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JUDICIAL ETHICS AN OVERVIEW LECTURE NOTES

1. Introduction

- Judicial ethics is something very much is the public eye for not only is there an perception of very serious want of it within the Kenyan judiciary but there is also a widespread perception that no serious efforts has been made to tackle it as is invariably confirmed by the various public surveys e.g. the latest report by T.I.

- No exaggeration to say that no Kenyan judge can ever boast as Lord Devlin did- "the English Judiciary is popularly treated as a national institution and like the English navy tends to be admired to the excess."

- To be sure public gestures have been made by the judiciary to improve this image under the present Chief Justice but it would be indefensible flattery to describe those efforts as window-dressing. Indeed, the most visible of these efforts the Ringera Committee can only be most fairly described as an ill-conceived, ill-designed, ill-considered, ill-executed and ill-fated spectacular failure. One has to question the sanity of those who would label it a success. Further initiatives include the Onyango-Otieno report and the recently launched Kariuki committee Impossible to assess, lack of publicity

- In another direction, the Government's ostensible efforts which have resulted in the codification of expected standards of judicial conduct under the umbrella of the Public Ethics Act, 2003 which by section 5 requires each commission with the responsibility for a particular sector within the public service to establish and publish a specific code of ethics and conduct for the relevant sector. This has resulted in the promulgation for the Judicial Service Code of Conduct and Ethics 2003.

- This code which applies to all judges, magistrates, registrar and kadhis, more or less enacts the previous Code of Conduct for Judicial Officers in Kenya, and also more or less tracks the standard provisions reflected in most common law jurisdictions as enshrined for example in the Bangalore draft for the Code of Judicial Conduct. While is purports to put benchmarks on judicial conduct, it is to be "construed so as not to impinge on the essential independence of judicial officers in the making of judicial decisions or to limit their legal rights." Most of its provisions reflected settled understandings are quite unremarkable and one of hope non-controversial. They include setting pout the ideals for the judiciary such as requirements for independence, integrity, and impartiality in the discharge of the function- no outside consultation, not to influenced by extraneous matters or persons; reporting obligations; disqualifications requirements e.g. personal bias, served as a lawyer, has an interest which that could substantially affect the outcome of the case; restrictions of permissible activities; prohibitions against solicitation; appropriate conduct of proceedings; limits of public statements and communications with the press; complete proscriptions against political

activities and canvassing. Rule 22 sets out the process of sanction for breach of the code, via JSC.

- To be sure there are some differences between it and the Bangalore draft e.g. the Kenyan code omits such values such as propriety, equality, competence and diligence, and accountability from its explicit statement of the values its seeks to uphold. These are also significant differences in the wording of specific provisions but those need not detain us.

- By section 35 of the Public Officers Ethics Act, 2003, the Judicial Service Commission is empowered to investigate allegations of breach of the code either on its own initiative and by section 36 may take appropriate disciplinary action or if disabled from so doing refer the matter to the body so empowered to act for appropriate action.

- To round up this bird-eye survey of the formal mechanism for judicial ethics, we must turn to the constitution which by section 62(1) guarantees security of tenure for High Court judges until an age prescribed by Parliament. Section 62(3) is sufficiently important to be set out in full:

  "A judge of the High Court may be removed from office for inability to perform the function of his office (whether arising from infirmity of body or mind) or for misbehaviour, and shall not be removed except in accordance with this section."

- Sections 62 (4)- (6) provide for the manner for involuntary removal of High Court judges by the President after following the procedure set out therein i.e. upon representation by the Chief Justice that investigation should be carried out as to whether or not a judge should be removed, the President must appoint of a tribunal of five consisting of current or former judges of the High Court or Court of Appeal or persons qualified to be appointed judges of the High Court or Senior Counsel; the President may also suspend judge during the period of the investigation. Sections 62(7) and (8) make special provision for the removal of the Chief Justice- mandatory appointment tribunal consisting current or ex-speaker of the National Assembly, two current or ex-judges of appeal, a senior counsel and Chairman of the Public Service Commission. if question of removal arises. The C-J may not exercise of the functions of the office while the investigation persists. The provisions relating to security of tenure of High Courts judges and their removal, apply to judges of appeal.

- Sections 68 of the Constitution establishes the Judicial Service Commission whose members are the CJ, two persons appointed by the President who are currently either High Court judges or judges of appeal, and the Chairman of the Public Service Commission.

- By section 69(1), the JSC has the power to "appoint persons to hold or act .... in an office to which this section applies, the power to exercise disciplinary control over persons holding or acting in those offices and the power to

remove those persons....". This section applies to Registrar, D/Rs, Magistrates, Chief Kadhi or Kadhi, etc.

- Though 68(3) explicitly gives JSC power to promulgate regulations for the conduct of their affairs, none have in fact been promulgated. Apparently some draft regulations were prepared but they become one with Nineveh and Tyre.

— Appeals process, open courts

- Some matters are immediately apparent:

  (a) Though its there, it is doubtful whether the Public Ethics Act and the subsidiary legislation promulgated thereunder in this case the Judicial Service Code of Conduct and Ethics are directly constitutionally binding to the Chief Justice, Judges of Appeal and High Court judges. It is likely that they are constitutionally infirm not only in light of the protections afforded by section 62 of the Constitution but also expressed limitation on the powers of the Judicial Service Commission in respect to discipline under section 69 (1) which is unequivocal that disciplinary and removal power of the JSC is in respect of those it appoints. With respect to the High Court and Court of Appeal, the JSC's powers are limited to "advice" with respect to appointments –see sections 61(2) and 64(3). It is impossible to see how arguments invoking purposive interpretations, penumbras specific constitutional provisions, or immanent principles inherent to the constitutional structure can get around this. Of course, it is still possible to rule that indirectly the Judicial Code of Conduct reflecting as it were universe principles of justice are obligations *erge omnes* and constitutes principles inherent in the judicial office and thus there breach may constitute misbehaviour for purposes of section 62.

  (b) While there is no doubt, that they apply to the Registrar, DR's magistrates etc, given that section 35 of the Public Ethics Act, requires enforcement by the JSC as well the preamble of the code refers to procedure to the followed being in the regulations, the absence of regulations presents a formidable obstacle.

  (c) Whether it is judges or magistrates, there is no structured system in place for the transparent and fair institution and investigation of complaints and the administration appropriate sanction depending on the infraction found.

  (d) Difficult to assess the actual success of these process

2. Independence and Accountability

- I noted earlier that the Kenyan code does not include explicitly include accountability as one of the important values of the judiciary. The Bangalore draft is explicit that accountability is essential. Judge Kirby explained "It accepts the need for accountability beyond open Courts, the appeals system, and parliamentary removal of incapable or corrupt judges."

- Two side of the same coin, accountability is the yang to the independence's yang.

- Judicial independence not an end in itself, but a means to various ends- supposed to ensure that essential functions of the judiciary maintenance of the rule of law, protection of rights, fair adjudication of disputes by contending parties is possible. It also encourages public confidence in the judiciary which is essential for the effective discharges of the judicial function. History shows it is preserved as much by formal institutions as well as informal understandings and practices.

- Judicial accountability is also not an end in itself but rather means to the very same ends which judicial independence strives to achieve promotes rule of law i.e. judges not carrying out their jobs are undermining it; enhances public confidence; ensures institutional responsibility.

- Properly understood no clash- which provisions of the Code of Ethics challenge independence.

Accountability

- Comes in various forms which may be categorized as institutional, decisional and behavioural

- Exclusion of the public from the process of accountability- self regulation and legal exclusivity

- Defensible in the case of decision accountability, not defensible in the other instances

- Weak justification for self-regulation

    (a) sour grapes and frivolity of complaints It recognises also accepts that judges are specially vulnerable to complaint because, every day they are bound to disappoint contesting litigants. They are therefore subject to accusations, many of which are misconceived– logical non-sequitar as only losing parties will tend to complain- ".."; guild culture

    (b) compromise judicial independence- requires the conflict model of judicial independence and accountability; self-referential

    (c) adequate publicity via opinions peer review conflation of forms of accountability

- Judge Arnold judiciary must have the continued consent of the governed, public confidence all point to the insulation of the process of judicial discipline

- Secrecy and openness in the process of discipline

3. **Code of Ethics**

Information rules and Processes etc