3 Readings: Extra-judicial activities

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3 Reading

Extra-judicial activities

> *"As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen."*
>
> *Article 4.2 of the Banaglore Principles of Judicial Conduct*

1. Introduction

Being a judicial officer is not simply a job, it is a way of life. When magistrates take their Oath of Office, they undertake "to uphold and protect the Constitution and the human rights entrenched in it" and to apply the law impartially, "without fear, favour or prejudice."[1]

Doing this has implications for a magistrate, not only in the exercise of his or her official duties, but also in his or her personal life. In order to remain true to the Oath a magistrate must be careful not to do anything outside court which may affect his or her impartiality on the bench or which may conflict with the principles contained in the Bill of Rights. In addition, the Code of Conduct prohibits a magistrate from doing anything that may bring the "good name, dignity and esteem"[2] of the judiciary into disrepute.

In the words of the Honourable John Doyle:

> "With acceptance of the judicial office, and the taking of the judicial oath, one necessarily accepts restraints on one's …private behaviour. It is not just a matter of good taste or decorum, and not just a notion that in some way or by tradition judicial officers conduct themselves in a certain manner. It is not merely a matter of judicial etiquette. The restraints are imposed upon us as a conscience of the office that we accept and undertake… The effectiveness of the judiciary, and its role as an institution administering justice on behalf of the community rests on public confidence in the judiciary… A judicial officer must avoid conduct that will erode [this] confidence."[3]

While most magistrates are prepared to accept that there are limitations placed on their participation in extra-judicial activities, there are different points of view on the extent of such limitations. Lord Hailsham once said that, "no one is obliged to accept appointment as a magistrate, but if he does so he must also accept certain inhibitions on his freedom of behaviour which d[o] not necessarily apply to others."[4]

2. Key categories of extra-judicial activities

The spectrum of potential scenarios that could be discussed under the topic of extra-judicial activity is so wide it is infinite. The following types of activities have come up regularly as matters of concern to magistrates in South Africa:

- Judicial activism
- Membership of clubs and organisations
- Holding other positions and receiving remuneration
- Restrictions on social behaviour

2.1 Judicial activism

Probably, the most contentious arena of extra-judicial activity is judicial activism - in the sense of taking a stand on political or controversial matters. The reason that this area is so contentious is that the very nature of "taking a stand" means that the magistrate is demonstrating partiality with a particular cause or grouping. It may therefore seem that the question of whether judicial activism is appropriate has a simple answer: magistrates should not speak out or display any views on political or contentious issues as this will compromise their independence and impartiality.

This was the approach taken by Lord Chancellor Kilmuir in the United Kingdom. From 1955 to 1989, the question of judicial activism was governed by the Kilmuir Rules, guidelines laid down by the Lord Chancellor. They essentially prohibited judicial officers from participating in any form of public debate. It was the Lord Chancellor's view that,

> "so long as a judge keeps silent, his reputation for impartiality remains unassailable; but every utterance he makes in public except in the course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism."[5] A similar approach was taken by members of our judiciary. For example, Chief Justice Steyn in 1967 and Judge Ogilvie-Thompson in 1972 said that:
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> "The expression in public … by judges of opinions on controversial issues, whether or not such issues have political overtones is to be deprecated. Independence, impartiality and detachment are the essence of judicial office."[6]

One of the main criticisms of this kind of approach is that:

> "If the maintenance of judicial independence … depends solely on silence, lack of controversy and a refusal to enter public debate, then we are entitled to ask what it is, exactly, that we are seeking to preserve and whether it is worth preserving?"[7]

South Africa during apartheid is a case in point and clearly illustrates that the principle of "detachment" is not always the

most appropriate way to preserve the integrity and independence of the judiciary.

Judicial activism: political causes

In the past in South Africa the principle of preserving judicial independence through silence in the political arena was not only inappropriate, but in fact, violated the integrity of the judiciary. As Judge Goldstone wrote in 1994, on the topic of the judiciary speaking out:

> "There are many hard cases. Frequently it is difficult to decide where moral precepts and standards end and strictly political doctrine begins. In that area, in my view, if a judge is to err, it should be on the side of defending morality. By doing so he or she will be protecting the integrity of the judiciary. Mr Justice Rand of the Canadian Supreme Court wrote in 1951:
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> > 'The courts in the ascertainment of truth and the application of laws are the special guardians of freedom of unpopular causes, of minority groups and interests, of the individual against the mass, of the weak against the powerful, of the unique, of the non-conformist - our liberties are largely the accomplishments of such men.'
>
> How much more is this so in South Africa, where the vast majority of the citizens have been without a vote and have not been represented in Parliament which makes the laws our courts apply. I do not believe that any South African [judicial officer] speaking out against unjust or immoral laws, … out of court, has made himself unfit to sit on the Bench. Indeed, … judges who did so tended to preserve the integrity of the South African Bench."[8]

In 1993 Judge Edwin Cameron said that if judicial officers do not speak out in the face of gross inequities such as took place under apartheid,

> "[T]he dignity and prestige of the judicial office [is] ill-served… [Judicial officers] enjoy considerable status in the community at large. Their pronouncements, … off the bench, carry weight. Silence in the face of injustice is, it is suggested, incompatible with the judicial office."[9]

The principle to be gleaned from these sentiments is that judicial officers, as guardians of civil liberties and freedom, have a duty to speak out when these are violated because, in doing so, they preserve the integrity of the bench. In extreme cases such as apartheid, it may mean showing support for a certain political cause but it is a different matter for a judicial officer to show express support for a particular political party. The point is well illustrated by the Constitutional Court in the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[10] (referred to as *SARFU*) where it held that:

> "In South Africa, soon after our transition to democracy, it would be surprising if many candidates for appointment to the bench had not been active in or publicly sympathetic towards the liberation struggle. It would be ironic and a matter of regret if they were not eligible for appointment by reason of that kind of activity. [But,] on their appointment … judges are expected to put any party loyalties behind them."[11]

This principle is contained in our Code, which provides that, "A magistrate shall refrain from expressing support of any political party or grouping."[12]

> "Judicial Ethics in South Africa Guidelines for Judges" contains a similar provision which states that, "A judge should not belong to any political party … Except insofar as necessary for the discharge of the judicial office, a judge should not become involved in any political controversy or activity."[13]

The Australian Code states that:

> "It is expected that a judge on appointment will sever all ties with political parties. An appearance of continuing ties such as might occur by attendance at political gatherings, political fundraising events or through contribution to a political party, should be avoided."[14]

In Britain, the "Lord Chancellor's guidance on outside activities & interests of judges", warns that, "A judge should expect to forgo any kind of political activity…."[15]

The Zambian Judicial (Code of Conduct) Act prohibits holding office in or belonging to a political party, making any speech or public statement on behalf of a political organisation; attending a political gathering; soliciting funds on behalf of, or paying a contribution to a political organisation; partaking in any function held or organised by a political party; and generally engaging in any political activity.[16] In Canada, similar prohibitions are placed on the judiciary.[17]

Judicial activism: non-political causes

The concept of judicial activism is broader than described above and includes taking a stand on all kinds of issues which may be contentious or which, in some way, display sympathy with a particular non-political cause or grouping.

For example, a question that often arises in South Africa is whether it is appropriate for a magistrate to address interest groups or schools on issues such as domestic violence and rape.

At LRG Workshops on judicial ethics, no consensus has been reached on this particular issue. Magistrates who were against the notion explained that their main concern was that by involving themselves in such activities they would compromise

their impartiality. It was their argument that, even if they themselves were able to remain impartial in a domestic violence or rape matter that may subsequently come before them, the public perception would be one of bias. For example, in one magisterial district, a magistrate, who is actively involved in educating the community on domestic violence, has been given the nickname "500 Metres Magistrate" as the community perceive that she will always believe the woman's version of events and order an interdict against the male partner. It could be argued that this particular magistrate should not hear such cases in order to ensure that justice is not only done but is also seen to be done. [18]

There are, however, strong arguments to counter those relating to the potential public perception of bias. Domestic violence and rape are crimes and prevailing problems in our society. If a magistrate publicly addresses these issues by, for example, speaking to survivors about the remedies and procedures available, he or she cannot be seen as aligning him- or herself with a particular group on a contentious issue. After all, magistrates swear to apply the law and the Constitution when they take their Oath. Speaking out on issues such as domestic violence and rape serves both these duties in two respects: firstly, on a constitutional level, domestic violence and rape raise issues relating to dignity, bodily integrity and equal protection under the law; secondly, matters such as domestic violence and rape are not contentious. They are harmful to our society and for that reason they are criminal offences. A magistrate who speaks out against crimes such as these is educating the members of the community by explaining their legal rights and in doing so, is applying and promoting the law. To illustrate the point, no one would say that a magistrate may not speak out against the crime of murder. As Judge Goldstone said:

> "[D]ecent members of society will assume that judicial officers have strong views against criminal conduct … Judicial officers when sentencing criminals express … strong views on a daily basis. Why should they not express these views in public off the bench? It would enhance the integrity and credibility of the courts. Not the converse."[19]

The only reason that speaking out on rape and domestic violence tends to cause concern may be that these crimes are, in most cases, inflicted by men on women. It could therefore be argued, that there might be an inference of gender bias. However, if one takes the view that rape and domestic violence are crimes like any other, the fact that they are predominantly perpetrated by one particular group in society on another should be irrelevant.

The next argument in favour of speaking out on issues such as domestic violence and rape is based on a situation in Britain concerning interdisciplinary participation, but which would be equally applicable here.

In Britain there are certain pilot projects that have been run regarding placing children in safe homes. Several family court judges and magistrates are involved in these projects with other professionals, such as psychologists and social workers, to give advice on legal issues. The Family Division had to decide whether it was inappropriate for the judiciary to sit on these kinds of projects, as their impartiality on the bench might then have been impaired. The court found that, as a general rule, such interdisciplinary participation is to be commended, particularly in the area of family law where different role players can learn from each other. [20] In the case of magistrates, this can only enhance the service they provide in the family courts.

This is an extremely compelling argument as the courts after all provide a public service. In accordance with this notion "Judicial Ethics in South Africa Guidelines for Judges" contains two provisions which place an expectation on the judiciary to enhance the accessibility of the courts and improve the public understanding of proceedings.[21]

The judiciary, at all levels has been described as,

> "[A]loof and distant from the public. The result of this is a public suspicion and distrust of the way they reach their decisions. It has been said that the judiciary need to demystify what they do and thus win the confidence of the society they serve."[22]

On this issue, Goldstone's opinion is that, by addressing the public on issues in which they have expertise and performing educative functions, the judiciary can enrich society and demystify the judiciary. [23] Canadian jurisprudence also strongly supports the notion that judicial officers have a duty to educate the community in which they work.[24]

The Australian Code provides that:

> "Many aspects of the administration of justice … are the subject of public consideration and debate in the media, at public meetings and at meetings of a wide range of interest groups. Appropriate judicial contribution to this consideration and debate is desirable. It may contribute to the public's understanding of the administration of justice and to public confidence in the judiciary. At least, it may help to dispose of misunderstandings and correct false impressions.'[25]

The Magistrates Commission has said that community outreach should be encouraged to a certain extent.

Another way of winning public confidence and demystifying the judiciary is to show awareness of the problems facing the community through the media and other forums. After all, independence and impartiality does not mean that judicial officers must be "grey shadows and forensic eunuchs"[26] devoid of any opinions, views or sympathies.

In *R v Milne and Erleigh*[27], the court held that, "the mere fact that a judge holds strong views on [a matter] does not disqualify him… His duty is to administer the law as it exists but he may in administering it express his strong disapproval of it."[28] In this case, prior to being appointed to the bench, the presiding officer had written an article and a book in which he expressed strong anti-capitalist views. In the matter that came before him, the accused alleged that the judge was biased against them as they were corporate capitalists who were on trial for several allegations of fraud and contravention of the Companies Act 46 of 1926.[29]

Their application was not successful and the reasoning appears from the *dictum*. The important point about this case, is that the judicial officer was not considered to be ineligible for office simply because he had expressed certain views on a matter. In fact, the court held that on becoming a judge a person cannot be expected to suddenly divest him- or herself of those views. [30]

This view was confirmed by the Constitutional Court in *South African Commercial Catering and Allied Workers Union and Others v Irvin and Johnson (Seafoods Division Fish Processing)*[31] (referred to as *SACCAWU*), which held that such "absolute neutrality is unachievable … judicial officers are the products of their own life experiences."[32] For this reason they are bound to have certain preconceived views and opinions.[33] In fact, a person who is absolutely neutral would not be fit to sit as a magistrate.[34] This is because one of the main adjudicative functions of any judicial officer is to measure the standards of the community and a magistrate who has no life experience would be unable to do this.[35]

According to the Canadian Judicial Council, "active participation in the affairs of the community is, indeed, a prime qualification for appointment [to the bench]."[36] Therefore, true impartiality does not require that a [magistrate] has no sympathies or opinions, it requires that he or she "is able to entertain and act upon different points of view with an open mind."[37] As the Canadian Judicial Council points out, "impartiality is one thing, indifference is another, a judge may show alertness to the problems of our days without putting his impartiality into jeopardy."[38]

In Belgium, it was held by the Court of Cassation that a magistrate had brought his impartiality into jeopardy by attending a fundraising dinner for the parents of children who were victims of a paedophile who was at that point on trial before the magistrate concerned. [39]

It is difficult to know where to draw the line. The case of *S v Van Heerden en ander sake*[40] is an example of a magistrate who showed alertness to the problems of the community, but failed to maintain her impartiality. In that case the magistrate was on circuit court hearing several matters concerning traffic offences. The magistrate was an ardent supporter of the "Arrive Alive

Campaign". During proceedings she had forgotten to switch off the recording device and said to the traffic officers in court, "Ons wag vir sake. Julle is te stadig. Ja. Ons trek nou maar by hoeveel 73 cases. That is all. We have not even taken R10 000, R15 000."[41] On review Van der Walt J set aside the magistrate's convictions holding that she had made a circus of the justice system.[42] In this case, it would seem from the judgment that it was not the magistrate's support for the "Arrive Alive Campaign" as such that was held to impeach her impartiality, but the fact that her utterances in court displayed an obvious bias. Furthermore, the campaign was one spear-headed by the Department of Transport, a government department, and this also supported the conclusion that the magistrate was not impartial.

A question that this case leads one to ask is whether the situation would have been different if the magistrate had simply been associated with an organisation, which was not affiliated to a government department, and had not during the course of proceedings conducted herself in a patently prejudicial manner.

2.2 Membership of clubs and organisations and fundraising

Membership

Many codes of conduct contain provisions that prohibit or restrict membership of clubs and organisations. The South African Code disallows a magistrate from associating with any group "to the extent that he or she becomes obligated to such body in the execution of his or her official duties or creates the semblance thereof."[43] "Judicial Ethics in South Africa Guidelines for Judges" provides that "A judge may not be involved in any …activity that may affect the status, independence or impartiality of the judge"[44] and more specifically that, "A judge should not belong to any … secret organisation,"[45] or, "take part in the activities of any organisation that practices discrimination inconsistent with the Constitution."[46] The Zambian Act contains a similar provision.[47]

The Australian Code states that involvement in educational, charitable and religious organisations "is to be encouraged and carries a broad public benefit, provided that it does not compromise judicial independence or put at risk the status or integrity of judicial office."[48] As to membership of clubs, it gives useful advice that would be equally applicable in the South African context:

> "Assuming there is no breach of the law involved, this is a matter for the individual judge to decide. There is a view held by some judges that it is undesirable for a judge to be a member of a club or society that permits only exclusively male or female membership. Other judges disagree. Some judges have been members of such clubs or societies without giving rise to any embarrassment in the discharge of their judicial duties, or without affecting the reputation of the judiciary. This is not an issue on which there is a generally held view, but opinions may well be changing."[49]

The Canadian Judicial Council allows participation in "civic, charitable and religious activities", provided that such participation does not affect the judge's impartiality, performance or official duties, or involve fundraising and the giving of legal advice. Judicial officers are also warned not get involved in causes or organisations that may be involved in litigation.[50]

The Bangalore Principles provide that:

> "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."[51]

The Principles also contain a general warning that "A judge shall, as far as is reasonable, so conduct him- or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases."[52]

This principle is also reflected in our common law which holds that a judicial officer has a duty to sit in every case to which he or she is assigned,[53] and thus should, as far as reasonably possible, avoid the risk of recusal. In applying this principle, reference must be had to the test for recusal as established by the Constitutional Court in *SARFU,*[54] which is discussed in Module 3: Recusal and disclosure.

Recusal is warranted only if the reasonable and objective person in the position of the litigant who is informed of the facts, would reasonably apprehend that there will be bias due to some personal circumstance surrounding the magistrate which has a bearing on the case before him or her. Therefore, if the magistrate's personal activities or associations could not lead to a reasonable apprehension of bias in a particular matter there is no need to recuse.

The example that is often used and which clearly illustrates the point that is made by Baxter is that "the mere fact that a decision-maker is a member of the SPCA does not necessarily disqualify him from adjudicating a matter involving alleged cruelty to animals."[55] On the other hand, in *Pinochet*, [56] the fact that Lord Hoffman was involved with Amnesty International was held to be a ground for his recusal in that particular case, because the organisation was a party to the litigation. However, it is important to note that none of the five Law Lords who handed down the judgment in *Pinochet* mentioned that Lord Hoffman's involvement with Amnesty International *per se* was in any way inappropriate for a judicial officer. The only reason that Lord Hoffman's membership became an issue was because of the organisation's involvement in the matter over which he was presiding.

It is therefore clear that the principles contained in the various codes provide useful guidelines in determining whether membership of a particular club or organisation is appropriate. However, each situation has to be considered with reference to the surrounding circumstances and to general ethical principles such as dignity, integrity and impartiality.

For example, in both South Africa and England, membership of the Freemasons has been an issue. The contrast between approaches taken is interesting and indicates the need to assess each situation with reference to the surrounding circumstances. In the English case of *Everest v General Council of the Bar*[57] it was held *obiter* that there could be no objection to a judge being part of the Freemasons as it would not be a sound basis for requesting the recusal of the presiding officer.

In South Africa, the Judicial Service Commission, when deciding on Judge Cloete's application for a seat on the Supreme Court of Appeal, recently had to consider the issue carefully as he was a member of the Freemasons. Judge Cloete, eventually resigned from the organisation on the basis that there is a public perception that the group discriminates against women and therefore his membership was incompatible with the requirement of impartiality.[58] Another problem with membership of such organisations is the secretive nature of their business.

This leads to the question of whether belonging to an organisation such as the South African Women Lawyers Organisation (SAWLO) may be inappropriate given that it is gender based. In an interview Justice O' Regan said that membership of this type of organisation would not be unfitting for a magistrate and any alleged perception of bias would be too far-fetched. In her view, belonging to a professional organisation such as SAWLO does not display any prejudice, but is simply an attempt to promote women in the profession. One could also argue that membership of these types of organisations, shows a commitment to the promotion of the constitutional principle of equality.

The Constitution also promotes freedom of religion and expression, but some judicial codes do restrict the freedoms of judicial officers in this regard. For example, the Bangalore Principles provide that:

> "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."[59]

A practice in Mpumalanga shows that lines may not be easy to draw in this context. In that region the Zionist Christian Church (ZCC) has a wide following and its members wear a badge which indicates their allegiance. On occasion it has happened

that an accused, who is not a member of the Church, will borrow a badge from a friend to wear at his or her trial. This is in the hope that the magistrate will be more prone to believing his or her version if he or she presents him- or herself as a person of Christian virtue by being a member of the ZCC. The question then to ask is: if a magistrate who is a member of the ZCC were to wear the badge on his or her gown, would this create a reasonable apprehension that the magistrate would be biased towards the party who is a member of the church?

The United States may be able to offer some direction. In *Menora v Illinois High School Association*[60] an application was made for the recusal of Judge Shadur based on the fact that he was Jewish and had been a member of the American Jewish Congress. In the case before him the organisation was challenging a school on one of its rules that prohibited the wearing of headgear during basketball games. This rule, so the organisation argued was discriminatory as Jewish students would not be able to play because all observant Jewish men must wear a skull cap, called a "yarmulke" at all times. The few exceptions to this rule do not include playing basketball.

The application for recusal was refused and was not taken on appeal. In reaching his decision, Judge Shadur held that a judge's personal associations would not warrant an application for recusal. In explaining this he made the following remark, "When a suit is brought challenging the erection of the Nativity scene in a city hall at Christmas who shall hear it? Must a Jewish judge recuse him- or herself? If so, must not a Christian Judge?"[61]

Fundraising

A related issue is that of fundraising. In any club or organisation, whether religious, charitable or civic, fundraising is extremely important as most of these institutions depend on donations for their existence. The question for magistrates is whether participating in fundraising on behalf of their club or organisation is appropriate.

There are essentially two ethical problems with fundraising. Firstly, the nature of fundraising is to solicit favours. Although the favour is not solicited for the direct benefit of the magistrate him- or herself, there is always the danger that this may create a perception that people can try to "gain an edge" with the magistrate by contributing to his or her cause. The result is that the public perception of impartiality of the magistrate is threatened. Secondly, it is not in keeping with the dignity of office that a magistrate should put him- or herself in the vulnerable position of having to ask for money, even if it is for a charitable cause. It is one thing to work for an organisation, but it is another thing to tout on its behalf.

"Judicial Ethics in South Africa Guidelines for Judges" prohibits a judge from being involved "in any … fundraising or other activity that may affect the status, independence or impartiality of the judge."[62]

In Canada, judges are prohibited from soliciting "funds (except from judicial colleagues or for appropriate judicial purposes) or lend[ing] the prestige of judicial office to such solicitations."[63]

The Australian Code warns that "it is undesirable for the name and title of a judge as a member of an … organisation to appear on the letterhead or other documents specifically associated with an appeal for funds. A judge should not personally solicit funds from a legal practitioner or any other prospective donor."[64]

The question could be asked whether a magistrate can participate in fundraising activities, such as raising money for his or her child's school. In this situation one could argue that fundraising would be permissible because the magistrate is not acting in his or her capacity as a magistrate, but rather as a parent and is not using his or her title to obtain the funds.

2.3 Holding other positions and receiving remuneration

There are numerous positions that a judicial officer may be called upon to hold.

The spectrum of possible situations is so wide that they are not easily divided into categories. However, the following headings will be used for the sake of discussion:

- Service on the boards of charities, hospitals, civic, educational and religious institutions
- Commissions of enquiry and non-judicial tribunals
- Teaching and other academic work
- Receiving remuneration
- Acting as legal advisor, as an executor or in any other fiduciary capacity

Service on boards of charities, hospitals, civic, educational and religious institutions

In principle, the Magistrates Commission is not opposed to judicial officers holding such positions, provided that the particular organisation is not one that is, or is likely to become, involved in some controversy. It is for this reason that the Commission on one occasion requested a magistrate to resign from a school board. The school in question was at the time, involved in issues involving racial discrimination.

In the circumstances it would be logical to conclude that service on the boards of civic and religious institutions would be permitted subject to the same considerations that are to be taken into account when considering membership of such organisations.

Hospital boards have however warranted a slightly different approach. In Canada the view is that, "hospital boards [are] particularly dangerous ground for a judge. The hospital depends on government for financing. It also has a full range of labour problems and general litigation as well as malpractice litigation."[65]

In light of this warning, it would seem that magistrates should avoid sitting on university councils as universities, like hospitals, depend on government for a large portion of their financing. Thus, holding such a position could be said to compromise the independence of the judicial officer concerned. This may, however, be taking things too far, as the entire administration of justice itself depends on government funding. In South Africa, it is not uncommon for judges to sit on university boards and this has never presented a problem.[66] Also, university councils are less likely to be the subject of litigation than hospital boards.

In England, such activities are not prohibited and the Lord Chancellor's Guidance on Outside Activities & Interests of Judges, states that, "A judge may continue to hold non-commercial directorships which relate to organisations whose primary purpose is not profit-related, and whose activities are of an uncontroversial nature."[67] But judicial officers are warned to be on their guard, "against circumstances arising which might be seen to cast doubt on [their] judicial impartiality or conflict with [their] judicial office."[68]

The Australian Code also does not prohibit sitting on the boards of charitable, educational, or other community organisations, but does caution that consideration should be given to the involvement of any such organisations if they become involved in litigation.[69]

In Zambia, the Judicial (Code of Conduct) Act allows service on the boards of such organisations, provided that the organisation does not practice discrimination contrary to the Constitution.[70]

Commissions of enquiry and non-judicial tribunals

In South Africa, the issue of judicial officers sitting on commissions of enquiry and non-judicial tribunals has been a subject of much debate.[71] Nevertheless, it has been common for members of our judiciary to sit on commissions of enquiry in the past and they continue to do so. Some of these commissions have been of a political nature and others not.[72]

The traditional conservative argument against judicial officers sitting on tribunals and commissions of enquiry was expressed by Sir William Hill Irvine in 1923, in what is known as the Irvine Memorandum:

> "The duty of …Judges is to hear and determine issues of fact and of law arising between the King and the subject or between the subject and the subject, presented in a form enabling judgment to be passed upon them, and when passed to be enforced by process of law. There begins and ends the function of the judiciary."[73]

On the other hand, the view has been expressed, even in relation to commissions of enquiry which may have extremely politically contentious overtones, that:

> "Judges …are by virtue of their high office and the nature of their duties often called upon to deal with most vexing and contentious matters, strictly legal and otherwise… It is therefore the duty of judges to face such tasks with fortitude and to perform them to the best of their abilities…"[74]

"Judicial Ethics in South Africa Guidelines for Judges", takes the middle path between the two polar approaches and contains the following provision:

> "While judges should be available to use their judicial skill and impartiality to further the public interest, they should remain mindful of the separations of powers and the independence of the judiciary when considering a request to perform non-judicial functions for or on 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."[75]

In other jurisdictions, there are more general provisions dealing with the issue and which would be equally applicable to the South African judiciary where the commission or tribunal is not connected with the State. For example, the Australian code advises that:

> "The head of the jurisdiction should be consulted about the proposed appointment…. There are a number of tribunals in respect of which there is statutory authority for judicial membership, but in some other cases - particularly if decisions of the tribunal are likely to be controversial as in the case of some sporting disciplinary tribunals - the judge should weigh the risks of involvement and adverse publicity before accepting appointment. In the case of private or sporting tribunals, the judge should consider whether any apparent conferring of judicial authority on the tribunal is appropriate."[76]

The Bangalore Principles are couched in even more general terms and provide that:

> "Subject to the proper performance of judicial duties, a judge may 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; or 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."[77]

Teaching, writing and other academic work

This area does not provide controversy and it is generally accepted that judicial officers may participate in teaching and other academic work. In fact, in "Judicial Ethics in South Africa

Guidelines for Judges" there are two provisions that not only condone the concept of the judiciary as educators in the community at large, but also, place an expectation on them to do so. Article 27 provides that, "[j]udges should be available to use their skill to enhance public interest", and Article 6 that, "[j]udges should take reasonable steps to enhance the accessibility of our courts and improve public understanding of judicial proceedings."

The Australian Code contains a similar provision, but it is more specific in that it refers to educating law students as opposed to the general public. In this regard, the Australian code provides a useful *caveat*: "In aspects of a course where there may be differences of views discretion will have to be exercised, particularly where the lecturer may later have to decide the question as a judge."[78] The same warning is given in respect of academic writing.[79] In England a similar approach is taken in the Lord Chancellor's guidelines.[80]

It might seem that the Australian and English approach is in conflict with our law given the *dictum* in *R v Milne and Erleigh* (discussed above), in which it was held that,

> "The mere fact that a judge holds strong views on [a matter] does not disqualify him… His duty is to administer the law as it exists but he may in administering it express his strong disapproval of it."[81]

In that case, prior to being appointed to the bench, the presiding officer had written an article and a book in which he expressed strong anti-capitalist views. In the matter that came before him, the accused had alleged that the judge had been biased towards them as they were corporate capitalists who were on trial for several allegations of fraud and contravention of the Companies Act. The question to consider is whether the matter would have been decided differently if the judge had written the article and the book while he was on the bench. Furthermore, if this did not create a ground for recusal, whether it would nonetheless have been seen to be undesirable.

In this regard the Bangalore Principles may be more in line with the approach taken in *R v Milne and Erleigh*. The principles allow members of the judiciary to "write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice and related matters", provided that this does not interfere with the proper performance of judicial duties.[82] This could be interpreted to mean that in teaching or writing or pursuing an any academic endeavour the judicial officer may express a definite opinion on a debatable or contentious issue. At the same time, he or she should ensure that any such opinion would not create a reasonable perception of bias in a matter, which may come before him or her.

Receiving remuneration

The question of receiving remuneration for extra-judicial

activities is one of the few issues in this section that is clear. The Magistrates Act expressly prohibits magistrates "performing any paid work outside his or her duties of office", without the consent of the Minister.[83]

"Judicial Ethics in South Africa Guidelines for Judges" provides that, "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 allowances payable to the judge in a judicial capacity." This prohibition does not, however, include "subsistence and travel allowances and payments by way of reimbursement for expenditure."[84] Although there is no such express exclusion in the Magistrates Act[85], it would seem that such expenses would be allowed, as they do not constitute payment as a reward as such, but rather reimbursement.

With regard to receiving a token of appreciation or *honorarium* for any sort of work done in connection with extra-judicial activity, such as speaking at a function or teaching, refer to Module 2: Corruption: gifts and favours.

Acting as legal advisor, as an executor or in any other fiduciary capacity

It is not considered wise for a magistrate to give legal advice in any sort of professional capacity for two reasons. Firstly, it is wholly incompatible with the duty to remain impartial. Secondly, a magistrate does not have a trust account and so the person receiving such legal advice is not protected by Fidelity Fund Insurance in the event of negligence and neither is the magistrate concerned. In addition, it would be unbecoming of the office of a magistrate to get involved in such a dispute.

The Bangalore Principles generally prohibit the practice of law while holding office.[86] Other codes are more specific, for example, "Judicial Ethics in South Africa Guidelines for Judges" prohibits the giving of legal advice in any professional capacity, but does allow a judicial officer to give, "informal legal advice to family members, friends, charitable organisations and the like without compensation."[87] The Zambian Act contains a similar provision.[88]

As regards judicial officers holding fiduciary positions, the South African codes do not provide directives. In this regard guidance can be sought from other jurisdictions.

The Australian code permits judicial officers to manage "deceased estates for close family members, whether as executor or trustee, … and [it] may be acceptable even for other relatives or friends if the administration is not complex, time consuming or contentious."[89]

In Zambia on the other hand, judicial officers may only "serve as an executor, administrator or other personal representative [for] a member of the officer's family."[90]

2.4 Social behaviour

Any restriction placed on social behaviour is of such a personal nature that it is often a difficult pill to swallow and the question has been asked, "Do we become priests in plain clothes with one foot in the outside world, and the other in the monastery?"[91]

Obviously such extreme personal restriction is not necessary, but there are compelling reasons for placing certain restrictions on the social behaviour of magistrates. As the Australian Code so aptly puts it:

> "[Judicial officers] have to accept that the nature of their office exposes them to considerable scrutiny and constraints on their behaviour that other people may not experience. [Judicial officers] should avoid situations that might reasonably lower respect for their judicial office or might cast doubt upon their impartiality… they must also avoid situations that might expose them to charges of hypocrisy by reason of things done in their private life. Behaviour that may be regarded as merely "unfortunate" if engaged in by someone who is not a [judicial officer] might be seen as unacceptable if engaged in by someone who is a [judicial officer] and who, by reason of that office has to pass judgment on the behaviour of others."[92]

It is for these reasons that many codes of conduct place restrictions on the social activities of members of the judiciary. Our Code directs that, "A magistrate acts at all times (also in his or 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."[93] "Judicial Ethics in South Africa Guidelines for Judges" requires that a judge should, "always, not only in the discharge of official duties, act honourably and in a manner befitting the judicial office."[94] The Bangalore Principles provide that "A judge should avoid impropriety and the appearance of impropriety in all of the judge's activities."[95] The Australian Code makes specific mention of bars, clubs and gambling and provides that:

> "This is … a matter for the individual judge. A judge should give thought to the perceptions that might arise from, for example, the reputation of the place visited, to the persons likely to be present, and any possible appearance that the premises are conducted otherwise than in accordance with the law."[96]

3. Concluding remarks

Judge Kreigler once said that if anyone thinks that they have the answers to the questions raised by these issues then they must be a charlatan or a fool. The best one can do in deciding whether a particular extra-judicial activity is appropriate for a magistrate is to consider the ethical principles that the issue

raises. The process would involve a balancing of the following considerations:

- A magistrate must understand society's needs and concerns but never show prejudice or bias to any group or point of view.
- Magistrates are expected to have lived and bring life experience to the bench, but they must put aside their preconceived opinions and sympathies and open their minds to the arguments of counsel.

In the words of Chief Justice Mahomed, the magistrate's task is "formidable".[97]

Footnotes

[1] Magistrates' Courts Act 32 of 1944 (Oath of Office) s 9(2)(a).
[2] Code of Conduct for Magistrates (Regulation 54A promulgated in terms of s 16 the Magistrates Act 90 of 1993) art4.
[3] The Hon John Doyle, "Judicial Standards: Contemporary Constraints on Judges - The Australian Experience" (2001) 75 *The Australian Law Journal* 96 at 98.
[4] Sir Thomas Skyrme *The Changing Image of the Magistracy* (1979) 141.
[5] Kate Malleson *The New Judiciary* (1999) 190; see also G F K Santow "Transition to the Bench" (1997) 71 *The Australian Law Journal* 294 at 298; These rules were heavily criticised and were abolished in 1989 by Lord Kilmuir's successor, Lord Mackay, whose policy was to leave the decision to the discretion of the individual judicial officer who would have to assess for him- or herself the inherent encroachments, if any, that a particular action may make upon their impartiality and independence.
[6] Richard Goldstone "Do Judges Speak Out?" (1994) 111 *SALJ* 258 at 259.
[7] *The New Judiciary* (n5) at 190.
[8] Goldstone (n6) at 266.
[9] Edwin Cameron "Judges' Extra-Judicial Pronouncements" (1993) *Annual Survey of SA Law* 794 at 795.
[10] 1999 (4) SA 147 (CC).
[11] *Ibid* at para75.
[12] Art15.
[13] See Committee of senior judges chaired by Mr Justice of Appeal Louis Harms "Proposals for a mechanism for dealing with complaints against judges and a code of ethics for judges" (2000) 117 *SALJ* 377 art31.
[14] The Council of Chief Justices of Australia, "Guide to Judicial Conduct" (2002) art3.2.
[15] "Lord Chancellor's guidance on outside activities and interests of judges" (2000), available at <http://www.briandeer.com/westway/judges-code.htm>.
[16] The Zambian Judicial (Code of Conduct) Act 13 of 1999.
[17] Canadian Judicial Council *Ethical Principles for Judges* (1998) art6(D).
[18] *The King v Sussex Justices* (1924) 1 KB 256 at 259 quoted in *S v Herbst* (1980) SA 1026 (E) at 1029.
[19] Goldstone (n6) at 266 –267.
[20] *M v London Borough of Islington and L* [2002] 1 FLR 95.
[21] Committee of senior judges chaired by Mr Justice of Appeal Louis Harms (n13) arts6 and 27.
[22] Sunday Times 19/05/2002.
[23] Goldstone (n6).
[24] Canadian Judicial Council *Commentaries on Judicial Conduct* (1991) 44.
[25] The Council of Chief Justices of Australia, "Guide to Judicial Conduct" (n14) art 5.6.1.
[26] Canadian Judicial Council C*ommentaries on Judicial Conduct* (n24) at 41.
[27] 1951 (1) SA 1 (A).
[28] *Ibid* at 12.
[29] 61 of 1973.
[30] *R v Milne and Erleigh* (n27) at 12.
[31] 2000 (3) SA 705 (CC).
[32] *Ibid* at para13.
[33] See also Canadian Judicial Council *Commentaries on Judicial Conduct* (n24) at 12.
[34] See also *SARFU* (n10) at para70.
[35] *Ibid;* Canadian *Commentaries on Judicial Conduct* (n24) at 8.
[36] Canadian *Commentaries on Judicial Conduct* (n24) at 67.
[37] *Ibid* at 12.
[38] *Ibid* at 46.
[39] Dato' Parum Cumaraswamy U.N. Special Rapporteur "The United Nations Basic Principles and the Work of the U.N Special Rapporteur on the Independence of Judges and Lawyers" Notes for an Address to the International Commission of Jurists July 1998.
[40] 2002 (1) SACR 409 (T).
[41] *Ibid* at 416.
[42] *Ibid* at 418.
[43] Code of Conduct for Magistrates (n2) art6.
[44] Committee of senior judges chaired by Mr Justice of Appeal Louis Harms (n13) art30**.**
[45] *Ibid* art.31.
[46] *Ibid* art.32.
[47] The Zambian Judicial (Code of Conduct Act) 13 of 1999 (n16) s 13(2).
[48] The Council of Chief Justices of Australia, "Guide to Judicial Conduct" (n14) art6.4.
[49] *Ibid* art6.10.2.
[50] Canadian Judicial Council *Ethical Principles for Judges* (1998) (n17) art 6(C)1.
[51] Bangalore Principles of Judicial Conduct art4.6.
[52] *Ibid* art 2.3.
[53] See also *SARFU* (n10) at para48.
[54] *Ibid.*

[55] Lawrence Baxter, *Administrative Law* (1984) 566.

[56] *R v Bow Street Metropolitan Stipendiary Magistrate and others , ex parte Pinochet Ugarte* (No 2) ALL ER 1999 vol 1 577; see also Module 3: Recusal and Disclosure.

[57] *Everest v General Council of the Bar* [8 November 2000] (CA) unreported.

[58] Sunday Times 07/04/2002.

[59] Bangalore Principles of Judicial Conduct art4.6.

[60] *Menora v. Illinois High School Association* 527 F.Supp. 632 (N.D 111 1981); see also The Honourable Maryka Omatsu "The Fiction of Judicial Impartiality" (1997) 9 *Canadian Journal of Women and the Law* 12 at 12 – 13.

[61] *Menora v. Illinois High School Association* (n60) at 634.

[62] Committee of senior judges chaired by Mr Justice of Appeal Louis Harms (n13) art27.

[63] Canadian Judicial Council *Ethical Principles for Judges* (1998) (n17) art6 (C)(1)(b).

[64] *Ibid* art6.5.

[65] *Ibid* at 23.

[66] For example, Judge Goldstone has sat as chair of the University of the Witwatersrand Council and Judge Cameron is currently the chair.

[67] "Lord Chancellor's guidance on outside activities & interests of judges" (n15).

[68] *Ibid.*

[69] The Council of Chief Justices of Australia, "Guide to Judicial Conduct" (n14) art3.2.

[70] Zambian Judicial (Code of Conduct) Act 13 of 1999 (n16) ss 13(1)(b) and 13(3).

[71] Committee of senior judges chaired by Mr Justice of Appeal Louis Harms (n13) at note to art27.

[72] See Ellison Kahn "Extra-Judicial Activities of Judges" (1980) 13 *De Jure* 188.

[73] *Ibid.*

[74] *Ibid* at 193.

[75] Committee of senior judges chaired by Mr Justice of Appeal Louis Harms (n13) art27.

[76] The Council of Chief Justices of Australia, "Guide to Judicial Conduct" (n14) art5.4.

[77] Bangalore Principles of Judicial Conduct arts4.11.3 and 4.11.4.

[78] The Council of Chief Justices of Australia, "Guide to Judicial Conduct" (n14) art5.8.

[79] *Ibid* art5.7.

[80] "Lord Chancellor's guidance on outside activities & interests of judges" (n15).

[81] *R v Milne and Erleigh* (n27) at 12.

[82] Bangalore Principles of Judicial Conduct art4.11.

[83] Magistrates Act 90 of 1993 s 15.

[84] Committee of senior judges chaired by Mr Justice of Appeal Louis Harms (n13) art25.

[85] 90 of 1993.

[86] Bangalore Principles of Judicial Conduct art4.12.

[87] Committee of senior judges chaired by Mr Justice of Appeal Louis Harms (n13) art29.

[88] Zambian Judicial (Code of Conduct) Act 13 of 1999 (n16) s 17.2.

[89] The Council of Chief Justices of Australia, "Guide to Judicial Conduct" (n14) art6.2.

[90] Zambian Judicial (Code of Conduct) Act (n16) s 16.1.

[91] Santow (n5) at 296.

[92] Australian Guide to Judicial Conduct (n14) art2.3.

[93] Code of Conduct for Magistrates (n2) art4.

[94] Committee of senior judges chaired by Mr Justice of Appeal Louis Harms (n13) art2.

[95] Bangalore Principles of Judicial Conduct art4.1.

[96] The Council of Chief Justices of Australia, "Guide to Judicial Conduct" (n14) art6.10.3.

[97] I Mahomed, "Address by the Chief Justice I Mahomed to the Second Annual General Conference of the Judicial Officer's Association of South Africa in Pretoria on 26 June 1998" (1998) 1 *The Judicial Officer* 47 at 51.