

KINGDOM OF LESOTHO

Fiat Justitia

ETHICAL PRINCIPLES

FOR

THE JUDICIARY

FOREWORD

The Ethical Principles for the Judiciary are based on the Bangalore Draft which is essentially a restatement of the universally accepted norms, rules and principles which govern the conduct of members of the Judiciary. They are meant to serve as a guide for the ethical conduct of Judges and Magistrates and to preserve the honour, integrity and independence of the Judiciary.

Given that the quality of justice depends to a larger extent on the standards observed by Judges and Magistrates who dispense it, I trust that Judges and Magistrates will at all times live up to the precepts set in these Principles, unanimously approved by us, in such a manner as to preserve and maintain the dignity of our office as well to ensure that confidence in the integrity, independence and impartiality of the Judiciary is upheld and enhanced.

I am pleased to commend these Principles to Judges and Magistrates for our guidance, use and observance.

M. LEHOHLA
CHIEF JUSTICE OF LESOTHO
PALACE OF JUSTICE
2004

1. VISION

The purpose of this document is to provide a vision and ethical guidance for the Judiciary in Lesotho.

PRINCIPLES:

1. The Principles and Commentaries describe the very high standards towards which all judges strive. They are principles of reason to be applied in light of all of the relevant circumstances and consistently with the requirements of judicial independence and the law. Setting out the very best in these, Principles and Commentaries does not preclude reasonable disagreements about their application or imply that departures from them warrant disapproval.
2. The Principles and Commentaries are advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. They are not and shall not be

used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct.

3. An independent judiciary is the right of every Mosotho. A judge must be and seen to be free to decide honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone. Nothing in these Principles and Commentaries can, or restrict judicial independence in any manner. To do so would be to deny the very thing this document seeks to further: the rights of everyone to

A. PREAMBLE

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

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

WHEREAS an independent judiciary is likewise essential if the courts are to fulfil their roles as guardians of the rule of law and thereby to assure good governance;

WHEREAS the real source of judicial power is public acceptance of, and confidence in, the moral authority and integrity of the judiciary;

AND WHEREAS consistently with the *United Nations Principles on the Independence of the Judiciary*, it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.

B. DEFINITIONS

In these Principles, unless the context otherwise requires

"Commission of Inquiry" means a Commission of Inquiry set up under the Commission of Inquiry Act.

"Conflict of Interest" means any situation where personal, proprietary, financial or political interest conflict with a case at hand.

"Improper Conduct" means any act, conduct or behaviour which is objectively incompatible with the standards of behaviour of a reasonable judge.

"irrelevant ground" includes a grounds relating to race, colour, sex, religion, national origin, caste,

political opinion, disability, age, marital status, sexual orientation, social and economic status and any other like cause;

"Judge" includes a magistrate or any other person exercising judicial office, however designated.

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

"Judge's spouse" includes a partner of the judge or any other person in a close personal relationship with the judge; and

"judicial duties" includes not only the performance of judicial duties in Court and the making of decisions but also other tasks relevant to the Court's operations or to the judicial office.

C. GENERAL PRINCIPLES

The following Ethical Principles are intended to establish standards of ethical conduct of judges. They are Principles to be applied in the light of all relevant circumstances and consistently with the requirements of judicial independence and the law. They are designed to provide guidance to judges and to afford a structure for regulating judicial conduct. They are intended to supplement, and not to derogate from, existing principles which bind the judge.

The values which these Ethical Principles uphold are:

- (a) propriety;
- (b) judicial independence;
- (c) integrity;
- (d) impartiality;
- (e) equality; and competence and diligence.

D. PROPRIETY

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

Principles:

- 1.1. A judge shall avoid impropriety and the appearance or impropriety in all of his or her judicial activities.
- 1.2. As a subject of constant public scrutiny, a judge shall freely and willingly accept personal restrictions that might be viewed as burdensome by the ordinary citizen. In

particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

- 1.3. A judge shall avoid close personal association with individual members of the legal profession, particularly those who practice in the judge's Court, where such association might reasonably give rise to the suspicion or appearance of favouritism or partiality in the mind of a reasonable, fair-minded and informed person.
- 1.4. A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or has an interest in the case.
- 1.5. A judge shall avoid the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession in circumstances that might reasonably give rise to the suspicion or appearance of impropriety on the part of the judge.
- 1.6. A judge shall refrain from conduct such as membership of groups or organizations or participation in public discussion which, in the mind of a reasonable, fair-minded and informed person, might undermine confidence in the judge's impartiality with respect to any issue that may come before Court.
- 1.7. A judge shall, upon appointment, cease to be involved in any political activity. A judge shall refrain from conduct that, in the mind of a reasonable, fair-minded and informed person, might give rise to the appearance that the judge is engaged in political activity.
- 1.8. A judge shall refrain from
 - (a) membership of political parties;
 - (b) political fund-raising;
 - (c) attendance at political gatherings and political fundraising events;
 - (d) contributing to political parties or campaigns; and
 - (e) taking part publicly in controversial discussions of a partisan political character.
- 1.9. A judge shall not allow the judge's family, social or other relationships to influence improperly the judge's judicial conduct and judgment as a judge.
- 1.10. A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey, or permit others to convey, the impression that anyone is in a special position to influence improperly the judge in the performance of judicial duties.
- 1.11. A judge shall not testify voluntarily as a character-witness, except that a judge may testify as a witness in a criminal proceedings if the judge or a member of the judge's family is a victim of the offence or if the defendant is a member of the judge's family or in like exceptional circumstances.

- 1.12 Subject to the proper performance of judicial duties, a judge may engage in activities such as:
- (a) writing, lecturing, teaching and participating in activities concerning the law, the legal system, the protection of human rights, the administration of justice and related matters;
 - (b) appearing at a public hearing before an official body concerned with matters relating to the law, the legal system and the administration of justice or related matters; and
 - (c) serving as Chairman of a Commission of Inquiry and as a member of any body devoted to the improvement of the law, the legal system, the protection of human rights, the administration of justice, the public service or related matters.
- 1.13 A judge may speak publicly on non-legal subjects and engage in historical, educational, cultural, sporting or like social and recreational activities, if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties in accordance with these Guidelines.
- 1.14 A judge may participate in civic and charitable activities that do not reflect adversely on the judge's impartiality or interference with the performance of judicial duties. A judge shall not be involved in fund-raising or membership solicitation.
- 1.15 A judge shall not serve as the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust or person connected with a member of the judge's family and then only if such service will not interfere with the proper performance of judicial duties.
- 1.16 Except for holding and managing appropriate personal or family investments, a judge shall refrain from being engaged in other financial or business dealings which may interfere with the proper performance of judicial duties or reflect adversely on the judge's impartiality.
- 1.17 Confidential information acquired by a judge in his or her judicial capacity shall not be used or disclosed by the judge in financial dealings or for any other purpose not related the other judge's judicial duties.
- 1.18 A judge shall not practice law whilst being the holder of judicial office.
- 1.19 A judge may form or join associations of judges or participate in other organizations representing the interests of judges to promote professional training and to protect judicial independence.
- 1.20 A judge shall neither ask for, nor accept, nor permit any member of the judge's family

to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

COMMENTARY - see under **Integrity** (*infra*)

E. INDEPENDENCE

Since an independence judiciary is indispensable to impartial justice under law, a judge shall uphold and exemplify judicial independence in both its individual and institutional aspects.

Principles:

- 2.1 A judge shall exercise independently his or her judicial functions on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason whatsoever.
- 2.2 A judge shall reject any attempt to influence his or her decision in any matter before the judge for decision where such attempt arises outside the proper performance of judicial duties.
- 2.3 In performing judicial duties, a judge shall, within the judge's own Court, be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.
- 2.4 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.
- 2.5 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence which is fundamental to the maintenance of judicial independence.

COMMENTARY

Section 118 (2) of the Constitution of Lesotho 1993 solemnly declares

"The court shall in the performance of their functions under this Constitution or any other law, be independent and free from interference and subject only to this Constitution and any other law."

Judicial independence is the main pillar of a democratic dispensation which values the protection of human rights and the rule of law. It also encompasses accountability under the constitution. Without accountability

judicial independence may be an unruly horse. The doctrine of Separation of Powers upon which democratic good governance is founded institutionalizes the relationship between the three main organs of the State—namely the Executive the Legislature and the Judiciary. As **Cullinan C.J. in the case of Swissbourgh Diamond Mines (Pty) Ltd v Military Council of Lesotho** - 1991-96 LLR 1481 at 1697 stated

"It is not a matter of supremacy of Parliament nor of the Executive: neither is it a matter of supremacy of the Judicature. None of them is supreme. It is the rule of law which is supreme, ensuring that each power is exercised within its proper limits. "

1. Judicial independence is not the private right of judges but the foundation of judicial impartiality and constitutional right of all Basotho. Independence of the judiciary refers to the necessary individual and collective or institutional independence required for impartial decisions and decision making. Judicial independence thus characterized both a state of mind and a set of institutional and operational arrangements. The former is concerned with the judge's impartiality in fact; the latter with defining the relationships between the judiciary and others, particularly the other branches of government, so as to assure both the reality and the appearance of independence and impartiality. The Principles deal with judges' ethical obligations as regards their individual and collective independence. They do not deal with the many legal issues relating to judicial independence.
2. The first qualification of a judge is the ability to make independent and impartial decisions. The subject of judicial impartiality is treated in detail in chapter on **Impartiality**. However, judicial independence is not only a matter of appropriate external and operational arrangements. It is also a matter of independent and impartial decision making by each and every judge. The judge's duty is to apply the law as he or she understands it without fear or favour and without regard to whether the decision is popular or not. This is a cornerstone of the rule of law. Judges individually and collectively should protect, encourage and defend judicial independence. Judges must of course reject improper attempts by litigants, politician, officials or others to influence their decisions. They must also take care that communications with such persons that judges may initiate could not raise concerns about their independence. Regardless of the source of influence, ministerial, journalistic or other, all such efforts must, of course, be firmly rejected. This rule is so elementary that it requires no further exposition.
3. Given the independence accorded judges, they share a collective responsibility to promote high standards of conduct. The rule of law and the independence of the judiciary depend primarily upon public confidence. Lapses and questionable conduct by judges tend to erode that confidence. Judicial independence and judicial ethics have symbiotic relationship. Public acceptance of and support for court decisions depends upon public confidence in the integrity and independence of the bench. This, in turn, depends upon the judiciary upholding high standards of conduct.

Only by maintaining high standards of conduct will the judiciary (1) continue to warrant the public confidence on which deference to judicial rulings depends, and (2) be able to exercise its own independence in its judgments and rulings.

In short, judges should demonstrate and promote high standards of judicial conduct as one element of assuring the independence of the judiciary.

4. Judges should be vigilant with respect to any attempts to undermine their institutional or operational independence. While care must be taken not to risk trivializing judicial independence by invoking it indiscriminately in opposition to every proposed change in the institutional arrangements affecting the judiciary, judges should be staunch defenders of their own independence. Although the form and nature of the defence must be carefully considered, the propriety in principle of such defence cannot be questioned.

5. Judges should also recognize that not everyone is familiar with these concepts and their impact on judicial responsibilities. Public education with respect to the judiciary and judicial independence thus becomes an important function, for misunderstanding can undermine public confidence in the judiciary. There is, for example, a danger of misperception about the nature of the relationship between the judiciary and the executive. The public may not get a completely balanced view of the principle of judicial independence from the media which may portray it incorrectly as protecting judges from review of and public debate concerning their actions. Judges, therefore, should take advantage of appropriate opportunities to help the public understand the fundamental importance of judicial independence, in view of the public's own interest.
6. Judges are asked frequently to serve as inquiry commissioners. In considering such a request, a judge should think carefully about the implications for judicial independence of accepting the appointment. There are examples of Judicial Commissioners becoming embroiled in public controversy and being criticized and embarrassed by the very governments which appointed them. The terms of reference and other conditions such as time and resources should be examined carefully so as to assess their compatibility with the judicial function.
7. Judges are asked frequently to serve as inquiry commissioners. In considering such a request, a judge should think carefully about the implications for judicial independence of accepting the appointment. There are examples of Judicial Commissioners becoming embroiled in public controversy and being criticized and embarrassed by the very governments which appointed them. The terms of reference and other conditions such as time and resources should be examined carefully so as to assess their compatibility with the judicial function.

F. INTEGRITY

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

Principles:

- 3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable, fair-minded and informed person.
- 3.2 The behaviour and conduct of a judge shall be such as to reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.
- 3.3 A judge shall, in addition to observing personally the standards of these Principles, encourage and support their observance by their judicial colleagues.

COMMENTARY

1. Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality and good judgement. The Lesotho judiciary should strive for a strong and honourable tradition in

this area which will serve as a sound foundation for appropriate judicial conduct.

2. While the ideal of integrity is easy to state in general terms, it is much more difficult and perhaps even unwise to be more specific. There can be few absolutes since the effect of conduct on the perception of the community depends on community standards that may vary according to place and time.

3. As one commentator put it, the key issue about a judge's conduct must be how it "...reflects upon the central components of the judge's ability to do the job." This requires consideration of first, how particular conduct would be perceived by reasonable, fair minded and informed members of the community and second, whether that perception is likely to lessen respect for the judge or the judiciary as a whole. If conduct is likely to diminish respect in the minds of such person, the conduct should be avoided. As Shaman put it, "... the ultimate standard for judicial conduct must be conduct which constantly reaffirms fitness for the law, integrity in his or her private dealings and generally avoid the appearance of impropriety."

4. Judges, of course, have private lives and should enjoy, as much as possible, the rights and freedoms of citizens generally. Moreover, an out of touch judge is less likely to be effective. Neither the judge's personal development nor the public interest is well served if judges are unduly isolated from the communities they serve. Legal standards frequently call for the application of the reasonable person test. Judicial fact-finding, an important part of a judge's work, calls for the evaluation of evidence in light of common sense and experience. Therefore, judges should, to the extent consistent with their special role, remain closely in touch with the public. These issues are discussed more fully in the "Impartiality" chapter.

5. A judge's conduct, both in and out of court, is bound to be the subject of public scrutiny and comment. Judges must therefore accept some restrictions on their activities - even activities that would not elicit adverse notice if carried out by other members of the community. Judges need to strike a delicate balance between the requirements of judicial office and the legitimate demands of the judge's personal life, development and family.

6. In addition to judges' observing high standards of conduct personally they should also encourage and support their judicial colleagues to do the same as questionable conduct by one reflects on the judiciary as a whole.

7. Judges also have opportunities to be aware of the conduct of their judicial colleagues. 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.

G. IMPARTIALITY

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

Principles:

4.1 A judge shall perform his or his judicial duties without fear, favour, bias or prejudice.

4.2 A judge shall ensure that his or her conduct, both in and out of Court, maintains and

enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary .

- 4.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.
- 4.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or Issue.
- 4.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which a reasonable, fair-minded and informed person might believe that the judge is unable to decide the matter impartially.
- 4.6. A judge shall disqualify himself or herself in any proceedings in which there might be a reasonable perception of a lack of impartiality of the judge including, but not limited to, instances where the judge
- (d) has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
 - (e) previously served as a lawyer or was a material witness in the matter in dispute; or
 - (f) a member of the judge's family, has an economic interest in the outcome of the matter in dispute.
- 4.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge' family.
- 4.8 A judge who would otherwise be disqualified on the grounds specified in paragraph 4.6 above may, instead of withdrawing from the proceedings, disclose on the record the basis of such disqualification. If: based on such disclosure, the parties, independently of the judge's participation, agree in writing or on the record, that the judge may participate, continue to participate, in the proceedings, the judge may do so.
- 4.9 Disqualification of a judge is not required if necessity obliges the judge to decide the matter in controversy including where no other judge may lawfully do so or where, because of urgent circumstances, failure of the judge to participate might lead to a

serious miscarriage of justice. In such cases of necessity, the judge shall still be obliged to disclose to the parties in a timely way any cause of disqualification and ensure that such disclosure is included in the record.

4.10. Except as is otherwise provided in this Part, a judge has a duty to perform the functions of the judicial office and litigants do not have a right to choose a judge.

COMMENTARY:

A. General

A.1 From at least the time of John Locke in the late seventeenth century, adjudication by impartial and independent judges has been recognized as an essential component of our society. Impartiality is the fundamental qualification of a judge and the core attribute of the judiciary. The Principles do not and are not intended to deal with the law relating to judicial disqualification or recusation.

A.2 While judicial impartiality and independence are distinct concepts, they are closely related. Our courts have often noted that the right to be tried by an independent and impartial tribunal is an integral part of the principles of fundamental justice protected by section 12 of the Lesotho Constitution.

A.3 Impartiality is not concerned with perception, but more fundamentally with the actual absence of bias and prejudgment. This dual aspect of impartiality is captured in the often repeated words that justice must not only be done, but manifestly be seen to have been done. Whether there is a reasonable apprehension of bias is to be assessed from the point of view of a reasonable, fair minded and informed person.

A.4 True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind. The judge's fundamental obligation is to strive to be and to appear to be as impartial as is possible. This is not a counsel of perfection. Rather it underlines the fundamental nature of the obligation of impartiality which also extends to minimizing any reasonable apprehension of bias.

A.5 A reasonable perception that a judge lacks impartiality is damaging to the judge, the judiciary as a whole and the good administration of justice. Judges should, therefore, avoid deliberate use of words or conduct, in and out of court, that could reasonably give rise to a perception of an absence of impartiality. Everything from his or her associations or business interests to remarks which the judge may consider to be "*harmless banter*," may diminish the judge's perceived impartiality.

A.6 The expectations of litigants may be very high. Some will be quick to perceive bias quite unjustifiably when a decision is not in their favour. Therefore every effort should be made to ensure that reasonable grounds for such a perception are avoided or minimized. On the other hand, judges have an obligation to treat all parties fairly and evenhandedly; those litigants who perceive bias where no reasonable, fair minded and informed person would find it are not entitled to different or special treatment for that reason. Moreover, as discussed below, the judge also has the obligation to ensure that proceedings are conducted in an orderly and efficient manner. This may well require an appropriate degree of firmness.

It is helpful to address the question of impartiality under more specific headings.

B. Judicial Demeanour

B.1 Litigants and others scrutinize judges very closely for any indication of unfairness. Unjustified reprimands of counsel, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgment and intemperate and impatient behaviour may destroy the appearance of impartiality. On the other hand, judges are obliged to ensure that proceedings are conducted in an orderly and efficient manner and that the court's process is not abused. An appropriate measure of firmness is necessary to achieve this end. A fine balance is to be drawn by judges who are expected both to conduct the process effectively and avoid creating in the mind of a reasonable, fair minded and informed person any impression of a lack of impartiality. These issues are more fully discussed in chapters on "Diligence" and "Equality". It bears repeating however, that any action which, in the mind of a reasonable, fair minded and informed person who has considered the matter, would give rise to reasoned suspicion of a lack of impartiality must be avoided. When such impressions are created, they affect not only the litigants before the court but public confidence in the judiciary generally.

C Civic and Charitable Activity

C.1 A judge is appointed to serve the public. Many persons appointed to the bench have been and wish to continue to be active in other forms of public service. This is good for the community and for the judge, but carries certain risks. For that reason, it is important to address the question of the limits that judicial appointment places upon the judge's community activities.

C.2 The judge administers the law on behalf of the community and therefore unnecessary isolation from the community does not promote wise or just judgments.

C.3 The precise constraints under which judges should conduct themselves as regards civic and charitable activity are controversial inside and outside the judiciary. This is not surprising given that the question involves balancing competing considerations. On one hand, there are the beneficial aspects, both for the community and the judiciary, of the judge being active in other forms of public service. This needs to be assessed in light of the expectations and circumstances of the particular community. On the other hand, the judge's involvement may, in some cases, jeopardize the perception impartiality or lead to an undue number of recusals. If this is the case, the judge should avoid the activity.

C. 4 Requests for letters of reference may be difficult for a judge. There are certainly factors a judge will want to consider before agreeing provide such a letter. One is that the judge should avoid being seen as using the prestige of judicial office to advance a person's private interests. The judge must also avoid giving the impression that certain persons stand in a particular position of influence or favour with the judge. These factors combine to suggest that the judge should agree to give a reference only where it is clear, first, that it is the judge's knowledge of the individual that is called for and not simply the status of the judge and, second where the judge has an important respect about the individual to contribute such that would be unfair to the individual to contribute such that it would be unfair to the individual and the selection process were the judge to refuse.

D Political Activity

D. 1 This section deals with out of court activities of judges. In particular, it addresses political activities and other conduct such as memberships in group or organizations or participation in public debate and comment which, from the perspective of a reasonable, fair minded and informed person could undermine a judge's impartiality as regards issues that could come before the courts.

D.2 Commentators are unanimous that *"all partisan political activity and association must cease absolutely and unequivocally with the assumption of judicial office."* Two considerations support this rule.

Impartiality, actual and perceived, is essential to the exercise of the judicial function. Partisan political activity or out of court statements concerning issues of public controversy by a judge undermine impartiality. They are also likely to lead to public confusion about the nature of the relationship between the *judiciary* on the one hand and the *executive* and *legislative* branches on the other. Partisan actions and statements by definition involve a judge in publicly choosing one side of a debate over another. The perception of partiality will be reinforced, as is almost inevitable, the judge's activities attract criticism and/or rebuttal. This in turn tends to undermine judicial independence. In short, a judge who uses the privileged platform of judicial office to enter the political arena puts at risk public confidence in the impartiality and the independence of the judiciary.

D.3 The Judiciary is counselled against making contributions to political parties. The rationale of this advice is that the judge should not be identified with the political process or with specific positions on matters of political controversy.

D.4 The application of this Principles, which counsels avoidance of public participation in controversial political discussions, is more open to debate and problems of application than the other principles in this section. Judges on appointment do not surrender all of the rights to freedom of expression enjoyed by everyone else in Lesotho. But, the office of judge imposes restraints that are necessary to maintain public confidence in the impartiality and independence of the judiciary. In defining the appropriate degree of involvement of the judiciary in public debate, there are two fundamental considerations. The first is whether judge's involvement could reasonably undermine confidence in his or her impartiality. The second is whether such involvement may unnecessarily expose the judge to political attack or be inconsistent with the dignity of judicial office. If either is the case the judge should avoid such involvement.

D.5 This Principle recognizes that, while restraint is the watchword, there are limited circumstances in which a judge may properly speak out about matter that is politically controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice, or the personal integrity of the judge. Even with respect to these matters, however, a judge should act with great restraint. Judges must remember that their public comments may be taken as reflective of the views of the judiciary; it is difficult for a judge to express opinions that will be taken as purely personal and not those of the judiciary generally. There are usually alternatives to public discussion. For example, the Chief Justice may raise the matter formally with the appropriate official or officials. Except for statutory and constitutional duties and matters affecting the operation of the courts or the proper administration of justice, Chief Justices is in no different position than his colleagues.

D.6 Nothing in these Principles prevents or indeed discourages judicial participation in law reform or other scholarly or educational activities of a non-partisan nature directed to the improvement of the law and the administration of justice. Judges seconded to law reform commissions may exercise greater latitude with respect to matters under consideration by the Commission. However, when engaging in such activities, the judge must be not seen as "lobbying" government or as indicating how he or she would rule if particular situations were to come before the judge in court. This, of course, does not prevent judges from making representation to government concerning independence or, through the appropriate mechanisms, with respect to salaries and benefits. Discussions of the law for educational purposes or pointing out weaknesses in the law in appropriate settings is in no way discouraged. For example, in certain special circumstances, judicial commentary on draft legislation may be helpful and appropriate, so long as the judge avoids giving informal interpretations or opinions on constitutionality. Normally, judicial commentary on proposed legislation or on other questions of government policy should relate to practical implication or legislative drafting and should avoid issues of political controversy. In general, such judicial commentary should be made as part of a collective or institutionalized effort by the judiciary, not of an individual judge.

D.7 The duties of Chief Justice and, in some cases, those of other judges having administrative responsibilities will lead to contact and interaction with government officials, particularly the Attorney

General, the Principal Secretary and court services officials. This is necessary and appropriate, provided the occasions of such interactions are not partisan in nature and the subjects discussed relate to the administration of justice and the courts and not to individual cases. Judges, including Chief Justice, should take care that they are not perceived as being advisors to those holding political office or to members of the executive.

E Conflict of Interests

E.1 Judges should organize their personal and business affairs to minimize the potential for conflict with their judicial duties. Notwithstanding the judge's best efforts, situations will arise in which the appearance of justice requires the judge to disqualify himself or herself. The issues to be addressed in this section are: (1) what constitutes a conflict of interest? (2) in what circumstances should a judge disclose circumstances which may constitute a conflict of interest? (3) in what circumstances will consent of the parties obviate the need for the judge to be disqualified? And (4) in what circumstances will it be necessary for a judge to preside even though there is an apparent conflict of interest? Each will be addressed to turn.

E.2 What Constitutes a Conflict of Interest?

The potential for conflict or interest arises when the personal interest or the judge (or of those close to him or her) conflicts with the judge's duty to adjudicate impartially. Judicial impartiality is concerned both with impartiality in fact and impartiality in the perception of a reasonable, fair minded and informed person. In judicial matters, the test for conflict or interest must include both actual conflicts between the judge's self interest and the duty of impartial adjudication and circumstances in which a reasonable fair minded and informed person would reasonably apprehend a conflict.

E.3 As elsewhere in this area, the concern is with "*reasonable perception*", as well as "*actual*" conflict of interest. In general, a judge should not preside over a case in which he or she has a financial or property interest that could be affected by its outcome or in which the judge's interest would give rise in a reasonable, fair minded and informed person, to reasoned suspicion that the judge would not act impartially. This general rule applies whether the interest is itself the subject matter of the controversy or where the outcome of the case could substantially affect the value of any interest or property owned by the judge, the judge's family or close associates. It will not apply where the judge's interest is limited to one shared by citizens generally.

E.4 This broadly formulated rule cannot be strictly applied, however. Owning an insurance policy, having a bank account, using a credit card or owning shares in a corporation through a mutual fund would not, in normal circumstances give rise to conflict or the appearance of conflict unless the outcome to the proceedings before the substantially affect such holdings.

E.5 Should interests of members of the judge's family, close friends or associates be considered as giving rise to a perception of conflict of interest? As a matter of broad general principle, one can imagine circumstances in which the interest of the judge's family, close friends or associates in matters before the judge could give rise to a reasonable apprehension of conflicting interest and duty.

E.6 Personal insolvency and bankruptcy give rise to a variety of potential difficulties for judges. Whether, and if so in what circumstances, these difficulties will provide grounds for removal of a judge is not an issue that falls within the range of questions addressed by these Principles.

E.7 The judge who is in financial difficulty will have to be particularly vigilant for conflicts of interest, both actual and perceived. There will be difficulties in the judge presiding over matters involving any of his or her creditors or, perhaps, other matters raising similar issues. Serious questions arise if any aspect of the judge's financial difficulties becomes contentious. In this event, the possibility of the judge appearing before a judicial colleague as a party or a witness would arise. The actual day-to-day impact of the financial difficulties on the judge's ability to perform the job will obviously vary considerably depending on the

circumstances and the size of the jurisdiction. Circumstances which might cause very minor inconvenience to a large court might nonetheless have a significant practical impact on a smaller court. Once against, however, it seems impossible and unwise to try to deal with the scores of possibilities other than through application of the general principle that, where a reasonable, fair minded and informed person would have a reasoned suspicion that the judge will not be impartial, the judge should not sit. In certain circumstances, the principles relating to diligence might also be relevant if the judge's conflicts were so extensive that they effectively prevented the judge from carrying out his or her duties. A judge's bankruptcy may raise many of these issues in acute form. When judges become aware of financial or other similar circumstances likely to affect public perception of their impartiality, they should draw them to the attention of their Chief Justice.

E. 8 Disclosure

The absence in Lesotho of a general statutory requirement for financial disclosure does not resolve the ethical question of when a judge should disclose to the parties a matter which might be considered as giving rise to a potential conflict of interest. The position in English and Australia appears to be that the judge should disclose any interest or factor which might suggest that the judge should be disqualified. This approach, however, is premised on the view that the disclosure is made a view to seeking the consent of the parties for the judge to hear the case.

E.9 Whether there are circumstances in which the consent of the parties is essential to permit the judge to hear the case is the subject of the next section. However, the issues of disclosure and consent are not necessarily linked for now, it can be concluded that a judge should disclose on the record anything which might support a plausible argument in favour of disqualification.

E.10 Necessity

Extraordinary circumstances may require departure from the approaches discussed above. The principle of necessity holds that a judge who would otherwise be disqualified may hear and decide a case where failure to do so could result in an injustice. This might arise where an adjournment or mistrial would work undue hardship or where there is no other judge reasonably available who would not be similarly disqualified.

E.11 Former Clients

Judges will face the issue of whether they should hear cases involving former clients, members of the judge's former law firm or lawyers from the government department or legal aid officer in which the judge practiced before appointment. There are three main factors to be considered. First, the judge should not deal with cases concerning which the judge actually has a conflict of interest, for example, as result of having had confidential information concerning the matter prior to appointment. Second, circumstances must be avoided in which a reasonable, fair minded and informed person would have a reasoned suspicion that the judge is not impartial. Third, the judge should not withdraw unnecessarily as to do so adds to the burden of his or her colleagues and contributes to delay in the courts.

The following are some general guidelines which may be helpful:

- (a) A judge who was in private practice should not sit on any case in which the judge or the judge's former firm was directly involved as either counsel of record or in any other capacity before the judge's appointment.
- (b) Where the judge practiced for government or legal aid, guideline (a) cannot be applied strictly. One sensible approach is not to sit on cases commenced in the particular local office prior to the judge's appointment.

(c) With respect to the judge's former law partners, or associates and former clients, the traditional approach is to use a "*cooling off period*", often established by local tradition at 2, 3 or 5 years and in any event at least as long as there is any indebtedness between the firm and the judge and subject to guideline (a) above concerning former clients.

(d) With respect to friends or relatives who are lawyers, the general rule relating to conflicts of interest applies, i.e. that the judge should not sit where a reasonable, fair minded and informed person would have a reasoned suspicion that the judge would not be impartial.

Related issues, requiring similar approach, may arise in relation to overtures to the judge while still on the bench for post-judicial employment. Such overtures may come from law firms or prospective employers. There is a risk that the judge's self-interest and duty would appear to conflict in the eyes of a reasonable, fair minded and informed person considering the matter. A judge should examine such overtures in this light. It should also be remembered that the conduct of former judges may affect public perception of the judiciary.

H. EQUALITY

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

Principles:

- 5.1 A judge shall strive to be aware of, and to understand, diversity in society and differences arising from various sources, including but not limited to any irrelevant ground.
- 5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on any irrelevant ground.
- 5.3 A judge shall carry out his or her duties with appropriate consideration for all people, including parties, witnesses, lawyers, court staff and judicial colleagues without unjust differentiation on any irrelevant ground, immaterial to the proper performance of such duties.
- 5.4 A judge shall not knowingly permit Court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter which is before the judge, on any irrelevant ground.
- 5.5 A judge shall require lawyers in proceedings before a Court to refrain from manifesting, by words or conduct, bias or prejudice based on any irrelevant grounds. This requirement does not preclude legitimate advocacy where any such ground is legally relevant to an issue in the proceedings.
- 5.6 A judge shall not be a member of, nor associated with, any group, association or body that practices unjust discrimination on the basis of any irrelevant ground.

5.7 Without authority of law and notice to, and consent of, the parties and an opportunity to respond, a judge shall not engage in independent, personal investigation of the fact of a case.

COMMENTARY:

1. The Constitution and a variety of statutes enshrine a strong commitment to equality before and under the law and equal protection and benefit of the law without discrimination. This is not a commitment to identical treatment but rather **"... to the equal worth and human dignity of all persons" and "...a desire to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in our society"**. Quite apart from explicit constitutional and statutory guarantees, fair and equal treatment has long been regarded as an essential attribute of justice. While its demands in particular situations are sometimes far from self evident, the law's strong societal commitment places concern for equality at the core of justice according to law.

2. Equality according to law is not only fundamental to justice, but is strongly linked to judicial impartiality. A judge who, for example, reaches a correct result but engages in stereotyping does so at the expense of the judge's impartiality, actual or perceived.

3. Judges should not be influenced by attitudes based on stereotype, myth or prejudice. They should, therefore, make every effort to recognize, demonstrate sensitivity to and correct such attitudes.

4. As is discussed in more detail in the **"Impartiality"** chapter, judges should strive to ensure that their conduct is such that any reasonable, fair minded and informed member of the public would justifiably have confidence in the impartiality of the judge. Judges should avoid comments, expressions gestures or behaviour which reasonably may be interpreted as showing insensitivity to or disrespect for anyone. Examples include irrelevant comments based on racial, cultural, sexual or other stereotypes and other conduct implying that persons before the court will not be afforded equal consideration and respect.

5. Inappropriate conduct may arise from a judge being unfamiliar with cultural, racial or other traditions or failing to realize that certain conduct is hurtful to others. Judges therefore should attempt by appropriate means to remain informed about changing attitudes and values and to take advantage of suitable educational opportunities (which ought to be made reasonably available) that will assist them to be and appear to be impartial. In doing this, however, it is also necessary to take care that these efforts enhance and do not detract from judges' perceived impartiality.

This Principle deals with the role of the presiding judge in addressing clearly irrelevant comments which are sexist or racist or other such inappropriate conduct in proceedings before them. This does not require that proper advocacy or admissible testimony be curtailed where, for example, matters of gender, race or other similar factors are properly before the court. This advice is consistent with the judge's general duty to listen fairly but, when appropriate firmness to maintain an atmosphere of dignity, equality and order in the courtroom. This Principle certainly does not counsel perfection. Further, applying it may sometimes be a formidable challenge for the judge. The adversarial system gives the parties and their counsel considerable leeway and the relevance and importance of evidence may be difficult of assess accurately as it is being presented. The judge should always do her or her best to strike the right balance. The fact that, when reconsidered later with the benefit of hindsight and the opportunity for further reflection, the situation might have been handled differently is not, of itself, any indication that the judge failed to deal with inappropriate conduct during the proceeding.

I. COMPETENCE AND DILIGENCE

Competence and diligence are pre-requisites to the due performance of judicial functions.

Principles

- 6.1 The Judge shall give precedence to his or his judicial functions over any other activity.
- 6.2 A judge shall not engage in any activity which may adversely affect the diligent discharge of his or her judicial duties.
- 6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties.
- 6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms and, within any applicable limits of constitutional or other law, shall conform to such norms as far as is feasible.
- 6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and within a reasonable time.
- 6.6 A judge shall maintain order and *decorum* in all proceedings in which he or she is involved. He or she shall endeavour to adopt a calm, dignified and courteous approach in relation to litigants, juries, witnesses, lawyers and other with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction, or control.

COMMENTARY:

1. **Socrates** counselled judges to hear courteously, answer wisely, consider soberly and to decide impartially. These judicial virtues are all aspects of judicial diligence. It is appropriate to add to **Socrates'** list the virtue of acting expeditiously, but diligence is not primarily concerned with expedition. Diligence, in the broad sense, is concerned with carrying out judicial duties with skill, care and attention, as well as with reasonable promptness.

2. Appointed Judges must devote themselves to judicial duties. Subject to the limitations imposed by the Constitution and the judicial role, judges are free to participate in other activities that do not detract from the performance of judicial duties. In short, the work of the judge's court comes first.

3. While judges should exhibit diligence in the performance of their judicial duties, their ability to do so will depend on the burden of work, the adequacy of resources including staff, technical assistance and time for research, deliberation, writing and other judicial duties apart from sitting in court. The importance of the judge's responsibility to his or her family is also recognized. Judges should have sufficient vacation and leisure time to permit the maintenance of physical and mental wellness and reasonable opportunities to

enhance the skill and knowledge necessary for effective judging.

4. As mentioned in Commentary on the "Judicial Independence" chapter, judges are sometimes called upon by governments to undertake tasks which take them away from the regular work of their courts. Service on royal commissions of inquiry is one example. A judge should not accept such an appointment without consulting with his or her Chief Justice to ensure that acceptance of the appointment will not unduly interfere with the effective functioning of the court or unduly burden other members.

5. As long ago as *Magna Carta*, it was recognized that judges should have a good knowledge of the law. This knowledge extends not only to substantive and procedural law, but to the real life impact of law. As one scholar put it, "*law is not just what it says law is what it does*". Sustained efforts to maintain and enhance the knowledge, skills and attitudes necessary for effective judging are important elements of judicial diligence. This involves participation in continuing education programs as well as private study.

6. It is useful consider the subject of judicial diligence under three headings: Adjudicative Duties, Administrative and Other Out of Court Duties, and Contributions to the Administration of Justice Generally.

Adjudicative Duties

7. Diligence in the performance of adjudicative duties includes striving for impartial and even-handed application of the law, thoroughness, decisiveness, promptness and the prevention of abuse of the process and improper treatment of witnesses. While these are all qualities and skills and judge needs, the variety of cases and the particular conduct or counsel and parties require a judge conducting a hearing to emphasize one or more sometimes at the expense of some of the others, in order to achieve the proper balance.

Striking this balance may be particular challenging when one party is represented by a lawyer and another is not. While doing whatever is possible to prevent unfair disadvantage to the unrepresented party, the judge must be careful to preserve his or her impartiality.

8. The obligation to be patient and treat all before the court courtesy does not relieve the judge of the equally important duty to be decisive and prompt in the disposition of judicial business. The ultimate test of whether the judge has successfully combined these ingredients into the conduct of the matters before the court is whether the matter has not only been dealt with fairly but in a fashion that is seen to be fair. These issues are addressed in the "Impartiality" chapter.

9. Generally speaking, judge should perform all properly assigned judicial duties, be punctual unless other judicial duties prevent it and be reasonably available to perform all assigned duties.

10. The proper preparation of judgment is frequently difficult and time consuming. However, the decision and reasons should be produced by the judge as soon as reasonably possible, having due regard to the urgency of the matter and other special circumstances. Special circumstance may include illness, the length or complexity of the case, an unusually heavy workload or other factors making it impossible to give judgement sooner. Reserved judgments should be delivered within six months after hearing, except in special circumstances.

11. It is, of course, often necessary for judges to make findings of credibility and to rule on the propriety of others' conduct. However, judges should avoid making comments about persons who are not before the court unless it is necessary for the proper disposition of the case. For example, irrelevant or otherwise unnecessary comments in judgments about a person's conduct or motives ought to be avoided.

Administrative and Other Out of Court Duties

12. Today, judicial duties include administrative and other out of court activities. Judges have important responsibilities, for example, in case management and pre-trial conferences as well as on committees of the

court. These are all judicial duties and should be undertaken with diligence.

Contributions to the Administration of Justice Generally

13. Judges are uniquely placed to make a variety of contributions to the administration of justice. Judges, to the extent that time permits and subject to the limitations imposed by judicial office, may contribute to the administration of justice by, for example, taking part in continuing legal education programs for lawyers and judges and in activities to make the law and the legal process more understandable and accessible to the public. These activities are discussed in the "Impartiality" chapter.

14. It is a delicate question whether and in what circumstances a judge should report, or cause to be reported, a lawyer to the lawyer's professional governing body. Taking such action may affect the ability of the judge to continue in the proceeding in which that lawyer is appearing, given that the judge's view of the lawyer's conduct may give rise to a reasonable apprehension of bias against the lawyer or the lawyer's client. On the other hand, a judge is in a special position to observe lawyers' conduct before the court. Putting aside any issue of contempt, generally a judge should take, or cause to be taken, appropriate action where the judge has clear and reliable evidence of serious misconduct or gross incompetence by a lawyer. The judge will have to weigh carefully whether the interests of justice require that he or she wait until the end of the proceeding or whether there are circumstances which require earlier action even though the judge, nonetheless, continues to preside.
