民建聯 DAB

《司法獨立與公正的原則》

李國英議員

就立法會司法及法律服務事務委員會

於 2006 年 6 月 26 日舉行的會議討論「法官的政治背景」

呈交的意見書

加拿大司法委員會[1]發出的《法官道德原則》[2]第 1 章第 3 段指出：『司法獨立是每一位加拿大人的權利。法官必須做到並被看到，在不受外在壓力或影響及無懼於任何人的干預的情況下，自主地在法律及證據的基礎上作出誠實及公正的裁決。』[3]

2. 澳洲首席法官梅理基遜[4]在倫敦舉行的 2005 年英聯邦法律會議中，精闢地指出：『司法獨立不是法官的權利，是屬於公民的權利。』[5]

3. 這個權利不單只須要做到，更加須要被看到權利的施行。正如終審法院首席法官李國能在二〇〇五年法律年度開啓典禮的演辭中強調：『司法機構必須獨立，而且還要令人看到司法機構是獨立的，這對維護法治及有效地保障個人的權利及自由極爲重要，而保

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[1] Canadian Judicial Council

[2] Ethical Principles for Judges

[3] An independent judiciary is the right of every Canadian. A judge must be and be 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.

[4] Justice Murray Gleeson

[5] judicial independence is not an entitlement to judges, but a right belonging to the citizen.

障個人的權利及自由正是我們制度之精髓。』[6]

4. 除司法獨立外，司法公正同樣是法律賦予香港居民的權利。《香港人權法案》[7]第10條訂明(比照《公民權利和政治權利國際公約》[8]第14(1)條)：『人人在法院或法庭之前，悉屬平等。任何人受刑事控告或因其權利義務涉訟須予判定時，應有權受獨立無私[9]之法定管轄法庭公正公開審問……。』[10]

5. 因此，香港居民所享有的司法獨立與司法公正的權利是法律所保障及不容以任何方式剝奪的，亦不容受任何形式的外來壓力干預。

6. 由於近期在報章中披露，有一位原訟法庭的特委法官及一位區域法院暫委法官是政黨成員；報導亦指出現有《法官行爲指引》[11]提到『法官應避免加入任何政治組織，或與之有聯繫，或參加政治活動』[12]，但司法機構申明不適用於兼職法官。

7. 但是，根據《高等法院條例》第6A(3)條及《區域法院條例》第7(2)條規定，原

[6] A Judiciary which is and which is perceived to be independent is of course fundamental to the rule of law and to the effective protection of individual rights and freedoms which are at the heart of our separate system.

[7] Hong Kong Bill of Rights

[8] International Covenant on Civil and Political Rights

[9] 「無私」及「公正」是"Impartial"或"Impartiality"的交替中文翻譯。

[10] All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law

[11] Guide to Judicial Conduct

[12] Judges should refrain from membership in or association with political organization or activities

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訟法庭特委法官及區域法院暫委法官分別具有行使原訟法庭法官及區域法院法官的所有司法管轄權、權力及特權。

8. 由於兼職法官和全職法官在行使司法管轄權、權力及特權並無分別，我們看不到《法官行爲指引》並不適用於兼職法官的理據。就有關非全職法官的政治聯繫，馬力議員於 5 月 24 日在立法會作出提問；而政務司司長許仕仁所作的書面答覆的要點如下：

> 『司法機構認爲，基於確定法律原則，以及考慮到非全職法官的全職工作是執業律師，《法官行爲指引》內法官應避免加入任何政治組織或與之有聯繫的指引並不能引用於非全職法官。』[13]

9. 政務司司長的書面答覆不但沒有釋疑，反而帶來更多問題。就「基於確定法律原則」而言，由於有關法律原則同時適用於全職及兼職法官，爲甚麼《法官行爲指引》只適用於全職法官，而不適用於兼職法官呢？

10. 就「考慮到非全職法官的全職工作是執業律師」而言，我們提出的疑慮並不是兼職法官身兼多職或何職；而是兼職法官在出任法官時須遵從的原則爲何！

11. 由於上述原因，本人認爲司法及法律服務事務委員會有責任就有關問題作出討

[13] According to the Judiciary, based on the … well established legal principles, and having regard to the fact that the full time occupation of part time judges is practising in the legal profession, the guidance in the Guide to Judicial Conduct that judges should refrain from membership in or association with political organisations does not apply to part time judges.

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論；因此，本人去信委員會要求作出討論。

12. 本人很高興獲悉公民黨就有關討論向委員會呈交題爲《司法獨立與結社自由：準則與平衡》的意見書(“《意見書》”)。但是，《意見書》似乎較爲強調結社自由，未有與司法獨立作出平衡。

13. 爲作出適當的平衡，本人希望就 3 個問題作出討論：(1)法官加入政黨會否影響司法獨立及司法公正；(2)司法獨立及司法公正如何與結社自由作出平衡；及(3)政黨黨員是否適合出任兼職法官？

14. 就第(1)個及第(2)個問題而言，本人欲借用《意見書》提及的國際原則。首先，《意見書》在引述《斑加羅爾司法行爲原則》[14]時，只引述第 4.6 條，而沒有引述第 1 章及第 2 章分別就司法獨立及司法公正作出的規定。縱使如此，第 4.6 條本身亦述明行使結社自由等權利時須維護司法獨立及司法公正。

15. 再者，在《北京宣言》[15]中，除《意見書》引述的第 8 段有關結社等自由外，第 1 至 9 段詳述了司法獨立的規定。其中，第 7 段訂明：

『法官須避免不合適及視聽不合適的所有活動以維護司法的完整及獨立。』[16]

[14] The Bangalore Principles of Judicial Conduct

[15] Beijing Statement

[16] Judges shall uphold the integrity and independence of the Judiciary by avoiding impropriety and the appearance of impropriety in all their activities.

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16. 又比如，在聯合國宣布的《關於司法獨立的基本原則》[17]中，除《意見書》引述的第 8 段有關結社等自由外，第 1 至 7 段就司法獨立作出規定。其中第 2 段訂明：

『司法機構須公正地就他們席前的事項作出裁斷；有關裁斷須基於事實及法律，沒有受到任何來自何方或理由的，直接或間接的，限制、不正確影響、引誘、壓力、威脅或干預的情況下作出。』[18]

17. 《意見書》在談及世界各地的司法區在奉行有關原則作出平衡時，只提述美國法官指引及英國政制事務部的某些訂明。因此，本人想在此引述其他司法區的規定。

18. 加拿大司法委員會發出的《法官道德原則》第 6 章第 D1 段訂明：

『法官須斷絕某些行爲，諸如作爲某團體或組織成員，或參與公開討論，而該公開討論在合理、中肯及熟悉情況的人而言，在顧及該問題會在法庭處理的情況下，會損害對法官公正的信心。』[19]

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[17] Basic Principles on the Independence of the Judiciary

[18] The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

[19] Judicial should refrain from conduct such as membership in groups or organization in public discussion which, in the mind of a reasonable, fair minded and informed person, would undermine confidence in a judge's impartiality with respect to issues that could come before the courts.

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19. 《法官道德原則》第 6 章第 D2 段訂明：

『所有政治活動須於獲委任時終止。法官須斷絕某些行爲，而該行爲在合理、中肯及熟悉情況的人而言，該法官被視爲參與政治活動。』[20]

20. 《法官道德原則》第 6 章第 D3 段訂明：

『法官須斷絕：

(a) 政黨成員身分及政治捐獻；

(b) 出席政治集會及政治捐獻活動；

(c) 對政黨或政治運動捐獻；

(d) 公開參與具爭議性的政治討論，除非針對法庭運作有直接影響、司法獨立及施行公義的基礎觀點等事項；

(e) 簽署請願書以影響政治決定。』[21]

21. 澳洲大法官委員會[22]發出的《法官行爲指引》[23]第 3.2 段訂明：

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[20] All partisan political activity must cease upon appointment. Judges should refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that the judge is engaged in political activity.

[21] Judges should refrain from:

(a) membership in political parties and political fund raising;

(b) attendance at political gathering and political fund raising events;

(c) contributing to political parties or campaigns;

(d) taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the courts, the independence of the judicial or fundamental aspects of the administration of justice.

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『有關廣爲接受的法官須考慮的司法行爲以外的活動的限制及原則如下：

- 雖然於委任爲法官以前的活動參與及作爲政黨成員本身並不構成司法偏私或被視爲偏私，法官應預期於獲委任時斷絕所有政黨聯繫。被視爲繼續聯繫的情況諸如出席政治集會、政治募款項目及向政黨捐獻應予避免。
- 法官的主要事務和職責是履行司法責任。法官須避免司法以外的活動，而該活動看來會引起由被視爲偏私或利益衝突致使法官須避席的情況。』[24]

22. 英國法官委員會[25]發出的《法官行爲指引》[26]第 3.3 段訂明：

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[22] The Council of Chief Justices of Australia

[23] Guide to Judicial Conduct

[24] There are some well-established limitations and principles for a judge to consider in relation to extra-judicial activities:

- Although active participation in or membership of a political party before appointment would not of itself justify allegations of judicial bias or an appearance of bias, it is expected that a judge on appointment will sever all ties with political parties. An appearance of continuing ties such as might occur by attendance at political gatherings, political fundraising events or through contribution to a political party, should be avoided.
- The judge's primary task and responsibility is to discharge the duties of office. A judge should avoid extra-judicial activities that are likely to cause a judge to have to refrain from sitting on a case because of an appearance of bias or because of a conflict of interest that would arise from the activity.

[25] Judges' Council

[26] Guide to Judicial Conduct

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『該原則(司法公正)的特定應用是法官須放棄任何形式的政治活動及於獲委任時斷絕一切政黨聯繫。繼續聯繫的現象諸如出席政治集會、政治募款項目及向政黨捐獻應予避免。……』[27]

23. 本人須指出加拿大司法委員會發出的《法官道德原則》、澳洲大法官委員會發出的《法官行爲指引》和英國法官委員會發出的《法官行爲指引》所指的政治活動似乎包括作爲政黨成員。

24. 就此，我們對《意見書》有所保留，特別是其中第 6 段提及由吳靄儀議員發表的「司法獨立與結社自由」有關法官應避免參加政治組織的提述，她指稱：

『香港特區司法機關 2004 年發表的《法官行爲指引》，表明「法官應避免參加政治組織」。這是相當罕見的條文，我們認爲沒有必要，而是應當信賴任職法官的人士自行判斷。』

25. 從上述加拿大、澳洲及英國等普通法司法區的有關指引所見，本人相信「法官應避免參加政治組織」並不是相當罕見的條文；相反，有關規定是普通法司法區的普遍原則。

26. 況且，「避免參加政治組織」並不只限制法官；在公務員事務局亦有「參與政治

[27] A specific application of that (impartiality) principle is that a judge must forego any kind of political and on appointment sever all ties with political parties. An appearance of continuing ties such as might occur by attendance at political gatherings, political fundraising events or through contribution to a political party, should be avoided….

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及助選活動」的規定，該規定訂明：

> 『公務員和市民一樣，享有公民及政治權利，但另一方面，社會需要公務員隊伍保持政治中立。在現行政策下，當局力求在兩者之間取得合理的平衡。
>
> 爲符合這個原則，政府雖然不反對個別公務員參加與本身職務並無利益衝突的政治及助選活動，但對於某些高級人員或因爲本身工作性質而特別容易被視爲有偏私之嫌的人員，則會被禁止參與任何政治及助選活動。這些人員包括所有首長級人員、政務主任、新聞主任，以及警務處的紀律部隊人員。』

27. 本人相信市民普遍接受公務員事務局所制定的「合理的平衡」，就是「因爲本身工作性質而特別容易被視爲有偏私之嫌的人員」須限制參與政治。爲維護選舉的公正和公眾利益，特區政府的有關公務員須遵從「政治中立」的規定。在政治上，他們有投票權利，但是，爲了避免不必要的猜測，特區政府禁止他們參與任何政治及助選活動。

28. 同樣道理，爲維護司法獨立及司法公正，爲避免被視爲有偏私之嫌，法官須避免加入任何政治組織，或與之有聯繫，或參加政治活動。

29. 很明顯，就第(1)個問題而言，法官加入政黨會影響司法獨立及司法公正；就第(2)個問題而言，司法獨立及司法公正與結社自由作出平衡的準則，是在於公眾利益的基礎上，司法獨立及司法公正須得到絕對的維護。然而，就第(3)個問題，首先需要討論的是：應否針對兼職法官作出行爲指引？

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30. 英國法官委員會發出的《法官行爲指引》第 3.7 段訂明：

『本指引適用於收費法官與及全職和兼職法官。針對收費法官的特定問題於下述第 3.15 至 3.18 段作出考慮。』[28]

31. 美國法官指引的第 7 項準則亦有訂明指引的某些準則不適用於兼職法官。換言之，法官指引的某些準則適用於兼職法官。

32. 縱使不同司法區有其不同的情況，針對兼職法官作出行爲指引是具肯定的原則。在肯定針對兼職法官作出行爲指引後，我們須考慮有關針對兼職法官的行爲指引應否與全職法官一致；如不一致，有關適用準則爲何？

33. 即使針對兼職法官的行爲指引不應與全職法官一致，本人認爲兼職法官行使的司法權無異於全職法官；因此，司法獨立和公正的原則是沒有討價還價的餘地。

34. 終審法院首席法官於 2006 年 6 月 16 日發出《關於非全職法官及參與政治活動的指引》(“《政治活動指引》”)重申了司法獨立及公正的原則。同時，其中第 5(a)條規定：一位非全職法官若積極參與政黨的活動是不可以接受的。例如出任政黨內的職位、作爲黨內委員會的成員、作爲政黨的發言人、參與政黨的籌款或招募成員活動等。

[28] The guidance applies to fee-paid as well as full-time and part-time judges. Issues specific to fee-paid judges are considered in paragraphs 3.15 to 3.18 below.

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35. 正如《政治活動指引》第 7 段規定：『本指引並不擬涵蓋所有情況……』，第 5(a)條所指的「積極參與政黨的活動」並不限於上述例子。上文提述並引起廣泛討論的兼職法官似乎是政黨的創黨成員，作爲創黨成員本身，是否「積極參與政黨的活動」？

36. 政黨政策一般是全方位的，亦有政黨成員表示他們的目標是爭取成爲執政黨。因此，有政黨背景的法官會在各個範疇受到所屬政黨政策所規範。假如一宗案件由一位有政黨背景的法官進行審理，他/她會否被視爲有偏私之嫌？

37. 這位法官不單被視爲受有關法官行使司法權力等規定的約束，他/她亦會被視爲受該黨的黨章及政黨政策所約束。由於一般政黨黨章會設有革除黨籍的規定，如任何黨員因基於該黨利益、對該黨利益造成損害或違反紀律，他/她將被革除會籍。這樣，這位法官便出現既須效忠於司法獨立公正，又須效忠於該政黨政策，的雙重效忠問題。

38. 無論如何，基於該黨黨章的規定，即使可以做到公義的政黨法官，如何令公眾視爲做到公義？如何令公眾看到在高度政治化的社會中，政黨法官沒有受到法律及證據以外的外來干預？

39. 太陽報於 2006 年 6 月 7 日發表題爲「市民質疑易惹利益衝突　法官入政黨衝擊司法公正」的專題報導指出：

> 『……「太陽民意」調查發現，逾八成受訪市民擔心法官成爲政黨成員，會衝擊不偏不倚的原則，本港賴以爲基石的司法制度或受到挑戰。更有三成四受訪者認

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爲，如有關成員執意入黨，應放棄視爲兼職的法官工作。……』

40. 因政治問題而放棄兼職法官職位在香港亦有先例可援。如前立法局主席施偉賢[29]、前市政局議員貝納祺[30]及行政會議成員廖長城[31]在接受政治任命後，或辭去兼職法官職位，或根本不接受委任。[32]

41. 本人認爲香港市民在法官可否加入政黨的問題上已經非常清晰。爲維護香港居民的司法獨立及司法公正的權利及公眾利益，有政黨背景的人士不宜出任兼職法官。

2006 年 6 月

[29] John Swaine SC

[30] Brook Bernacchi

[31] Andrew Liao SC

[32] 黃英豪：本港法官應保持政治中立(於 2006 年 5 月 10 日在文匯報發表)

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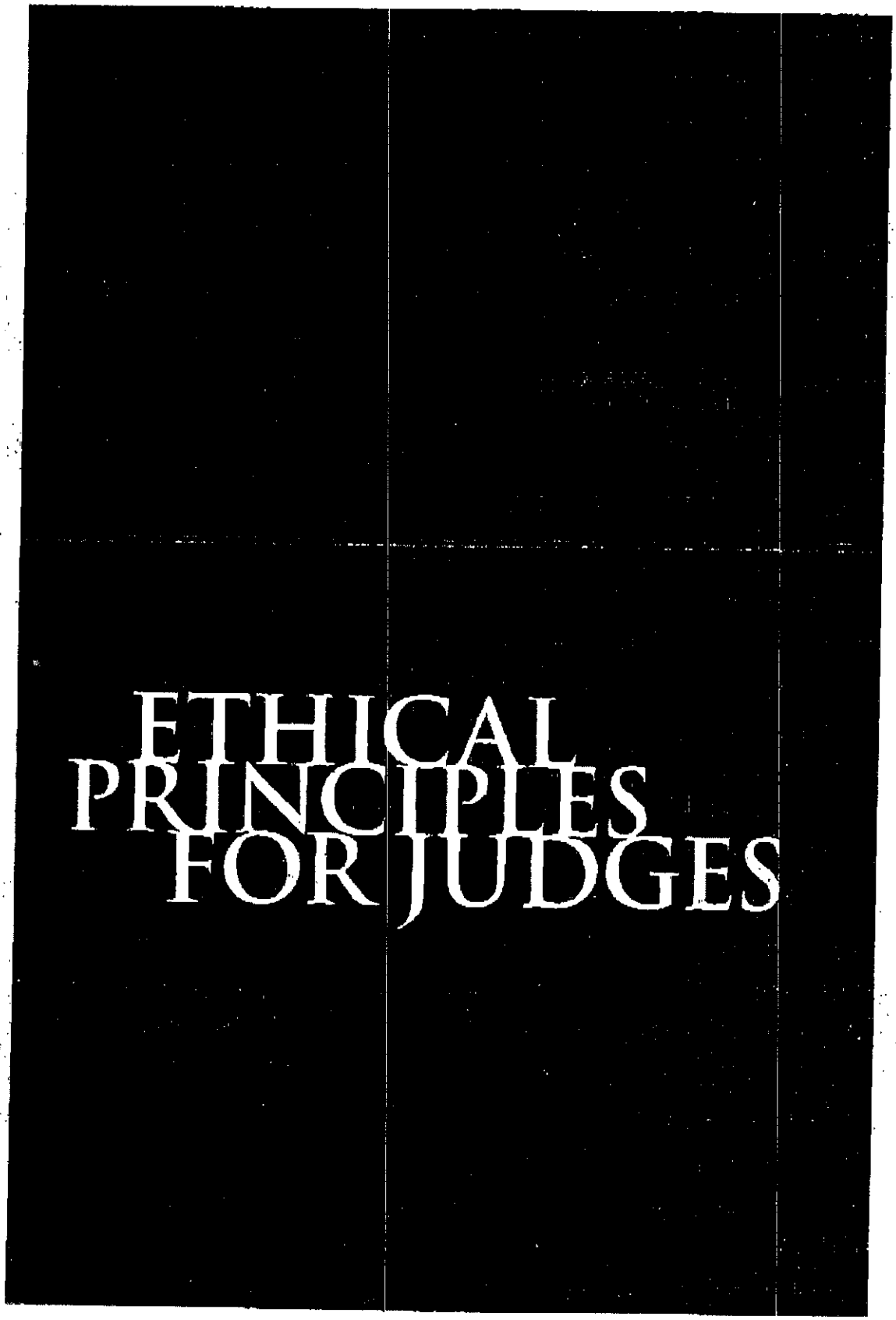
ETHICAL
PRINCIPLES
FOR JUDGES

1. PURPOSE

Statement | *The purpose of this document is to provide ethical guidance for federally appointed judges.*

Principles:

1. The Statements, Principles and Commentaries describe the very high standards toward 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 Statements, Principles and Commentaries does not preclude reasonable disagreements about their application or imply that departures from them warrant disapproval.

2. The Statements, 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 Canadian. A judge must be and be 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 Statements, Principles and Commentaries can, or is intended to limit 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 equal and impartial justice administered by fair and independent judges. As indicated in the chapter on Judicial Independence, judges have the duty to uphold and defend judicial independence, not as a privilege of judicial office but as the constitutionally guaranteed right of everyone to have their disputes heard and decided by impartial judges.

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Commentary:

1. These Statements, Principles and Commentaries are the latest in a series of Canadian efforts to provide guidance to judges on ethical and professional questions and to better inform the public about the high ideals which judges embrace and toward which they strive. They build upon the earlier work of the Hon. J.O. Wilson in *A Book for Judges* published in 1980, the Rt. Hon. Gerald Fauteux in *Le livre du magistrat* also published in 1980, the Canadian Judicial Council's *Commentaries on Judicial Conduct* published in 1991 and Professor Beverley Smith's text, *Professional Conduct for Lawyers and Judges* (1998). While drawing heavily on these invaluable resources, the present publication is by far the most comprehensive treatment of the subject to date in Canada. But it cannot provide exhaustive coverage of the myriad issues that arise in practice. The sources just mentioned, as well as those referred to in the next Commentary, will continue to be of assistance to Canadian judges.

2. As the references throughout the text indicate, a wide variety of sources have been consulted in the process of preparing this document. These include not only Canadian sources but also the Code of Judicial Conduct applying to the United States Federal judiciary, the American Bar Association's *Model Code of Judicial Conduct* (1990) as well as scholarly writing and rulings concerning judicial conduct in Canada, the United Kingdom, Australia and the United States. Of particular note are J.B. Thomas, *Judicial Ethics in Australia* (2d, 1997), J. Shaman et al, *Judicial Conduct and Ethics* (2d, 1995) and S. Shetreet, *Judges on Trial* (1976). While all of these sources are helpful, this document is uniquely the work of Canadian judges. The process which resulted in these Statements, Principles and Commentaries was carried forward by a Working Committee representative of both the Canadian Judicial Council and the Canadian Judges Conference. An extensive process of consultation within the judiciary and beyond ensured that these Statements, Principles and Commentaries have been the subject of painstaking examination and vigorous debate. The intention is that Canadian judges will accept these Statements, Principles and Commentaries as reflective of their high ethical aspirations and that they will find them worthy of respect and deserving of careful consideration when facing any of the issues addressed in them.

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3. A document of this nature can never be viewed as the "final word" on such an important and complex subject. Publication of these Statements, Principles and Commentaries coincides with the establishment of an Advisory Committee of Judges to which specific questions may be submitted by judges and which will respond with advisory opinions. This process will contribute to ongoing review and elaboration of the subjects dealt with in the Principles as well as introduce new issues that they do not address. More importantly, the Advisory Committee will ensure that help is readily available to judges looking for guidance.

6. IMPARTIALITY

Statement: *Judges must be and should appear to be impartial with respect to their decisions and decision making.*

Principles:

A. General

1. Judges should strive to ensure that their conduct, both in and out of court, maintains and enhances confidence in their impartiality and that of the judiciary.

2. Judges should as much as reasonably possible conduct their personal and business affairs so as to minimize the occasions on which it will be necessary to be disqualified from hearing cases.

3. The appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and informed person.

B. Judicial Demeanour

1. While acting decisively, maintaining firm control of the process and ensuring expedition, judges should treat everyone before the court with appropriate courtesy.

C. Civic and Charitable Activity

1. Judges are free to participate in civic, charitable and religious activities subject to the following considerations:

(a) Judges should avoid any activity or association that could reflect adversely on their impartiality or interfere with the performance of judicial duties.

(b) Judges should not solicit funds (except from judicial colleagues or for appropriate judicial purposes) or lend the prestige of judicial office to such solicitations.

(c) Judges should avoid involvement in causes or organizations that are likely to be engaged in litigation.

(d) Judges should not give legal or investment advice.

D. Political Activity

1. Judges should refrain from conduct such as membership in groups or organizations or participation in public discussion which, in the mind of a reasonable, fair minded and informed person, would undermine confidence in a judge's impartiality with respect to issues that could come before the courts.

2. All partisan political activity must cease upon appointment. Judges should refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that the judge is engaged in political activity.

3. Judges should refrain from:

(a) membership in political parties and political fund raising;

(b) attendance at political gatherings and political fund raising events;

(c) contributing to political parties or campaigns;

(d) taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice;

(e) signing petitions to influence a political decision.

4. Although members of a judge's family have every right to be politically active, judges should recognize that such activities of close family members may, even if erroneously, adversely affect the public perception of a judge's impartiality. In any case before the court in which there could reasonably be such a perception, the judge should not sit.

E. Conflicts of Interest

1. Judges should disqualify themselves in any case in which they believe they will be unable to judge impartially.

2. Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest (or that of a judge's immediate family or close friends or associates) and a judge's duty.

3. Disqualification is not appropriate if: (a) the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification, or (b) no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a miscarriage of justice.

The Australian Institute of
Judicial Administration Incorporated

GUIDE TO JUDICIAL CONDUCT

Published for
The Council of Chief Justices of Australia
by The Australian Institute of Judicial Administration
Incorporated

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CHAPTER THREE

3 IMPARTIALITY

A judge should try to ensure that his or her conduct, in and out of court, in public and in private, maintains and enhances public confidence in the judge's impartiality and in that of the judiciary.

This chapter deals with aspects of a judge's private life that can raise matters that have the capacity to affect adversely the public perception of a judge's impartiality. Chapter 4, which deals with conduct in court, also raises some matters relevant to impartiality.

For present purposes it is not necessary to do more than identify some broad areas of sensitivity in no particular order of importance. The list is not exhaustive, but may help to keep judges alert to any risk of a challenge to their impartiality. They are in the nature of warning signs, and the direction in which they point in some common factual situations will be examined more closely in Chapter 4.

3.1 Associations and matters requiring consideration

Professional or business associations requiring consideration include those, past and current, involving directly or indirectly:

- Litigants;
- Legal advisers of litigants; and
- Witnesses.

Other matters requiring consideration are:

- Close relationship to persons in the previous categories;
- Social contact with parties or witnesses; and
- Public statements or expressions of opinion on controversial social issues, or matters in issue in litigation made before or after appointment.

3.2 Activities requiring consideration

- Current commercial or business activities – likely in any event to be limited in scope;
- Personal or family financial activities, including shareholding in public or private companies or other investments; and
- Membership of or involvement with educational, charitable or other community organisations if they become parties to litigation.

There are some well-established limitations and principles for a judge to consider in relation to extra-judicial activities:

- Although active participation in or membership of a political party before appointment would not of itself justify allegations of judicial bias or an appearance of bias, it is expected that a judge on appointment will sever all ties with political parties. An appearance of continuing ties such as might occur by attendance at political gatherings, political fundraising events or through contribution to a political party, should be avoided.
- The judge's primary task and responsibility is to discharge the duties of office. A judge should avoid extra-judicial activities that are likely to cause a judge to have to refrain from sitting on a case because of an appearance of bias or because of a conflict of interest that would arise from the activity.

Judges should be aware that the majority of complaints to the Judicial Commission of New South Wales involve allegations of bias against a party, or failure to give a fair hearing. For the most part such complaints have not been sustained, but they indicate the need for care to avoid them.

The guiding principles are:

- Whether an appearance of bias or a possible conflict of interest is sufficient to disqualify a judge from hearing a case is to be judged by the perception of a reasonable well-informed observer. Disqualification on trivial grounds creates an unnecessary burden on colleagues, parties and their legal advisers;
- The parties should always be informed by the judge of facts which might reasonably give rise to a perception of bias or conflict of interest but the judge must himself or herself make the decision whether it is appropriate to sit.

Judges should be careful to avoid giving encouragement to attempts by a party to use procedures for disqualification illegitimately, such as in an attempt to influence the composition of the bench or to cause delay. (The observations of members of the High Court in *Ebner*, set out at the end of par 3.3.1 are relevant here.)

3.3 Conflict of interest

Some common situations are mentioned in this chapter, but whether or not such situations disclose a relevant conflict of interest is often debatable.

3.3.1 Shareholding in litigant companies, or companies associated with litigants

Relevant questions for the judge to consider are:

(a) Is the shareholding sufficiently large to enable the judicial or related shareholder to influence the decisions of the company?

(b) Is the value of the judicial or related shareholding likely to be affected by the outcome of the litigation?

But the ultimate issue is whether a fair-minded lay-observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case.

If the answer to either question is in the affirmative, it is clearly a case for self-disqualification, but if the answer to both questions is negative, the basis for disqualification is much less obvious. Nevertheless, it is important to make full disclosure to the parties before making a decision, although a failure to do so in some circumstances may not be critical

The judge should disclose the fact of the shareholding in open court thereby giving the parties an opportunity to make any submissions with respect to disqualification or otherwise.

It may be wise, but not obligatory, to limit the range of investment in public companies, to minimise the need for frequent disclosure. Shareholding in a public investment company or in managed funds may be a sensible alternative.

For a more comprehensive examination of the relevant principles with respect to judicial shareholding in litigant public companies as a sufficient reason for disqualification see *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* [2000] HCA 63; (2000) 75 ALJR 277; 176 ALR 644.

The application of these principles, and the making of a decision whenever issues of possible bias are raised, call for a good deal of care and common sense. It is useful to bear in mind the remarks of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner* at [20]:

> This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.

3.3.2 Business, professional and other commercial relationships

Business, professional and other commercial relationships have the capacity to cause a judge to have a potential interest in the outcome of litigation, and so to raise the question of possible disqualification. If such a relationship means that a judge has a "not insubstantial, direct, pecuniary or proprietary interest in the outcome of litigation" (*Ebner* at [58]), disqualification will ordinarily be necessary.

The circumstances requiring consideration are varied. A judge should consider any current commercial or business activities, although it is likely that they will be limited. A judge should also consider any such activities undertaken by close relatives. Although these are properly to be considered under the heading "Personal relationships" (below), a financial interest of a close relative might be regarded by an observer as equivalent to a financial interest on the part of the judge.

The relationships or associations that require consideration under this head include relationships such as insurer and insured, banker and customer, local government body and ratepayer, school and parent of child attending school. In some circumstances such a relationship could give rise to a disqualifying interest in the outcome of litigation. The judge should consider any such relationship that arises on the facts.

The judge should also consider whether any such relationship might give rise to a conflict of interest because of an appearance of predisposition in favour of or against the other party to the relationship. There is, for example, an obvious difference between the situation of the judge who is negotiating, say, the terms under which a bank will extend a significant overdraft, and that of a judge whose relations with a bank do not involve the bank doing anything more than honouring its obligations as a banker. Similarly, a judge who is a ratepayer and is also an objector to a rate assessment or an objector to a planning application, will be in a different situation to a judge who is merely a ratepayer. A judge whose claim under an insurance policy is questioned by the insurer is in a different situation to a judge who is merely a policy holder or whose claim under the policy is quite uncontentious.

3.3.3 Judicial involvement with litigant community organisations

Questions similar to those posed with respect to judicial shareholdings and commercial relationships may again be relevant, ie is the judge able to influence decisions of the organisation; is the litigation likely to have an effect on the organisation that is involved? But even if a negative answer is given to those questions, disqualification may be the most prudent course to adopt where a relationship exists. There may be no significant conflict of interest, but a real risk of the appearance of bias by reason of the judge's empathy with the organisation.

3.3.4 Personal relationships

There are many personal relationships to be considered. The most important relationships may be categorised for present purposes as:

First degree – parent, child, sibling, spouse or domestic partner;

Second degree – grandparent, grandchild, "in-laws" of the first degree, aunts, uncles, nephews, nieces;

Third degree – cousins and beyond;

And such relevant relationships may exist with:

(i) Parties;

(ii) Legal advisers or representatives of parties;

(iii) Witnesses.

In addition to such relationships, friendship or past professional or other association with such persons needs to be considered in some situations. There are no hard and fast rules, but the following guidance is offered.

(a) A judge should not sit on a case in which the judge is in a relationship of the first, second or third degree to a party or the spouse or domestic partner of a party.

(b) Where the judge is in a relationship of the first or second degree to counsel or the solicitor having the actual conduct of the case, or the spouse or domestic partner of such counsel or solicitor, most judges would and should disqualify themselves. Ordinarily there is no need to do so if the matter is uncontested or is a relatively minor or procedural matter. Nor is there a need to do so merely because the person in question is a partner in, or employee of, a firm of solicitors or public authority acting for a party. In such cases, it is a matter of considering all the circumstances, including the nature and extent of the involvement in the matter of the person in question. Some judges may be aware of cases involving such a relationship when the judge has sat without objection, but current community expectations make such conduct undesirable.

In most of these situations, Bar Rules in each jurisdiction require a barrister to return a brief to appear in a contested hearing, so the occasion for a judge to disqualify himself or herself should arise infrequently.

There may be a justifiable exception by reference to the principle of necessity (see par 2.1), or where the solicitor-relative is a partner or employee of the solicitor on the record, but has not been involved in the preparation or presentation of the case. There may also be a justifiable exception where, notwithstanding the relationship, the parties to the case consent to the judge sitting but that may depend upon the nature of the relationship, which should be disclosed to the parties before the judge decides whether to sit or not to sit.

(c) Personal friendship with a party is a compelling reason for disqualification, but friendships should be distinguished from acquaintanceship which may or may not be a sufficient reason for self-disqualification, depending upon the nature and extent of such acquaintanceship. The judge should consider whether to inform the parties of an acquaintanceship before the hearing begins.

(d) A current or recent business association with a party will usually mean that a judge should not sit on a case. For this purpose a business association usually does not include associations such as insurer and insured, banker and customer, rate payer and local government body, but might do so, depending on the circumstances.

(e) Past professional association with a party as a client is not of itself a reason for disqualification unless the judge has been involved in the subject matter of the litigation prior to appointment or unless the past association gives rise to some other good reason for disqualification.

If the judge has been involved in the subject matter of litigation, the judge should not sit, but otherwise the decision to sit or not to sit may depend upon the extent of previous representation and when it occurred. It may be desirable to disclose the circumstances of such representation to the parties before deciding what to do. The nature and content of anything learned, or any views formed, bearing upon the credibility of the party may need to be considered.

(f) Friendship or past professional association with counsel or solicitor is not generally to be regarded as a sufficient reason for disqualification.

(g) Where a person who is in a first degree relationship to the judge is known to be a witness, the judge generally should decline to take the case, unless the witness is to give only undisputed narrative testimony. In such a case, and if no objection is taken by the parties, the judge may decide to sit, but may well choose not to do so.

(h) Where the relationship of a witness to the judge is of the second or remoter degree, disqualification by the judge is less compelling, but again the decision to sit or not to sit may depend upon the nature of the testimony and the issue, if any, of credibility.

(i) The mere fact that a witness is personally well known to the judge, may not of itself be a sufficient reason for disqualification of the judge. If however the credibility of the witness, as distinct from opinion, is known or likely to be in dispute, the judge should not sit.

(j) A recent business association between a judge and a witness will not necessarily be a basis for disqualification of the judge, particularly if the association involved only an isolated transaction, but all of the circumstances should be carefully considered.

In the latter two cases, the fact of the relationship or friendship, and ordinarily its nature, should be disclosed to the parties.

3.4 Other grounds for possible disqualification

If a judge is known to hold strong views on topics that are relevant to issues in the case by reason of public statements or other expression of opinion on such topics, possible disqualification of the judge may have to be addressed, whether or not the matter is raised by the parties. In such a case, the judge will have to assess, and respond to, the risk of an appearance of bias. The risk is especially significant where a judge has taken part publicly in a controversial or political discussion. (Discussions of that nature concerning the administration of justice are dealt with as a separate matter in par 5.6.)

What a judge may have said in other cases by way of expression of legal opinion whether as *obiter dicta* or in dissent can seldom, if ever, be a ground for disqualification.

Where a close member of a judge's family is politically active, the judge needs to bear in mind the possibility that, in some proceedings, that political activity might raise concerns about the judge's own impartiality and detachment from the political process.

3.5 Disqualification procedure

(a) If a judge considers that disqualification is required, the judge should so decide. Prior consultation with judicial colleagues is permissible and may be helpful in reaching such a decision. The decision should be made at the earliest opportunity.

(b) In cases of uncertainty where the judge is aware of circumstances that may warrant disqualification, the judge should raise the matter at the earliest opportunity with:

(i) The head of the jurisdiction;

ii) The person in charge of listing;

(iii) The parties or their legal advisers;

not necessarily personally, but using the court's usual methods of communication.

(c) Disqualification is for the judge to decide in the light of any objection, but trivial objections are to be discouraged.

(d) It will generally be appropriate in cases of uncertainty for the judge to hear submissions on behalf of the parties and that should be done in open court.

(e) The judge should be mindful of circumstances that might not be known to the parties but might require the judge not to sit, and of the possibility of the parties raising relevant matters of which the judge may not be aware. It is not appropriate for a judge to be questioned by parties or their advisers.

(f) If the judge decides to sit, the reasons for that decision should be recorded in open court. So should the disclosure of all relevant circumstances.

(g) Consent of the parties is relevant but not compelling in reaching a decision to sit. The judge should avoid putting the parties in a situation in which it might appear that their consent is sought to cure a ground of disqualification. Even where the parties would consent to the judge sitting, if the judge, on balance, considers that disqualification is the proper course, the judge should so act.

(h) Even if the judge considers no reasonable ground of disqualification exists, it is prudent to disclose any matter that might possibly be the subject of complaint, not to obtain consent to the judge sitting, but to ascertain whether, contrary to the judge's own view, there is any objection.

(i) The judge has a duty to try cases in the judge's list, and should recognise that disqualification places a burden on the judge's colleagues or may occasion delay to the parties if another judge is not available.

There may be cases in which other judges are also disqualified or are not available, and necessity may tilt the balance in favour of sitting even though there may be arguable grounds in favour of disqualification.

3.6 Summary

If these guidelines do not lead the judge to a conclusion, there is a large volume of case law and academic writing that may assist the judge, but in the end the decision to sit or not to sit must rest comfortably with the judicial conscience.

relevant
a publication of the kuala lumpur bar
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KL/Selangor Bench & Bar Get-Together

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Oratory Contest

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Seminar on Native Peoples' Land Rights - Claims, Issues & Procedures

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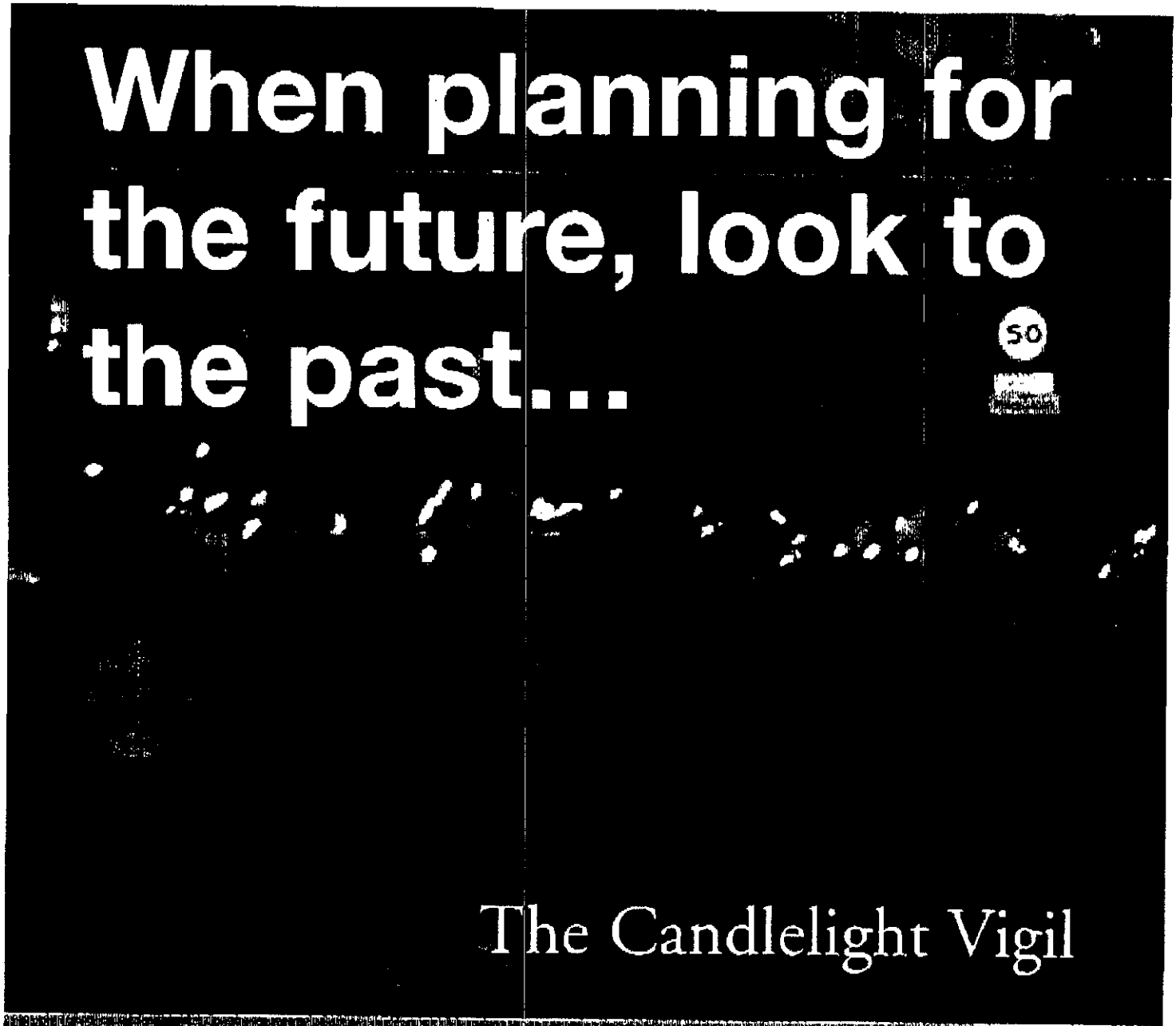
When planning for the future, look to the past...



The Candlelight Vigil

The 3rd speaker was our own Justice Gopal Sri Ram. He focused his presentation on access to justice in Malaysia. He began by saying that although we have a written constitution which guarantees basic fundamental rights, there is no express provision for access to justice. He explained that this lacuna is however not in the least surprising. It is the duty of the courts, when interpreting a written constitution, especially provisions on human rights, to give life to the black letter and treat expressions used as concepts, and not as mere words. He says "The task of the judicial interpreter is therefore to discover the several meanings locked away in each concept. A literal or positivistic approach is hardly the right key to achieve the correct result. What is required is a prismatic approach. Just as a ray of light when passed through a prism breaks down into its several primary constituent colours, so too a concept in a fundamental rights clause when subjected to a prismatic interpretation will yield all its several constituent meanings." He spoke at length about this approach in interpreting a written constitution, but only as an introduction to his later heavy criticism of several Federal Court cases in Malaysia which have derogated from this approach. These cases, which he felt upheld the right to access to justice in the Court of Appeal, were reversed on appeal to the Federal Court and were, in his view, wrongly decided. These are ***Sugumar Balakrishnan, Loh Wai Kong*** and ***Danaharta***.

In the state of current authority, 2 propositions emerge. First, it is clear that access to justice is not housed within the phrase "life or personal liberty" entrenched in article 5(1) of our Constitution. Second, even if access to justice is guaranteed at common law, Parliament may qualify or exclude it altogether by ordinary legislation.

Justice Sri Ram concluded by adding that the judges of the Court of Appeal are not and cannot be bound by obviously incorrect decisions, especially in matters involving constitutionally guaranteed rights of a citizen. The Court of Appeal cannot be expected to accept what was said by the Federal Court in these cases "as part of the crooked trail emblazoned by the legendary calf." In the realm of constitutional interpretation, he ended by asserting that "judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation." At the end of his presentation, Lord Justice Brooke of the English Court of Appeal took the opportunity to comment lightheartedly that he too faces similar woes with regard to several House of Lords decisions.

Day 3 – 14 September 2005

Workshop: Judicial Independence

The only speaker for this session was Justice Murray Gleeson, the Chief Justice of Australia. I thoroughly enjoyed his presentation, as the focus was not on judicial independence as a concept, but on the citizen's right to an independent judiciary.

From the outset he emphasised that judicial independence is not an entitlement to judges, but a right belonging to the citizen. I was very impressed by this and the fact that this view was genuinely expounded by a chief justice, as this shift in focus takes judicial independence from the realm of jurisprudential theory and puts it into a very real context. In fact, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights all declare that in the determination of civil rights and obligations and criminal responsibility, every person is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Judicial independence is a necessary component of the rule of law and affects the acceptability of judgments of courts.

He also mentioned that while the constitution provides a means for securing independence, it must be supported by other instruments. This is because citizens cannot be expected to have blind faith in judges, and judges cannot strive or struggle to achieve independence individually. It is a right of the citizen to have justiciable controversies decided by an impartial and independent tribunal sufficiently supported by a system which reveres independence. He also discussed the other side of the spectrum, in that judicial independence is often viewed by the executive as a threat or restriction on the government to govern. Political governments have curtailed judicial independence by establishing administrative tribunals.

A vital component of judicial independence is judicial appointment, accountability and removal. The reality or appearance of such independence should not be compromised in appointing judges. There must be some form of discipline, and that is served by provisions for the removal of judges. It is not there as a threat to loom over the heads of judges in the process of adjudication, rather it is there to aid in achieving independence. Accountability on the other hand provides for and encourages good decision-making. Therefore, an independent judicial appointment process is key in keeping politicians and the executive out of the judicial arm of government. He concluded by reiterating that judicial independence is a fundamental human right of a consumer of justice, and not a privilege of the judiciary. It is an indispensable part of a society living under the rule of law.

Workshop – Corruption within the Courts and the Limassol Conclusions on Judicial Corruption

I particularly enjoyed this workshop as I felt that it was very relevant in our local context.

The 1st speaker, Madam Justice Desiree Bernard, sits in one of the 7 judicial offices in the Caribbean Court of Justice. She spoke about the abuse of public office for private gain and how it is usually caused by inadequate funding. Corruption within the courts, whether it is a judge or an overworked court staff that has been bribed,

新聞公報

終審法院首席法官演辭全文（譯文）

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下稿代司法機構發：

以下是終審法院首席法官李國能今日（二月十七日）在二〇〇五年法律年度開啓典禮的演辭全文(譯文)：

律政司司長、大律師公會主席、律師會會長、各位嘉賓：

本人謹代表司法機構全體仝人，歡迎各位蒞臨二〇〇五年法律年度開啓典禮。這項典禮以法治和司法爲主題，是法律界和司法界的盛事。在座各位今天在百忙中撥冗出席，本人實在衷心感謝你們的支持。

法治

法治是香港社會的基石。司法機構必須獨立，而且還要令人看到司法機構是獨立的，這對維護法治及有效地保障個人的權利及自由極爲重要，而保障個人的權利及自由正是我們制度之精髓。

法官的憲法職能是公平公正、不偏不倚地裁決市民相互之間或市民與政府之間的糾紛。法律面前人人平等，不論是市民或是政府、是強是弱、是富是貧，在法庭上都是平等的。

近年，法院需要處理愈來愈多在政治、經濟及社會的層面上引發重大影響的案件。這個現象並非香港獨有，在很多其他司法管轄區亦屬常見。不少案件都關乎憲法所賦予的各種權利和自由，法庭必須保持警覺，確保個人權利和自由得到保障。

極其重要的是，社會人士要瞭解，法官並不在政治舞台上扮演任何角色，因爲在政治層面上，問題時常都是透過考慮多種因素和利害關係，以妥協的方式來解決的。法官的本份是依法裁斷，無懼無偏。法官不應偏離本份，考慮用政治手法和權宜辦法來解決問題。依法裁斷與力求便捷這兩種取向往往難以並存，這個說法頗有道理。

判決糾紛必須依循應有的程序進行，這是法治的基本原則。市民享有向法院申訴的憲法權利。法院亦必須確保與訟各方都有公平的機會申述案情。我們不單要秉行公正，還要使之有目共睹。若某方濫用法院程序，法院可憑藉法院規則和固有管轄權兩者所賦予的有效權力來防止濫用。但若某方的爭論點有理可據，

法院則有責任受理申訴，使當事人獲得公平對待。

法官行爲指引

我們必須令公眾人士對司法機構及司法工作抱有信心。爲了維持及增強公眾人士的信心，法官的行爲時刻都必須達到至高的標準，這點極其重要。一如本人在去年的演辭中向公眾所說，司法機構當時參考了多個海外普通法適用地區的經驗後，已經開始研究制定一套適用於香港的法官行爲指引。有關工作已於二〇〇四年十月完成。這是由高等法院首席法官出任主席的工作小組努力的成果。本人謹此向工作小組致意。

訂立法官行爲指引之目的，是向法官提供實用的指引。本人有信心這套指引能夠達到這個目的。爲了增加透明度，這套指引已向公眾發表。

司法機構的整體聲譽是珍貴的，必須予以維護。故此，每位法官都有責任在行爲上達到至高的標準。本人深信每位法官都明白這責任的重要性，而要切實履行這責任，法官必須提高警惕，謹言慎行。

緊縮預算

司法機構必需有足夠的資源才可進行司法工作，避免不當延誤。由於財政赤字的關係，當局已就司法機構的開支預算設定規限，以2002-3至2006-7年度而言，我們便需面對幾達14%的巨大減幅。撇開法官及司法人員的薪酬這個問題，據本人瞭解，司法機構在財政上所面對的減幅與整體公營機構所面對的減幅大致相若。

有見及此，司法機構已經採取了多項節約措施。暫委法官的數目將會減少，若干司法職位空缺亦暫時不會填補。此外，我們亦已擱置了基本工程項目，以及將兩所裁判法院與其餘的裁判法院合併。另一所裁判法院亦將進行合併，令裁判法院的數目最終會由原先的九個減爲六個。與此同時，司法機構政務處亦進行了大幅度的業務重組安排，當中包括刪減職位、精簡工作和程序等措施。

司法機構定會竭盡所能將緊縮預算所帶來的影響減至最低。舉例說，裁判法院和區域法院都已採取星期六開庭的措施。在可能的情況下，我們亦會不時調配內部資源，在工作壓力過大的法院暫時增加司法人手，以應所需。

在預算緊縮下，法官及其支援人員的工作量已經因此而增加，而且還會持續增加。不論是法官還是支援人員，他們都在巨大壓力下悉力以赴，本人謹此向他們致謝，他們的努力和熱誠實

堪嘉許。正如本人過往多次表明，我們必須保持司法質素，不能因緊縮預算而犧牲司法質素。這是基本原則，本人必須一再重申。

正因爲要顧及這基本原則，本人必須指出：司法機構在配合緊縮預算的同時，可以採取的恰當措施實屬有限。案件數量並非司法機構所能控制，我們必須應付不時增加的工作。即使案件數量保持穩定，長時期的緊縮預算難免會導致各級法院的案件輪候時間有所延長，案件需等候比現時較長的時間方可獲排期聆訊。本人有責任向公眾坦白言明，當案件輪候時間到了令人無法接受的時候，政府當局和立法機關便須考慮向司法機構增撥資源。

民事司法制度改革

民事司法制度改革工作小組已於二〇〇四年三月發布《最後報告書》。工作小組就民事司法制度進行了廣泛和深入的研究，小組成員在這方面所作的努力，實在值得表揚。《最後報告書》極有建設性，本人已接納當中的提議，而這些提議也是在先前諮詢期內提供意見的有關人士或團體（包括法律界）所大力支持的。

這份報告書爲民事司法制度改革定下了藍本，而改革的模式亦切合本港的情況，這是一個重要的里程碑。我們既須提高本地司法制度的成本效益、簡化訴訟程序及減少拖延，亦要緊守基本的原則，務求讓與訟各方都得到公正對待。

我們現正著手推行各項提議。由於大部份的改革提議均相互關聯，所以需以一整套方案來推行。本人已委派高等法院首席法官統籌這方面的事宜，並已成立督導委員會，由他出任主席。

我們絕不可低估推行改革提議所帶來的挑戰及工作。所涉的基本法例及附屬法例需要起草，還需通過立法程序才可施行。此外，我們亦需改良及提升資訊科技系統，以及爲法官和有關支援人員提供廣泛的培訓。本人預計需時兩至三年才可落實各項提議。雖然我們會盡速進行有關工作，但是也需切合實際。由於這些改革涉及重大改變，我們必須確保推行得宜。改革的成功端賴司法機構以外的很多方面（包括法律界、政府當局和立法機關）的共同努力。本人期望各界都能支持這項意義重大的工作。

調解

調解在多個普通法適用地區都已逐漸成爲訴訟以外的另一種解決糾紛的有效方法。《最後報告書》其中一個重要的提議是，在政府當局作出進一步研究及有關方面進行諮詢後，法律援助署便應有權在合適的情況下，提供在調解方面的法律援助。政府當局已與司法機構商討，並最近決定在婚姻爭端的範疇進行試驗計

劃，爲調解當事人提供法律援助。這計劃可能影響深遠，因爲現時在婚姻爭端方面提供法律援助的費用龐大，其所涉及的金額約佔民事法律援助費用的三份之一。

司法機構曾於二〇〇〇至二〇〇三年引入一項調解婚姻爭端的試驗計劃，並取得了值得參考的經驗。該項試驗計劃頗爲成功，在各方當事人同意的情況下進行調解從而達成和解的比率甚高。香港理工大學的研究小組對該計劃進行評估並作出結論，認爲家事糾紛的調解服務有存在的空間，並建議應鼓勵當事人盡量使用這項服務。

政府當局將予推行的試驗計劃?期一年。該計劃會以司法機構的試驗計劃爲藍本，我們有充分理由相信它也可同樣取得理想成效。在該計劃實行及有關方面作出評估後，當局便應考慮授予法律援助署署長酌情權，以便能爲所有合適的個案提供在調解方面的法律援助。本人相信，提供法律援助進行調解，將會有助節省公帑。更重要的是，進行調解並獲得成功將會對社會有利，因爲它可爲各方當事人帶來一個較令人滿意的解決方案，亦可減少整個過程所造成的壓力和困擾。

檢討勞資審裁處的運作

爲確保勞資審裁處能夠面對種種挑戰，本人委任了一個由朱芬齡法官出任主席的工作小組檢討審裁處的運作及提交改革建議。工作小組於二〇〇四年六月發布報告，本人亦已接納當中的建議。這些建議大部份都不需經過立法程序，而且大多已經實施。

勞資審裁處在一所商業大廈內已經運作多年。這情況極不理想。除了在運作上的種種不足之處，其所在的地點不但令法院的形象模糊不清，且有損法院的莊嚴。工作小組其中的一項重要建議是將勞資審裁處搬遷至前南九龍裁判法院大樓。這項建議落實後將可節省大量公帑，而改裝和裝修工程的費用也會由所節省的巨額租金抵銷。政府當局已決定撥發資源以作搬遷之用，本人對此表示歡迎。搬遷行動可望於二〇〇七年底完成。

律師的出庭發言權

多年以來，一直有人認爲應該擴大律師現時的出庭發言權，以增加公眾人士可延聘的訟辯律師人數。這是一個極爲重要的課題。我們應以公眾利益爲依歸。在這大前提下，最重要的一點是：在法庭進行的訟辯必須達到最高標準，因爲在抗辯式訴訟程序中，庭上訟辯必須達到最高標準，司法工作才可妥善進行。另外最重要的一點是：我們必須有一個高質素而獨立的大律師行列。

數年前，本人認爲當時便探討這個問題是言之尚早，但現時研究此課題正合時宜。本人已委派一個由包致金法官出任主席的工作小組，以「考慮目前律師的出庭發言權應否擴大，及如果認爲應該時，應如何訂定機制，將擴大的出庭發言權賦予律師」。工作小組的成員包括法官、大律師、律師、一位法律專員，以及一位非從事法律工作的人士。工作小組現已展開工作，並會在日後進行適當的諮詢。

結語

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最後，本人謹代表司法機構全體仝人，祝大家身體健康，新年快樂。

完

二〇〇五年二月十七日（星期四）

寄給朋友

關於
非全職法官及參與政治活動
的指引

終審法院首席法官在諮詢高等法院首席法官、首席區域法院法官和總裁判官後，就非全職法官[1]及參與政治活動的事項發出以下指引。

1. 維持司法獨立和司法公正，並使司法的獨立性和公正性有目共睹，是至爲重要的。對於確保公眾人士對司法機構及法官執行司法工作的信心，這是不可或缺的。

2. 適當的標準是：社會上一個明理、不存偏見、熟知情況的人會否認爲以有關形式參與有關的政治活動會影響司法獨立或司法公正（"適當的標準"）。在應用此標準時，必須以香港當時的普遍情況作爲參考的基礎。

3. 應予注意的是：

   (a) 不論是全職還是非全職法官，他們身爲市民都享有權利和自由，包括結社的自由。但是，我們必須理解到，要維持司法獨立和司法公正，並使司法的獨立性和公正性有目共睹，對這些自由施加某些限制是必需的。至於限制的程度則應以"相稱原則"爲依歸。

   (b) 法官應在甚麼情況下取消自己在某一案件的聆訊資格的普通法原則當然同樣適用於全職及非全職法官。這包括那些令人覺得法官表面上存有偏頗的情況。測試的準則是：在有關情況下，一個明理、不存偏見、熟知情況的旁觀者會否得出結論，認爲法官有偏頗的實在可能。

   (c) 司法覆核的案件不會編排予非全職法官處理。

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[1] 對"法官"的提述包括司法人員。

(d) 非全職法官只在有限的期間聆訊案件。他們的全職工作是執業律師。

4. 《法官行爲指引》關於法官應避免加入任何政治組織或與之有聯繫或參與政治活動的規定適用於全職法官。然而，如果一位非全職法官僅爲政黨的成員，在應用適當的標準時，並不會被視爲不妥。但非全職法官較積極地參與政治活動則會有不同的考慮。在應用適當的標準時，會視乎參與活動的性質及程度。如非全職法官不僅爲政黨成員，還積極參與政治活動，便很可能不獲接受。

5. 一位非全職法官若參與下述政治活動是不可接受的:

(a) 積極參與政黨的活動。例如出任政黨內的職位、作爲黨內委員會的成員、作爲政黨的發言人、參與政黨的籌款或招募成員活動等。

(b) 以候選人身份或提名候選人或協助候選人（不論屬何種情況，亦不論該候選人是否由政黨贊助）參加區議會、立法會或根據《行政長官選舉條例》組成的選舉委員會，以及行政長官職位的選舉。就這方面而言，應注意的是：

(i) 立法會及選舉委員會法律界功能界別的投票人包括可能曾在非全職法官席前出庭及可能會在非全職法官席前出庭的大律師和律師。

(ii) 非全職法官當然可以行使他們在上述選舉中所享有的權利來投票。

6. 身爲執業大律師及律師的非全職法官當然可以在所屬的專業團體擔任職位及積極參與所屬專業團體的活動。他們亦有權參與主要關乎法律問題（包括與法治及司法有關的法律問題）的公開辯論和活動，並就這些問題發表意見。

7. 本指引並不擬涵蓋所有情況。實際上亦難以將能夠接受及不能接受的政治活動詳盡無遺地逐一列述。在這方面很可能會有一些灰色地帶，需要考慮適當的標準，衡情酌理地作出判斷。非全職法官或考慮出任非全職司法職位的法律執業者，如擬就所參與政治活動的模式是否會被視爲與非全職司法職位相抵觸一事尋求指引，應與有關法院領導商討，而法院領導會在情況需要時諮詢終審法院首席法官。

8. 非全職法官出任司法職位是一項重要的公職，他們在這方面作出的貢獻對司法機構極爲重要。與此同時，我們亦理解到非全職法官或考慮出任司法職位的法律執業者，或會選擇透過積極參與政治活動來服務社會而不選擇從事非全職法官的工作。

終審法院首席法官
2006年6月16日

新聞公報

立法會十題：法官加入政治組織

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以下是政務司司長許仕仁今日（五月二十四日）在立法會會議上就馬力議員的提問所作的書面答覆：

問題：

據報，分別有一名高等法院原訟法庭特委法官和區域法院暫委法官加入了一個本地政黨爲創黨黨員。就此，政府可否告知本會，是否知悉：

（一）鑑於現行的《法官行爲指引》規定，法官應避免加入任何政治組織或與之有聯繫，該規定是否適用於非全職法官；若適用，司法機構如何處理違規法官；若不適用，原因爲何：

（二）現時全職和非全職法官的委任書中，分別有否就法官參加政治組織和參與政治活動作出任何規定；若有，詳情爲何：

（三）公眾及法庭使用者現時有何途徑得悉個別法官是否任何政治組織的成員或與之有聯繫；及

（四）司法機構會否規定任何人獲委任爲法官前須作出聲明，承諾在職期間不會成爲任何政治組織的成員或與之有聯繫？

答覆：

主席女士：

提問的事項屬於司法機構的事宜。我們根據司法機構所提供的資料，作出以下回覆。

（一）司法機構重申，司法獨立和司法公正無私當然至爲重要。案例法已有確定而適用於全職及非全職法官的法律原則，訂明法官應在甚麼情況下取消自己的聆訊資格。這包括那些令人覺得法官表面上存有偏頗的情況。測試的準則是：在有關的情況下，一個明理、不存偏見、熟知情況的旁觀者會否得出結論，認爲法官有偏頗的實在可能。

司法機構認爲，基於上述的確定法律原則，以及考慮到非全職法官的全職工作是執業律師，《法官行爲指引》內法官應避免加入任何政治組織或與之有聯繫的指引並不能引用於非全職法官。

（二）全職和非全職法官的委任書並沒有關於法官加入政治組織或參與政治活動的規定。

（三）司法機構並沒有就個別法官是否任何政治組織的成員或是否與之有聯繫方面的問題，收集個人資料。

（四）所有全職法官都應當遵守《法官行爲指引》，包括法官應避免加入任何政治組織，或與之有聯繫，或參與政治活動的規定。

完

２００６年５月２４日（星期三）
香港時間１２時３２分

列印此頁

香港特別行政區政府
公務員事務局

香港

政府資訊中心 | 繁體版文字 | 簡體字 | ENGLISH 搜尋 | 網頁指南 |

公務員隊伍的管理 >> 品行和紀律

列印

參與政治及助選活動

公務員和市民一樣，享有公民及政治權利，但另一方面，社會需要公務員隊伍保持政治中立。在現行政策下，當局力求在兩者之間取得合理的平衡。

為符合這個原則，政府雖然不反對個別公務員參加與本身職務並無利益衝突的政治及助選活動，但對於某些高級人員或因為本身工作性質而特別容易被視為有偏私之嫌的人員，則會被禁止參與任何政治及助選活動。這些人員包括所有首長級人員、政務主任、新聞主任，以及警務處的紀律部隊人員。

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修訂日期：二零零二年十月十五日

文章總數: 1 篇

論壇
A28

明報

吳靄儀
2006-05-22

特區・政治

司法獨立與結社自由

香港一份周刊，以渲染誇張的手法，報道公民黨創黨黨員名單，指稱其中有擔任暫委法官的資深法律界人士，是違反司法獨立和司法公正。隨後，《文匯報》接連刊登評論，鋪陳同一論調。這些報道與言論捕風捉影，似是而非，意在中傷公民黨及公民黨的支持者。然而，事件已波及司法制度，我們實在不能坐視。司法獨立和公正，是法治的基石，是我們的自由和權利最重要的保障。法官的質素、操守和在社會上的公信力，必須達到最高水平，不能容忍任何污蔑和破壞，這是公民黨所堅決維護的。

●結社自由是基本人權

與此同時，不可忘記的是，結社自由是基本人權；參加政黨是每個人的公民權利，更與思想、信仰及言論自由關係密切，不可分割。《公民權利和政治權利國際公約》第22條、《基本法》第27條及第39條、《香港人權法案條例》第18條，都以明文保障，不得任意褫奪。在發展民主普選的過程中，政黨政治需要得到健康培植，結社自由，變得更加重要。

《公約》第22條更規定，「除非依照法律規定，而且是民主社會爲維護國家安全或公共安寧、公共秩序、維持公共衛生或風化、或保障他人權利自由所必要之外，不得限制這些權利的行使」。香港社會，必須尊重所有人參加政黨的自由，不應因其行使這項權利而加以政治壓迫。

維護司法獨立，不在危言聳聽而須植根於清晰正確的理念；不在犧牲其他基本權利，而在於在兩者之間取得合理平衡。我們希望藉此機會，與公眾一起探討司法獨立、公正和結社自由所涉及的事實與原則。

●民主社會並不限制法官參加政黨

無論地區性的法官守則，或是國際的司法獨立宣言，都明文保障法官的基本人權，不限制法官參加政黨，而只是在政治活動上加以限制。聯合國1985年宣布的《關於司法獨立的基本原則》第8條表明：「按照世界人權宣言，司法人員與其他公民無異，享有言論、信仰、結社及集會自由；但行使該等自由之際，其行爲與態度必須維持其公職的莊重和公正，以及保障司法獨立。」民主社會，一般在法官守則之中，只是表明法官不應參加與司法身分不符的活動，例如不得出任政黨的職位、不得爲政黨籌款等。香港特區司法機關2004年發表的《法官行爲指引》，表明「法官應避免參加政治組織」。這是相當罕見的條文，我們認爲沒有必要，而是應當信賴任職法官的人士自行判斷。我們相信，事實上全職法官，在接受委任時必會考慮放棄這類聯繫。

●暫委法官不應受到同等限制

暫委法官並非全職法官，而是普通法制———特別是香港沿襲的英倫及威爾斯法制———之中的一種短期及試驗性質委任，讓具適當資歷和才能的法律界人士短期執行法官的職務。以香港特區而言，區域法院的「暫委法官」，是一次過的委任，每次爲期1個月；而高等法院的Recorder(也是稱「暫委法官」)則是3年的委任，其間每年執行法官職務1個月。這些委任的一個目標是讓接受委任的法律界人士，藉此經驗，在適當的時候考慮會否擔任全職法官；同時法庭亦可藉這些委任增添人手，協助審理案件。

除了在執行法官職務的期間，這些暫委法官的身分是執業大律師或律師，不是法官，因此個人行爲、活動、聯繫等，亦不受《法官行爲指引》的規範。司法機構已澄清，《法官行爲指引》不適用於這些人士。英倫Recorder聘用條件中，只要求暫委法官「行爲謹慎」，對參加政黨並不加以限制，例如有不少暫委法官是國會議員——包括貝理雅夫人、御用大律師彭雪玲(CherieBlair)。Recorder的聘書中只規限該等議員不得坐在他們選區的席上。顯見，暫委法官的傳統並不認爲不放棄黨籍甚至適當的政治活動，會違反司法獨立或破壞公眾對司法公正的信心。接受了委任爲全職之後，當然又當別論。

理由是很簡單的。如果對暫委法官也作對法官同樣嚴格的限制，司法機關就無法吸引到最具資格的法律界人士接受任命，英倫和香港特區情況都是一樣。

香港身爲大律師的暫委法官在執行法官職務期間，會採取措施適當限制自己的活動、行爲及所接觸的人，以維護法官職位的公正及獨立，傳統悠久，與其他普通法地區無異，已廣爲社會接受。將特區全職法官《指引》限制參加政治組織的要求引伸至暫委法官，既不合理、沒有必要，也是無先例可援，甚至違憲的。

●歪理止於明理、公道而知悉實情的人

因參加公民黨而遭到不公平攻擊的兩位法律界人士，不但在任暫委法官期間沒有任何偏離法官應遵守的守則，平日也是低調而莊重的專業人士。攻擊者儘管洋洋萬言，也數不出其行爲有任何令人有理由相信有偏私之處。

事實上，司法公正獨立，就是將任何個人的政治立場、信仰、愛惡，摒除於審判過程考慮之外，在審理案件之際只依據法律及事實裁斷維持獨立，並令公眾看得到是公正獨立。

《基本法》第92條規定，「香港特別行政區的法官和其他司法人員，應根據其本人的司法和專業才能選用」。窒礙參與政黨的有才能者獻身司法服務，豈是符合公眾利益？

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A22

文匯報

2006-05-10

■黃英豪 港區全國政協委員 香港法律論壇發起人

豪情集

本港法官應保持政治中立

根據香港司法界的傳統，法官必須保持政治中立，而法院的公義，是必須「看得見」的，故即使法官本人道德高尚，亦應「避嫌」。即使擔當的是特委法官和暫委法官，也不能不考慮到這一點。假如法官加入政黨，在明理的公眾的眼中，難免存在偏頗的可能，不符合「瓜田不納履，李下不整冠」的「避嫌」原則。

公民黨近日被傳媒曝光的黨員名單，其中赫然有高等法院特委法官梁冰濂及區域法院暫委法官區慶祥，令社會各界質疑是否存在利益衝突，並擔憂損害司法獨立。

雖然英美法官多有政黨背景，但香港司法界傳統則與英美有所不同。根據香港司法界的傳統，法官必須保持政治中立，而法院的公義，是必須「看得見」的，故即使法官本人道德高尚，斷案符合嚴謹的法理邏輯，亦應「避嫌」。即使擔當的是「臨時法官」，也不能不考慮到這一點。

法官不宜加入以政治爲目標的組織

本港法官一般沒有政黨背景，而司法機構就此亦有專門的指引。二〇〇四年十月二十五日司法機構發表的《法官行爲指引》，訂明法官不宜加入以政治爲目標的組織，雖然這點主要是針對全職法官而言，而非兼職法官和特委法官，不過，以往案例訂下一些法律原則，關於法官在何時應自動取消聆訊資格，而這些原則適用於兼職法官及全職法官。《法官行爲指引》就此用了不少篇幅，闡述法官在什麼情況下會因爲出現了涉及「偏頗」(bias)的情況而不能聆訊某一宗案件。如果是法官的利益實際上會受到一宗官司的結果的影響，他就不能審訊那宗官司。但即使沒有實際利益影響，只要在明理的公眾的眼中，法官有偏頗的可能，他也不能審訊該宗官司。

假如法官加入政黨，在明理的公眾的眼中，難免存在偏頗的可能，不符合「瓜田不納履，李下不整冠」的「避嫌」原則。公民黨本身有好幾個大狀，應該知道有關指引，並明白內中玄機。既然知道，又爲甚麼要隱瞞黨員姓名呢？莫非真要等到有案件上庭才申報？如果可以申報，又爲甚麼不及早申報呢？

法官並不在政治舞台上扮演任何角色

終審法院首席法官李國能去年二月十七日在二〇〇五年法律年度開啓典禮的演辭中指出：「極其重要的是，社會人士要了解，法官並不在政治舞台上扮演任何角色，因爲在政治層面上，問題時常都是透過考慮多種因素和利害關係，以妥協的方式來解決的。法官的本份是依法裁斷，無懼無偏。法官不應偏離本份，考慮用政治手法和權宜辦法來解決問題。依法裁斷與力求便捷這兩種取向往往難以並存，這個說法頗有道理。」法官加入公民黨，無可避免在政治上扮演了角色，在審訊有關官司就可能有偏頗的可能。因此，輿論指出法官加入公民黨損害司法獨立，是有一定道理的。

法官獨立是司法獨立的最高形態

有關國際文件雖然未對法官加入政黨予以禁止，但對其活動明確加以限制。如《司法獨立世界宣言》第二十八條規定：「法官不得爲政黨之積極黨員或在政黨中任職。」國際法曹協會《司法獨立最低標準》第

三十八條規定：「法官不得在政黨中任職。」實際上，法官獨立是司法獨立的最高形態。法官個人獨立與法院獨立是司法獨立不可分割的兩個方面，沒有法院獨立，單個法官無法獨立履行其職責；同樣，如果法官不能免於其獨立審判可能會帶來的種種利益衝突，就不可能有獨立的審理與判決，也就不可能有司法獨立。

西方國家遵奉「三權分立」的原則，憲法賦予法院「司法獨立」的特權，法院行使司法權時，不受任何干擾。確保法官具有獨立公斷人的身份，有的國家還規定法官終身制，而且法官任職後不能再以政黨的身份進行活動，在黨派之間要恪守中立。這些規定決定政黨是不能直接干預司法工作的。世界一些國家的司法獨立都十分強調法官的個人獨立，德國基本法第九十七條規定：「法官具有獨立性，只服從憲法和法律」；日本憲法第七十六條規定：「所有法官依良心獨立行使職權，只受本憲法和法律的拘束」。爲具體界定司法獨立，德國學者將法官的個人獨立分爲幾個方面，包括獨立於社會間的各種勢力、獨立於議會、獨立於政黨、獨立於新聞輿論、獨立於時尚與時好、獨立於自我偏好等。

如果法官不獨立就不可能忠於法律

香港司法界的慣例，亦十分注重法官是否政治中立，如前立法局主席施偉賢、前市政局議員貝納祺及行政會議成員廖長城在接受政治任命後，或辭去暫委法官職位，或根本不被委任爲暫委法官，在某程度上便反映了司法機構力求避免因法官的政治背景而引起公眾對公平審訊的質疑。

「制而用之存乎法，推而行之存乎人」。由此可見法官對於法的運行是起着很重要的作用的。法官如果不能夠獨立，他們就不可能忠於法律。美國的法學家亨利米斯認爲：「在法官做出判斷的瞬間被別的觀點或者被任何形式的外部權勢或壓力所控制和影響，法官就不復存在……法官必須擺脫不受任何的控制和影響，否則他們便不再是法官了。」

公民黨被「踢爆」黨員之中竟然有兩名法官後，引起社會驚訝和質疑。該黨的幾位大狀立即施展雄辯滔滔，爲「政治法官」尋找理據，指高院原訟庭特委法官梁冰濂和區域法院暫委法官區慶祥，兩人都不是全職法官，審案時會申報利益，不擔心影響司法公正云云。但是，正如有輿論指出，熊掌與魚，不可兼得，兩名法官若選擇做公民黨黨員，就宜拿下頭上的假髮，脫去法袍，放棄手中的法槌；若選擇做法官，就宜退出公民黨。香港司法界的傳統，不應輕易改變。

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專題
A31

太陽報

2006-06-07

市民質疑易惹利益衝突　法官入政黨衝擊司法公正

本港政黨根據《公司條例》披露資料的事件餘波未停，由一班法律及專業人士組成的公民黨承認有暫委法官及特委法官加入成爲黨員，引起其他政黨及部分市民質疑利益衝突、甚至影響司法公正。「太陽民意」調查發現，逾八成受訪市民擔心法官成爲政黨成員，會衝擊不偏不倚的原則，本港賴以爲基石的司法制度或受到挑戰。更有三成四受訪者認爲，如有關成員執意入黨，應放棄視爲兼職的法官工作。

分析結果

公民黨今年初成立後，刮起政壇旋風，該黨不諱言，有暫委及特委法官加入，並強調有關人士與全職法官不同。「太陽民意」透過電話抽樣訪問了三百零四名市民，結果發現，大部分受訪市民都反對法官出任政黨成員。

接受調查的市民中，有八成一受訪市民質疑，其中四成六表示，公民黨成員有法官，很擔心影響司法公正，因現時政黨經常提司法覆核，法官有政黨背景可能在審案時出現利益衝突；另有三成半受訪市民認爲，法官應該保持不偏不倚的立場，擔任政黨成員較易捲入政治紛爭；另有一成二受訪者表示，法官有專業操守，會依例審案，即使他們有政黨背景也無礙審案。

兼職與全職權力無異

公民黨解釋暫委及特委法官與全職法官不同，只需兼職工作，故毋須限制他們入黨，七成半受訪市民反對這種看法，其中四成一受訪者認爲，該兩類法官與全職法官享有的權力無異；另有三成四受訪者認爲既然公民黨解釋成員擔任暫委及特委法官是兼職，有關人士應考慮放棄兼職的法官工作，便可全無顧慮加入政黨。

對於有建議司法機構應研究法官加入政黨的問題，甚至研究修訂法官行爲指引，必要時限制暫委法官及特委法官加入政黨，七成六受訪市民支持，其中四成半受訪者強調，限制這兩類法官加入政黨，有助維持法官政治中立；另有三成一受訪市民亦支持修訂法官行爲指引，司法機構可因而避免遭到政治化挑戰；不過，有一成四受訪者認爲，修訂法官行爲指引，可能引來違反人權法的批評，不支持這個建議。

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