JUDICIAL ACCOUNTABILITY MECHANISMS: 
A RESOURCE DOCUMENT

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1. INTRODUCTION

1.1 JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN SOUTH AFRICA

One of the cornerstones of a functioning democracy is an independent judiciary which is able to freely and impartially exercise its role as both protector of the rule of law and guarantor of constitutional and human rights. As final arbiters and enforcers of constitutional limitations on government, an independent judiciary plays the important role of protecting individuals against state power. In South Africa, the judiciary is further empowered to provide remedies to citizens (and permanent residents) whose constitutional rights have been violated by private actors, and not just the state.

This role is particularly important in South Africa where an independent judiciary is a relatively new idea. Prior to 1994 the apartheid era judiciary acted as an extension of executive power through its regular enforcement of repressive and racially biased legislation. However, through the 1996 Constitution, the current judiciary enjoys constitutionally protected independence (through section 165) and is explicitly tasked to interpret and enforce constitutional guarantees. Section 165 states that, “no person or organ of state may interfere with the functioning of the courts” and that “the courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice.” Judges are also guaranteed security of tenure, with strict rules pertaining to the appointment and removal of judges.

The current judicial institution does more than guarantee constitutionally prescribed rights. Because legal precedence developed during apartheid is of limited relevance to issues of good governance, human rights and judicial independence, decisions made by the South African judiciary today are of greater legal significance. The judiciary is essentially developing and re-defining South African jurisprudence and therefore playing an important role in the transformation of South Africa into an open and inclusive constitutional democracy that guarantees the progressive realization of social and economic rights. Viewed in this light, the independence of the judiciary must not only be constitutionally protected; it must also capture and maintain the confidence of the public it seeks to protect. Loss of confidence in the judicial system due to perceptions of a lack of independence and impartiality is extremely damaging to the effective working of the justice system.

Because the judicial institution has such important and wide ranging powers, including the power of judicial review, there is a growing feeling that the judiciary must also be held “accountable” - so that minimum standards of competence and ethical standards can be maintained. Judges often face ethical issues in the course of their service- for instance, they may be uncertain about whether to present their views on matters outside of the courtroom or may wonder whether the circumstance of bias exists. From the perspective of litigants in particular, the timely resolution of cases and the assurance of courteous and non-prejudicial court behavior are important ethical concerns. Where rules are in place to promote judicial ethics and those rules are visible to the public, confidence in the administration of justice is both maintained and
enhanced. In fact, judges have strongly expressed the view that sensitivity to ethical rules, both on and off the bench, helps protect the independent and impartial status of the courts.

South Africa is currently in the process of adopting new laws on judicial ethics and discipline, financial disclosure, judicial codes of conduct and training for judges. Issues of judicial accountability have been on the legislative agenda since the late 1990’s, mostly in the realm of the Justice Ministry; and the subject of wide public debate. During the current parliamentary term (January to May 2007) Parliament’s Portfolio Committee on Justice and Constitutional Development will be deliberating the latest versions of two judiciary bills - the Judicial Services Commission Amendment Bill B-2007 (dealing with judicial discipline and ethics) and the South Africa Judicial Education Institute Bill B 4-2007 (dealing with judicial education).

Judicial accountability mechanisms are contemplated by the Constitution itself and its benefits clearly evident; however the principles of judicial independence and separation of powers must always be respected when such mechanisms are being crafted. A number of international protocols and guidelines have developed over the years to assist judges in dealing with ethical issues and to correct unacceptable judicial behavior. It has been suggested that well defined and publicly known standards and procedures complement, rather than diminish, the notion of judicial independence - for example, rules to prevent conflicts of interest and corruption along with appropriate monitoring mechanisms, aim to ensure judges act impartially in the adjudication process. If construed properly, the notion of “judicial accountability” should not be seen in uncomfortable tension to “judicial independence”. Rather, the combination of judicial independence and judicial accountability should foster public confidence in the courts - provided that accountability mechanisms are embedded in the judiciary and satisfy the appropriate standards for judicial autonomy, respect the separation of powers framework, and are transparent and publicly known.

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1 See the introduction to the (current) Code Of Conduct, entitled “Guidelines for judges of South Africa” adopted by senior judges and published by the Chief Justice in 2000
2 Since 1994, the need to adopt legislation to rationalize and streamline the court structure (inherited from apartheid) and to regulate judicial accountability has been recognized. However, certain provisions contained within the package of five laws designed to implement these aims have been the subject of public debate and controversy. In July 2006, President Mbeki intervened and temporarily shelved the Superior Courts Bill and Constitution Fourteenth Amendment Bill. Currently, two (redrafted) judiciary bills are being deliberated by parliament - the Judicial Services Commission Amendment Bill [B 2007] and South African Judicial Education Institute Bill [B4 2007] (introduced in February, 2007). It is also worth noting that in mid 2006, the Ministry, Judges, the Judicial Services Commission, the Magistrates Services Commission and various academics met at a Colloquium to discuss the package of laws on judicial transformation. A White Paper on Judicial Transformation is also expected this year.
3 Constitution of South Africa, 1996. Chapter 8, section 180 states that “national legislature may provide for... ....a. training programs for judicial officers; b. procedural for dealing with complaints about judicial officers...”
4 In this regard, see the principles set out in the IFES “Indicators for a State of the Judiciary Report”
1.2. List of Significant Documents on Judicial Independence, Integrity and Accountability

- Universal Declaration of Human Rights (1948)
- Basic Principles on the Independence of the Judiciary adopted by the UN (1985) which elaborate on six core areas of judicial independence
- Latimer House Guidelines, 1998
- IFES and USAID Office of Democracy and Governance “Guidance for promoting judicial independence and impartiality” (“Guidance Principles”)
- Universal Principles of judicial independence for the SADC region, 2004
- International Bar Association, Minimum Standards of Judicial Independence, 1982
- Declaration of Principles of Judicial Independence issued by the Chief Justice of the Australian States and Territories, 1997
- Ethical Principles for Judges, Canadian Judicial Council, 1998
- Guidelines for South African Judges, issued by the Chief Justice, the President of the Constitutional Court and the Presidents of High Courts, Labour Courts and the Land Claims Court, 2000
- The Judicial Code of Conduct, enacted by Parliament of Zambia, 1999
- Code of Conduct for Judicial Officers of Tanzania, adopted by the Judges and Magistrates Conference, 1984
2. JUDICIAL DISCIPLINE

2.1 International Standards

A functioning and transparent system for registering and evaluating complaints from the public forms a core element of judicial accountability. To this end, both the UN Principles and IFES/USAID “Guidance Principles” encourage countries to adopt appropriate, transparent and objective procedures for discipline, and suggest that legislative and executive bodies should have limited involvement in this process. The Latimer House Guidelines on the “Independence of the Judiciary” discourages public admonishment and limits grounds for removal of judges to serious misconduct and inability to perform judicial duties. Complaints procedure should also be well known and accessible to the public.

The remainder of this section briefly sets out the position on judicial discipline in Australia, Canada and the United States and concludes with a discussion on the current and intended position on judicial discipline in South Africa.

2.2 Australia

The standard for a judge’s removal from office is set high. The federal judiciary enjoys constitutional protection in terms of appointment and removal of judges by virtue of section 72 of the Federal Court of Australia Act. Removal can only occur through proved misbehavior or incapacity. Interpretation of ‘misbehavior’ falls under the discretion of the head of the relevant court. Removal must be effected by the Governor General on an address from both houses of parliament in the same sitting on either of the two grounds listed above.

There is a wide range of conduct by judicial officers which can properly be regarded as inappropriate, to which a sanction such as removal from office cannot conceivable be applied. Yet it appears that no formal sanction exists in the Australian federal jurisdiction, other than removal. This lacuna has been noted by Australian judges, and in New South Wales, a more formal mechanism for considering complaints was established to address this - the Judicial Commission of New South Wales. It appears that other states are considering creating such a Commission.

6 “Guidance for promoting judicial independence and impartiality” Office of Democracy and Good Government, USAID.
7 Latimer House Guidelines V1.1 For a discussion of judicial independence and accountability, see Democratic Governance and Rights Unit, UCT The Judicial Institution in Southern Africa
8 Attempts to remove judges have by and large proved unsuccessful. The closest Australia has come to removing a judge, was the case of Mr. Justice Lionel Murphy, accused of perverting the course of justice, and whom after being convicted, was acquitted on appeal. An ad hoc tribunal was then established to inquire on the meaning of “misconduct” and “misbehavior” and came to the conclusion that misconduct must be regarded in a wide view, beyond conduct of a criminal nature.
9 See Federal Court of Australia website at www.fedcourt.gov.au
The Commission consists of ten members, of whom six are official members, being the judicial heads of the six different courts in New South Wales. The New South Wales statute requires the Commission to dismiss complaints in a number of specified circumstances: including where there is a right of appeal, where the complaint is frivolous or trivial, or where further consideration is unnecessary or unjustifiable.\textsuperscript{11}

Matters that are classified as serious, in the sense that they could justify the removal of the judicial officer, must be referred to a Conduct Division which is a panel of three persons, all being judicial officers (one of which may be a retired judicial officer). A Conduct Division does not have the power to punish. Its power is directed to the presentation of a report as to whether or not the matter complained of could justify parliamentary consideration of removal of the judicial officer.\textsuperscript{12} Where a report making such a finding is presented, the head of jurisdiction has a statutory power to suspend an officer from duty.\textsuperscript{13}

Substantial complaints that do not justify removal are referred to the relevant head of jurisdiction. The Judicial Commission does not itself perform any disciplinary function. What happens as a result of a reference from the Judicial Commission to the head of jurisdiction is in the complete discretion of that judicial officer.\textsuperscript{14} Counselling or training or the provision of assistance to the judge concerned may be required, and in appropriate cases, the head of jurisdiction may recommend that the judge offer an apology. In all states within the Australian jurisdiction, complaints that involve an allegation of criminal misconduct or corruption can be referred to the appropriate police authorities.\textsuperscript{15}

\subsection*{2.3 Canada}

In Canada the independence of the federally appointed judiciary is guaranteed by the Canadian Constitution (namely sections 96 to 100 of the Constitution Act, 1867) which provides for the appointment, security of tenure and financial security of superior court judges.\textsuperscript{16} Section 99 of the Constitution Act states: \textit{Subject to subsection 2 of this section the judges of Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and the House of Commons.} This provision aims to ensure judicial independence by making it extremely difficult to remove judges from office for political or other reasons.\textsuperscript{17}

The 1971 amendments to the Judges Act created the Canadian Judicial Council and gave it statutory authority to investigate complaints against federally appointed judges. The Council consists of the Chief and Associate Chief Justices of all the

\begin{flushleft}
\textsuperscript{11} ibid \\
\textsuperscript{12} ibid \\
\textsuperscript{13} ibid \\
\textsuperscript{14} ibid \\
\textsuperscript{15} As an example, in New South Wales an Independent Commission Against Corruption has been established to investigate complaints of corruption. Ibid \\
\textsuperscript{16} Judicial Independence in also guaranteed by the Canadian Charter of Rights and Freedoms, Schedule B to the Constitution Act, 1982 \\
\textsuperscript{17} Canadian Judicial Council at www.cjc-ccm.gc.ca
\end{flushleft}
courts. According to the Canadian Judicial Council, “when someone believes that a judge’s behaviour is of serious concern, or a judge is not fit to sit on the bench, a complaint may be made to the Canadian Judicial Council.”

Under section 63(2) of the Judges Act, any member of the public (including a provincial attorney general or the federal Minister of Justice) may make a complaint about a federally appointed judge by writing to the Canadian Judicial Council. The Council’s jurisdiction arises only upon a complaint being made about inappropriate conduct on the part of a judge, and not about a judge’s decision.

As provided in the Council’s Complaints Procedures, complaints are first screened by the Chairperson or a Vice-Chairperson of the Judicial Conduct Committee of the Council. Comments are often sought from the judge and his or her Chief Justice. If serious enough to merit further consideration, the matter is referred to a Panel of up to five chief justices and puisne judges, often following a fact-finding investigation by independent counsel.

The Panel can close the file with or without an expression of concern about the conduct which led to the complaint, or it can recommend to the full Council that there be a formal investigation under section 63(2) of the Act to determine whether to recommend the judge’s removal from office. In special circumstances, a file may be closed when a judge agrees to receive counselling or undertake other remedial measures.

If the Council decides to undertake a formal investigation, an Inquiry Committee is appointed. The Committee generally consists of two Council members together with a lawyer appointed by the Minister of Justice of Canada.

An Inquiry Committee may summon witnesses, take evidence and require the production of documents in the same was as a superior court. A judge whose conduct is being investigated is entitled to be heard and to be represented by counsel.

Upon completion of its investigation, the Inquiry Committee makes a report to the Canadian Judicial Council. This report may include a recommendation that the judge in question be removed from judicial office because he/she has become, in the words of the Act, "incapacitated or disabled from the due execution of the office of judge" for one or more of the reasons set out in the Act. If the Canadian Judicial Council feels that the conduct in question does not merit removal, it can still express disapproval of such conduct.

Upon receipt of such report, the full Council, with or without receiving further submissions from the judge, must formulate a recommendation that the judge be removed, or not be removed, from judicial office. Although there has never been a Parliamentary removal, a number of judges have resigned at various stages of the

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18 Ibid available at www.cjc-ccm.gc.ca Much of the information in section 2.3 has been obtained from papers and information on the website of the Canadian Judicial Council
20 Ibid
21 Ibid
22 Ibid
23 Ibid
24 Ibid
process triggered by complaints of misconduct.\textsuperscript{25}

Most of the provinces have established judicial councils to investigate and inquire into complaints against Provincial Court judges appointed by the Provincial governments.

\subsection{2.4 United States}

Article III of the US Constitution\textsuperscript{26} establishes the judiciary as an independent third branch of government. Article III gives the judiciary the power to hear and adjudicate all cases arising out of the constitution and laws of the USA with impartiality. Article III also states that federal judges shall hold office in good behaviour and can only be removed through impeachment by the House of Representatives and conviction by the US Senate for “treason, bribery or other high crimes or misdemeanours”.

Short of removal, federal judges can be disciplined for violations of the Code of Conduct for United States Judges-a set of ethical principles and guidelines adopted by the Judicial Conference of the United States.\textsuperscript{27} This Code provides guidance for judges on issues of judicial integrity and independence, on permissible extra-judicial activities and the avoidance of impropriety or even the appearance of impropriety. The Judicial Councils in each circuit are generally responsible for enforcing the Code. Sanctions for breach include private or public censure, temporarily suspending a judge’s caseload, and requesting voluntary retirement.\textsuperscript{28}

At the state level, state constitutions provide for the impeachment, removal and other forms of discipline of state judges, with a list of disciplinary grounds typically contained in a state’s constitution, statutes or court rules. Most states have adopted the Model Code of Judicial Conduct compiled by the American Bar Association in 1990, which governs judges’ conduct during judicial proceedings, as well as speech, business activities, civic, charitable, political and other associations.\textsuperscript{29} All states have created judicial disciplinary organizations that investigate, prosecute, and adjudicate cases of judicial misconduct.\textsuperscript{30}

These judicial disciplinary organizations operate either in a one-tier or two-tier system. The one tier system consists of a panel of judges, lawyers and private citizens who investigate complaints, prosecute formal charges, holds hearings, make findings of facts or imposes sanctions or recommends such sanctions to the state supreme court.\textsuperscript{31} The two-tier system consists of one tier similar to the one tier system while another select panel of judges adjudicates formal charges and decides on their final disposition.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{25} ibid
\item \textsuperscript{26} Adopted in 1787
\item \textsuperscript{27} American Bar Association “The American Judicial System”, available at www.abanet.org
\item \textsuperscript{28} ibid
\item \textsuperscript{29} ibid
\item \textsuperscript{30} ibid
\item \textsuperscript{31} See National Centre for State Courts “Judicial Ethics, Conduct and Discipline: Resource Guide” available at www.ncsconline.org
\end{itemize}
\end{footnotesize}
The two-tier system separates the prosecutorial and adjudicative processes in order to avoid biased decision-making. The one tier system combines the two processes which avoids duplicative work and ensures promptness while guarding against biased decision making by leaving the final disposition to the state supreme court.\(^{32}\)

These panels can recommend or impose a variety of sanctions including: private admonition, reprimand or censure; public admonition, reprimand or censure, temporary suspension from office; mandatory retirement or permanent removal from office.

The detail of the actual complaints procedure at federal district level is set out in the Judicial Councils Reform and Judicial Conduct and Disability Act. \(^{33}\) To bring a complaint, individuals submit written statements to the clerk for the chief judge of the relevant court. A chief judge can also initiate a proceeding based on informal complaints received. Complaints about the behavior of state court judges can be filed as a grievance with the state’s judicial conduct organization referred to above.\(^{34}\)

### 2.5 Developments on Judicial Discipline in South Africa

#### 2.5.1 The current position

At the end of the spectrum, there is the sanction of removal if the Judicial Services Commission\(^{35}\) (JSC) finds that the judge suffers from incapacity, is grossly incompetent, and is guilty of gross misconduct and if the National Assembly, on the recommendation of the JSC, calls for the judge’s removal. This is set out in section 177 of the Constitution. Complaints against judges regarding these tests for removal first are lodged with and reviewed by Judges President of the relevant court, and then referred to the JSC should the Judges President see fit. This is a very high standard, and is rarely met. In fact, a judge has not been removed in this way since 1897. The JSC has recently (late 2006) adopted rules for the impeachment process.

Conduct falling short of conduct that could give grounds for removal (non-impeachable, yet serious conduct) is, from time to time, the subject of complaints from parties to proceedings or from the general public. Yet there is still a gap in the legal framework for such offences. There is no law setting out the procedure for how the JSC receives complaints from the public, handles such complaints, or metes out sanctions. Although no formal mechanism exists, practices have developed by the courts and the JSC to hear non-impeachable complaints; but these practices are not well known to the public\(^{36}\). The need for a formal, objective and transparent disciplinary mechanism has been recognized over the years and legislation is currently being drafted to regulate this.

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32 ibid  
33 See Title 28, U.S.Code, Section 372(c) referred to ibid; also see “Disciplining Judges” at www.uslaw.com  
34 see ibid at footnote 27  
35 The composition of the Judicial Services Commission is set out in section 178 of the Constitution, 1996  
36 See comment by Shameela Seedat “Waiting for new policy on the judiciary”, Business Day
2.5.2 The Position on discipline under the new draft law: Judicial Services Commission Amendment Bill [B 2007] 37

This Bill originates in section 180 of the Constitution, which grants Parliament the authority to adopt legislation to deal with complaints against judicial officers. 38 In addition to a mechanism for judicial discipline, the Bill introduces a formal judicial code of conduct and the requirement of judicial financial disclosure 39.

Any person can lodge a complaint to the Chairperson of the Judicial Conduct Committee. The complaint must be lodged by affidavit and based on one or more of the following five grounds (“listed grounds”): 1) incapacity, gross incompetence or gross misconduct; 2) willful or negligent breach of the Code of Judicial Conduct; or failure to comply with the provisions relating to the Financial Register; 3) accepting, holding or performing any profit of office, unless done so in terms of the Act; 4) willful or grossly negligent failure to comply with a remedial step set out in the Act or 5) “any other willful or grossly negligent conduct that is incompatible with or unbecoming of a judge, including any conduct that is prejudicial to the independence, impartiality, dignity, effectiveness, accessibility, efficiency or effectiveness of the courts” 40.

The Judicial Conduct Committee, the first port for receiving such complaints, is composed of 5 members: the Chief Justice (who is the chairperson of the committee); the Deputy Chief Justice; and three judges (including at least one woman) designated by the Chief Justice in consultation with the Minister 41.

When a complaint is received, the Chairperson of the Committee may deal with it in one of three ways: 1) determine that the complaint does not fall within the listed grounds (see above), is frivolous, lacking in substance or hypothetical- in this case,

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37 This Bill is currently being discussed by the Committee on Justice and Constitutional Development. Previous versions of the bill have been on committee’s agenda for a number of years. On 16 March 2007, the Department of Justice and Constitutional Development briefed the committee on version B-2007 as well as the South African Judicial Education Institute Bill. It can be noted that the provisions on discipline along with a host of other matters dealing with remuneration and conditions of services for judicial officers were previously contained in the “Judicial Officers Amendment Bill, 2001”. In the course of drafting and deliberations, the Justice Committee of Parliament removed the provisions on discipline and inserted these into the Judicial Services Commission Bill as an amendment.

38 Section 180 of the Constitution empowers the National Assembly to enact such legislation. Legislation on judicial ethics, discipline and education has been canvassed by the Department of Justice for a number of years, and the subject of lengthy discussion between judges and the department. Public controversy over versions of the bills for their perceived interference with the independence of the judiciary resulted in the intervention of President Mbeki and an announcement of the development of a White Paper on the Transformation of the Judiciary (expected in the course of 2007). A “Judges Colloquium” was also held in mid 2005, attended by a number of stakeholders, to discuss the package of laws. According to the Department at its briefing to Parliament’s Justice Committee on 16 March 2007, broad agreement was reached on the provisions of the new judicial education bill. In respect of disciplinary mechanisms and judicial ethics, the Departments “briefing note” (16 March 2007) states that the relevant bill formed “part of the package of legislation on the transformation of the judiciary that was discussed at the Colloquium hosted by the Minister during 2005. Following further consultation with role-players, the principles contained in the redrafted bill were subsequently noted by Cabinet and Cabinet was requested to approve the further processing of the redrafted bill by the Portfolio Committee. The redrafted version of the Bill was then returned by the Minister to the Chairperson of the Portfolio Committee for further processing in Parliament”.

39 Clause 11 and 12 of B-2007 respectively

40 Clause 14.4 of B-2007

41 Clause 8 of the B-2007
the complaint may be summarily dismissed\textsuperscript{42}; 2) determine that the complaint is serious but can not lead to impeachment- in this case, an investigation is conducted to determine the merits and if necessary, a hearing is held\textsuperscript{43}; or 3) determine that the complaint can lead to a finding of incapacity, gross misconduct or gross incompetence- in this case the matter is referred to the JSC with the recommendation that it consider the appointment of a Judicial Conduct Tribunal to investigate the matter formally and report to the JSC on its investigation\textsuperscript{44}.

In respect of trivial complaints (point one in paragraph above), a dissatisfied complainant may lodge a written appeal to the committee within one month.

In respect of serious but non-impeachable complaints (point two above), the Chairperson or designated member of the Committee must investigate the complaint in an inquisitorial manner, and may hold a formal hearing if necessary. The relevant judge is also entitled to respond to the complaint in writing and the complainant can comment on this response. The Chairperson can decide to a) dismiss the complaint; b) conclude that the complaint is so serious, it can lead to impeachment and refer it to the Tribunal for further consideration, or c) find the judge guilty of a charge in section 14(4) (see “listed grounds” above) and impose remedial steps. Remedial steps range from an apology, reprimand, written warning, and counseling to any appropriate corrective measures. Both parties may appeal the outcome to the Committee within a month\textsuperscript{45}.

In respect of impeachable complaints (point three above), the Committee must meet to consider whether to refer the matter to a Judicial Conduct Tribunal (“the Tribunal”). Both the complainant and respondent may submit a written representation to this meeting. As a result of this meeting, the Committee may recommend to the JSC that a Tribunal be established. Where this is done, the JSC must also advise the President as to the desirability of suspending the relevant judge\textsuperscript{46}.

It is the Chief Justice who has the formal power to appoint a Tribunal. Each Tribunal is composed of three people- two judges (one who must be designated by the Chief Justice as the Tribunal President) and one other non-judicial person\textsuperscript{47}. The “non judicial person” is drawn from a list of suitable persons who have been approved by the Chief Justice acting with the concurrence of the Minister\textsuperscript{48}. At least one member of the Tribunal must be a woman. The Executive Secretary (in the Office of the Chief Justice) maintains this list.

The Tribunal must inquire into allegations of incapacity, gross misconduct or gross incompetence by collecting evidence and conducting a formal hearing and make findings of fact and findings of merit on the allegation, and then submit a report containing its findings to the JSC

\textsuperscript{42} Clause 15 of B-2007
\textsuperscript{43} Clause 17 of B-2007
\textsuperscript{44} Clause 16 of B-2007
\textsuperscript{45} See clause 17 of B-2007
\textsuperscript{46} See clause 17, 19 and 20 of B-2007 for further details
\textsuperscript{47} See clause 22 of B-2007
\textsuperscript{48} See clause 23 of B-2007
The powers of the Tribunal and the procedure for hearing the complaint are set out in the Bill. The Chief Justice has the power to make regulations on the Tribunal’s activities and, subject to the Act, the Tribunal has the power to regulate and protect its own proceedings. The Tribunal will conduct its proceedings in an inquisitorial manner, with no onus on any person to prove or disprove a fact, and is further compelled to keep a record of its proceedings.

Once a Tribunal is established and a vacancy arises, it can operate on a quorum of two members, but must have at least one judge. In any other case, the Tribunal is dissolved. The Tribunal President may request the Minister, after consulting with the National Director of Public Prosecutions, to appoint a member of the NPA to collect and adduce evidence.

In respect of the hearing, the Tribunal must give notice to the judge concerned, who is entitled to attend the hearing, present evidence and witnesses, and may be assisted by a legal representative. The hearing may be attended only by the judge, the complainant, legal representatives of both, witnesses and their legal representatives, people who are subpoenaed, and any person who the Tribunal deems necessary or expedient.

Following the hearing, the Tribunal must consider and report to the JSC on the facts and merits of the matter, including the credibility of witnesses. The JSC subsequently holds a meeting to consider this report and must also inform the judge and the complainant that they can make written representations, which will be considered at this meeting. If the JSC finds that the judge is guilty of an impeachable offence, the JSC submits this finding to the Speaker of the National Assembly (together with the report of the Tribunal and the reasons of the JSC).

If the JSC finds that the judge is not grossly incompetent, it may still make a finding that a judge attends a specific training course. If the JSC makes a finding of misconduct, not amounting to gross misconduct, it can impose the remedial steps set out in the Act, and referred to above.

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49 See clause 25 of B-2007
50 See clause 26, 27 28 of B-2007
51 See clause 22 of B-2007
52 See further provisions in Clause 24 of B-2007
53 Only for the duration for which the witness is required. See clause 29 of B-2007
54 See clause 33 of B-2007
55 See clause 20 of B-2007
56 See clause 20 of B-2007

3.1 International Standards

Income and Asset Disclosure is generally perceived to be an essential aid towards monitoring whether judges perform outside work, monitoring conflicts of interests, discouraging corruption and encouraging adherence to the standards prescribed by a judicial code of conduct. In most countries following common law traditions, the requirement of disclosure does not apply- however, it appears that many countries have been contemplating this, in light of the general move towards obliging public servants to disclose their income and assets\(^{57}\). In countries where disclosure is mandatory, the “Guidance Principles” suggest that a list of judge’s assets and liabilities must be declared on appointment and annually thereafter\(^{58}\). The “Guidance Principles further stipulate that the information disclosed must be accurate, timely and comprehensive\(^{59}\). Furthermore, security and privacy concerns of judges should be respected, the oversight body maintaining the register must be credible, and the public should have proper access to the public portion of the register.

Most countries, however, do contain provisions in their laws or codes of conduct prohibiting judges from performing services for profit outside of their judicial work except under defined and limited circumstances. It has been suggested that financial registers can help monitor whether judges perform extra-judicial work, along with other conflicts of interests such as the possibility of bias.

3.2 England

England does not appear to have a statutory requirement compelling judges to disclose their financial position or assets. However, the English long-standing general principles for the judiciary prescribe that Judges may not undertake any other remunerated employment, nor receive or retain any fee or emoluments in any circumstances save for royalties earned as an author\(^{60}\). This rule is complementary to section 8.6 of the English Guide to Judicial Conduct, which prescribes that “in addition to a judicial salary, a full-time judge should not receive any remuneration except for fees and royalties earned as an author or editor”\(^{61}\), and a judge may of course receive money from investments or property\(^{62}\).

It is also long-standing rule in England that no judge should hold a commercial directorship. This applies to a directorship in any organization whose primary purpose is profit-related. It applies whether the directorship is in a public or a private company.

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\(^{57}\) See Democratic Governance and Rights Unit, University of Cape Town *The Judicial Institution in Southern Africa*. This book describes and critically assesses the state of the judiciary in eleven commonwealth countries, including South Africa.

\(^{58}\) IFES/ USAID “Guidance for promoting judicial independence and impartiality” 36

\(^{59}\) ibid 36

\(^{60}\) see http://www.jspjudges.judiciary.gov.uk/judgmentguidance/psjudg holders/outsideactivitiesinterests.htm#2

\(^{61}\) Section 8.6 of the English Guide to Judicial Conduct.

\(^{62}\) Section 8.6 of the English Guide to Judicial Conduct.
and whether or not it is remunerated. Any person holding such a directorship is therefore expected to resign from it on appointment to judicial office.\footnote{http://www.judiciary.gov.uk/judgmentguidancerespsjudoffholders/outsideactivitiesinterests.htm#2}

3.3 Australia

Australia, like in England, does not appear to have legislation specifying that judges should disclose their financial interests. However, in respect of commercial activities, chapter six of the Australian Guide to Judicial Conduct expressly provides that judges on appointment should resign from Directorships of public companies and thereafter not accept these while in judicial office.\footnote{Section 6.1 of the Australian Guide to Judicial Conduct.} The Code further prescribes that a judge should not engage in any financial or business dealing that might reasonably be perceived to exploit the judge’s judicial position, or that will involve the judge in frequent transactions or business relationships with persons likely to come before the judge in court.\footnote{Section 6.1 of the Australian Guide to Judicial Conduct.}

3.4 Canada

In Canada, like in England and Australia, there does not appear to be a statutory requirement that judges should disclose their financial interests.\footnote{See Commentaries E.11, Canadian Judicial Council’s Ethical Principles for Judges.} However, the current position is that “the judge should disclose on the record anything which might support a plausible argument in favour of disqualification.”\footnote{Ibid. E.12.} The Canadian position seems to be directed at disclosure to litigants in order to comply with the principle of impartiality.

3.5 United States

In the United States of America the position is different to the various Commonwealth Countries- disclosure requirements are mandated by law. Section 101-111 of the Ethics in Government Act of 1978 ("the Act") requires that federal judges disclose personal and financial information each year.\footnote{Ethics in Government Act of 1978, section(s) 101-11. The financial disclosure requirement applies to: the Chief Justice of the United States, the Associate Justices of the Supreme Court, and the judges of the United States courts of appeals, United States district courts, including the district courts in Guam, the Northern Mariana Islands, and the Virgin Islands; Court of Appeals for the Federal Circuit, Court of International Trade, Tax Court, Court of Federal Claims, Court of Appeals for Veterans Claims, United States Court of Appeals for the Armed Forces, and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior.} In terms of the Act, federal judges must disclose the source and amount of income, other than that earned as employees of the United States government, received during the preceding calendar year.\footnote{Ethics in Government Act of 1978, section 102(a)(1)(A). A comprehensive discussion on financial disclosure in the United States can be found in Goldstein, Sarah: “Reexamining Financial Disclosure Procedures for the Federal Judiciary,Georgetown Journal of Legal Ethics, The Summer 2005. http://www.findarticles.com/p/articles/mi_qa3975/is_200507/ai_n14684137} Judges must also disclose the source, description, and value of gifts for which the aggregate value is more than a certain minimal amount, received from any source
other than a relative; the source and description of reimbursements; the identity and category of value of property interests; the identity and category of value of liabilities owed to creditors other than certain immediate family members; and certain other financial information.\(^70\)

As a security and privacy measure, the Act allows judges to redact information from their financial disclosure reports under the following circumstances: "(i) to the extent necessary to protect the individual who filed the report; and (ii) for as long as the danger to such individual exists."\(^71\) The Act gives the U.S. Judicial Conference, in consultation with the Department of Justice, the task of submitting to the House and Senate Committees on the Judiciary an annual report documenting redactions.\(^72\)

It is worth noting that the redaction practice expired in December 2005\(^73\) but that in February 2007 the Judicial Conference Committee recommended an extension until December 31, 2009 at the least. According to the US Judicial Conference Committee, the redaction of sensitive information recognizes the unique security risk judges face in the form of personal contact with violent offenders or other disgruntled litigants every day in which they preside over a trial, which can result in animosity directed toward the judge, and which may also affect their family.\(^74\) Judges who file for redaction are required to enumerate the specific items that they request be redacted from their reports, and those requests are reviewed by the Judicial Conference Committee on Financial Disclosure.\(^75\) In determining whether to redact information from a report, the Committee consults with the United States Marshals Service. As required by the statute, the Director of the Administrative Office has provided an annual report on the number of redactions approved by the Committee in the preceding year.\(^76\) It is also worth noting that in the United States, judges’ financial disclosure reports are posted on several Internet websites.

\(^{70}\) Ethics in Government Act of 1978, section 102(a). See Goldstein ibid

\(^{71}\) Ethics in Government Act of 1978, section 105(b)(3)(B). See Goldstein ibid

\(^{72}\) Ethics in Government Act of 1978, section 105(b)(3)(C). In its annual report, the U.S. Judicial Conference must submit information on the total number of reports redacted, the individuals whose reports have been redacted, and the types of threats against individuals whose reports are redacted, where appropriate. Id. section 105(b)(3)(C)(i)-(iii).


\(^{74}\) Statement by Honourable D Brock Hornby for the Committee on the Judiciary, United States Senate Hearing on Judicial Security and Independence, February 2007

\(^{75}\) ibid

\(^{76}\) ibid
3.6 DEVELOPMENTS IN SOUTH AFRICA ON FINANCIAL DISCLOSURE AND EXTRA JUDICIAL WORK

3.6.1 The current position on financial disclosure

The requirement of financial disclosure does not apply—although this will change when the proposed law is adopted. Currently, financial judicial accountability in South Africa is only partially accommodated by the Code of Conduct for South African Judges, which in clause 22 prohibits members of the judiciary from holding any office of profit or earning anything apart from the salaries and the allowances payable to them from the state. However, this prohibition does not require judges to periodically disclose their financial positions or assets to either the Minister or any institution. This is seen by various commentators as a setback since this periodic disclosure of financial income and assets is perceived to be an essential aid towards monitoring whether the judges adhere to the standards prescribed by the Code of Conduct.

Like its Commonwealth counterparts, South Africa has been considering legislation on financial disclosures for judges. Disclosure provisions for members of the legislature and executive have already been implemented; in respect of judges, Parliament is currently considering such regulation in the provisions of the Judicial Services Commission Amendment Bill.

3.6.2 The position on Financial Disclosure in the terms of the draft New Law

Clause 13 of the Judicial Services Commission Amendment Bill entitled “Register of Judicial Officers’ Interests”, makes it compulsory for judges and immediate family members of the judges to declare their interests. “Immediate family” includes spouses and family members living in the same household with that judge. All registrable assets or interests—financial or otherwise—of each judge and their immediate family must be disclosed.

Clause 13 further envisages regulations on the content and manner of financial disclosure. In this regard, the Minister of Justice and Constitutional Development, acting in consultation with the Chief Justice, makes such regulations. Regulations should address the compilation, maintenance, content and management of the Register, and in particular, prescribe a format of the register; state what is regarded as “registrable interests”; provide for a confidential and public part of the Register; stipulate the procedure for public to access the public part of the Register, a procedure for maintaining confidentiality of the register; and, lastly, the procedure for lodging a complaint “where there is a failure to lodge a registrable interest, where false or misleading information is registered or where there is a breach of confidentiality”. Thus a failure to comply with any provision relating to the financial register is one of the five valid grounds for complaint under section 14(4) of the Bill, and may attract a sanction.

77 The Judicial Institution in Southern Africa ibid at footnote 39
78 The Judicial Institution in Southern Africa ibid
79 The Department of Justice and Constitutional Development has referred to examples in both developed and developing countries where disclosure is required. Briefing by Department to Parliament on B-2007, 16 March 2007
3.6.3 The current position on extra-judicial work

Clause 22 of “Guidelines for Judges in South Africa” (currently in operation)\(^80\) requires judges to obtain the consent of the Minister of Justice before “accepting or performing any other office of profit or receiving payments in respect of any service, apart from a judge’s normal salary and allowances”. However, there is no requirement that such permission be written, as opposed to oral (controversy has already arisen in this regard)\(^81\), and no clarity on the criteria used to grant or refuse such permission. The new draft law attempts to provide clarity, consistency and transparency to this area.

3.6.4 The position on extra-judicial work in terms of the new draft law

The new Judicial Services Commission Amendment Bill B-2007 prohibits extra judicial work: clause 11 prevents judges from holding or performing “any other office of profit or receiving in respect of any service any fees, emoluments or other remuneration apart from his or her salary and any other amount which may be payable in his capacity as a judge”.

The Bill, however, does allow for exceptions - those will be set out in a list drawn up by the Minister of Justice, acting after consultation with the Chief Justice. This list must be tabled and approved by parliament, and published in the gazette. The Bill specifically stipulates that the list of permitted services must be closely connected to a judge’s office, and the department has recently indicated that such exceptions will be limited to royalties from authorship and lectureships.

Retired judges will be able to engage in paid work when they are no longer on the bench, but on condition that written permission is received from the Minister of Justice in consultation with the Chief Justice. The Minister, acting in concurrence with the Chief Justice, is required to issue guidelines on the criteria to be applied when such consent is given.

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\(^80\) This Code has been in operation since 2000. A new formal code with binding enforcement mechanisms is expected to replace the code. See discussion in section 4. The current code was adopted in 2000 by the Chief Justice, the President of the Constitutional Court, and the Presidents of the High Courts, Labour Courts and Land Claims Court, March 2000

\(^81\) See certain events relating to the President of the Cape High Court
4. Codes of Judicial Conduct

4.1 International Standards

Countries are encouraged to set high and clear standards of ethics which should be contained in an effective code of judicial ethics\(^\text{82}\). Codes of Ethics should be well publicized, even outside of judicial circles, and the public should be able to lodge complaints against breach of the code\(^\text{83}\). Mechanisms for enforcement and interpretation of the Code should be established, and ideally a code should be drafted by the judiciary or judges association, with input from civil society\(^\text{84}\).

4.2 Developments in South Africa

4.2.1 The current position

Judges are informally regulated by a 34-clause code (“Guidelines for Judges of South Africa”) drafted and issued by senior judges and the Chief Justice in 2000\(^\text{85}\). These serve as guidelines without any legally binding sanctions for breach. These guidelines uphold the independence and integrity of judges and the courts; dealing with a wide range of issues ranging from the avoidance of conflict of interests and bias, diligent performance of duties, delivering judgments without undue delay to extra judicial work.

Over the past few years, some commentators have suggested that the current, informal code be replaced by a new code of conduct with legally binding enforcement mechanisms. Proponents point to lack of legal clarity in interpretation and enforcement of the existing code, and to certain controversies arising in the recent past\(^\text{86}\). The new Judicial Services Commission Amendment Bill introduces a more formal code, along with a complaints mechanism and sanctions for breach.

4.2.2 The position in terms of the draft new law

Clause 12 of the Judicial Services Amendment Bill provides that the Chief Justice, acting in consultation with the Minister, must compile a “Judicial Code of Conduct”. The first code must be tabled in the National Assembly by the Minister within six months of the commencement of the legislation and thereafter be published in the

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\(^\text{82}\) See IFES “A Model State of the Judiciary Report”

\(^\text{83}\) USAID Guidance Principles 30-1 See also Democratic Governance and Rights Unit, UCT The Judicial Institute in Southern Africa

\(^\text{84}\) ibid UCT The Judicial Institution in Southern Africa

\(^\text{85}\) Adopted in 2000 by the Chief Justice, the President of the Constitutional Court, and the Presidents of the High Courts, Labour Courts and Land Claims Court, March 2000

\(^\text{86}\) Reference can be made to the “Old/Mutual judges lunch incident” in 2006, as well as certain allegations against the President of the Cape High Court. See also Shameela Seedat “Judicial Ethics” available at www.idasact.org.za
gazette. Therefore the actual content of the Code will only be publicly known and operative at a later stage (at the latest, within six months of the of the legislation coming into effect). Once every three years the Chief Justice, acting in consultation with the Minister, must review the Code and any amendment must be submitted to Parliament and published in the gazette. A breach of the Code by any judge is a valid ground for discipline and the complaints mechanism can be invoked. Sanctions for breach may be imposed within the terms of the Act.

5. Conclusion

The need to ensure that judges are “accountable”; that appropriate levels of performance are reached, ethical conduct upheld and that all of this is demonstrated to the public is an important one. At the same time, such measures should respect the principle of judicial independence- crucial to the functioning of an impartial and effective judiciary. South Africa is for the first time contemplating laws on judicial ethics, financial disclosure and judicial discipline. Judicial accountability mechanisms are contemplated by the Constitution itself and the benefits are clearly evident. As parliament goes about drafting the relevant legislation and hearing public views, it should ensure that judicial accountability measures enhance the capacity of the institution as a whole to perform its function with integrity and true independence.

SHAMEELA SEEDAT
Political Information and Monitoring Service
IDASA
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Thanks to Ram Subramanian and Masibulele Mfunza for assistance with comparative material. For further information, please contact Shameela Seedat at shameelas@idasct.org.za.