved. She had expressed concern at the possibility that she might get conflicting instructions from the Chief Secretary and the Chief Justice, but she had not expressed concern about being under the disciplinary control of the executive, as suggested by the Chief Justice in his speech. Mr Pitto said that he did not consider that he had been consulted before the Chief Justice made the written submission of 7 March 2005. He said that discussion "tended to be more about the Chief Justice giving me his views". He did not dissent from those views, but thought that ultimately they were a matter for those drafting the Constitution, not to be imposed by the judiciary. He was not happy with the proposal of petitioning the Privy Council, and the Chief Justice was aware of this. Mr Pitto spoke of one short meeting at which the Chief Justice's views were discussed with Mr Dudley and he did not dissent from them. He also, however, was not in favour of a petition to the Privy Council.

125. The position can be summarised as follows. There had been no formal consultation of the local judiciary. While its members would not have dissented from the changes that the Chief Justice wished to procure to the draft Constitution, they would not have approved of proactive attempts by the judiciary to achieve those changes, such as the proposed petition to the Privy Council. Nor would they have approved the aggressive terms of the Chief Justice's speech, which he had not discussed with them. The Chief Justice was, in reality, conducting a one man campaign in the name of the judiciary as a whole.

126. Also open to criticism is the letter by the Chief Justice to the Chief Minister of 11 August which purported to contain the submissions of all four members of the judiciary. The threat, if necessary, to petition Her Majesty through the Privy Council against errors of principle in the draft Constitution, was one which had no support from the other members of the judiciary and Mr Pitto had made it plain that he was opposed to it.

127. The second criticism is that the Chief Justice acted as if the judiciary had equal standing to the Governments of the United Kingdom and Gibraltar in negotiating the draft constitution. The tone of the Chief Justice's communications in relation to the draft Constitution was indeed high handed and did not reflect the reality that the new Constitution was primarily a matter for the Governments of the United Kingdom and Gibraltar.

128. The third criticism is that the speech was deliberately worded so as to give rise to an implication of bad faith on the part of the two Governments. There is force in this criticism. Anyone listening to the Chief Justice's address would have formed the impression that he was alleging that the Government had deliberately withheld from him details of the three provisions of the draft Constitution that gave him particular cause for concern. We would have been inclined to conclude that this was the subjective view of the Chief Justice at the time, but he did not, when giving evidence to the Tribunal, seek to defend his words on that

basis. He claimed to have been misunderstood. We are satisfied that the impression that his words created was deliberate.

129. The fourth criticism is that the address did not present a balanced view of the proposed Constitution or of the process by which it had been agreed. The Chief Justice himself accepted in evidence the force of this criticism. His speech was indeed thoroughly unbalanced. The draft Constitution was, as we will shortly explain, beneficial overall to Gibraltar. The Chief Justice represented it as if it had at its heart an attack on judicial independence.

130. Fifthly the Tribunal criticises the Chief Justice for failing to make plain in his address that he had been consulted about the composition of the Judicial Service Commission. That criticism is not valid. The Chief Justice stated that the Chief Minister had provided him with details of the proposed composition of the Judicial Service Commission and that the judiciary had made proposals in relation to this. The Tribunal also criticises the Chief Justice for not referring to the reservations of Mr Pitto and Mr Justice Dudley. These reservations related, however, to the proposal to petition the Privy Council, to which the Chief Justice did not refer in his address. This criticism is more appropriately directed to the letter of 11 August.

131. The sixth, last and most important criticism is that the Chief Justice's remarks were polemic in tone. This is coupled with the general criticism that the Chief Justice acted improperly in undertaking a public campaign with regard to part of the subject of the referendum. This calls for more detailed consideration.

132. The Chief Justice ended his speech as follows:

> "The issues involved are fundamental and will affect future generations of Gibraltarians. It is for the Judiciary to protect its independence so that it may in turn protect the rule of law. As Head of the Judiciary I have a duty to ensure that the Constitution together with the assurances do indeed provide the necessary safeguards. I am therefore in the process of putting together a team of constitutional experts who will give an independent opinion on whether the Constitution does provide for an independent Judiciary given the recent communication from the UK and Gibraltar Governments. I shall make that opinion available to both Governments, to all members of the Gibraltar Bar and will also make it public. If there are still issues of concern I have advised the UK Government that I shall take up their offer of a meeting. If we do not agree on a way forward I shall seek the further advice of the expert team.

> I am already some way towards putting the team together and I hope to have a detailed, joint, opinion in my hands by mid-November at the latest."

133. The Chief Justice consulted Sir Sydney Kentridge QC, Keir Starmer QC and Richard Tur. Their Opinion, provided in November, expressed "considerable reservations" about the provisions of Article 57, "both as to general constitutional principle and European Convention compliance". These related to the composition of the JSC and to the power given to the Governor under section 57(3). The advice none the less pointed out that the institution of a Judicial Service Commission was "a significant step towards ensuring judicial independence". Furthermore, the advice opened with the statement that the authors had "left out of account that the Draft Constitution is undoubtedly an advance on the existing Gibraltar Constitution and colonial constitutions generally."

134. The Chief Justice and Sir Sydney Kentridge attended a meeting at the FCO where the only concession that they achieved was an addition to the explanatory note to the Constitution stating that the executive powers of the JSC were "subject only to an exceptional power of veto by the Governor". This did no more than repeat the undertaking already given to the Bar Council. The Chief Justice took no further action and the new Constitution was approved in a referendum on 30 November.

135. The new Constitution, laboriously negotiated between the United Kingdom and Gibraltar, represented a significant advance for the independence of Gibraltar. The Chief Justice's criticisms of aspects of the Constitution that advanced judicial independence but did not, in his view, go far enough were criticisms that he could fairly advance. They were, however, relatively insignificant in the context of the Constitution as a whole. In his speech the Chief Justice presented the draft Constitution as if it were a threat to the independence of the judiciary rather than a significant advance of this. The fact that the advance did not go as far as he wished could not justify action that might derail, or assist in derailing, the approval of the new Constitution on the forthcoming referendum. The Chief Justice's address carried that risk. When giving evidence the Chief Justice confirmed that he was conscious that a referendum was in the offing. He said that he was not trying to influence votes but to influence the Constitution. Later he added "I did not seriously consider that this would derail the referendum".

136. We accept that the Chief Justice's actions were motivated by the praiseworthy aim of promoting judicial independence. But to attempt to achieve this by a public and unbalanced attack on the draft Constitution shortly before the referendum showed a serious lack of judgment. The Chief Justice accepted that, with hindsight, his actions might be open to criticism. The problem with his conduct was that he did not exercise the foresight required of someone in his position. It may be open to question whether his headstrong action amounted to misbehaviour. It certainly demonstrated an inability to pay due regard to the likely political consequences of his actions.

The draft Judicial Service Bill

137. This is dealt with in paragraphs 5.1 to 5.35 of the Tribunal's Report. It marks the start of the most critical part of the case against the Chief Justice. At the heart of this case is the relationship between the Chief Justice and his wife, the extent to which he was party to her actions and the extent to which he was reasonably perceived, and should have appreciated that he would be reasonably perceived, as being party to her actions.

138. We have already commented on the fact that the Chief Justice and his wife were and are clearly devoted to one another. Her actions, throughout the story, misguided as they frequently were, demonstrate a passionate concern for her husband and his position. Passages in his evidence disclose devotion to and support for his wife. The Chief Justice did not have a policy of keeping any matters confidential from his wife. He shared with her an e-mail address. He also shared with her his own concerns. We would not suggest that a man in his position should not share matters that are confidential with his wife. If he does so, however, he implicitly undertakes responsibility for the maintenance by her of that confidence.

139. In the course of introducing the 2006 Order the Government announced its intention of creating a Minister of Justice and passing a Judicial Service Act. On 20 February the Chief Minister wrote to the Chief Justice recording that at a dinner that had been given for judges of the Court of Appeal the previous week the Chief Justice had told him that he would be going on holiday in Argentina with his daughter at the end of the following week (24 February) and that the Chief Minister had promised to try to get the draft Judicial Service Bill to him before he left. The Chief Minister enclosed the draft Bill. He stated that the Government intended to publish the Bill the following week, which would be the beginning of a six week consultation period, so that the Chief Justice would have more time to respond on his return from holiday before the Bill went to Parliament. The letter ended:

> "Finally, since no other consultee will yet have seen the draft Bill, I must ask that you treat it confidentially and 'for your eyes only' until the consultation paper issues next week".

140. In evidence the Chief Justice confirmed that the letter also enclosed the Consultation Paper, although it is possible that he received this a little later. It was addressed to "the President and Justices of the Court of Appeal, the Chief Justice and other judges of the Supreme Court, the Stipendiary Magistrate, the Chairman of the Justices, the Chairman of the Bar Council (for consultation with him and the Bar Council) and the Attorney General."

141. The draft Bill very largely reflected, as the Consultation Paper pointed out, provisions of the British Constitutional Reform Act 2005. This was true of Clause 5, which provided a mechanism under which the President of the Court of Appeal and the Chief Justice could

have, what the Consultation Paper described as "an appropriate and dignified method of making [the views of the judiciary] known to the Parliament, and through the Parliament, to the public at large. Clause 6 provided:

> "President of the Courts of Gibraltar
>
> (1) The President of the Court of Appeal holds the office President of the Courts of Gibraltar.
>
> (2) As President of the Courts of Gibraltar he has overall responsibility—
>
> (a) for representing the views of the judiciary of Gibraltar to Parliament, to the Minister and to the Government generally;
>
> (b) for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of Gibraltar within the resources made available by the Government;
>
> (c) for the maintenance of appropriate arrangements for the allocation of work within courts.
>
> (3) The President of the Courts of Gibraltar is president of the courts listed in subsection (4) and is entitled to sit in any of these courts.
>
> (4) The courts are –
>
> (a) The Court of Appeal
>
> (b) The Supreme Court
>
> (c) The Magistrates' Court
>
> (d) The Coroner Court"

As to these provisions, the Consultation Paper stated:

> "Although the Court of Appeal is an itinerant court, it is nevertheless a Gibraltar Court and its President is therefore the most senior member of Gibraltar's own judiciary. The Government no longer considers it appropriate, in the context of the new constitution, for the Court of Appeal to 'look like' an external court (even though it has never actually been that). Accordingly, Section 6 establishes the President of the Court of Appeal as the President of the Courts of Gibraltar."

142. The Chief Justice said in evidence that he was horrified at the implication of Clause 6 for the administration of justice. It is plain that he was also horrified at the implication of the Clause for his own position. This is not surprising. The Chief Justice had regarded himself as head of the judiciary of Gibraltar, although that position had received no formal recognition. We consider that he was reasonable to do so, for the leadership role of that position was one more naturally performed by the senior member of the local judiciary rather than the President of a Court of Appeal that only visited Gibraltar from time to time.

143. The Chief Justice and his wife formed the view that Clause 6 of the Bill was directed at him personally and was intended to drive him from office by forcing his resignation. By the end of the hearing before the Tribunal this was no longer his position, nor was it before the Committee. We consider that the Chief Justice and his wife could reasonably have concluded that Clause 6 was motivated, in part, by dissatisfaction with aspects of his own conduct in the office of Chief Justice but not that it was deliberately aimed at him, or at forcing his resignation.

144. The Chief Justice wrote to the Chief Minister on 21 February stating that the provisions which put the present functions of the Chief Justice in the hands of a visiting President of the Court of Appeal were of particular concern. He stated that he felt that he must discuss the Draft with the members of the Court of Appeal while they were in Gibraltar that week. This was a breach of confidence that he should not have committed. The proper course would have been for the Chief Justice to ask the Chief Minister to agree to his doing this. In the event his action forced the Chief Minister's hand and he immediately distributed the consultation paper to all the consultees.

145. On 23 February the Chief Justice got the Registrar to send a copy of the draft Bill to every member of the Bar, together with a statement that he felt that it might have wider constitutional implications and inviting the views of the recipients. The Tribunal inferred that this was a further breach of confidence. We are not of that view. The Chief Minister had asked the Chief Justice to treat his copy as confidential until the start of the consultation. His initial breach of confidence had caused the Chief Minister to advance the start of consultation, thereby releasing the Chief Justice from the duty of confidentiality. The Tribunal found that the Chief Justice's conduct in by-passing the Bar Council was not merely high-handed but deliberately provocative. We would agree that it was high handed and provocative, but does not feel justified in finding that the latter was deliberate. It was inappropriate and ill-judged, as was demonstrated by the fact that only two members of the Bar responded to his request for their views. The Chief Justice had, however, been indirectly responsible for a much more reprehensible publication of the Government's proposals.

146. On 22 February Mrs Schofield went to see Mr Charles Gomez, a barrister with a sole practice, taking with her a copy of the draft bill. According to his witness statement she asked him to advise on its implications so far as she and her family were concerned. On the following day *Vox* published an article under the heading "Now Caruana Attempts to Twist

the Law". It purported to be based on a "leaked draft" of the Judicial Service Bill. It set out clause 6 in the context of a description of the Chief Justice's receipt of the "leaked draft" and his reaction to it. It reported that Charles Gomez had confirmed that he was "looking to initiate proceedings to declare the act invalid after being consulted by a concerned citizen". The article alleged that the draft Bill had been deliberately disclosed to the Chief Justice just when he was about to go on holiday.

147. The Tribunal found that the "leaked draft" that Mrs Schofield had taken to Mr Gomez was the draft that had been sent to the Chief Justice and that Mrs Schofield and Mr Gomez were together responsible for the article in *Vox*. The Chief Justice did not challenge these conclusions. He said, however, that he had only showed his wife clause 6 of the Bill, that he did not know how she had come by a copy, that, although he had become aware, perhaps before he left for Argentina, that she had been to see Mr Gomez, he had not expected her to go public, that he might have "skim read" the article in *Vox* before he left for Argentina but that he did not discuss with his wife whether she had provided *Vox* with a copy of the draft Bill.

148. All of this evidence the Tribunal rejected. It found that the Chief Justice had shown the draft Bill and the consultation paper to his wife as soon as he received them, that he left the draft Bill in their house where it was available to her, that he expected that she would "go public" and was at the very least content that she should do so and supportive of her in that respect and that he discussed the article in Vox with her before he left for Argentina.

149. The Tribunal based this last finding on the "overwhelming likelihood" of the Chief Justice having behaved in this way and stated that it found the Chief Justice's evidence on each of these matters "deliberately evasive". We have read the relevant part of the transcript of the evidence of the Chief Justice, and share the impression that his evidence made on the Tribunal. We also consider that the Tribunal's findings accord with the overwhelming likelihood of the situation. Both the Chief Justice and his wife were understandably deeply concerned at the provisions of clause 6. The Chief Justice accepts that they discussed this. It was only to be expected that they would also discuss what, if any, action to take in the face of it. No reason has been advanced as to why Mrs Schofield should conceal from her husband the actions that she proposed to take. Her witness statements are significantly silent as to what transpired at this stage of the story.

150. This was a discreditable episode. The copy of the Bill that the Chief Minister had disclosed to the Chief Justice in confidence in advance of the consultation period had been used to provide copy for an attack by *Vox* on the Government's proposals. The Chief Justice bore responsibility for permitting this to occur.

151. While the Chief Justice was on holiday in Argentina his wife entered into e-mail correspondence with Mr James Neish, QC, the Chairman of the Bar. On 25 February she sent him a lengthy e-mail making recommendations "as a member of the public and a person who may be affected by any constitutional and contractual implications of the draft Bill". They included suggestions as to what the Bar Council should do before meeting to discuss the draft Bill. These included that members disclose "personal, political and business relationship[s] with the Government of Gibraltar, Minister for Justice or any other member of the Gibraltar Government" and whether they had discussed the proposed Bill prior to it being referred to the Bar Council for consultation. The matters that she suggested the Council should consider when it did meet to discuss the draft Bill ended with:

> "Whether the Chief Minister in including these provisions is demoting, demeaning, harassing, the justice for statements or decisions that he may have made in the performance in his role as Chief Justice about the Chief Minister and whether this is an abuse of office and or interference with the Chief Justice."

152. The e-mail ended with a demand for a reply by the end of the following day, failing which Mrs Schofield would go public. She ended by alleging that the section [implicitly 6]:

> "to my mind is an 'attempted rape' of the Gibraltar Constitution and of the Chief Justice's office and contract. In my view it is intended to force a resignation of the CJ unless he accepts a demotion or to force him to sue in which case we shall hear calls for him to resign."

153. Mr Neish made a short and restrained reply on 27 February. At about this time Mrs Schofield went to visit her family in Kenya. While she was away *Vox* carried on 2 March an article that reported the Chief Justice's personal consultation of members of the Bar under a headline "Schofield bypasses Bar in legal clash". It also reported Mrs Schofield's letter to the Bar Council acting "in my capacity as a private individual". The Tribunal accepted that Mrs Schofield was not responsible for providing *Vox* with this information.

154. The Chief Justice returned from holiday on 15 March, by which time his wife had returned from Kenya. He accepted that on the day of his return his wife, probably in the late afternoon, told him the gist of the e-mails that she had sent to Mr Neish. He said that she told him that Mr Neish had sent a bland reply. When asked for details of the conversation he said repeatedly that he could not remember. He said that he took very little interest in the matter and expected it to blow over. The Tribunal found the Chief Justice's evidence on this "wholly unconvincing" and "frankly incredible". It found that he acquainted himself fully with the terms of her correspondence, that he did not expect the matter to blow over but that he was fully aware that his wife intended to pursue the matter as vigorously as she could, which indeed she did.

155. On the evening of 15 March Mrs Schofield sent a further e-mail to Mr Neish in aggressive terms alleging that he and/or members of his firm had been involved in the drafting of the Bill and alleging that this gave rise to a conflict of interest. The Chief Justice said that he recalled his wife telling him that she had received this information from a local lawyer, but that he could not remember when this was. He said that he was surprised that she should have been typing e-mails on the evening of his return from Argentina and could not remember her sending this e-mail.

156. We consider it incredible that, after discussing with her husband her e-mail correspondence with the Chairman of the Bar, Mrs Schofield would have sent this e-mail without discussing her intention to do so with her husband. We share the Tribunal's conclusion that the likelihood is that he would have read the earlier e-mail correspondence at this point. What is more significant, however, is that he did not seek to dissuade her from sending the e-mail that she sent that evening.

157. The Bar Council met to consider the e-mails that had been sent by Mrs Schofield. As a result of their deliberations Mr Neish sent the three letters of 3 April that are quoted in detail in the Tribunal's Report. The first letter was to Mrs Schofield protesting in strong terms at her conduct and including the following paragraph

> "This is unprecedented conduct in Gibraltar by the wife of a Chief Justice. Notwithstanding the ludicrous fiction under which you have sought to interfere, i.e. 'as a member of the public', the inescapable fact is that you are the wife of the Chief Justice acting in your common interests. Your actions cannot be dissociated from the Chief Justice and, I regret to say, impact upon his position. This is an issue which will be addressed separately."

158. The second letter was to the Attorney General, inclosing the previous correspondence with Mrs Schofield, including his letter to her of 3 April. This stated:

> "As the Chief Justice's wife whatever Mrs Schofield has written or done is liable to be construed as having the express or implied approval or knowledge of the Chief Justice or as expressing their common views. The Chief Justice has not distanced himself from Mrs Schofield's e-mails or their contents."

159. The third letter was to the Chief Justice, informing him of the letter that had been sent to the Attorney General. It ended

> "Mrs Schofield is not an ordinary member of the public – she is the Chief Justice's wife. Her e-mails were therefore liable to be construed – as in fact they have been – as enjoying your express or implied approval or knowledge or as reflecting your and Mrs Schofield's common views. We note that you have not distanced yourself from those e-mails."

It was at this point that the Chief Justice said that he first gave detailed consideration to the earlier e-mail correspondence.

160. It was put to the Chief Justice that the last sentence in this letter was an implicit invitation to distance himself from the statements in his wife's e-mails to the Bar Council. He accepted that these and subsequent e-mails sent by his wife could not properly or appropriately have been sent by him, but denied that he would be associated with them. He said that his wife was known to the Bar and well known in Gibraltar as an independent-minded person. He did not consider that public opinion would necessarily think that her views were his. He said that he did not consider that the last sentence in Mr Neish's letter to him was an implicit invitation to dissociate himself from his wife's e-mails. It was simply a statement of fact.

161. The Tribunal was highly critical of this passage of the Chief Justice's evidence, rejecting it as untrue. It found that it must have been clear to any reader, and most especially to the Chief Justice, that the Bar Council considered that he should have distanced himself from his wife's e-mails, that by not doing so he had provided tacit support for the statements made in them and that, by the final sentence of the letter the Bar Council was inviting him to remedy the situation by making a statement distancing himself from the statements. The Tribunal found it "extraordinary" that he did not do so and concluded that he knew that his silence would almost certainly be interpreted as support for his wife's views and was more than content that should be so.

162. We do not agree that the last sentence in Mr Neish's letter was an implicit invitation to the Chief Justice to distance himself from his wife's conduct. Rather it implicitly accused him, in the light of his failure to do so, of approving her conduct and sharing her views. It expressly spelt out to the Chief Justice that these conclusions were a consequence of his silence. The reality was that the Chief Justice did largely share his wife's views. He believed that the Chief Minister was trying to get rid of him as Chief Justice. He also believed that some members of the Bar Council, and in particular Mr Neish "as a good friend and ally" of the Chief Minister, were "partisan". At no stage did the Chief Justice suggest that he attempted to dissuade his wife from making the statements that she did. In the absence of any

statement that he should not be associated with them the natural conclusion that was drawn was that he shared her views.

163. The same is true of his wife's subsequent communications at this time. These included her e-mail to Mr Peter Schirmer of *Vox* of 4 April, which she gave him express permission to publish. This made the following allegations, which were among those quoted by *Vox* in an article published on 13 April.

> "I consider the action by the Bar Council an attempt to harass me into silence. In a matter where I assert that the Chief Minister now clothed as Minister for Justice has been trying to get rid of the Chief Justice, the use of consultation and legislation to legitimise this long held ambition is an attempted rape of the Constitution and the Chief Justice."

164. We consider that the Tribunal was right not to accept the Chief Justice's evidence that he was unaware of the e-mail sent by his wife to Mr Neish on 5 April in answer to his letter of 3 April. On his own evidence the Chief Justice asked for copies of his wife's e-mail correspondence when he received Mr Neish's letter of 3 April. His wife was plainly incensed by the letter that she received from Mr Neish on the same day. How could they possibly have failed to discuss how she was going to respond? In the event her letter included the allegation that Mr Neish and other members of the Bar Council were guilty of "conduct unbecoming" in failing to recuse themselves from taking a part in making decisions in relation to the Judicial Service Bill. It also alleged that no Chief Justice had been put through what the Chief Justice had been put through since the Chief Minister came to power.

165. On 25 April Mrs Schofield sent a fax to the International Commission of Jurists in Kenya, with copies to the British Foreign Secretary, the Chief Minister and the Leader of the Opposition. The letter set out a list of events dating back to 1998 as evidencing the intention of the Chief Minister to get rid of the Chief Justice. These included the Maids Issue and the MOT prosecution. This letter immediately entered the public domain, for it was the subject of an article in the *Gibraltar Chronicle* on the following day under the headline '"Why the Chief Minister wants to get rid of the Chief Justice" Mrs Schofield tells Kenya Jurists Committee'. We are satisfied that the Chief Justice was content that his wife should make these allegations. Indeed it is significant that in his evidence to the Tribunal he never suggested that he at any stage disapproved of the allegations made by his wife, remonstrated with her for making them or sought to dissuade her from making similar allegations in the future.

Mrs Schofield's libel action

166. This action and its repercussions are covered by paragraphs 5.37 to 5.93 of the Tribunal's Report.

167. On 10 April, on Mrs Schofield's instructions, Mr Gomez wrote a letter addressed to "the General Council of the Bar in Gibraltar" alleging that Mr Neish's letter of 3 April was "a very serious defamation" in as much as it accused her of "interfering in the affairs of the Bar with the intention of inhibiting the Bar's freedom of expression and undermining the independence of the Bar". The claim called for an undertaking on behalf of the Council members not to repeat the allegations, failing which he had "firm instructions to apply for an injunction". Mr Neish replied on 12 April, alleging that it was Mrs Schofield who had made defamatory statements about members of the Bar Council and refusing to give an undertaking.

168. On 13 April Mrs Schofield issued defamation proceedings, naming Mr Neish as sole defendant. The claim alleged that Mr Neish's letter of 3 April meant that her communications with the Bar Council were a dishonest and cynical manoeuvre and that she was motivated exclusively by a desire to protect her personal interests by inhibiting the Bar's freedom of expression and undermining its independence.

169. The Chief Justice stated in evidence that he could not recall any conversation with his wife about her intention to issue libel proceedings though she might have told him that she had sent a letter before action. He said that it would not have been appropriate for him to have dissociated himself from the libel action or to have interfered with the exercise of her legal rights. The Tribunal did not accept that the Chief Justice was unaware of his wife's intention to issue defamation proceedings nor do we. The Tribunal was prepared to accept that the Chief Justice did not know the detailed nature of those proceedings until after they had been issued. We consider that had the Chief Justice exercised reasonable prudence he would have found out precisely what action his wife was minded to take, for it should have been obvious to him that if she commenced a libel action against the Chairman of the Bar in relation to his letter it would have the potential to make his position very difficult, as indeed it did. Had he discovered the details of the claim his wife proposed to make he should have sought to dissuade her, both out of consideration for her position and for his own. The accusations that she had made in her e-mails had been intemperate and inappropriate and the Chief Justice had, not unreasonably, been associated with them. Mr Neish's response had been robust, but to base a claim for libel on it was asking for trouble. And trouble there was.

170. The Bar Council had agreed that if Mrs Schofield commenced the threatened libel action, Mr Neish would ask the Chief Justice to recuse himself from hearing any matters involving members of the Bar Council or their firms. One of those firms was Hassans. This

was on the basis that they could not properly appear before the Chief Justice when his wife had issued proceedings against them with the approval of her husband. Although, in the event, Mr Neish was named in the action as sole defendant, the Bar Council considered that, in accordance with Mr Gomez's letter before action, the action was aimed against them as a whole. They concluded that clients on whose behalf they were acting could not be sure of having a fair hearing before the Chief Justice.

171. On the morning of 16 April 2007 a case management conference was listed before the Chief Justice in the case of *Sonia Bossino v Attorney General*. Hassans were acting for the claimant. At their request Mr Neish appeared at the hearing. He informed the Chief Justice of the decision of the Bar Council and asked him to recuse himself for the reasons set out by the Tribunal in its Report. The Chief Justice adjourned the application.

172. What then transpired is set out in detail in the Tribunal's Report. It is a confused and confusing picture. The background is (i) information received by Mrs Schofield from Hassans that on the following day, 17 April, a vote of no confidence in the Chief Justice was to be moved at the AGM of the Gibraltar Bar; (ii) the conclusion reached by Mrs Schofield and Mr Gomez that both the recusal application and the proposed resolution at the AGM were intended to undermine Mrs Schofield's defamation claim. The latter conclusion caused Mrs Schofield and Mr Gomez to request a hearing in chambers before the Chief Justice on the afternoon of 16 April. The Tribunal found that the Chief Justice deliberately omitted from his first witness statement the fact that his wife had telephoned him to inform him of the possibility of this request. Mr Beloff drew attention to the fact that this conversation featured in his wife's second statement and comments that this indicates either that he and his wife had no intention of concealing this information or is powerful evidence that they act independently. We see the force of the former point and is not satisfied that the Chief Justice deliberately concealed the fact of the telephone conversation with his wife.

173. The Chief Justice sat on the afternoon of 16 April on a chambers hearing, convened at the request of Mr Gomez on behalf of Mrs Schofield at which Mr Gomez and his wife were present. The basic facts in relation to that hearing set out in paragraph 5.73 of the Tribunal's report are not challenged. The Tribunal concluded that the Chief Justice's conduct demonstrated "a reckless disregard for the requirements and reputation of the office of Chief Justice" and constituted "judicial misconduct of the most serious kind". We consider that these findings are over severe. The Chief Justice should not have agreed to an ex parte hearing when the party in question was his wife. The capacities in which she and Mr Gomez appeared were as claimant and counsel in her libel action. Having wrongly entertained the hearing, the Chief Justice should have ascertained this at the outset and, having done so, permitted the hearing to go no further. That said, he granted no relief and made no order. His actions showed lack of judgment of a high order and amounted to judicial misconduct. It was not, however, judicial misconduct of the most serious kind. Nor would we conclude that the Chief Justice was motivated by "the need (as he saw it) for Mrs Schofield's position as a claimant in her libel action to be protected" (5.64). His conduct was bred of muddle, not design.

174. On 3 May Triay & Triay, who acted for Mr Neish in the libel case, wrote to the Deputy Registrar, a letter "Re: Schofield v Neish" asking for a copy of the Judge's note of the application in that case that had taken place on 16 April. On instructions from the judge Mr Mendez wrote back on 4 May saying that no notes were taken and that the matter which was brought before him was not *Schofield v Neish* but the *Bossino* recusal application. The Chief Justice's assertion that the hearing had been in the *Bossino* matter appears to us to have been a piece of *ex post facto* rationalisation in an attempt at damage limitation. We do not, however, share the Tribunal's view that his reply that no note was taken was highly misleading or that his statement to the Tribunal that he thought that Triay & Triay's request related to notes taken by him was an "afterthought". His understanding of the situation was, in fact, correct, as demonstrated by Triay & Triay's letter of 9 May expressing surprise that the judge should not have taken notes and asking for a copy of the note taken by the court clerk.

175. In the event a vote of no confidence was not passed on 17 April. Instead the Signatories first Memorandum was sent to the Governor.

176. The general recusal application that had been made in *Bossino* was restored on 24 April and then withdrawn in the circumstances described in the Tribunal's report. The Chief Justice permitted Mr Gomez to be present to represent his wife. Mr Gomez explained that he was there because of concern that the "flurry of applications" was meant to put pressure on Mrs Schofield in her libel action. The Tribunal found that in treating Mrs Schofield as an interested party the Chief Justice was, "to put it no higher", giving a degree of judicial credence to Mr Gomez's submission that the purpose of the recusal application was to stifle the libel action and that he should not have done this. Rather he should have recognised that his wife's continuing involvement in the application was yet another reason for his recusal and that his failure to recuse himself could only have inflicted further damage on his office of Chief Justice.

177. We do not draw the same conclusions from this episode. The hearing was in open court and it was on that basis that the Chief Justice said that it was open to Mr Gomez to remain, albeit that he recognised the possibility that Mr Gomez might seek to play some part in the proceedings. We cannot see that Mr Gomez had any legitimate part to play in the recusal proceedings and it would have been better had the Chief Justice so held. It did not follow, however, that he accepted Mr Gomez assertion that the recusal proceedings were designed to put pressure on his wife. Nor do we think that the Chief Justice should have recused himself in the *Bossino* case. No application was made that he should do so. He came prepared to hear the general recusal application, which was not pursued.

The Second Memorandum

178. On 21 May the Signatories submitted to the Governor their Second Memorandum, setting out in detail their reasons for asserting that they had lost confidence in the ability of the Chief Justice to discharge his functions and that his continuance in office would cause prejudice to the administration of justice and to the reputation and image of Gibraltar. A copy of this was sent to the Chief Justice. This document ran to 20 pages. Most of the individual matters relied upon subsequently featured in the Statement of Issues, were considered by the Tribunal and have been considered by the Committee in its turn. There was one recurrent theme. Mrs Schofield had repeatedly acted in a reprehensible manner in support of the Chief Justice and the Chief Justice had done nothing to dissociate himself from her conduct, leading to the inference that it had his approval.

The recusal application of 22 May

179. The Tribunal deal with this at 5.94 to 5.102 of their Report. The application was made by counsel for the claimant company, which was wholly owned by the Government. It was that the Chief Justice should recuse himself on the ground of apparent bias resulting from certain public statements by his wife from which he had not dissociated himself. The Chief Justice adjourned the application so that he could seek the assistance of an *amicus curiae*, but in doing so stated that there was an interested party who had a right to be heard and who should be notified. The Tribunal observed that there was no possible ground on which Mrs Schofield could be treated as an interested party in this application and that the Chief Justice's failure to appreciate this was another example of his inability to comprehend the constraints and responsibilities of his office, in particular where Mrs Schofield was concerned. We consider that that observation was well founded.

180. Before the date for the hearing of the adjourned application the Chief Justice was suspended from office.

The cancellation of the opening of the legal year 2007 to 2008.

181. This episode is dealt with in paragraphs 6.1 to 6.8 of the Tribunal's Report. On 11 July Mr Mendez, then the Acting Registrar, received instructions from the Chief Justice that he understood to mean that he would no longer be holding a Ceremonial Opening of the Legal Year. He made an announcement to that effect. There was an issue before the Tribunal as to whether the Chief Justice had intended his instructions to relate solely to the forthcoming ceremony or to indicate the abolition of the ceremony for all time. The Tribunal resolved this issue against the Chief Justice. We do not consider that there was a firm basis for doing so, nor that the issue is of significance. Nor do we consider that there was a firm

basis for the Tribunal's conclusion that the Chief Justice's decision was motivated by concern not to afford those whom he perceived as hostile to him the chance to criticise his conduct or challenge his views. Our conclusion is that the Chief Justice's conduct was probably motivated by a desire to mark his objection to being deprived of the position of head of the judiciary. The ceremony was a well established part of Gibraltar's traditions and the Chief Justice must have anticipated that his action, even if restricted only to the forthcoming ceremony, would cause concern and dismay in Gibraltar. If he had any concern as to whether it would be appropriate for him to conduct the ceremony, this was a matter that he could and should have discussed with the President, Sir Murray Stuart-Smith, who in the event took over responsibility for the ceremony. The cancellation occupied the front page of the Gibraltar Chronicle on 12 July and provoked a leader headed "Justice is not one man's property". Once again the Chief Justice showed a lack of judgment in relation to his public conduct in a respect that was damaging to his office. The Tribunal was justified in describing it as a "deliberately provocative act which only served to exacerbate existing tensions".

Mrs Schofield's complaint against Freddie Vasquez QC.

182. The Tribunal deals with this in paragraphs 6.9 to 6.14 of their Report. Mrs Schofield made an unfounded disciplinary complaint against Mr Vasquez in relation to a letter that he wrote to the *Gibraltar Chronicle*, which was published on 14 August 2007. She complained among other matters that this letter sought to undermine the Chief Justice in the eyes of the public. This is but one example of an ill-advised attempt by Mrs Schofield to fight her husband's battles. The Tribunal did not find that the Chief Justice was complicit in his wife's action, albeit that there would have been a natural inference that he approved it. We agree with Mr Beloff that this was not an incident of overall significance.

The Chief Justice's proceedings for judicial review

183. The Tribunal deal with this at pages 6.15 to 6.36 of their Report. The background to this part of the story is as follows. The Chief Justice was not the only person who had had criticisms to make of clause 6 of the Judicial Service Bill. Thus:

> i) On 5 March 2007 Sir Paul Kennedy wrote to the Legal Secretary to the Chief Minister giving the view of the members of the Court of Appeal. These were that, while there was no objection to the President of the Court of Appeal being given the office of President of the Courts of Gibraltar and overall responsibility for those courts, as he was not permanently resident in Gibraltar the Bill should make it clear that "the *direct* responsibility for the day to day discharge of the duties set out in clause 6(2)(b) and (c) of the Bill (as opposed to the *overall* responsibility) lies with the Chief Justice".
>
> ii) On 23 March Mr Justice Dudley wrote making similar points, but also questioning whether it was practical or desirable for the President rather than

the Chief Justice to be the titular head of the courts. He suggested that the powers in 6(2)(a)(b) and (c) should be vested in the Chief Justice. On April 2 Sir Murray Stuart-Smith wrote on behalf of the Court of Appeal endorsing his comments in relation to 6(2)(a).

iii) On 23 March the President of the Gibraltar Magistrates Association wrote saying that on occasion the Association required prompt access to the Head of the Judiciary and expressing concern at the practicability of accessing the President at short notice.

iv) On 26 March the Governor wrote pointing out that it was likely to prove necessary for certain administrative functions to be carried out by the resident judiciary and suggesting that the Act should make express provision for this.

v) On 30 March the Bar Council wrote:

> "(i) Whilst recognising that the present incumbent of the Office of President of the Court of Appeal is the most senior judge in our 'judicial system' and notwithstanding the advances in telecommunications systems the Bar Council is not persuaded that it is practicable for the President of the Court of Appeal to be de facto President of the Courts of Gibraltar. Accordingly the Council does not support Clause 6 (2) of the draft Judicial Service Act.
>
> (ii) Section 6 (3) may contravene or alternatively be inconsistent with the provisions of section 60 (2), 62 and 64 (1) of the Constitution."

184. The Government subsequently responded to these comments by amending 6(3) of the draft Bill to read:

> "(3) As President of the Courts of Gibraltar he has overall responsibility—
>
> (a) for representing the views of the judiciary of Gibraltar to Parliament, to the Minister and to the Government generally;
>
> (b) for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of Gibraltar within the resources made available by the Government;
>
> (c) for the maintenance of appropriate arrangements for the allocation of work within courts.

> (4) Subject to subsection (3), for the Supreme Court and all lower courts the Chief Justice shall have direct day to day responsibility for the mattes set out in subparagraphs (b) and (c) of subsection (3)."

The Act containing this wording came into force on July 5.

185. Meanwhile the Chief Justice had sought the advice of Rabinder Singh QC and Alex Bailin on whether the proposed Act would be *ultra vires*, whether action challenging it could be brought in the United Kingdom (as he preferred) and whether he had a claim for constructive dismissal, on the basis that, as stated in the Instructions, 'Since 1998, there have been major disagreements between Derek and the Chief Minster who has been trying to get rid of him, so far without success'. On 28 March they provided a written opinion on the draft Bill. They advised that section 6 would be unconstitutional since 'it undermines the core constitutional principle of the independence of the judiciary, which itself forms part of the rule of law'. An amendment to provide that for the Supreme Court and lower courts the Chief Justice should have direct responsibility for the matters specified in subsection (2)(b) and (c) would in their opinion create 'an artificial and unworkable division of functions'. They considered that the independence of the judiciary, enshrined in the Constitution, required that the President of the Courts should have a degree of security of tenure which the Court of Appeal judges did not have, and the Chief Justice did.

186. On 30 August 2007 the Chief Justice filed an application for judicial review as a claimant in his own court seeking a declaration that sections 6 and 37(3) of the Judicial Service Act were ultra vires the Constitution. The grounds for the claim attached to the claim form ended:

> "4.9 It is submitted that to demote the office of Chief Justice, and to appoint the President of the Court of Appeal as President of the Courts of Gibraltar, is to undermine the principle of Judicial Independence in Gibraltar, and to imperil the rights guaranteed in section 8 (1) and 8 (8) of the Constitution. This is because appointments to the Court of Appeal are short term and renewable. Renewal is on the recommendation of the Judicial Service Commission, whose members are appointed in such a way as not to offer any guarantee of their independence.
>
> 4.10 It is not uncommon for the head of the judiciary not to sit habitually in the highest court of the jurisdiction in question. See the position of the Lord Chief Justice in England and Wales, the Lord President in Scotland, the Lord Chief Justice of Northern Ireland. See also the position of the Chief Justice of New Zealand before the abolition of appeal to Her Majesty in Council from that Jurisdiction.
>
> 4.11 In contrast, the claiming is unaware of any jurisdiction in which full-time professional judge resides, but in which the

head of the judiciary is a short-term, part-time judge residing outside the jurisdiction."

The claim was withdrawn on 13 December on the ground that the Chief Justice could not cope simultaneously with judicial review proceedings and proceedings in relation to his own suspension.

187. The Chief Justice filed a statement in support of his application for Judicial Review which included the following allegations :

> "Personal Attempts to remove me from office
>
> 14 In the course of late 1998 and early 1999 I was called to a number of meetings with the then Governor Sir Richard Luce. Sir Richard asked me to consider my position as Chief Justice, and ultimately suggested that I accept a six month warrant of appointment. When I pressed him as to the reason for his suggestions he told me that the Chief Minister had made representations that my 'contract' be not renewed. I made it clear to the Governor that I had security of tenure under the Constitution and would stay in post as per the Constitution.
>
> 15 In 1999, at the ceremonial opening of the legal year, I spoke publicly of instances in which the delay or denial of funds by the Government had had the potential adversely to affect the administration of justice. A copy of my address is exhibited hereto as exhibit 7.
>
> 16 I referred to two particular incidents. Firstly, I had sought funding to attend a Judicial Studies Board seminar on the Woolf reforms, which were to be introduced into Gibraltar. Gibraltar has no equivalent of the Judicial Studies Board. Funding for this was refused by the Government, although the UK government eventually provided funding.
>
> 17 Secondly, I had initiated discussions with the Government to institute a system of part-time acting stipendiary magistrates, similar to recorders or deputy district judges in England & Wales. The benefit of this would have been twofold. It would have assisted in reducing backlog in the magistrates' court. It would also have provided a pool of local practitioners with judicial experience, which would have been valuable when making future judicial appointments. The Government were willing to agree to this, provided that they had some say in who was appointed. I considered this to be unacceptable.
>
> 18 In February 2002, whilst was sitting in a criminal trial, I was presented by the Governor with a warrant purporting to

appoint me Chief Justice for 1 year. I asked counsel in the criminal trial to consider the position. My view was that, if the warrant did limit my appointment to 1 year, I would not be an independent tribunal as required by the 1969 Constitution then in force.

19 Counsel for 2 of the defendants (who is also one of my counsel in this matter) made representations that, pursuant to the 1969 Constitution, a Chief Justice appointed held office until the age of 67, or until removed by the Constitutionally established procedure. Counsel for the other defendants (a member of the same firm) adopted these representations. Counsel for the prosecution (a member of the Attorney-General's chambers) did not address the Court in any meaningful way.

20 I received no explanation from the Governor as to the powers he considered he had to circumvent my tenure of office.

21 I had expressly asked the Attorney General to attend the Court and address me on the warrant. He did not do so, nor did he provide any explanation for why he did not do so.

22 On 04.09.2002, Sir Desmond de Silva QC wrote to me, to record that he had received an approach from the Attorney General, indicating that I would be assisted in finding judicial employment elsewhere if I were to leave Gibraltar. A copy of Sir Desmond's letter is exhibited hereto as exhibit 8.

23 I considered and consider that I would be untrue to my oath if I were to accept such an inducement or bow to such pressure."

188. The Tribunal were critical of the Chief Justice in relation to a number of aspects of his application for judicial review. First they found that, so far as this stage of the story was concerned, there was evidence that the Chief Justice and his wife were working together in relation to the legal proceedings that each had initiated. Secondly they criticised the Chief Justice for the allegations against the Chief Minister and the Attorney that he chose to make in his statement in support of his application in that the allegations were neither well founded nor relevant to the application. Thirdly they questioned the justification for bringing judicial review proceedings at all.

189. So far as the first point is concerned, there could be no objection to the Chief Justice and his wife assisting one another if the endeavours to which their mutual assistance related were not open to criticism. Indeed it would be strange if they were not helping one another. Nevertheless his wife stated in her witness statement that her husband had no involvement in her defamation proceedings and the Chief Justice confirmed this. Equally he said that she

had no hand in his judicial review application. So far as the latter is concerned the Tribunal pointed out that papers disclosed by the Chief Justice's solicitors included an e-mail from his wife to them which expressed her views on some legal questions with which the action was concerned. Faced with this the Chief Justice accepted that she was "putting her fingers in the pie" but said that this was to be discouraged. So far as the former is concerned, the Tribunal drew attention to the strong similarity between the application by the Chief Justice and orders for which Mrs Schofield applied on 17 July in her libel action. The Chief Justice sought to explain this by saying that he and his wife, both lawyers, were likely to articulate matters in the same way.

190. The Tribunal did not find this explanation acceptable and nor do we. Mrs Schofield gave notice that she intended to apply for the following orders in her libel action:

> "3. A declaration that the current composition of the Judicial Service Commission as the Governor's advisory body, on inter alia, appointments for acting judges undermines the fundamental right to a fair trial under the Gibraltar Constitution ('the Constitution') and European Convention of Human Rights ('ECHR').
>
> 4. A declaration that Section 6 of the Judicial Service Act is ultra vires the Constitution and therefore null and void.
>
> 5. A declaration that Section 26 (e) of the Judicial Service Act is ultra vires the Constitution and undermines independence of the judiciary.
>
> 6. Declarations that Section 33(3) and Section 33(4) of the Judicial Service Act undermine independence of the judiciary in Gibraltar and therefore are null and void.
>
> 7. Section 37(1)(d) and 37(3) of the Judicial Service Act are ultra vires the Constitution and therefore are null and void.
>
> 8. A declaration that Section 42(1) (a) (b) (c) (d) and 42(2) of the Judicial Service Act is ultra vires the Constitution and undermines the independence of the judiciary in Gibraltar.
>
> 9. A declaration that the devolved powers to the Gibraltar Parliament do not empower Parliament to change any constitutional provisions or structures."

These were not appropriate orders to seek in her libel action. They appear to have been an attempt to duplicate the battle that the Chief Justice was about to launch by his judicial review proceedings. Their source would seem to be documents prepared in relation to those proceedings, kept in a file that was common to both the Chief Justice and his wife, together with conversations that she must have had with the Chief Justice about those proceedings.

191. What is more significant is that in his judicial review proceedings the Chief Justice for the first time himself advanced allegations that his wife had previously made as to attempts by the Chief Minister to get rid of him stretching back to 1999. This lends strong support to the conclusion that the Chief Justice was in sympathy with the allegations made publicly by his wife at the earlier stages of the story.

192. In his statement the Chief Justice accused the Chief Minister of having made personal attempts to oust him from office and alleged that the provisions of the Constitutional Reform Act and the Judicial Service Act that related to the role of the Chief Justice were designed to achieve the same end. This remained the Chief Justice's case at the start of the hearing before the Tribunal. The Chief Justice's stance received some support from the Leader of the Opposition. He told the Tribunal that he believed that there had been "an orchestrated campaign against him politically driven". Later he said:

> "It seems to me that the only reason we have a head of the judiciary based in London is because Mr Caruana got a bee in his bonnet about it and wanted to do it to spite the current Chief Justice. It is a pure value judgment, but it is consistent with his normal reactions when he deals with other people that cross him."

193. The Chief Minister gave evidence to the Tribunal. He was asked about the Chief Justice's contention that Lord Luce had told him, in relation to the expiry of his warrant in 1999 that the Chief Minister had made representations that he should vacate office. He said that he had no recollection of making any such representation. He added in relation to that period:

> "…it has never been my position that Derek Schofield should be removed from the bench and certainly not for any of the reasons at the time that the Government was unhappy with him about. But there have been occasions where we have believed that his behaviour was not what the Government would have expected of him."

194. The Chief Minister said that he knew nothing about the decision in 2002 to offer the Chief Justice a one year warrant of appointment in place of the usual three year warrant. He said that the Government exercised restraint in its public handling of "pretty provocative events, politically damaging, electorally damaging to the Government". The beginning of the "terminal process" that led the Government to form the view that Mr Schofield could no longer remain as Chief Justice of Gibraltar were his wife's statements to the Bar Council and the Kenyan Jurists that the Chief Minister was trying to hound the Chief Justice out of office. He added that the process was concluded by:

> "Derek Schofield's witness statement in which for the first time, although the Government of course had believed it from the beginning, and we said so in our recusal application, that we thought it was not possible to distinguish so clinically the position of Mr and Mrs Schofield. It was actually confirmed in his statement when he actually swore a statement in his own court, openly accusing the Government of using executive and legislative means to remove him from office. At that point I think the Government decided that this is it. One of us has got to go."

195. By the end of the hearing before the Tribunal the Chief Justice had ceased to contend that the Chief Minister had tried personally and by legislative means to drive him from office. Instead it was submitted, as it has been before the Committee, that the Chief Justice had had reasonable grounds for forming that view. Our conclusions are as follows. At the time of the maids incident and the MOT prosecution the Chief Justice had reasonable grounds to believe, and there are still reasonable ground to believe, that the Government would have been happy to see the Chief Justice replaced, having particular regard to the furore that had followed his statement at the opening of the legal year in 1999. The Government may well have hoped that there would prove to be some means by which this could properly be achieved. The Chief Minister may well have made that view clear to Lord Luce in his regular meetings with him. It may well be that he shared the view, agreed to by the Attorney General in August 2000, that "it would be a good idea if the Chief Justice could be found something elsewhere". The Chief Justice had, however, security of tenure, and no attempt was made to deprive him of this.

196. There was no justification for concluding that the Chief Minister had been involved in attempts to remove the Chief Justice from office in 1999 or 2000 or that he was responsible for the decision of the Governor to issue a warrant for only one year in 2002. Nor in the period from 2002 to 2006 was there any basis for concluding that the Chief Minister wished to engineer the removal of the Chief Justice from office.

197. The Chief Justice, and an objective observer, might have concluded that there was a possibility that the diminution in the standing of the Chief Justice brought about by the provisions in the 2006 Order and the Judicial Service Act reflected at least in part a conclusion, influenced by the Chief Justice's own performance in office, that it would be better for the position of head of the judiciary of Gibraltar to be filled by a person who had achieved judicial office carrying higher standing than that of Chief Justice of Gibraltar. It was not reasonable to conclude that the motive for the legislative changes was to get rid of the Chief Justice or to reduce his personal standing.

198. Had the Chief Justice's application for judicial review been supported by argument that focussed solely on the question of whether section 6 of the Judicial Service Act was

constitutional, we consider that his action in making that application would have shown a grave lack of judgment. Bringing legal proceedings in the court over which he presided would have been bound to raise severe practical problems to the administration of justice in Gibraltar. They would be likely to be seen to be motivated not simply, or perhaps not at all, by the Chief Justice's concern for the Constitution of Gibraltar, but by concern for his personal position and as part of the battle that his wife was fighting on his behalf.

199. In the event the Chief Justice ensured that such a conclusion would be drawn by supporting his application with a statement that alleged that the legislation was motivated by personal animosity against him on the part of the Chief Minister. This was based not on hard evidence but on conjecture. Even if that conjecture had been reasonable, which it was not, the Chief Justice should not have founded allegations upon it in his judicial review application. In the first place the motives of the Chief Minister had no relevance to the constitutionality of the Judicial Service Act. In the second place the allegations were calculated to damage the standing of his office and to render it at least questionable whether he could continue to hold that office. The Tribunal was correct to hold that the action of the Chief Justice in bringing the judicial review proceedings constituted misbehaviour.

Inability and misbehaviour

200. As Mr Beloff pointed out, there is a lack of clarity in 7.35 to 7.42 of their Report as to the precise basis upon which the Tribunal held that the Chief Justice's conduct justified his removal from office under section 64(2) of the 2006 Order. They gave four instances of misbehaviour, commenting that no single instance demonstrated that the Chief Justice was unfit to hold office, but did not hold that his cumulative misbehaviour demonstrated that he was unfit for office. Rather the Tribunal appears to have held that, by reason of a combination of defects of character, misbehaviour and the effects of his behaviour on how he and his office were perceived, his removal was justified because of his *inability* to discharge the functions of his office.

201. There is considerable jurisprudence on the test of both "misbehaviour" and "inability" in the context of the removal from office of a judge or public official. This demonstrates that there is a degree of overlap between the two. The most recent authoritative guidance on the meaning of misbehaviour is to be found in the advice of this Committee in the case of *Lawrence v Attorney General of Grenada* [2007] UKPC 18; [2007] 1 WLR 1474. That appeal was against the removal from office of the Director of Audit of Grenada under a provision in identical wording to that of section 64(2). Her misbehaviour had consisted of the single act of sending to the Minister of Finance, who was also the Prime Minister of Grenada, with copies to the Clerk of Parliament and the Speaker of the House of Representatives of an intemperate and abusive letter that accused him of tampering with her report prior to its being laid before Parliament.

202. Giving the advice of the majority of the Committee Lord Scott of Foscote remarked at paragraph 23 that "misbehaviour" was a word which drew its meaning from the context in which it was used. He went on at paragraph 25 to quote with approval paragraph 85 of the decision of Gray J in *Clark v Vanstone* [2004] FCA 1105, (2004) 81 ALD 21:

> "It is clear from these expressions of opinion that, in order to constitute misbehaviour by the holder of an office, the conduct concerned need not be criminal conduct and need not occur in the course of the performance of the duties of the office. For present purposes, the important proposition to be drawn from these expressions of opinion is that, in a case in which the term 'misbehaviour' is used with reference to the holder of an office, the content of its meaning is to be determined by reference to the effect of the conduct on the capacity of the person to continue to hold the office. In turn, the capacity to continue to hold an office has two aspects. The conduct of the person concerned might be such that it affects directly the person's ability to carry out the office. Alternatively, or in addition, it may affect the perceptions of others in relation to the office, so that any purported performance of the duties of the office will be perceived widely as corrupt, improper or inimical to the interests of the persons, or the organisation, for whose benefit the functions of the office are performed. In either case, the danger is that the office itself will be brought into disrepute as a result of the conduct of its holder. If that is likely to be the case, then the conduct is properly characterised as misbehaviour for the purposes of the relevant legislation."

203. Lord Scott derived from this passage four ingredients that will normally need to be present before conduct can be characterised as "misbehaviour" for the purposes of removal from office. We consider that Lord Scott's analysis can helpfully be applied in the present case. The search for the four ingredients raises the following four questions:

> i) Has the Chief Justice's conduct affected directly his ability to carry out the duties and discharge the functions of his office?
>
> ii) Has that conduct adversely affected the perception of others as to his ability to carry out those duties and discharge those functions?
>
> iii) Would it be perceived to be inimical to the due administration of justice in Gibraltar if the Chief Justice remains in office?
>
> iv) Has the office of Chief Justice been brought into disrepute by the Chief Justice's conduct?

204. So far as "inability" is concerned, assistance can be derived from the decision of the House of Lords in *Stewart v Secretary of State for Scotland* 1998 SC (HL) 81. That appeal arose out of a report by the Lord President and the Lord Justice-Clerk to the Secretary of State for Scotland pursuant to section 12(1) of the Sheriff Courts (Scotland) Act 1971 that the appellant was "unfit for office by reason of inability, neglect of duty or misbehaviour". The conduct that was the subject of investigation consisted of a consistent pattern of bizarre behaviour both on and off the Bench. The finding was that this did not constitute "misbehaviour" but was attributable to a character flaw which amounted to "inability". The House upheld the finding of the Court of Session that "inability" was not to be restricted to unfitness through illness but extended to unfitness through a defect in character. In the leading speech Lord Jauncey of Tullichettle rejected the submission that the importance of judicial independence required that "inability" be accorded a narrow meaning. He held that the fact that the decision as to a sheriff's unfitness lay with two senior judges was the bulwark standing between the sheriff and any undue interference by the executive.

205. A similar point can be made in the present case. There is good reason to give "inability" in section 64(2) the wide meaning that the word naturally bears. If for whatever reason a judge becomes unable properly to perform his judicial function it is desirable in the public interest that there should be power to remove him, provided always that the decision is taken by an appropriate and impartial tribunal.

206. We consider that it was open to the Tribunal to proceed on the basis that defect of character and the effects of conduct reflecting that defect, including incidents of misbehaviour, were cumulatively capable of amounting to "inability to discharge the functions of his office" within section 64(2). It remains to consider their finding that, on the facts of this case, such inability had been demonstrated in the case of the Chief Justice.

An overview

207. The Tribunal heard the Chief Justice give evidence over the best part of two days. They took an adverse view of him as a witness. Repeatedly they found his evidence incredible and rejected it. We have reviewed the Tribunal's findings and, on a number of occasions, concluded that there was no firm basis for rejecting the Chief Justice's evidence. However on the central issue of the extent to which the Chief Justice was aware of his wife's actions and intentions we have concluded that the Tribunal had good reason to reject the Chief Justice's evidence that he neither knew nor was particularly interested in what his wife was doing. The transcript fully supports the Tribunal's finding that the Chief Justice was evasive. Repeatedly he said that he could not remember matters that one would expect to have been etched on his memory. It is simply incredible that he and his wife would not have discussed matters that were of great mutual concern and how they were going to react to them.

208. The evidence demonstrates that Mrs Schofield has a strong personality and we have concluded that, in her relationship with her husband, it was the dominant personality. From the time of the public exchanges between the Government and her husband that followed his comments at the opening of the legal year in 1999 she formed the view that the Government, and in particular the Chief Minister, was bent on hounding her husband from office. She undoubtedly communicated her views to her husband. If he was not persuaded that she was right, he was not persuaded that she was wrong. Over time he also came to believe that the Chief Minister was trying to hound him from office.

209. The Chief Justice initially kept his thoughts to himself. His wife did not. She went public with them and she acted on them. There was never any indication that he was not content that she should do so, nor has he given any such indication to this day. His attitude has been that his wife is an independent person, that she is entitled to do and say what she chooses and that no one would reasonably associate him with his wife's conduct. In that he has been wrong. He has been associated, and reasonably associated, with his wife's conduct.

210. Finally, in his judicial review proceedings, the Chief Justice publicly adopted his wife's contention that the Chief Minister had, from 1999, been bent on driving him from office. Through his counsel he persisted in so contending at the opening of his case before the Tribunal.

211. The Chief Minister gave evidence. He vigorously refuted the suggestion that he and his Government had been attempting to drive the Chief Justice from office. He stated that, on the contrary, his Government had acted with considerable restraint in the face of provocation from the Chief Justice, and illustrated that contention at some length.

212. The transcript of the Chief Minister's evidence is compelling. So, it seems, was his evidence itself. It was not challenged by Mr Fitzgerald QC, who was acting for the Chief Justice. Rather it was put to him that the Chief Justice had reasonable grounds for believing that he was bent on driving him from office. That also he refuted. "Reasonable grounds for belief" was the way in which the Chief Justice's case was advanced in Mr Fitzgerald's closing submissions. Neither then nor since has the Chief Justice apologised for the allegations made against the Chief Minister that he has accepted were not justified.

213. This case has aspects of a Greek tragedy. The Chief Justice's wife's conduct in reaction to what she mistakenly believed were attempts to drive him from office threatened to make that office untenable by him unless he publicly dissociated himself from her conduct. This he was not prepared to do. He was not persuaded that her allegations were unfounded and in the end he publicly associated himself with them.

Conclusions

214. We turn to the four questions based on the approach of Lord Scott in *Lawrence*. The first requires consideration of the practical effect of the Chief Justice's conduct on his ability to discharge the functions of his office. So far as that is concerned the debate before us has focussed on the extent to which the Chief Justice might be obliged to recuse himself from trying cases involving those whom he himself has attacked or is seen as having attacked by reason of association with attacks made by his wife. As this depends in part on perception it is convenient to address first the second question, which relates to the perception of others as to the Chief Justice's ability to perform his functions.

215. The Tribunal had before it an abundance of evidence of the perception of others as to the consequences of the Chief Justice's conduct. The signatories to the Memoranda were Louis Triay QC, signing on his own behalf and on behalf of his firm Triay Stagnetto & Nash, JE Triay QC, signing on behalf of himself and of his firm Triay & Triay, James Levy QC on his own behalf and on behalf of his firm Hassans, A Levy on his own behalf and on behalf of his firm Attias & Levy, AV Stagneto QC, David Dumas QC and AA Vasquez QC. A common theme of the Second Memorandum to which the Signatories subscribed and of individual witness statements made by Signatories or member of their firms was that, having failed to disassociate himself from his wife's public utterances, the Chief Justice was seen as supporting these. In a witness statement which impressed the Committee as balanced and moderate, Mr Francis Triay put his viewpoint as follows:

> "4. The size of our community is small, and because most land is owned by the Government of Gibraltar and most business activities require licensing by the Government in some way or another, the Government is necessarily involved in a large number of legal and business matters. The legal profession is also small in number and accordingly, it is very important for the proper functioning of the community and the administration of justice that Government representatives and those involved in the administration of justices keep to their proper roles within the small community. When the Chief Justice began to involve himself in political matters, I felt that he was exceeding his role as Chief Justice and this would undermine the administration of justice. This situation was made worse when unfortunately his wife began to crusade to protect him from what she perceived to be a conspiracy since her actions have only served to further undermine his position as Chief Justice, especially as the Chief Justice has invariably taken up the same crusades.
>
> 5. In my view, Mrs Schofield has attempted to protect her husband but, in the process, she has created the very situation which she says she has tried to avoid, namely undermining and

> further polarising the position of the Chief Justice, especially as the Chief Justice has fought the same battles.
>
> 6. I cannot know the extent to which the Chief Justice operated in a joint enterprise with his wife. My overall impression is that they must have acted in concert to some large extent in view of the fact that the points that she made were all ultimately to protect or related to the Chief Justice and that the Chief Justice did nothing to intervene or disassociate himself from what she did or her allegations. It would also be very unusual in a marriage, for a husband or wife to take such high profile action on a matter which necessarily affects the other, without the other being privy to and being part of the action taken, especially where the views of both are in the main the same."

216. We quote this because it reflects our own conclusions as to the association of the Chief Justice with his wife's public utterances. As to the consequences of this perception, the Signatories put these as follows in their Second Memorandum:

> "We feel it is impossible for the Hon Derek Schofield CJ to sit in cases involving judicial reviews of Government or Ministerial decisions when his wife has very publicly accused the Chief Minister of wanting to get rid of her husband . . . The Hon Derek Schofield has not dissociated himself from those comments. Because he has not done so, a fair-minded and informed observer is bound to conclude that the Chief Justice either shares those views and is therefore likely to be biased against the Government or any Minister concerned or that, at the very least, there is a real possibility of subconscious bias on his part. Administrative Law is an expanding area of law as much here in Gibraltar as in England and Wales. There are increasing numbers of court challenges to the decisions of public authorities. A judge who is prevented from dealing with such cases because of perceived prejudice or bias is a judge who cannot properly discharge his functions."

217. The Second Memorandum was polemic in tone and it would not be right to treat its contents as reflecting a universal viewpoint. Mr Triay observed that the Chief Justice's conduct has polarised the legal profession in Gibraltar with some lawyers at times supportive of the Chief Justice whilst others have been against him. It would not be right, however, to treat the large body of lawyers who were prepared to subscribe to the Memoranda as partisan. We accept that the picture painted in the Second Memorandum portrayed the fairly held views of a significant proportion of the legal practitioners in Gibraltar.

218. The Tribunal made findings as to the effect that perceptions of bias caused by the Chief Justice's conduct would have on his ability to try cases. He himself had accepted that he would have problems in sitting on any case in which the Chief Minister was involved either as a witness or because a policy of Government for which he was responsible was in issue. The Tribunal rightly observed that these were likely to be among the most important so far as concerned their impact on the public. The Tribunal queried, however the practicability of identifying cases involving the Government which did not involve the Chief Minister. We endorse these findings.

219. The Tribunal further found that the Chief Justice would face a similar problem in sitting on cases involving Mr Rhoda, the Attorney General because of his allegation that the Attorney General had been involved in an attempt to remove him in 1999. We do not consider that this could give rise to any appearance of bias ten years later. More pertinent is the statement by Mr Rhoda that he would feel a great deal of unease in appearing before the Chief Justice having regard to the fact that "the Schofields have taken issue and asked me to recuse myself from the Judicial Service Commission and as Chairman of the Admissions and Disciplinary Committee in respect of Mrs Schofield's complaint against Freddie Vasquez QC " and the e-mail that she sent on 5 April 2007 stating that she would be instructing her lawyers to ask the Attorney General to recuse himself from dealing with any issue relating to herself or her husband. Overall we consider that there would be no more than a possibility of a recusal application and that only in relation to a case in which the Attorney General was personally involved

220. The Tribunal also found that the Chief Justice's known antipathy towards certain members of the Bar Council , in particular Mr Neish the leader of the Bar, would be likely to affect the ability of the Chief Justice to be seen to do justice in some individual cases. This raises the wider question of whether there would be a perception of bias against the lawyers who were, or who were in the firms of, the Signatories to the two Memoranda. Mr Catania, a partner in the firm Attias & Levy, suggested in his witness statement that the Chief Justice would be perceived as favouring those lawyers who had supported him and his wife as opposed to those who had been party to the Memoranda. While there would be a risk of this we do not consider that it would be right in principle to consider as a ground for removal of a judge, an appearance of bias based on resentment that the judge might be thought to feel towards advocates who had sought his removal. Were this not so, an application to a judge to recuse himself might be self-fulfilling.

221. While we have not accepted all the allegations of apparent bias that would arise if the Chief Justice were to continue to sit, those that they have accepted are significant. A Chief Justice of Gibraltar who was unable to sit on cases involving the Government would be substantially disabled from performing his judicial function.

222. We turn to the third and fourth questions based on *Lawrence*, which are linked. Essentially the question is whether the behaviour of the Chief Justice has brought himself and his office into such disrepute that it would damage the image of the administration of justice in Gibraltar if he continues to serve as Chief Justice. No question has ever been raised as to the Chief Justice's judicial ability to resolve issues of fact and law. His conduct has, however, shown repeated and serious shortcomings and misjudgements' in his public behaviour. The office of Chief Justice, it must be recognised, carries demands well beyond those placed upon ordinary sitting judges, however senior. We have concluded that the Tribunal was right to criticise his conduct in that office in relation to the following episodes

- The content of his address at the opening of the legal year in 1999 and his interchanges with the Government thereafter

- Failure to have due regard to his legal obligations in relation to the maids that he employed in 1996 and 1997.

- His defence to the MOT prosecution in 2000.

- His behaviour in court after the issue of the one year warrant.

- The swearing in of the Deputy Governor in July 2006.

- His reaction to the draft 2006 Constitution culminating in his speech at the opening of the legal year.

- His initial reaction to the Judicial Service Bill.

- Allowing his wife to appear before him in court on 16 April 2007

- His reference to his wife's interest at the recusal application of 22 May 2007.

- The cancellation of the 2007 opening of the legal year ceremony.

- His implicit support of repeated accusations made by his wife against the Government and the Chief Minister and against members of the Bar Council.

- His judicial review proceedings and the allegations made against the Chief Minister in support of them.

223. These episodes demonstrated the defects of personality and attitude identified by the Tribunal at 7.37 to 7.39 of their Report. That indeed is the principal relevance of the episodes that predated 2006. The last two items also resulted in an inability to preside over hearings involving the Chief Minister because of the appearance of bias. There would also be a risk of applications to recuse himself in hearings involving the Attorney General.

224. This conduct infringed almost every one of the principles in the two Guides to Judicial Conduct that set out in paragraphs 28 and 29, namely 2.2, 2.3, 4.1, 4.2, 4.3, 4.6 and 4.8 of the Bangalore Principles and 3.1 and 3.2 of the Guide to Judicial Conduct and the

warning in this guide in relation to disqualification and to talking to the media with the greatest circumspection.

225. The conduct of the Chief Justice has brought him and his office into disrepute. The Tribunal had evidence and submissions from a large proportion of those who practise in the courts of Gibraltar that in their perception his conduct had adversely affected his ability to carry out his duties and functions and that it would be inimical to the due administration of justice in Gibraltar if he remained in office. Indeed they went further and submitted that his occupation of his office had been rendered untenable.

226. Mr Mendez, who had always loyally served the Chief Justice as Deputy Registrar and who was praised by the Tribunal as a reliable witness spoke in his witness statement of his perception of the loss of respect sustained by the Chief Justice among the people of Gibraltar and added that if the Chief Justice returned to his post he would not continue working with him.

227. We have reached the conclusion that the actions of the Chief Justice and his wife have rendered his position as Chief Justice of Gibraltar untenable. The Chief Minister was realistic in saying that the terminal process began with Mrs Schofield's publicised statements to the Bar Council and to the Kenyan Jurists that the Chief Minister was trying to hound her husband out of office and ended when he brought judicial review proceedings in which he publicly adopted that allegation.

228. Although there were a number of incidents that qualified as misbehaviour we would follow the example of the Tribunal in finding that these were incidents in a course of conduct that has resulted in an inability on the part of the Chief Justice to discharge the functions of his office.

229. Accordingly we humbly advise her Majesty that the Hon Mr Justice Schofield be removed from the office of Chief Justice of Gibraltar.

LORD HOPE, (**with whom Lord Rodger and Lady Hale agree)**

230. I regret that I am unable to agree with the opinion of the majority in this extremely important and very troublesome case. While we share their view that in numerous respects the Tribunal's criticisms of the Chief Justice of Gibraltar cannot be accepted (see paras 50-52, 55-56, 71-73, 78, 82-83, 110-111, 113, 145, 172-174, 181 and 219-220), I find myself in the same position as Lord Rodger and Lady Hale. We do not regard the remaining grounds

of criticism as justifying the conclusion which the majority have reached that he ought to be removed from his office of Chief Justice on the ground of inability to discharge the functions of that office. The following are my reasons for reaching this view.

Procedural Backgound

231. Section 64 of the Gibraltar Constitution Order 2006 ("the Order") provides that the Chief Justice shall be removed from office by the Governor if the question of his removal has, at the request of the Governor made in pursuance of section 64(4), been referred by Her Majesty to the Judicial Committee of the Privy Council and the Judicial Committee has advised Her Majesty that the judge ought to be removed from office "for inability to discharge the functions of his office or for misbehaviour": see section 64(2). Section 64(4) lays down the procedure that the Governor must follow before he makes such a request. He must appoint a tribunal whose task is to inquire into the matter, to report on the facts to the Governor and to advise him whether he should request that the question of the judge's removal should be referred by Her Majesty to the Judicial Committee. If the tribunal so advises, the Governor is required by the subsection to request that the question be referred accordingly.

232. The steps laid down by section 64(4) of the Order have all been fulfilled. A tribunal was duly appointed. There were two hearings for directions, which were followed by a full hearing at which evidence was led. Having considered the evidence and a substantial number of documents, the Tribunal concluded that the Chief Justice is unable to discharge the functions of his office and that this inability warrants his removal from office: para 7.42. Accordingly it advised the Governor that he should request that the question of his removal should be referred by Her Majesty to the Judicial Committee. It is now for the Board to consider whether the Chief Justice should be removed from office. It is a heavy responsibility. We must look at the facts with an appropriate measure of detachment from the cut and thrust that characterised the events that gave rise to this procedure. Our task is to set them into a wider context in the light of our own knowledge and experience of the relationships that may develop between the judiciary and the executive. We must be sensitive to the fact that it takes two to create an argument, and to the risk that one side or the other may be over-reacting to perceived insults. Above all, we must be careful not to undermine the principle of independence by judging too harshly one man's judgment of what it required of him.

233. The Board is not, it must be appreciated, sitting as a court of appeal. The jurisdiction which it is required to exercise in a case of this kind is an original jurisdiction. It must make up its own mind as to whether or not the allegation that the Chief Justice is unable to discharge the functions of his office has been made out. The raw material that it needs to address this issue is to be found in the report and the supporting documents. But the Tribunal's findings are not binding on the Board, nor is the conclusion that the Tribunal drew from those findings. The weight to be given to them must depend on whether the Board is

satisfied that the Tribunal addressed the issues that were before them fully and fairly, and that it directed its mind to the right questions when it reached the conclusion that the Chief Justice should be removed from office.

234. The report is, as one would expect of such a distinguished Tribunal, clear and comprehensive. I see no reason to doubt the fairness of the procedure that was adopted. Nevertheless it seems to me that the report suffers from a number of significant defects and that, taken overall, it requires to be approached with a great deal of caution. Although the Tribunal says in para 1.21 that it took full account of complimentary remarks made by a number of witnesses, the impression that is created by the remorseless criticism of him that follows is that there was a marked lack of balance in its approach to the issues that were before it. I have the distinct impression that it failed to give proper weight to the context in which the various events which it was considering had arisen and to analyse them with a due sense of perspective and detachment. It seems to me that, in the result, it has presented us with a one-sided version of these events. It did not pay adequate regard to the situation in which the Chief Justice found himself as those events unfolded, to the room for differences of opinion as to what upholding the principle of judicial independence required of him and to the nature of the jurisdiction in which he was operating.

235. I accept with gratitude the careful way in which, for the majority, Lord Phillips has reviewed the facts and analysed the Tribunal's report. But, for the reasons I shall explain, I would draw a different conclusion than he does from the product of this analysis. Here too I think that the approach lacks the necessary sense of perspective and detachment. It fails to give proper weight to the crucial importance of protecting senior judges against attacks by the executive upon their efforts to uphold judicial independence in their jurisdiction. Errors of judgment there may well have been. But to say that this amounts to an inability to discharge the functions of the office within the meaning of section 64(2) of the Order which justifies his removal from office seems to me to go too far. It risks setting a dangerous precedent.

Judicial independence

236. It is a striking fact that the first and last of the episodes listed by the majority as those for which they consider that the Tribunal was right to criticise the Chief Justice's conduct (para 222) were instances where he was addressing himself to what he saw as risks to the independence of the judiciary. This was the theme of the relevant part of his address at the opening of the legal year in 1999. It was also the theme of his statement that was filed in support of his proceedings for judicial review on 29 August 2007. Leaving aside some of the earlier episodes which fall outside this pattern, it is a theme that runs right through the problems that his relationship with the executive gave rise to. One of the central questions in this case is how far it was open to the Chief Justice to exercise his own judgment as to what the need to protect the independence of the judiciary required of him.

237. In his address to the Commonwealth Law Conference in Nairobi on 12 September 2007 Lord Phillips of Worth Matravers CJ said:

> "A judge should value his independence above gold. Not for his or her own benefit, but because it is of the essence of the rule of law."

Nine years earlier, in June 1998, the Chief Justice was among the group of parliamentarians, judges, lawyers and legal academics who joined together at Latimer House at a Colloquium on Parliamentary Sovereignty and Judicial Independence within the Commonwealth. He participated in these discussions as a representative of the Commonwealth Magistrates' and Judges' Association and presented a paper on maintaining judicial independence in a small jurisdiction. He brought to these discussions his own experience of the risks to the independence of the judiciary in Commonwealth Africa. There were other examples that would have had a part to play in these discussions, notably the way in which Chief Justice Gubbay of Zimbabwe had been forced out of office in that jurisdiction by the executive. The product of the Colloquium was the Latimer House Guidelines in which various principles were set out for preserving judicial independence. There is no doubt that the Chief Justice saw it as part of his mission in life to promote these principles and, by doing so, to set an example for others in small jurisdictions such as his own. He may be criticised for the way in which he pursued this aim. He was perhaps too ready to perceive threats to his independence when in reality there were none. Perhaps he took insufficient care in his choice of language. But the importance of the principle is not in doubt. I do not detect any reasons for doubting his good faith in seeking to do all that he could to uphold it.

238. The Chief Justice is by no means alone among the holders of this office in having said or done things in pursuit of judicial independence or the rule of law that have given rise to controversy. In his address at the opening of the legal year in Trinidad and Tobago on 16 September 1999 Chief Justice de la Bastide said that efforts were being made to make the judiciary's access to funds voted to it by Parliament subject to the approval or disapproval of the Attorney General and that if this were to happen he would have a stranglehold on the judiciary. He went on to express fears that the independence of the Bar was being compromised and that the President of the Law Association had joined with the Attorney General to subvert the independence of the judiciary. These and other remarks gave rise to a lengthy and acrimonious statement by the Attorney General and a caustic press statement by the President of the Law Association: Sir Fred Phillips, *Commonwealth Caribbean Constitutional Law* (Cavendish Publishing Ltd, 2002), p 280. Sir Telford Georges was asked to intervene in the dispute. He drew attention to flaws in a statement to Parliament by the Attorney General in which he claimed that he had responsibility for overseeing the judiciary, but he ended his report with a warning that highly placed judges should not lose their nerve and descend, or threaten to descend, into the arena when provoked: Phillips, *op cit*, pp 281-282. A Commission of Inquiry was appointed by the Government to investigate the administration of justice in Trinidad and Tobago presided over by Lord Mackay of Clashfern. It found that the Chief Justice's allegations that the executive was endeavouring to undermine the independence of the judiciary were not well founded. But the Chief Justice's ability to continue to perform the duties of his office was not called into question.

239. Bruising exchanges between the senior judiciary and the executive are not unknown in England and Wales, and the behaviour of the senior judiciary is not always above reproach. In December 1934 Lord Chief Justice Hewart's attack on the Lord Chancellor and permanent officials in the Lord Chancellor's Department for their supposed attempt, in the Supreme Court of Judicature Bill, to interfere with the independence of the judiciary was so scathing, so ill-judged and so extreme that only the intervention of the Marquess of Reading saved the day: Hansard Debates, HL, vol 95, cols 224-237. Lord Lane was Chief Justice when Mrs Thatcher was Prime Minister and it fell to Lord Mackay of Clashfern as Lord Chancellor to promote the reforms to the legal profession which were introduced by the Courts and Legal Services Act 1990. In a debate in the House of Lords on 7 April 1989 he was subjected to a sustained and bitter attack by the senior judiciary. In the course of the debate Lord Lane accused him of discourtesy in failing to consult him before he announced the proposed reforms and, in a passage which was widely regarded as intemperate, of conduct that was reminiscent of that perpetrated by Nazi Germany: Hansard, HL Debates, vol 505, cols 1329-1331. In a debate in the House of Lords on 7 April 1989 Lord Mackay was able to set the record straight by referring to an exchange of letters between himself and Lord Lane before the Green Papers were published. He told the House that Lord Lane had authorised him to say he withdrew the word "discourteous": col 1475. No-one, of course, suggested that any steps should be taken to remove either Lord Hewart or Lord Lane from office because of their remarks.

240. It is not unknown too for a member of the executive to perceive a slight by a member of the senior judiciary in asserting his independence when in reality there is none. In the course of his address to the Commonwealth Law Conference in Nairobi on 12 September 2007 Lord Phillips recalled Charles Clarke's furious public reaction, when he was Home Secretary, to the refusal by Lord Bingham of Cornhill, the Senior Law Lord, to meet him to discuss issues of principle that might be raised by the measures that he was proposing to meet the challenge of terrorism. He failed to appreciate, of course, that it was not open to Lord Bingham to risk compromising his judicial independence by entering into discussions of that kind with the executive.

241. The ability of the press too to stir up trouble must not be underestimated. As Lord Phillips has mentioned (para 27), Gibraltar has a particularly lively press, anxious for copy and, in common with the media in other jurisdictions, eager to identify any actual or supposed conflict between the judiciary and the executive. I encountered this phenomenon during my last year as Lord President of the Court of Session when Michael Forsyth was the Secretary of State for Scotland. He decided to follow the example of the Home Secretary, Michael Howard, in his approach to criminal justice which had been criticised vigorously and in public by the Chief Justice, Lord Taylor of Gosforth. In *HM Advocate v McKay*, 1996 JC 110, in which the Crown sought to abandon an appeal against a sentence on the ground that it was unduly lenient, I took the opportunity at p 115, in view of the concern that was being expressed on this issue south of the border, to assert the court's right to exercise leniency in the matter of sentencing whenever this was appropriate. This attracted the headline in *The Scotsman's* report the next day: "Warning over threat to justice". From then on the press sought to exploit what they saw as a rift between me and the Secretary of State over issues of policy. As report fed upon report the number of occasions on which I had intervened were said to have been much greater than they actually were. So much so that when it was

announced that I was to resign as Lord President on my appointment as a Lord of Appeal in Ordinary the headlines were "Was he pushed or did he jump?" and "Forsyth tightens grip on crime as Lord Hope quits". I was able to correct this impression in an interview after my resignation. But it was obvious to me that any attempt to do so earlier would only have provided the press with further copy and made matters worse.

242. I refer to these examples – and others could no doubt be cited (see, for example, the matters referred to in para 5 of Lord Mustill's Report of the Tribunal in the question of removing Chief Justice Sharma from office as Chief Justice of Trinidad and Tobago) – in order to emphasise the latitude that must be given to senior judges when they engage with the executive on matters which may be thought to affect the independence of the judiciary. Upholding that principle is one of their most important responsibilities. The rule of law depends upon it. Of course, they must be careful, as Sir Telford Georges remarked, not to descend into the arena when they are provoked. To do so risks bringing their office into disrepute. But sometimes a venture in that direction is unavoidable in order to make the point that there is a boundary beyond which the executive may not go in its dealings with the judiciary. From time to time mistakes will be made, as tends to happen in the heat of battle. But they should not be characterised as instances of misbehaviour or indicative of inability. That would only be appropriate in the most extreme case. Ideally, it would only be after a warning has been given by a higher judicial authority that conduct of a kind which has given offence out of all proportion to the circumstances must not be repeated. In the case of this Chief Justice no such warning was given. It is unclear who, if anyone, was in a position to do this. He was, in effect, on his own. All the more reason for according him a measure of latitude, so long as his actions were not malicious or in bad faith.

The episodes in general

243. The majority have concluded that the Tribunal was right to criticise the Chief Justice in relation to the twelve episodes that they list in para 222 of their judgment. I wish to concentrate on only four of them: the first, the seventh and the last two. As for the remainder, I would make these brief points. First, as the majority have observed (para 112), there was an interval of four years between the fourth episode, which relates to his behaviour after the issue of the one year warrant on 7 February 2002 in respect of which the majority reject the Tribunal's findings of bad faith and collusion (para 111), and the fifth episode in July 2006. No criticism is made of the behaviour of the Chief Justice during this period, either on or off the bench. This is a strong indication that, whatever one is to make of these earlier episodes, they are not indicative of an inability to discharge the functions of his office. So I would discount the second, third and fourth episodes entirely from the overall assessment. The first episode, as it forms part of a pattern, does deserve further scrutiny.

244. As for the fifth episode, the swearing in of the Deputy Governor, the majority say that the Tribunal was justified in describing this as disgraceful behaviour and that it could properly be described as misbehaviour although not of major consequence. It seems to me

however that if, as they say, it was not of major consequence – a view with which I agree – it must follow that it was not misbehaviour of the kind that would justify removal from office. This was an isolated incident, and I accord it a low priority in the overall assessment of inability. The sixth episode relates to the debate over the 2006 Constitution. The majority conclude that the Chief Justice's actions on this occasion were motivated by the praiseworthy aim of promoting judicial independence but that this showed a serious lack of judgment. They say that it may be open to question whether this amounted to misbehaviour but that it showed an inability to pay due regard to the consequences of his actions. In my opinion the appropriate finding, in the light of these remarks, is that it has not been shown that this was an example of misbehaviour. I agree that his lack of judgment falls to be taken into account in the overall assessment of inability. But I would accord him greater latitude for mistakes of judgment in pursuit of that aim than he has been given by the majority.

245. I leave aside for the moment the seventh episode. As for the eighth which relates to the Chief Justice's action in allowing his wife to appear before him in court on 16 April 2007, I think that the proper conclusion in the light of the majority's comments (para 177), with which I agree, is that it cannot be characterised as an example of misbehaviour. In regard to the ninth episode as to his wife's interest at the recusal application of 22 May 2007, the majority accept the Tribunal's conclusion (para 179) that he had no possible ground for treating his wife as an interested party who should be notified and that this was an example of his inability to comprehend the constraints and responsibilities of his office, particularly where his wife was concerned. While his conduct on this occasion is open to some criticism, it is not said to have led to an injustice and had no lasting effect. I would regard it as insignificant in the overall assessment. In regard to the tenth episode, the cancellation of the opening of the legal year 2007 to 2008, the majority reject the Tribunal's main conclusions about it which were against the Chief Justice. But they accept its description of it as a deliberately provocative act which only served to exacerbate existing tensions (para 181). I agree that he showed a lack of judgment, but I also agree that his conduct was probably motivated by a desire to mark his objection to being deprived by the legislative reform of the position as head of the judiciary. I would not leave this episode out of account in the overall assessment of inability. But it needs to be put carefully into the overall context.

246. As for the overall context, two other factors need to be taken into account in the assessment. The first is the absence of any suggestion that the Chief Justice was incapable of performing his judicial duties. As the majority recognise, no question has ever been raised about his judicial ability to resolve issues of fact and law: para 222. This is an important factor in his favour. To a substantial degree his performance of the duties of the office was beyond reproach. The second is to be found in the evidence of Mr Peter Caruana QC, the Chief Minister of Gibraltar. He gave evidence on the sixth day of the hearing. The Tribunal preferred his evidence to that of the Chief Justice where they were in disagreement. He insisted that it had never been his view that the Chief Justice's contract should not be renewed or that he should be removed from office until the Government had adopted that position in the light of the events of 2006 and 2007. He said that it had never been his position that he should be removed from the bench, although there had been occasions when the Government believed that his behaviour was not what it would have expected of him. In cross-examination, when asked to pinpoint the stage at which, in his view, the public interest required him to be no longer Chief Justice of Gibraltar he said that the beginning of the

terminal process was probably his wife's statements about his being hounded out of office and the things she was saying to Kenyan jurists and the Bar Council, and that it was concluded by his witness statement in support of his claim for judicial review in which he openly accused the Government of using executive and legislative means to remove him from office. Looking at the overall history, he accepted that, while there were periods of tension, there were quite long periods of complete normality of relations.

247. The conclusion that I would draw from this evidence is that the key to the case against the Chief Justice lies in these two episodes: his wife's behaviour and the extent to which, if at all, it is right to hold what she said or did against him; and the remarks that he made in his witness statement. As for the rest, there is an obvious danger in highlighting in a single inquiry a series of relatively isolated instances of misguided, tactless or irritable behaviour which extend over many years. A sense of perspective is lost unless one takes account of the whole picture, including the long periods when relations with the executive were perfectly normal. Had it not been for these two episodes, which the Chief Minister himself identified as marking the start and the end of the terminal process, there would have been no case for his removal from office. It is with that background that I turn to the first, seventh and last two episodes.

The first episode: the opening of the legal year 1999

248. As I have said, the interval of time between the group of episodes of which this forms part and those that follow is a strong indication that, whatever one is to make of them, they are not indicative of the Chief Justice's inability to discharge the functions of his office. The Chief Minister's evidence supports this assessment. Furthermore the majority, I think rightly, reject the Tribunal's findings of bad faith and its decision to treat this matter as an incident of misbehaviour forming part of the justification for removing him from office ten years later (paras 55 and 56). But they say that his remarks, which are quoted in para 2.4 of the Tribunal's report, were a demonstration of bad judgment which has relevance to the question whether there was a defect of character and personality resulting in a current inability to perform the functions of his office.

249. In my opinion, against the background of what had been discussed and agreed at Latimer House in June 1998 and was published as the Latimer House Principles in the Commonwealth Judicial Journal in December 1998, this is an unduly harsh judgment. The Chief Justice's remarks were comparatively restrained in comparison with those which had been made on the same theme by Chief Justice de la Bastide in Trinidad and Tobago a month earlier. It is true that the principle in the Guidelines that the administration of monies allocated to the judiciary should be under the control of the judiciary did not meet with the approval of the Commonwealth Heads of Government in December 2003. But that was long after the date of this episode. A fair interpretation of the Chief Justice's remarks is that he was putting down a marker for further discussion with the executive during the coming year. This was in accordance with the agreed guidelines as they stood at the time, although the

unspoken examples of interference that he had in mind did not really stand up to detailed scrutiny. The political storm which ensued was due to a substantial extent to the efforts of opposition politicians and the press which provoked what might be thought to have been a surprising over-reaction by the executive. Wisely, the Chief Justice did not pursue this line in his future addresses.

The last episode: the statement in the judicial review proceedings

250. I take this episode next, as it is linked to the first by the Chief Justice's concern to uphold and protect the independence of the judiciary. The majority say that there are grounds for thinking that, even if the application for judicial review had been supported by argument that focussed solely on whether section 6 of the Judicial Service Act was unconstitutional, his action in making the application in his own name would have shown a grave lack of judgment in view of the practical problems that this would give rise to (para 198). But the real burden of their criticism of him is directed to what he said in his statement, passages from which are quoted in paras 6.19-6.20 of the Tribunal's report.

251. The statement should, of course, be read as a whole. It is true that there are passages in it which contain serious allegations against the executive under the headings "Personal attempts to remove me from office" in paras 14-23, "Legislative attempts to remove me from office/diminish the office of Chief Justice" in para 24-32 and "Reduction of Powers of the Office of Chief Justice" in para 33-48. But the Chief Justice set out his reasons for making the statement in paras 3-4, where he said:

> "3. I have given anxious thought before bringing this action, but consider that I am obliged to do so. I am gravely concerned that the [Judicial Service Act] undermines the rule of law in Gibraltar, in that it undermines the principle of judicial independence. The JSA diminishes the office of Chief Justice and gives its powers to the President of the Court of Appeal who resides outside Gibraltar and necessarily will be less familiar with domestic issues.
>
> 4. In order to demonstrate that my concerns are not of a purely theoretical nature, I will give examples of instances in which those whom the JSA entrusts with safeguarding judicial independence failed to act with proper regard for the independence of the judiciary."

In para 32, although he said that he believed that the executive's determination to press ahead with the Bill was born out of a desire to diminish his powers as Chief Justice because he would not leave, he referred to his concern that this would have on the powers of future Chief Justices. In para 42 he said that he was taking the proceedings not for the purpose of

protecting his own position but to safeguard the office of Chief Justice and the principle of judicial independence.

252. As the Tribunal records in para 6.22 of its report, the Chief Justice said in evidence that he had signed the statement after taking legal advice and in good faith and that he considered that there was an evidential basis for everything that he had stated. He repeated his belief that he had been the victim of a series of personal and legislative attempts to remove him from office and that the Attorney General was knowingly involved in an improper attempt to remove him. He said that he had been reluctant to include these claims because he knew that this would be criticised but that he had accepted legal advice that he ought to do so. The Tribunal was shown evidence that contradicted the Chief Justice's evidence about his reluctance and it did not accept his evidence on this point: para 6.23. It also rejected his claim that his allegations were well founded. But it did not go so far as to hold that he was acting in bad faith because he knew that his allegations were baseless. The majority do not make such a finding against him either. Their criticism of him is that his allegations would be seen as motivated not simply by concern for the Constitution of Gibraltar but by concern for his personal position and as part of the battle that his wife was fighting on his behalf (para 198). But it seems to me that it is open to question whether this is a fair reading of the statement as a whole, having regard to what he said in paras 4, 32 and 42.

253. That having been said, I would accept that the Chief Justice's conduct in bringing these proceedings and supporting it by a statement in these terms raises a serious question as to whether he had shown that he was unable to discharge the functions of his office or was guilty of misbehaviour of a kind which justified his removal.

The seventh and second last episodes: Mrs Schofield

254. Common to these episodes is the allegation that the Chief Justice was aligning himself with his wife's allegations, which she started making after the opening ceremony in 1999, that the executive were trying to hound him out office, and that his actions give rise at least to the perception that they were helping each other in the respective legal proceedings which they were taking.

255. This gives rise to an important issue of principle. To what extent, and in what circumstances, is a judge to be held accountable for the actions of his or her spouse or other close relatives? It should be said at once that the circumstances of this case are, in this respect, highly unusual. Mrs Schofield is, as the majority have noted, a practising member of the Kenyan Bar and she possesses a strong, indeed headstrong, personality (para 34). Some indication of her highly unconventional behaviour can be obtained from the terms of her written application for disclosure which the Tribunal received in the course of its inquiry and which, at the close of the proceedings on the sixth day of the hearing, it rejected: see the

opening pages of the transcript of the proceedings on that day. At first sight, of course, she alone is answerable for her own actions and anything that she said or did that might be regarded as misbehaviour cannot be attributed to the Chief Justice. But the case is not as easy as that, because she was conducting a highly articulate and provocative campaign in his defence in the belief that he was being hounded out of office. The question is whether it is a fair reading of the situation that he had associated himself with that campaign and that it was in reality being conducted by them both in concert with each other.

256. The majority, following observations to a similar effect by the Tribunal, say that dissociating himself from her conduct would have been an appropriate step for the Chief Justice to take in an attempt to avoid the implication that what she was doing had his approval (para 36). They also say, more generally, that his conduct infringed almost every one of the principles in Bangalore Principles and the Guide to Judicial Conduct in England and Wales which was published in October 2004 (paras 29, 30 and 224). But it is difficult to find anything in these Guides which tells the judge what to do in the unusual circumstances exemplified by this case. Para 3.3 of the Guide to Conduct contains a warning that care must be exercised where a close member of a judge's family is politically active. But that is not really this case. As for the suggestion that the Chief Justice should have taken steps to dissociate himself publicly from what she was doing, it seems to me to be open to a series of objections.

257. As the Chief Justice himself said in his first witness statement, his position was that there was no joint enterprise between him and his wife. His approach was and had always been that she was absolutely entitled to take her own view and her own course of action, and he would never seek to interfere or endorse or dissociate himself from her independent opinions. I, for my part, would accept and respect the position which he said he adopted. There can be no doubt that she was entitled to the freedom of her own opinions, her own way of expressing them and her own beliefs. The days are long gone when a husband and wife were treated as one person in law and the husband was that person. It is not unknown for senior figures in public life to have spouses or partners who pursue their own careers and interests, in the course of which they may say or do things that are controversial and embarrassing. Any difficulties that this may give rise to should be resolved between themselves, if they can be resolved at all, in private. Judges are not to be taken as supporting or endorsing their spouse's or partner's conduct if they do not publicly dissociate themselves from it. The law should recognise that they are independent actors and that the deeds of the one are not to be visited on the other.

258. Furthermore, no findings have been made about the nature and efficacy of any steps the Chief Justice might reasonably have taken to dissociate himself publicly from her course of conduct. Such information as the Board has about her activities suggests that she would strongly resist any such interference, claiming with some justification in public that it was her right to do so. Public dissociation in such circumstances would be likely to lead to even more public controversy. The whole question as to how the Chief Justice was to go about this exercise and its likely consequences remains unexplored. I cannot accept that this provides a sound basis for alleging that he was guilty of misbehaviour by association with what his wife

was doing. As for the question whether he indicated by the remarks that he made in his statement in the judicial review proceedings that he associated himself with his wife's allegations, as the Chief Minister suggested, I would for the same reasons reject that conclusion. His remarks can be taken, on their own terms, to be an expression by him of his own beliefs. I do not think that there is a sound basis for holding that he was, by making these remarks, endorsing his wife's behaviour.

259. It is not difficult to understand that, in such a small and highly charged community to which she did not belong either by birth or upbringing, Mrs Schofield's activities would be likely to give offence to those who were the target of her allegations. But she and the Chief Justice were distinct individuals, leading separate lives. That this was how, up until the end, their activities were perceived is borne out by the Chief Minister's evidence that the beginning of the terminal process was Mrs Schofield's statements to the Kenyan jurists and the Bar Council which, he said, was beginning to cross the bounds of what society at large in Gibraltar and the Government at large ought to be expected to tolerate. Up until then relations between the Chief Justice and the executive had been normal for long periods. It is true that the Chief Minister then said that it was not possible to distinguish clinically between them, and that the Government's suspicions were confirmed when the Chief Justice swore his statement. But the important point is that it was not until the end that, according to this evidence, the executive formed the view that the Chief Justice could be associated with what she had been saying for many years.

260. For these reasons I cannot agree with the conclusion of majority that his wife's behaviour was one of the circumstances that rendered the position of the Chief Justice untenable (para 227). In my opinion it is by reference to his own actions alone, not those of his wife, that his ability to perform the functions of his office must be judged.

Misbehaviour and inability

261. Section 64(2) of the 2003 Order provides:

> "The Chief Justice, a Puisne Judge, the President of the Court of Appeal or a Justice of Appeal may be removed from office *only* for inability to discharge the functions of his office (whether arsing from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be removed except in accordance with subsection (3)" [my emphasis]

262. I have emphasised the word "only" in this quotation because it serves as a reminder that the grounds for removal of these judicial officers are limited to those expressly mentioned in the subsection. This means that careful attention needs to be given to the meaning of the expressions it uses and to the application of that meaning to the facts of the

case. This is not to say that those expressions must be read narrowly. But one must understand what they mean, having regard to what must follow from a finding that the facts show that the concepts described by one or other of them are satisfied. The principle of judicial independence has a part to play in this assessment. It is protected by the nature of the procedure that the section lays down. But the procedure, which places the responsibility for advising Her Majesty on the Judicial Committee, is not the only protection. It lies too in the principle that judicial officers should not be removed from office save in circumstances where the integrity of the judicial function itself has been compromised.

263. There is not much guidance in the authorities as to how the circumstances of this case should be approached. *Therrien v Minister of Justice* [2001] 2 SCR 3 was a case of misbehaviour. The judge was faced with a complaint that he had failed to disclose information that was prejudicial to him to the members of the committee to select persons qualified for appointment as judges. In para 147 Gonthier J said that the public's confidence in its justice system was at the very heart of the case:

> "Thus, before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office."

In *Lawrence v Attorney General of Grenada* [2007] 1 WLR 1474, the allegation was that the Director of Audit had written an intemperate and abusive letter to the Minister containing allegations of improperly tampering with her report prior to its being laid before Parliament. Lord Scott of Foscote quoted with approval a passage in the judgment of Gray J in *Clark v Vanstone* [2004] FCA 1105 which is quoted by the majority (para 202). As Gray J said, the word "misbehaviour" takes its meaning from the statutory context. If the conduct is such that it is liable to bring the office itself into disrepute it can be properly characterised as misbehaviour. But even if the conduct can be so characterised the question remains whether it is conduct of such gravity, applying the standard referred to in *Therrien v Minister of Justice*, that the recommendation must be that the judge must be removed from office.

264. This case has been treated however by both the Tribunal and the majority as one of inability. The Tribunal said in para 7.35 of its report that, while there were a number of instances of misbehaviour of the Chief Justice, it would not go so far as to say that any single instance amounted to such misbehaviour as to show that he was thereby unfit for office. Its conclusion was that he had shown by his conduct overall that he was unable to discharge the functions of his office: para 7.42. The majority adopt the same approach (para 228). So would I. I too would look at his conduct overall.

265. The only case which offers guidance as to the meaning in this context of the word "inability" is *Stewart v Secretary of State for Scotland*, 1996 SC 271, aff'd 1998 SC (HL) 81. In the Inner House at p 283 Lord McCluskey said that the word should be given its ordinary understood meaning, reading it in the context of the question whether the person was unfit for office. At p 285 Lord Clyde said that the intention of the statutory provision was that sheriffs may be removed from office if they are found to be unfit for office because they have failed to do things which it was their duty to do, or they have done things which they should not have done, or because there are things that they are unable to do. In the House of Lords Lord Jauncey of Tullichettle, rejecting the appellant's argument for a narrow construction, said at p 86 that it would be absurd if the senior judges were required to report that a sheriff was fit for office although they were entirely satisfied that due to some defect in character or quirk of behaviour not amounting to mental illness he was wholly unfitted to perform judicial functions.

266. I think that the phrase "wholly unfitted to perform judicial functions" captures the essence of what the word means in this context. It sets a high standard. But it seems to me right, if the rule of law is to be preserved, that it should do so. The rule of law is in the hands of the judges, and it is of crucial importance that their independence should be protected against allegations which do not achieve that standard. Section 64(2) is in harmony with this approach, as it refers to infirmity of body or mind or any other "cause". This was indeed what the senior judges found established in the case of *Stewart*, as he had persisted in his unacceptable behaviour notwithstanding two previous warnings that his conduct could not be tolerated in perpetuity. They held that this demonstrated an underlying defect in character which manifested itself in various ways to the severe prejudice of the sheriff's function as a judge. It was this defect in character which was the cause of his inability.

The assessment

267. I would apply that approach to this case. The question, as I see it, is whether the conduct of the Chief Justice in the respects that, for the reasons already given, I would take into account demonstrated that he was wholly unfitted to perform the functions of Chief Justice in the jurisdiction to which he had been appointed. The Tribunal said, in support of its conclusion, that his conduct stemmed from a number of characteristics of his personality and attitude: para 7.36. It set out these characteristics in paras 7.37 to 7.41 of its report. The majority, in making their assessment, say that the defects of personality demonstrated by the episodes on which they rely are those identified by the Tribunal at paras 7.37 to 7.39: in short, a lack of judgment as to what was and was not proper for someone in his position to do or say; showing a pre-occupation, bordering on an obsession, with judicial independence; and his inability to grasp that his association with his wife's communications would be perceived by a fair minded and well informed observer as improper.

268. For the reasons already given, I do not accept that the Chief Justice's attitude to his wife's behaviour can be regarded as a defect in his character or personality. The suggestion

that his pre-occupation with the principle of judicial independence was such a defect seems to me to be venturing into very dangerous territory. I refer to what I have already said about the importance of the principle, the duty of a Chief Justice to preserve and uphold it and the latitude that must be given to him in the performance of this function. It must also be borne in mind that the Chief Justice was not without some justification for his suspicions in his dealings with the Government. The reasons for the one year warrant, referred to by the majority in para 103, have never been explained. Nor have the reasons for publicly depriving him of his de facto position as head of the Gibraltar judiciary.

269. I would agree that there are instances where his conduct showed a lack of judgment. But it must not be forgotten, that in contrast to the cases referred to above, no criticism is made of the Chief Justice's ability to perform his judicial functions, and the fact is that for most of the time he was fulfilling his other functions as Chief Justice in a way that did not attract criticism. The events of the concluding period must be seen in that light. As the Tribunal was not prepared to say that those events in themselves amounted to misbehaviour of such gravity as to justify his removal from office, the case must stand or fall on the issue of inability. Taking the whole progress of events in the round, including the absence of criticism of his conduct on the bench and the Chief Minister's acceptance that there were long periods when the relationship between the Chief Justice and the executive were harmonious, I do not think that the proposition that his conduct demonstrated inability to fulfil the functions of his office, in the sense that he was wholly unfitted to perform them, has been made out.

Conclusion

270. The Chief Justice has now been suspended from office for more than two years. He has been exposed to a long and bruising inquiry, the effect of which has been to harden attitudes on either side. In these circumstances it is probably unrealistic to think that he could now resume the functions of his office. I would not hold this consequence against him. It was not his choice that he should be suspended. But we are where we are, and it seems to me that the proper course for him now to take would be for him simply to resign. I would hold that he should be given that opportunity and that, if he were to do so, no adverse inferences of any kind should be drawn against him. The case that was made against him has not been made out. We would have humbly advised Her Majesty that the Chief Justice ought not to be removed from his office as Chief Justice of Gibraltar.

Annex A

PRINCIPLES OF CONDUCT FOR COURT PERSONNEL

Preamble

WHEREAS international and domestic law recognize as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal established by law in the determination of rights and obligations and of any criminal charge.

WHEREAS competent and impartial administrative personnel and support staff are essential if the courts are to fulfil their role in upholding this principle.

WHEREAS public confidence in the judicial system is dependent on the perceived integrity of all personnel who play any role in the administration of justice.

AND WHEREAS the principal responsibility for court administration, including supervision and disciplinary control of administrative personnel and support staff, rests with the judiciary.

THE FOLLOWING PRINCIPLES have been approved by the Judicial Group on Strengthening Judicial Integrity, comprising the Chief Justices or Senior Justices of ten countries, and are intended to establish standards of conduct for administrative personnel and support staff within the judicial system. They are designed to provide guidance to judges and to afford the judiciary a tool of management. They are intended to supplement and not to derogate from rules of law and conduct which bind such personnel.

1. SCOPE

(1) These principles shall apply to all personnel other than judges who are directly or indirectly involved in the court's operation. Court personnel who are no longer employed in the judiciary but who acquired, while still employed, confidential information as defined in paragraph 3(1) are subject to paragraph 3(6).

(2) The term "personnel" includes court registrars or those who have important supervisory responsibilities. Each jurisdiction shall identify the particular court personnel to whom these principles shall apply.

2. FIDELITY TO DUTY

(1) Court personnel shall not use or attempt to use their official position to secure unwarranted privileges or exemptions for themselves or for others.

(2) Court personnel shall not solicit, accept, or agree to accept any gift, favour or anything of value based upon any understanding that the official actions, explicit or implicit, of such personnel would be influenced thereby.

(3) Court personnel shall not discriminate by dispensing special favours to anyone. They shall not allow kinship, rank, position or favours from any party or person to influence their official acts or duties.

(4) Court personnel shall not request or accept any fee or compensation, beyond what they receive or are entitled to in their official capacity, for advice or assistance given in the course of their employment.

(5) Court personnel shall use the resources, property and funds under their official custody or control in a judicious manner and solely in accordance with prescribed statutory and regulatory guidelines or procedures.

3. CONFIDENTIALITY

(1) Court personnel shall not disclose to any unauthorized person any confidential information acquired by them while employed in the judiciary, whether such information came from authorized or unauthorized sources.

(2) Confidential information available to specific individuals by reason of statute, court rule or administrative policy shall be provided only by court personnel authorized to do so.

(3) Court personnel shall report confidential information to the appropriate authority when they reasonably believe this information is or may be evidence of a violation of law or of unethical conduct. Court personnel shall not be disciplined for disclosing such confidential information to an appropriate authority.

(4) Court personnel are not precluded from responding to inquiries concerning court procedures, but they shall not give legal advice. Standard court procedures, such as the method for filing an appeal or starting a small claims action, may be communicated orally or summarized in writing and made available to litigants.

(5) Court personnel shall not initiate or repeat ex parte communications from litigants, witnesses or attorneys to judges, jury members or any other person.

(6) Former court personnel shall not disclose confidential information acquired by them during their employment in the judiciary when disclosure by current court personnel of the same information would constitute a breach of confidentiality. Any disclosure in violation of this provision may constitute contempt of court.

(7) Confidential information means information that has not been made a matter of public record relating to pending cases, as well as information not yet made public concerning the work of any judge relating to pending cases, including notes, drafts, research papers, internal discussions, internal memoranda, records of internal deliberations and similar papers. The notes, drafts, research papers, internal discussions, internal memoranda and similar papers that a judge uses in preparing a decision or order shall remain confidential even after the decision or order is made public.

4. CONFLICT OF INTEREST

(1) Court personnel shall avoid conflicts of interest in the performance of official duties. They are required to exercise utmost diligence in becoming aware of conflicts of interest, disclosing conflicts to an appropriate authority, and terminating them when they arise.

(a) A conflict of interest exists when:

i. the court personnel's objective ability or independence of judgment in performing official duties is impaired or may reasonably appear to be impaired, or

ii. when the court personnel, or their immediate family, or their business or other financial interest, would derive financial gain because of the personnel's official act.

(b) No conflict of interest exists if any benefit accrues to court personnel as a member of a profession, business or organization to the same extent as any other member of such profession, business or organization who does not hold a position within the judiciary.

(c) The term, "immediate family" includes the following, whether related by blood, marriage or adoption: spouse, son, daughter, brother, sister, parent, grandparent, grandchildren, father-in-law, mother-in-law, sister-in-law, brother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, and any other close relative or person who lives in the employee's household. The term "spouse" includes a de facto spouse or like domestic relationship.

(2) Court personnel shall not:

(a) enter into any contract with the judiciary for services, supplies, equipment, or lease or sale of property, apart from the employment contract relating to the personnel's position; nor use that position to assist any member of the personnel's immediate family in securing a contract with the judiciary in a manner not available to any other interested party.

(b) receive tips or other compensation, or reward or inducement, for assisting or attending to parties engaged in transactions with, or involved in proceedings in, the judiciary.

(c) participate in any official action involving a party with whom either the court personnel or any member of the personnel's immediate family is negotiating for future employment.

(d) knowingly employ or recommend for employment any member of the court personnel's immediate family.

(e) solicit or accept any gift, loan, gratuity, discount, favour, hospitality or service under circumstances from which it is, or could be, reasonably inferred that a major purpose of the donor is to influence the court personnel in performing official duties.

(3) To secure conformity with the above principles, court personnel who have authority to enter into or approve contracts for the judiciary shall file a financial disclosure statement with the designated authority at the beginning and upon termination of employment in such position, and annually while so employed. The disclosure shall follow the guidelines established by the designated authority, and includes all sources of personal and business income, including investments and

immoveable property, as well as all known income received by their spouses or dependent children.

(4) The position in the judiciary of every court personnel shall be the personnel's primary employment. "Primary employment" means the position that ordinarily consumes the normal working hours of the court personnel and requires the personnel's exclusive attention in performing official duties. Outside employment may be allowed only if it complies with all the following criteria:

(a) The outside employment is not with a person or entity that practises law before the courts or conducts business with the judiciary;

(b) The outside employment is not incompatible with the performance of the court personnel's duties and responsibilities;

(c) The outside employment does not require the practice of law;

(d) The outside employment does not require or induce the court personnel to disclose confidential information acquired while performing official duties;

(e) The outside employment shall not be with the executive or legislative branch of government unless specifically authorized by both employers;

(f) Where a conflict of interest exists or may reasonably appear to exist or where the outside employment reflects adversely on the integrity of the court, the court personnel shall not accept the outside employment.

5. PERFORMANCE OF DUTIES

(1) Court personnel shall at all times perform official duties properly and with diligence. They shall commit themselves exclusively to the business and responsibilities of their office during working hours.

(2) Court personnel shall carry out their responsibilities as public servants in as courteous a manner as possible.

(3) Court personnel shall not alter, falsify, destroy or mutilate, or fail to make required entries on, any record within their control. This provision does not prohibit alteration or expungement of records or documents pursuant to a court order.

(4) In performing official duties, court personnel shall not discriminate, nor manifest by word or conduct, bias or prejudice based on race, religion, national or ethnic origin, disability, age, gender, marital status, sexual orientation, social or economic status, or political affiliation or opinion.

(5) Court personnel shall not recommend private attorneys to litigants, prospective litigants, or anyone dealing with the judiciary.

(6) Court personnel shall expeditiously enforce rules and implement orders of the court within the limits of their authority.

(7) Court personnel shall not be compelled to perform any work or duty outside the proper scope of their employment.