

## Appendix 1 : 3 Judicial Ethics in South Africa

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[To be issued by the Chief Justice, the President of the Constitutional Court and the judges president of the different high courts and the Labour Appeal Court, and the President of the Land Claims Court.]

### **Introduction**

The supremacy of the Constitution and the rule of law are foundational to the democracy established by the Constitution<sup>1</sup> So too are the rights and freedoms enshrined in the Bill of Rights.<sup>2</sup> The protection of these fundamental values is entrusted to an independent judiciary,<sup>3</sup> whose members must on appointment take an oath or affirm that they will be:

‘...faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.’<sup>4</sup>

To fulfil that constitutional role the judiciary needs public acceptance of its moral authority and integrity, the real source of its power. Accordingly, the Constitution commands all organs of state to assist and protect the independence, impartiality, dignity, accessibility and effectiveness of the judiciary.<sup>5</sup> But it is even more important that judges at all times seek to maintain, protect and enhance the status of the judiciary. To that end they should be sensitive to the ethical rules which govern their activities and behaviour both on and off the bench.

The guidelines which follow are intended to assist judges in dealing with ethical and professional issues which may confront them during their judicial careers. They are also intended to inform the public about the judicial ethos in this country. Much of what follows may seem straightforward and obvious to most lawyers. However, the rules are often difficult to apply in practice and may require fine judgement.

In the preparation of these guidelines regard was had to the Constitution, our common law, case law, and international standards. Although the principles applied in comparable foreign countries are not necessarily applicable to South Africa, they are a useful source of reference. The views of the judiciary were also canvassed. It should be emphasised that professional ethical rules derive much of their binding nature from their general acceptance by members of the profession.

Ethical rules differ from legal rules in that they are seldom absolute. These guidelines are likewise not absolute but describe the high standards to which all judges should aspire. They are not to be interpreted as impinging on the constitutionally guaranteed independence of the judiciary or any judge. Nor does a breach of any particular rule or guideline necessarily warrant censure.<sup>6</sup>

On the one hand the Constitution enshrines judicial independence and embraces the doctrine of separation of powers: courts are independent and subject only to the Constitution and the law. On the other hand, it requires courts to apply the Constitution and the law impartially and without fear, favour or prejudice.<sup>7</sup> The independence of the judiciary is for the protection of the freedom of individuals and the integrity of the Constitution and not for the benefit of judges. The underlying assumption is that judges act lawfully and ethically and the Constitution protects them

by providing that a judge may be removed from office or suspended *only* if the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct.<sup>8</sup>

There is a tension between judicial independence and judicial responsibility. Judicial independence denotes freedom of conscience for judges and non-interference in their decision-making; it is not concerned with judicial misbehaviour. Individual judges must be free from personal influence or private interest and the judiciary must be beyond the undue influence of the legislative or executive branches of government and removed from the direct influence of popular majorities.<sup>9</sup> The rule of law and independence of the judiciary depend primarily upon public confidence; lapses or questionable conduct by judges tend to erode that confidence.<sup>10</sup>

The provisions of this document apply to all judges and, unless the context indicates otherwise, also to judges released from active service and who are liable to be called upon to perform judicial duties, and acting judges. The notes are in elucidation, often with reference to comparative codes. Most of the sources used are listed in the bibliography which follows at the end of these guidelines.

Similar guidelines in Canada are described as

‘...principles of reason to be applied in light of all the relevant circumstances and consistently with the requirements of judicial independence and the law. Setting out the very best... does not preclude reasonable disagreements about their application or imply that departures from them warrant disapproval.’<sup>11</sup>

This is a commendable approach. Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair-minded and informed persons.<sup>12</sup> Mr Dato’ Param Cumaraswamy, the UN’s Special Rapporteur on the Independence of the Judiciary, in a submission during 1998 to the Truth and Reconciliation Commission<sup>13</sup> explained the matter in these words:

‘...judicial accountability is not the same as the accountability of the executive or the legislature or any public institution. This is because of the independence and impartiality expected of the judicial organ... though judges are accountable, their accountability does not extend to their having to account to another institution for their judgments.’

This is similar to the views of the Council of Europe in *Independence, Efficiency and the Role of Judges* (1995): the independence of the judiciary requires that *decisions* of judges should not be the subject of any revision outside appeal procedures as provided for by law.<sup>14</sup> For this reason the US statute (28 US Codes s 372 (3)) requires that complaints against judges that are ‘directly related to the merits of a decision or procedural ruling’ must be dismissed at the outset. In *Petition of Lauer* 788 F.2d 135 (8<sup>th</sup> Circuit, 1985) the point is well made:

‘While many people may agree or disagree with the sentence and the judge’s reasons for imposing the sentence, it must be remembered that a judge has the authority and the power to be wrong as well as right... Disenchanted litigants or other citizens should not be able to influence a ... judge about a judicial decision through the threat of disciplinary sanction.’

The guidelines which follow are in two groups, namely those which apply to judges in respect of their judicial duties and those which apply in respect of their extra-judicial activities.

## Guidelines for Judges

### A. With Regard to Judicial Duties

1. A judge should uphold the independence of the judiciary and the authority of the courts, and should maintain an independence of mind in the performance of judicial duties. A judge should also take all reasonable steps to ensure that no person or organ of state interferes with the functioning of the courts.

Section 165 of the Constitution. Cf Merula *Maniere van Procederen* 1.6.3: a judge has to act fearlessly and according to his conscience. European Association of Judges *Judges' Charter in Europe* 2: 'The Judge is only accountable to the law. He pays no heed to political parties or pressure groups. He performs his professional duties free from outside influence and without undue delay.' Cf Sir Matthew Hale's prayer: 'That popular or court applause or distaste, have no influence...' and 'not to be solicitous what men will say or think, so long as I keep myself exactly to the rule of justice'. Thomas E Baker " *The Good Judge* (1989) 20: judges should be free from fear of retaliation for their decisions.

*Code of Conduct for United States Judges* 1: 'A judge should uphold the integrity and independence of the judiciary.'

This demands adherence to the rules of ethics and acceptance of the principle that, although they are independent, judges are pre-eminently obliged to comply with the law. It further implies that 'a judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice op cit canon 4 (C). Cf the Canadian case of *MacKeigan v Hickman* [1989] 2 SCR 796. The Canadian Judicial Council *Ethical Principles for Judges* 3 points out that ethical rules cannot and are not intended to restrict judicial independence.

Judicial independence is not a private right – or a principle for the benefit of judges as individuals (1996 *Australian Law Journal* 126) – but the cornerstone of impartiality and a constitutional right of every member of the public.<sup>15</sup> Independence is both individual and collective or institutional.

It is wrong to believe that the adoption of constitutional proclamations of judicial independence automatically create or maintain an independent judiciary. Judicial independence must be recognised, practised, and refined by all three branches of government.<sup>16</sup> Organs of state are constitutionally mandated to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness (s 165 (4)). The correlative is the right of every judge not to have his or her independence of mind disturbed by any person or organ of state.

2. A judge should always, not only in the discharge of official duties, act honourably and in a manner befitting the judicial office.<sup>17</sup>

A judge should therefore never act improperly or disgracefully. In the USA the requirement is that a judge should not engage in conduct prejudicial to the effective and expeditious administration of the business of the court (s 372(c)(1) of title 28 of the US Code).

This requirement is interpreted by the standard required of the office.<sup>18</sup> Austria 57(2): A judge should behave in his professional and private life in a

proper manner and should refrain from any act that can affect the trust in or respect for the judiciary. Thomas *Judicial Ethics in Australia* p 40: The actions of a judge in a private capacity should not be such as to create any substantial risk of disorder, violation of law, public misunderstanding, or future embarrassment in performing judicial duties. The *Code of Conduct for United States Judges* 2: 'A Judge should avoid impropriety and the appearance of impropriety in all activities.'

Magistrates Act 90 of 1993, Regulations of 11 March 1994 (GG 15524) *Code of Conduct for Magistrates* 1: 'A Magistrate is a person of integrity and acts accordingly. There are no degree[s] of integrity. Integrity is absolute.' Para 4: 'A magistrate acts at all times (also in his/her private capacity) in a manner which upholds and promotes the good name, dignity and esteem of the office of magistrate and the administration of justice.'

Judicial conduct is to be assessed objectively through the eyes of the reasonable person.

3. A judge should at all times comply with the laws of the land.<sup>19</sup>

This, obviously, includes both rules that are applicable to the judge's office and to the judge's extra-judicial conduct.<sup>20</sup>

4. In conducting judicial proceedings judges should themselves avoid and where necessary disassociate themselves from comments or conduct by any person subject to their control which are racist, sexist or otherwise manifest discrimination in violation of the equality guaranteed by the Constitution.<sup>21</sup> In court and in chambers judges should also always act courteously and respect the dignity of all who have business there.

The rule is not only, or even so much, aimed at promoting courtesy but at ensuring that degree of decorum which is essential for maintaining and enhancing the dignity of the judiciary and its business.

5. In conducting judicial proceedings a judge should give special attention to the right of equality before the law, and the right of equal protection and benefit of the law. A judge should not, in the performance of judicial duties, manifest any bias or prejudice.

Section 9(1) of the Constitution. Cf Kersteman sv *rechters*: (in the context of his time) no distinction is to be made between rich and poor, important and unimportant ('aanzienelyke of geringe'). In *Ethical Principles for Judges* the Canadian Judicial Council 5 points out that judges should strive to be aware of and understand the many differences between persons, and should remain informed about changing social attitudes and values. Cf ABA Model Code of Judicial Conduct 3B in 18 *Die Landdros* 90.

6. Judges should take reasonable steps to enhance the accessibility of the courts and improve public understanding of the judicial proceedings. Therefore judicial proceedings are ordinarily conducted and decisions are announced and motivated in open court.

The legitimacy of the judiciary depends in no small measure upon public understanding of and confidence in the judicial process. Likewise the educative and prophylactic function of the judiciary must fail if its proceedings are not

understood. Unless there is comprehension, justice cannot be seen to be done. Also, the corollary of judicial independence is accountability. The multi-cultural nature of South African society calls for special sensitivity for the perceptions and sensibilities of all who are affected by the proceedings of a court.

Judges should be conscious of the desirability of complying with the spirit of the requirement that proceedings should take place in open court. They should therefore avoid unnecessary discussion with legal representatives in chambers in the absence of the parties.

7. A judge should resolve disputes by making findings of fact and applying the appropriate law<sup>22</sup> in a fair hearing.<sup>23</sup> This includes –
  - (3) observing the audi alteram partem rule;<sup>24</sup>
  - (4) remaining manifestly impartial;<sup>25</sup> and
  - (5) giving adequate reasons for decisions.

*European Charter on the Statute for Judges* 1.5: ‘Judges must show, in discharging their duties, availability, respect for individuals, and vigilance in maintaining the high level of competence which the decision of cases requires on every occasion – decisions on which depend the guarantee of individual rights and preserving the secrecy of information which is entrusted to them in the course of proceedings.’

The UN’s *Basic Principles on the Independence of the Judiciary* 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.’

The duty to grant a party a fair hearing does not preclude the judge from keeping a firm hand. For instance, reasonable time limits may be laid down for argument which may be cut short when the judge is satisfied that more would not be of material assistance, and the examination of witnesses may be curtailed if it exceeds reasonable bounds.

Reasons for decisions ought to be clear, cogent, complete and succinct. A number of decisions do not necessarily require reasons, eg, unopposed cases and interlocutory rulings, because the reasons are usually self evident.<sup>26</sup> If reasons in such cases are later reasonably required, they should be given.

An indispensable part of judicial independence is the right to write judgments in the style and manner the judge thinks best. At the heart of a judge’s task is the necessity to make findings as to peoples’ motives, credibility, honesty and competence. Even the most temperate will have occasion to express harsh views about people during the course of argument or in judgments, eg, by using unflattering adjectives in regard to a recalcitrant or overzealous party, an unco-operative lawyer, a foot dragging witness and the like. (Wording based upon an unreported complaint investigation from Rhode Island.) However, a judge who, under the guise of performing judicial functions, makes defamatory statements actuated by malice (personal spite, ill will, improper motive, unlawful motive or ulterior motive) may not only be civilly liable,<sup>27</sup> but will be guilty of judicial impropriety.

8. In conducting judicial proceedings, a judge should maintain order, act in accordance with commonly accepted decorum, remain patient and courteous to legal practitioners, parties and the public and require them to act likewise.

*Code of Conduct for United States Judges* 3A. *Code of Conduct for Magistrates* 3: 'A magistrate executes his/her official duties objectively, competently and with dignity, courtesy and self-control.' and in 12: 'A magistrate maintains good order in his/her court and requires dignified conduct....'.

Sir Matthew Hale (quoted by J B Thomas *Judicial Ethics in Australia*) prayed '...that in the execution of justice, I carefully lay aside my own passions, and not give way to them however provoked.' Lord Denning once said: 'One thing a judge must never do. He must never lose his temper. However sorely tried.'

9. A judge should recuse him/herself from a case if there is a conflict of interest or if there is a reasonable suspicion of bias based upon objective facts.<sup>28</sup> However, a judge should not recuse him/herself on insubstantial grounds.<sup>29</sup>

In all respects the common law and case law on this issue are well developed. The interest of the judge need to be financial before he or she is disqualified: *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (no 2) [1999] 1 All ER 577 (HL). A judge should hear and decide cases allocated, unless disqualified. Super-sensitivity, distaste for the litigation or annoyance at the suggestion to recuse are not grounds for recusal. A judge's ruling on an application for recusal and the reasons for the ruling should be stated in open court.

If a judge is of the view that there are no grounds for recusal, but believes that there are facts which, if known to a party, might result in an application for his or her recusal, those facts should be made known timeously to the parties, either by informing counsel in chambers or in open court and the parties should be given adequate time to consider the matter. But asking for the parties' or their lawyers' approval to remain in a particular case is fraught with potentially coercive elements and may often be an undesirable practice.

10. A judge should attend chambers and court in such a manner and at such times as necessary and appropriate to perform all official duties properly, timeously and in an orderly manner.<sup>30</sup> Although the rule is straight forward and obvious, its application in practice requires common sense and good judgment. The views of the head of the relevant court should be respected.
11. A judge should perform all properly assigned judicial duties diligently,<sup>31</sup> investigate the matter at hand thoroughly<sup>32</sup> and dispose of the business of the court promptly in an efficient and businesslike manner.<sup>33</sup> A judge should not engage in conduct that is prejudicial to the effective and expeditious administration of justice or the business of the court, should avoid any personality issues and should seek to foster collegiality.

Unnecessary postponements, point taking, undue formality and the like should be avoided. A pattern of intemperate, abusive and intimidating treatment of lawyers and others, was held to be prejudicial to the effective administration of justice. (Judicial Conference of the USA: *In the matter of Judge McBryde*, 1997). So, too, a continuing pattern of conduct evidencing arbitrariness and abusiveness.

12. A judge should take reasonable steps to maintain the necessary level of professional competence in the law.

*ABA Model Code for Judicial Conduct* 3B. In Canada the duty is said to be to take reasonable steps to maintain and enhance knowledge, skills and personal qualities. Also Huber 5.15.9,10; Merula 1.6.4,5.

13. A judge should not exert undue influence in order to promote a settlement or obtain a concession from any party. In this regard, a judge usually refrains from expressing views about the merits or demerits of the case.

This does not mean that in an appropriate case a judge should not advise the parties to consider a settlement of a case; nor does it mean that a judge should not put a provisional view to counsel in the court of argument. Indeed, justice may require that a party be afforded the opportunity to deal with such view.

14. A judge should give judgment or any ruling in a case promptly and without undue delay.<sup>34</sup>

Litigants are entitled to judgment as soon as reasonably possible. The ideal is to deliver all reserved judgments before the end of term, failing which shortly after the beginning of the next term.

15. Upon appointment, a judge should sever all professional links and recover speedily all fees and other amounts outstanding<sup>35</sup> and organise his/her personal and business affairs to minimise the potential for conflict of interest.<sup>36</sup> A judge previously in private practice should not sit in any case in which the judge or the judge's former firm is or was directly involved as either attorney of record or in any other capacity before the judge's appointment. Such a judge should not sit in any case in which the former firm is involved until all indebtedness between the judge and the firm has been settled.
16. An acting judge who is a practising attorney should not sit in any case in which the acting judge's firm is or was involved as attorney of record or in any other capacity. It is better to err on the side of prudence, for it is not only actual bias that is to be avoided but its mere appearance.
17. Upon resignation, ceasing to be on active service or expiry of an acting appointment, a judge is obliged to complete all part-heard cases and to deliver all reserved judgments as soon as possible and to do such work at the applicable rate.

Ordinarily such uncompleted work is foreseeable and can be avoided or minimised by prudent precautions. If there is no prescribed rate, the remuneration may not exceed that of an acting appointment taking into account the time involved.

18. A judge should in respect of judicial activity refrain from any conduct that may be interpreted as personal advancement. There is an obvious tension between the right of the public to be informed by the media about legal proceedings and the right to a fair trial. The actions of the media ought not to interfere with the functioning of the court in a manner which could affect the fairness of the proceedings or the decorum of the court. There is as yet no single practice as to whether, and to what extent, courts should cooperate with the media, eg, by allowing cameras into court or by issuing press statements.

The Supreme Court of Appeal and the Constitutional Court permit the handing down of judgments to be televised. The Constitutional Court goes further,

providing the media with explanatory statements on pending cases and with summaries of judgments being delivered.

The salutary rule in the High Court is that judges should not permit a hearing in court to be photographed, televised or broadcast, or to be taped in order to be televised or broadcast. Unless in exceptional cases the public interest requires otherwise, a judge who fails to abide by this rule will probably be in breach of rule 18.

The *Code of Conduct for Magistrates* 13 contains a general prohibition, also extended to recesses and immediately prior to or after the court session, as do a number of states in the USA, such as Michigan.

19. A judge should respect the confidence of colleagues. The UN's *Basic Principles on the Independence of the Judiciary* 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...'

Obviously, formal deliberations among judges are and must remain confidential, but the rule goes further. Private consultation and debate are inherent in the functioning of a judge; and often a mere sounding board is helpful. It goes without saying that confidentiality is also essential for this benefit of collegiality to function.

20. A judge should inform the relevant professional body or a Director of Public Prosecutions of any conduct on the part of a legal practitioner or public prosecutor which may be unprofessional.<sup>37</sup>

The judge ought to have clear and reliable evidence of serious misconduct or gross incompetence and should usually await the conclusion of the proceedings before acting. A judge should not assume the role of prosecutor and is not a policeman. When a judge decides to take action in response to perceived misconduct, the reference to the appropriate authority should be made in a neutral fashion.<sup>38</sup>

Before commenting in a judgment or in public on the conduct of a particular practitioner or prosecutor, the judge should give that person the opportunity to deal with the allegation.

24. A judge who reasonably believes that a colleague has been acting in a manner which is unbecoming of the judicial office, should raise the matter with that colleague or with the head of the court concerned.

'If a judge is aware of evidence which, in the judge's view, is reliable and indicates a strong likelihood of unprofessional conduct by another judge, serious consideration should be given as to how best to ensure that appropriate action is taken having regard to the public interest in the due administration of justice. This may involve counselling, making inquiries of colleagues, or informing the chief justice... of the court' (*Ethical Principles for Judges* 15). The *ABA Model code for Judicial Conduct* 3B(3) requires of a judge also to initiate appropriate disciplinary measures against another judge for unprofessional conduct.



## **B. With Regard to Extra-Judicial Activities**

25. A judge may not, without the consent of the Minister of Justice, accept, hold or perform any other office of profit, or receive in respect of any service any fees, emoluments or other remuneration apart from the salary and any allowances payable to the judge in a judicial capacity.

Although the statutory prohibition refers to ‘supreme court’ judges only (s 11 read with s 10 of the Supreme Court Act 59 of 1959) the ethical rule applies to all judges on active service. Acting judges should take note that the prohibition applies to them during the term of their appointment. There is a statutory exception in relation to service on the South African Law Commission.

For a judge not on active service to sit as an arbitrator is acceptable. Royalties and the like are not covered by the general prohibition nor is there any objection to judges writing or editing books or journals. They may also deliver public lectures on appropriate subjects or teach at academic institutions. Any payment therefor, of course, is subject to the consent of the Minister of Justice. However, this does not include subsistence and travel allowances and payments by way of reimbursement for such expenditure.

26. A judge should not directly or indirectly accept any gift, advantage or privilege<sup>39</sup> that can reasonably be perceived as being intended to influence the judge in the performance of judicial duties or to serve as a reward therefor.<sup>40</sup> The rule is obviously not aimed at preventing corruption, for that need hardly be mentioned here. The point here is that judges should avoid any semblance of impropriety. No hard and fast line can be drawn, but judges will be well advised to err on the side of conservatism.
27. While judges should be available to use their judicial skills and impartiality to further the public interest, they should remain mindful of the separation of powers and the independence of the judiciary when considering a request to perform non-judicial functions for or on the behalf of the State. A judge should not accept an appointment that is likely to affect or be seen to affect the independence of the judiciary, or which could undermine the separation of powers.

The problem may arise with regard to appointment as commissioners of inquiry and the like. The question has been the subject of debate in South Africa and elsewhere.<sup>41</sup>

28. A judge’s judicial duties should take precedence over all other activities.<sup>42</sup>

In the case of judges who are not on active service but are liable to be called upon to perform judicial duties should arrange their affairs so as to be reasonably available for such duties as they may be called upon to perform.

29. A judge may not act as advocate, attorney or legal adviser but may give informal legal advice to family members, friends, charitable organisations and the like without compensation.<sup>43</sup>

Reticence is nevertheless advisable lest the judge’s status be abused by the recipient thereof.

30. A judge may not be involved in any undertaking, business, fundraising or other activity that may affect the status, independence or impartiality of the judge.<sup>44</sup>

The principle is well put in the *European Charter on the Statute for Judges* 4.2: Judges may carry on activities outside their judicial mandate including those which are embodied in their rights as citizens unless such outside activities are incompatible with the confidence in, or the impartiality or the independence of the judge, or the judge's availability to deal attentively and within a reasonable time with matters put before him or her.

The UN's *Basic Principles on the Independence of the Judiciary* 8: members of the judiciary are, like other citizens, entitled to freedom of expression, belief, association and assembly, provided that in exercising these 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.

*Code of Conduct for United States Judges* 4: 'A judge shall so conduct the judge's extra-judicial activities as to minimise the risk of conflict with judicial obligations.' Canon 4D: 'A judge shall not engage in financial and business dealings that may reasonably be perceived to exploit the judge's judicial position...'

Serving on university councils or governing bodies or boards of trustees of charitable institutions and the like is fairly common in South Africa, and in Canada and Australia.

31. A judge should not belong to any political party or secret organisation. Except in so far as necessary for the discharge of the judicial office, a judge should not become involved in any political controversy or activity.<sup>45</sup>

Judges should not attend political meetings. *Code of Conduct for Magistrates* 15: 'A magistrate shall refrain from express support for any political party or grouping.' In Canada all partisan political activity is expected to cease upon appointment and judges are advised to refrain from membership in political parties and fund raising. *Code of Conduct for Magistrates* 6: 'A magistrate does not associate with any individual or body to the extent that he/she becomes obligated to such person or body in the execution of his/her official duties or creates the semblance thereof...'

32. A judge should not take part in the activities of any organisation that practises discrimination inconsistent with the Constitution.

*ABA Model Code for Judicial Conduct* 2C: 'A judge shall not hold membership in any organisation that practices invidious discrimination...'

33. A judge should not lend the prestige of the judicial office to advance the private interests of the judge or others.<sup>46</sup>

An example is the use of official letterheads to influence someone. *ABA Model Code for Judicial Conduct* 2B. Colloquially put, a judge does not misuse or abuse official trappings.

34. Save in the discharge of judicial office, a judge should refrain from commenting on the merits of any case pending before that judge or in any other court.<sup>47</sup> Unless necessary for or in judicial proceedings, a judge should refrain from public

criticism of another judge or branch of the judiciary.<sup>48</sup>

The *Code of Conduct for United States Judges* 3A(6) states that a judge should avoid public comment on the merits of a pending or impending action, unless made in the course of official duties, to explain court procedures or to a scholarly presentation made for legal education purposes. The admonition applies until the completion of any appellate process. *ABA Model Code for Judicial Conduct* 3B(9): 'A judge shall not, while a proceeding is pending or impending in the court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any non public comment that might substantially interfere with a fair trial or hearing.'

A judge ought not to enter into a public debate about a case in which the judge was involved, irrespective of criticism levelled against the judgment.<sup>49</sup> If comment is required, the head of the part of the judiciary concerned should in that capacity react in order to protect the judiciary as a whole. This does not prevent an academic debate or a discussion of the legal issues that arose in the case. If the head of the court fails to act, the judge concerned may, under very special circumstances, issue a statement – preferably in open court – to clarify any issue.

The Judicial Council of the 1<sup>st</sup> Circuit in the matter of Judge Lagueux (July 1992) said this: 'Difficult as it may be for judges not to respond to what they perceive as unfair public criticism, we believe that judges usually serve themselves and their court best by remaining outside of and above public disputes of a rancorous nature, relying upon others who are not constrained by judicial office to champion their cause. But if response is deemed necessary, it should be in a reasoned, dignified manner.'

Criticising another judge and criticising another judgment are separate matters.

35. A judge ought to refrain from any action which may be construed as a device to stifle legitimate criticism of that or any other judge.

Judges ought to resort to instituting defamation actions or to contempt<sup>50</sup> proceedings in exceptional circumstances only.

36. A judge, while free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, should refrain from expressing views in a manner which may undermine the standing and integrity of the judiciary.<sup>51</sup>

As a general rule judges should be slow to participate in public debate for, although they may express themselves in temperate language, others may not be so restrained.

37. A judge should not disclose or use, for any purpose unrelated to judicial duties, non-public information acquired in a judicial capacity.<sup>52</sup>

*Code of Conduct for Magistrates* 10: A magistrate shall not divulge any confidential information which has come to his/her knowledge in his/her official capacity, except in so far as it is necessary in the execution of his/her duties.' The rule applies at all times and for all time.

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## Footnotes

- <sup>1</sup> Section 1(c) of the Constitution of the Republic of South Africa Act 08 of 1996.
- <sup>2</sup> (Ibid) s 7(1).
- <sup>3</sup> (Ibid) s 165(1) and (2).
- <sup>4</sup> (Ibid) s 174(8) read with para 6(1) of schedule 2.
- <sup>5</sup> (Ibid) s 165(4).
- <sup>6</sup> Cf Committee on Codes of Conduct of the Judicial Conference of the USA (September 1999) *Code of Conduct for United States Judges*: commentary to canon 1.
- <sup>7</sup> Section 165(2) of the Constitution.
- <sup>8</sup> Section 177 of the Constitution. This reflects internationally accepted principles, eg, the UN's *Basic Principles on the Independence of the Judiciary* 18, adopted by the 7<sup>th</sup> UN Congress on the Prevention of Crime and endorsed by the general Assembly (June 1999), *The Judicial Officer*, states that judges may be removed or suspended '... only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.'
- <sup>9</sup> The Baker *The good Judge* 20. *S v Makwanyane* 1995 (2) SACR 1 (CC) paras 87-9.
- <sup>10</sup> 'Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor.' (*Code of Conduct for United States Judges*: commentary to canon 1.)
- <sup>11</sup> Canadian Judicial Council *Ethical Principles for Judges*, 3.
- <sup>12</sup> Canadian Judicial Council *Ethical Principles for Judges*, 13.
- <sup>13</sup> Quoted by D T Zeffert in (1999) 116 SALJ 668-9.
- <sup>14</sup> The Center for Democracy *Summary Report of the 1999 International Judicial Conference* 6. See also M Cappelletti 'Who watches the watchmen? A comparative study on judicial responsibility' 31 *American Journal of Comparative Law* 1.
- <sup>15</sup> '... the provision for securing the independence of the judiciary were not created for the benefit of the judges, but for the benefit of the judged'. (Kurland 'The Constitution and the Tenure of Federal Judges' 1969 *University of Chicago LR* 665-6).
- <sup>16</sup> The Center for Democracy *Summary Report of the 1999 Institutional Conference* 4.
- <sup>17</sup> Huber 4.15.6.
- <sup>18</sup> (Ibid).
- <sup>19</sup> Thomas Fuller (1654-1734): 'Magistrates are to obey as well as execute laws.' *Code of Conduct for Magistrates* 5.
- <sup>20</sup> Convictions of offences in circumstances involving moral turpitude are a ground for disciplinary steps in Israel. Cf *The Courts Law of Israel*.
- <sup>21</sup> Cf Rule 5.4 of the *Ethical Principles for Judges*, Canadian Judicial Council.
- <sup>22</sup> Cf Merula 1.6; Voet *Commentarius ad Pandectas* 5.1.51 (Gane's translation); Huber *Hedendaegse Rechtsgeleertheyt* 4.15.12 (Gane's translation *Jurisprudence of my Time*).
- <sup>23</sup> Section 34 of the Constitution; *S v Tyebela* 1989 (2) SA 22 (A) 29.
- <sup>24</sup> Voet 5.1.49
- <sup>25</sup> Kersteman (ibid); *Judges' Charter in Europe* 3; *Ethical Principles for Judges* 6.
- <sup>26</sup> *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC).
- <sup>27</sup> *May v Udwin* 1981 (1) SA 1 (A) 19A-B.
- <sup>28</sup> See eg *Council of Review SADF v Monnig* 1992 (3) SA 482 (A); *BTR Industries SA (Pty) Ltd v Metal & Allied Workers' Union* 1992 (3) SA 673 (A); *President of the RSA v SA Rugby Football Union* 1999 (4) SA 147 (CC).
- <sup>29</sup> It is unfair to the other party and the other judges. *S v Radebe* 1973 (1) SA 796 (A) 812; Voet 5.1.46; *SA Motor Acceptances Corp Bpk v Oberholzer* 1974 (4) SA 808 (T); *S v Suliman* 1969 (2) SA 385 (A) 391; *R v T* 1953 (2) SA 479 (A) 483; *R v Milne and Erleigh* (6) 1951 (1) SA 1 (A) 11-12. *President of the RSA v SA Rugby Football Union* (supra).
- <sup>30</sup> Cf Austria 60.
- <sup>31</sup> *Ethical Principles for Judges* Canadian Judicial Council 4.10.
- <sup>32</sup> Merula 1.6.4; Kersteman sv *Rechters*. Both use the word 'naarstig'. Cf *Code of Conduct for Magistrates* 11.
- <sup>33</sup> Cf *Code of Conduct for United States Judges* 3.
- <sup>34</sup> Cf Voet 5.1.53.
- <sup>35</sup> Cf Thomas 44.
- <sup>36</sup> Cf para 10 (supra).
- <sup>37</sup> Cf *Code of Conduct for Magistrates* 14.
- <sup>38</sup> Administrative Office of the US Courts, *Guide to Judiciary Policies and Procedures* (June 1999) Chapter V-1.
- <sup>39</sup> Kersteman (ibid).
- <sup>40</sup> *ABA Model Code for Judicial Conduct* 4D(4).
- <sup>41</sup> See Professor Ellison Kahn 'Extra-judicial activities of judges' 1980 *De Jure* 188. See also *Bell v Van Rensburg* 1971 (3) SA 693 (C), Middleton in 1986 *CILSA* 257. Of special interest are Lord Denning's Report in the *Profumo* matter (CMND 2512) and the Salmon Report (*Royal Commission on Tribunals of Inquiry*, 1966) and the *Position of the Canadian Judicial Council on the appointment of Federally-Appointed judges to commissions of inquiry*.
- <sup>42</sup> *Code of Conduct for United States Judges* canon 3A.
- <sup>43</sup> Cf *Code of Conduct for United States Judges* 4G.
- <sup>44</sup> Cf Austria 63.
- <sup>45</sup> Cf *Code of Conduct for United States Judges* 7.
- <sup>46</sup> Thomas op cit 25,44.
- <sup>47</sup> Austria 58 (5).

<sup>48</sup> Cf Thomas op cit 18.

<sup>49</sup> (Ibid) 23.

<sup>50</sup> A useful study by the Canadian Judicial Council on the subject is *Some guidelines on the Use of Contempt Powers* (1996). It makes the point that contempt of court powers do not exist for the protection of the personal dignity, honour or personal reputation of judges, but only for courts and for judges as judges (p3).

<sup>51</sup> *Code of Conduct for Magistrates* 9.

<sup>52</sup> *ABA Model Code for Judicial Conduct* 3B(11). A similar rule applies on Austria.