

Judicial Ethics: A Key Tenet to Legal Ethics

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Abstract: *Judicial ethics are arguably one of the most important aspects of legal ethics. Values of legal ethics such as decorum, dignity, courtesy, and rationality that were emphasized by the late but still foremost scholar of professional legal ethics, Deborah Rhode, readily apply to the judicial context. Related to these values, judicial ethics ensures that three important attributes or three 'Is' characterise the judicial process and the conduct of judicial officers: independence, impartiality and integrity. Adherence to these three principles of judicial ethics is key in securing the administration of justice, professional discipline in the judiciary, and public confidence. This article therefore takes the view that the competence of judges not only includes their academic qualifications but their possession of qualities necessary to fulfil the three Is and other standards of ethical judicial conduct. Moving from this understanding, the article analyses how judicial ethics, as a derivation of legal ethics, shapes the role of judges and, further, how Kenya's Judicial Service (Code of Conduct and Ethics) Regulations integrates established principles of judicial ethics. From this analysis, the author argues that judicial ethics are inseparable from judicial competence and that Kenya's Judicial Service (Code of Conduct and Ethics) Regulations effectively reflect the necessary principles of judicial ethics. Thus, continued enforcement of the judicial Code of Conduct and Ethics is essential to safeguarding judicial ethics in the Kenyan judiciary.*

Keywords: *Kenya Judicial Service, Code of Conduct and Ethics, Deborah Rhode, Judicial Impartiality, Judicial Integrity*

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I. Introduction

Legal ethics are the established principles of conduct and practice in the legal profession. They define the reputation that each member of the legal profession is expected to have. The heavy weight borne by the reputation of a profession was aptly captured in *Bolton vs. Law Society* thus:

A profession’s most valuable asset is its collective reputation and the confidence which that inspires . . . The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.¹

Reputation in the legal profession is about recognition that the concept of justice is grounded in the rule of law and respect of human dignity. Legal ethics shape and define what it means to be a legal professional, whether in private practice, litigation, or on the bench. It cannot be gainsaid that legal ethics play an integral, if not critical role in the legal profession. The fundamentals of our lives as lawyers and legal professionals, including judges, are anchored on legal ethics. Legal ethics therefore extend beyond legal regulation.²

The broad nature of legal ethics was brought to life during the Colloquium on Justice and Legal Ethics held at the Strathmore Law School. At the colloquium, various members of the legal profession in different areas of practice converged to share knowledge on legal ethics in celebration of the life of distinguished legal ethics scholar Deborah Rhode. The works of Deborah Rhode attest to the growth that legal ethics has seen through the years and its

¹ *Bolton vs. Law Society* (1993), England and Wales Court of Appeal.

² See generally Rhode D and Luban D, *Legal ethics*, 3rd edition, Foundation Press, 1992.

consequent evolution to cover broader aspects of legal practice, including the development of what is now referred to as judicial ethics.

One of the most important aspects that emerge from the works of Deborah Rhode is her emphasis on legal ethics as a continuing result and on reaffirming the need for collective efforts to ensure its entrenchment in both law schools and institutions. She asserts, and I strongly agree, that it is by so doing that we can sharpen moral perceptions and reinforce moral commitments.³ Indeed, for legal ethics to be alive in our systems, it is not enough that it is a subject merely taught during law school but that we engage in constant discussions on how to entrench it in our day to day lives. For this reason, I find that this article, which aims to look into the works of Deborah Rhode albeit with the lenses of a member of the Bench, is not only timely but a great way of celebrating legal ethics to which she dedicated her life to. Whereas Professor Rhode spoke largely to legal ethics from the view of a practitioner, lawyer and professor, I seek to focus on the judicial aspect of it: judicial ethics.

Judicial ethics is a concept birthed from the umbrella of legal ethics; it is one of the facets of legal ethics. Judicial ethics ensures propriety in the administration of justice. It aims to maintain professional discipline and safeguard public confidence in the judiciary. In so doing, it seeks to answer the question of the propriety of a judge. The role of a judge is to uphold the law. For the law to be regarded as upheld, the public must have a minimum of trust in a judge. Public trust and confidence are therefore central to the role of a judge and cannot be taken for granted. To build and maintain public trust and confidence, a judge must not only be competent to be appointed to the position of judge, but also be ethical. Judicial ethics is therefore paramount in the critical role of a judge.

The essential features of judicial ethics are Independence, Impartiality and Integrity, often referred to as the three Is. Judges and judicial officers are required to adhere to these three Is in the discharge of their judicial functions. These three Is are amongst the values stipulated under the *Bangalore Principles of Judicial Conduct*. All three values go hand in hand in the administration of justice and promotion of the rule of law. Judicial independence, for one, is a prerequisite to the rule of law and a fundamental guarantee of a fair trial; impartiality is essential to the proper discharge of the judicial office; and integrity is key to

³ Rhode D, 'Ethics by the pervasive method' 42(1) *Journal of Legal Education*, 1992, 31-56.

ensuring that the conduct of a judge or judicial officer is consistent with the objects of the Constitution and brings honour and dignity to the office they hold. Deborah Rhode often emphasized on decorum, dignity, courtesy and rationality as essential elements of legal ethics, and which can be stated to be what is encapsulated in the three Is.

By dint of their oath of office, it is required of judges and judicial officers that the decisions they make in conducting their duties accord with the law rather than with their own whims and political inclinations. This is the basis of judicial ethics which demands the highest standard of judicial conduct. It therefore appears that in discussing legal ethics, we must also interrogate the role of a judge in their capacity as judge. This is because the reputation of the judiciary as an institution and of the respective judges and judicial officers require accountability to the rule of law.

II. Role of judges in judicial ethics

In the discharge of their judicial functions, judges are first and foremost called upon to interpret and apply the law.⁴ It is in so doing that a judge is able to define the rights and responsibilities of citizenry and litigants. Since their roles and duties centre on the rule of law, the public expects of them the highest standards of competence and ethics.⁵ Upon taking the oath of office, a judge is expected to comply with and remain steadfast to the rule of law, maintain professional confidence, and, by extension, promote public confidence in the judiciary.⁶

The discharge of judicial functions rests on the public trust in both the judiciary as an institution and the individual judge who adjudicates upon the cases filed in their respective courts. Hence the notion that a judge must be both competent and ethical to maintain the public trust. Before one is appointed judge, it is required that they are not only competent but that they also ascribe to the highest ethical standards. Prior to appointment to the office of a judge, the Judicial Service Commission requests members of the public to present any complaints or comments that they may have in respect of the shortlisted applicants. This practice, which takes place prior to the interviews conducted

⁴ Shaman J, 'Judicial ethics' 2(1) *Georgetown Journal of Legal Ethics*, 1988, 1-20.

⁵ Shaman J, 'Judicial ethics' 2(1), 1-20.

⁶ Shaman J, 'Judicial ethics' 2(1), 1-20.

for the position of a judge, is one amongst many, sought to ensure that prospective judges are ethical. Upon taking the oath of office, judges and judicial officers are expected to remain competent and abide by the existent codes of conduct and ethics.

III. Competence and judicial ethics

What then makes a judge competent? Competence is often measured by attainment of a set of qualifications which includes expertise and experience.⁷ As Justice Oliver Wendell Holmes put it, *the life of law has not been logic, it has been experience*. Additionally, a judge must not only abide by but also be seen to abide by the three Is. The qualifications required for appointment as a judge are provided under Part 1 of Chapter 10 of the Constitution.⁸ A person seeking to be appointed judge of a superior court is required to:⁹

- i. Hold a law degree from a recognized university, or be advocates of the High Court of Kenya, or possess an equivalent qualification in a common law jurisdiction;
- ii. Possess the experience required under clause (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction;¹⁰ and
- iii. Have a high moral character, integrity and impartiality.

By dint of the requirements of the office of a judge, it is only right that judges be uniquely qualified and to possess special qualities. It therefore emerges that before one is appointed judge, they must not only meet the academic qualifications and prescribed years of experience, but also be individuals of high moral character, integrity and impartiality, meaning that they must ascribe to the highest moral conduct. In this respect, the aspect of honesty and propriety also come into play.

⁷ Shaman J, 'Judicial Ethics' 2(1), 1-20.

⁸ *Constitution of Kenya*, 2010.

⁹ Article 166, *Constitution of Kenya* (2010).

¹⁰ Article 166(3), *Constitution of Kenya* (2010) provides the experience required of persons seeking to be appointed Chief Justice and other judges of the Supreme Court; Article 166(4) provides the experience required of persons seeking to be appointed judges of the Court of Appeal; and Art. 166(5) provides the experience required of persons seeking to be appointed judges of the High Court.

While in their court rooms, judges are required to not only apply and interpret the law and abide by the three Is, but also treat litigants and counsels with courtesy and respect.¹¹ This is because discharging judicial functions encompasses more than just law, the litigants and counsels who appear before the court must also feel comfortable and expect that they will not be judged or treated except on the basis of the facts and evidence they table before the court. The test for establishing a judge's impartiality is the perception of a reasonable person, this being a 'well-informed, thoughtful observer who understands all the facts', and who has 'examined the record and the law'.

In the discharge of their judicial functions, judges must therefore always ensure to avoid bias, real or perceived, which would cause the public to question their decisions for want of impartiality or raise suspicion of their independence. This means that a judge must also bear in mind how they relate with the counsels who appear before them. Surely, if a judge were to perhaps draw pleadings for parties or advise counsels on how to argue matters in court, their propriety would be called into question. A thoughtful observer would, no doubt, call into question their impartiality. Even if they were to justify their decisions, it would be no surprise if they were stated to be failing in their role to uphold the rule of law. Similarly, if a judge were to be in close association with litigants before them, *albeit* outside the court rooms, the impartiality and integrity of their decisions and of themselves as individuals would be called into question.

Judicial ethics, however, extends beyond the court room. It also looks into the personal life of a judge which is often interrogated when the conduct of a judge comes into question. Any behaviour or conduct that demeans the office of a judge is generally frowned upon.¹² While it may appear that judicial ethics asks of judges extraordinary lives, it in actual sense requires that while they live normal lives, they must have regard to high integrity and ethical conduct. A judge is an ambassador of the institution of the judiciary and, as such, their conduct should aim to inspire trust and confidence and bring honour to both their office and to the judiciary. The three Is therefore require judges and judicial officers to abide by ethical conduct not only in their official and public life but also in their private life. Integrity is, after all, adhering to ethical principles consistently.

¹¹ Shaman J, 'Judicial ethics' 2(1), 1-20.

¹² Shaman J, 'Judicial ethics' 2(1), 1-20.

IV. Entrenchment and regulation of judicial ethics in Kenya

In Kenya, we have the Judicial Service (Code of Conduct and Ethics) Regulations (hereinafter referred to as the Code).¹³ Part II of the Code prescribes the conduct and ethics expected of judges in Kenya. The Code encapsulates the essential features of judicial ethics: Independence, Impartiality and Integrity, and in addition makes propriety, accountability and prohibition against corrupt practices, professionalism, and equality and non-discrimination as requirements. Notably, the Code is not standalone but is supplementary to other legal requirements relating to code of conduct and ethics.¹⁴ There have been debates on whether or not the Code is applicable to judges and its implementation and constitutionality questioned. This issues are before the constitutional Court and I will therefore not delve into them. I will simply seek to highlight various aspects of the Code that resonate with the theme of this article.

The Code acknowledges the special place of judicial ethics as it applies not only to judges but also to judicial officers and judicial staff.¹⁵ By so doing, the Code recognizes that judicial integrity must be maintained at all levels in order to build and maintain public trust and confidence in the institution of the judiciary.¹⁶ The aim of judicial ethics is to preserve the public opinion and maintain public confidence in the judiciary as the custodian of justice.¹⁷ An interrogation of the Code reveals that it lays emphasis on the three Is and considers them essential attributes of good judging.

Firstly, the Code recognizes that judicial independence is a constitutional requirement to the rule of law and requires that a judge shall uphold and exemplify independence in both individual and institutional aspects.¹⁸ It goes further to explain that independence is based on assessment of facts coupled

¹³ The Code revoked the Judicial Service Code of Conduct and Ethics issued under Section 5(1) of the *Public Officer Ethics Act*, 2003. Notably, the Code may be reviewed from time to time by either the Judicial Service Commission or the Chief Justice.

¹⁴ Rule 30, *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

¹⁵ Part II of the Code provides the Code of Conduct and Ethics for judges; Part III provides the Code of Conduct and Ethics for Judicial Officers; and Part IV provides the Code of Conduct and Ethics for Members of Judicial Staff.

¹⁶ Shaman J, 'Judicial ethics', 1-20.

¹⁷ Geyh C, 'Judicial ethics: A new paradigm for a new era' 9(2) *St. Mary's Journal on Legal Malpractice and Ethics*, 2019, 238-259.

¹⁸ Rule 4, *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarters or for any reason. This emphasizes the notion that matters ought to be determined based on evidence presented in court as weighed against the existing law. Additionally, the Code recognizes the need for judges to promote high standards of judicial conduct in order to enhance public confidence in the judiciary, urging that this is fundamental to the maintenance of judicial independence.¹⁹

Secondly, the Code stipulates that it requires that judicial decisions are based on objective criteria rather than on the basis of bias, prejudice or conferring benefit to one person over another for improper reasons.²⁰ This speaks to the element of impartiality which is essential to the discharge of judicial functions. Whenever the impartiality of a judge comes into question, they are required to disqualify themselves from any such proceedings.²¹ Such a disqualification is termed a ‘recusal’. The Code is categorical that a recusal must be based on a specific reason, to be recorded in writing as part of the proceedings, including an explanation for the recusal on personal reasons.²² Recusal is informed by the notion that in conducting their judicial duties, a judge should be above the suspicion of partiality and bias. They must put natural affection or friendship aside.²³ Whereas the public may not always be convinced that the judges are immune to bias, they nonetheless keep the faith that the judges will be impartial, and through recusal, judges strengthen this faith.²⁴

Thirdly, the Code recognizes that integrity is essential to the discharge of judicial functions.²⁵ Therefore, a judge shall ensure that their conduct is beyond reproach in the view of a reasonable observer.²⁶ The behaviour and conduct of a judge must reaffirm the people’s faith in the integrity of the judiciary and a judge must uphold the principle that justice must not merely be done but be seen to be done.

¹⁹ Rule 4 (9), *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

²⁰ Rule 5 (1)-(2), *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

²¹ Rule 5 (6)-(8), *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

²² Rule 5 (7), *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

²³ Shaman J, ‘Judicial ethics’, 1-20.

²⁴ Shaman J, ‘Judicial ethics’, 1-20.

²⁵ Rule 6 (1), *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

²⁶ Rule 6 (2), *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

Additionally, the Code requires judges to avoid impropriety and appearance of impropriety in all of their activities.²⁷ To this end, the Code expects judges to conform to conventionally accepted standards of behaviour and morality and to act in a manner that upholds the dignity of their office.²⁸ Interestingly, the Code acknowledges that judicial ethics requires of judges personal restrictions which may be deemed burdensome by the ordinary citizen but urges judges to nonetheless accept these restrictions freely and willingly.²⁹

The Code further emphasizes professionalism and acknowledges that competence and diligence are prerequisites to the due performance of judicial duties.³⁰ To this end, the Code urges judges to take reasonable steps to maintain and enhance knowledge, skills and personal qualities necessary for the discharge of their judicial functions.³¹ Professionalism extends to maintenance of order and decorum in all proceedings and, in this respect, the Code calls upon judges to be patient, dignified and courteous in relation to all litigants, witnesses, lawyers and others with whom the judge deals in an official capacity.³² Similar conduct is expected of advocates, court staff, and other persons before the court.³³ The Code also calls upon judges to abide by the principle of equality and non-discrimination, to be accountable and shy away from corrupt practices, to keep themselves informed, and to observe the laws and policies relating to sexual harassment.³⁴

A wholesome reading of the Code reveals that it is intended to uphold integrity and independence of the institution of the judiciary. In so doing, its provisions govern the conduct of judges both on and off the Bench. It applies to judges, judicial officers and members of staff of the judiciary, all of whom are mandatorily required to sign and subscribe to it.³⁵ A breach of the Code amounts to misconduct for which appropriate lawful action may be taken.³⁶ Guidelines and directions on the oversight and implementation of the Code including the

²⁷ Rule 7, *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

²⁸ Rule 7 (4), *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

²⁹ Rule 7 (3), *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

³⁰ Rule 9 (1), *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

³¹ Rule 9 (4), *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

³² Rule 9 (7), *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

³³ Rule 9 (7), *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

³⁴ Rules 17-19, *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

³⁵ Rule 29, *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

³⁶ Rule 27, *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

lodgement and resolution of complaints against judges, judicial officers and members of staff of the judiciary are the preserve of the Chief Justice.³⁷ Notably, a judge of a superior court may be removed from office on the ground of breach of the code.³⁸ The removal of a judge may however be initiated only by the Judicial Service Commission acting either on its own motion, or on the petition of any person to the Judicial Service Commission.³⁹ The Judicial Service Commission is also vested with the power to receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the judiciary.⁴⁰

V. Conclusion

Judicial ethics play an integral role in the justice system. To ensure that justice is not only done but seen to be done, it is imperative on judges, judicial officers and members of staff of the judiciary to strictly abide by the principles of judicial ethics. The key notable principles of judicial ethics, which are also the essential features of legal ethics in general, and without which the public would lose all trust and faith in the judiciary, are Independence, Impartiality, Integrity and Competence. These however must go hand in hand with all other principles laid out in codes of conduct and ethics, including all those stipulated in the Judicial Code of Conduct and Ethics.

While legal ethics are central to the regulation of the legal profession, judicial ethics, which is one of its essential elements, is key to the fulfilment of the role of a judge. The role of a judge undoubtedly is to uphold the rule of law to ultimately facilitate administration of justice in accordance with the Constitution of Kenya. In discharging this role however, a judge must not only be competent but they must also abide by the ethical standards required of the office of judgeship. Ethics and competence are intertwined and interlinked and are key in enhancing access to justice and promoting the rule of law. Competence and judicial ethics are therefore critical and inseparable components of the office of a judge and by which every member of the judiciary must abide to affirm

³⁷ Rule 28, *Judicial Service (Code of Conduct and Ethics) Regulations* (Legal Notice No. 102 of 2020).

³⁸ Article 168(1) (b), *Constitution of Kenya* (2010).

³⁹ Article 168(2), *Constitution of Kenya* (2010)

⁴⁰ Article 172(1) (c), *Constitution of Kenya* (2010).

public trust and confidence not only on the respective judges and judicial officers, but also the judiciary, which is the institution tasked with administration of justice.