

# THE ROLE OF LEGAL ETHICS IN ACHIEVING JUSTICE IN SOCIETY

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## ABSTRACT

If the ethics of a particular profession is determined by its role in promoting the common good, the ethics of the legal profession should contribute towards promotion of justice in society. Justice in this respect will be taken in its broad sense.<sup>1</sup>

The legal profession, concerned as it is, with not only urging competing positions but also deciding which of the competing positions is just, is obviously prone to temptations. It therefore requires discipline to keep the profession on a relentless pursuit of justice. This discipline is enforced through legal ethics covering the prosecution of criminal and civil claims, legal work in non contentious matters, the defence of civil and criminal cases, the adjudication of disputes and generally ethics in the utilisation of legal training in any task at hand. To evaluate the ethics of lawyers in their various careers, one needs to ask whether these ethics have crystallised into some Codes of Ethics for Prosecutors, for private legal practitioners, for judges and magistrates, for litigators and for public service lawyers. These Codes of Ethics are important because they are the points of reference, deviation from which will amount to unethical behavior.<sup>2</sup> The Codes of Ethics will tend to evidence an effort to assure consumers of legal services that the standards are monitored and evaluated on a transparent benchmark. It is my thesis that in countries like Kenya, where such Codes of Ethics are not fully developed, nation building can greatly be enhanced by their formulation.<sup>3</sup>

Nation building being a continuous process, it would as of necessity require that any Codes of Ethics thus formulated be continuously evaluated to monitor their relevance to the needs of society. For legal ethics therefore to play their rightful role in nation building, legal education should be expanded so that legal ethics, which is taught at undergraduate law degree level, is made one of the mandatory courses of reading throughout the entire life of legal practitioners in a compulsory continuing professional education scheme. Of major concern to nation building is the need to adhere to legal ethics in adjudicating over disputes.

While it is generally accepted that the Judge's ideological philosophy, whether conservative or liberal may colour his judgements, it is expected that in making decisions the judge will not be influenced by fear or favour, malice or affection. It is arguable that adherence to legal ethics by Judges is the single most important object of judicial reforms, which emphasizes the urgent need for a Code of Ethics for judges and magistrates. This may go along way in assuring consumers of justice that the correct process of reasoning has been followed before arriving at the correct judicial decision.

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<sup>1</sup> See Dias, Jurisprudence, 5<sup>th</sup> edition, Butterworths, London, 1985, p.66. Where it is argued that justice is not something which can be captured in a formula once and for all, but a process, a complex and shifting balance between many factors, including equality. Prof.Dias argues that justice has five main tasks, to justly allocate advantages and disadvantages, to prevent abuse of power, to prevent abuse of liberty, to justly decide disputes and to adapt to change. See also Friedrich, 'Justice: the just political Act' 6 Nomos Justice, at p.36 where he says "Justice is never given, it is always a task to be achieved."

<sup>2</sup> To be sure, the standards contained in the Codes of Ethics will always tend to have the character of the lowest common denominator because the demands of ethics will be considerably more exacting than those in the professional codes. See generally Richard O'Dair, Legal Ethics: Text & Materials, Butterworths, London, 2001 p.16.

<sup>3</sup> Kenya does not have a formal Code of Ethics for prosecutors, for judges and for lawyers in Public Service. The private legal practitioners have one that is in urgent need of review.

## Introduction

The origin of the word jurisprudence is the Latin expression, *Juris prudentia*, which refers to either a 'knowledge of' or 'skill in law'. When taken as knowledge of law, the word sometimes refers to exposition of particular branches of law. In a wider sense, jurisprudence is used to describe legal connections of any body of knowledge.<sup>4</sup> The organisers of this conference have alluded to at least two other perspectives on jurisprudence. That, it may be understood either as a philosophy of law whereby it conveys the foundations on which the legal profession should stand in order to contribute towards the common good by achieving justice in society. Or, it may be understood as the process of reasoning in judicial decision making by directing and guiding the process of reasoning so as to achieve justice in society. In either case, the ultimate goal of jurisprudence is the achievement of justice in society.

This leads us to the question, What is justice? There are those who think that "the quest for justice [is] as challenging as the quest for the Holy Grail, and as illusive"<sup>5</sup> Aristotle<sup>6</sup> distinguished between distributive justice and corrective justice on the grounds that distributive justice sought equal distribution among equals. Corrective justice on the other hand sought to restore equality when it has been disturbed, for example, by wrongdoing. In this scheme, at least some well meaning person or body of persons, will be inspired to avail justice in all its shades to the citizens.<sup>7</sup>

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<sup>4</sup> See.Dias, Jurisprudence, note 1 at P. 3. Where the author explores the view that no word,least of jurisprudence, has a 'proper' meaning. He asserts, "...the answer to the question, what is 'jurisprudence?'is that it means pretty much whatever anyone wants it to mean..."

<sup>5</sup> Ibid p. 65

<sup>6</sup> Aristotle, *Nicomachean Ethics*, (translated by H. Rackham)V.

<sup>7</sup> There are several criticisms of Aristotle's theory of justice. For example, by what criteria are we to measure equality? If equals are to be treated equally does it not follow that unequals be treated unequally? Is a criteria that allows this unequal treatment just? Taking the principle of sanctify of contract, the law presupposes that parties to contracts are equal, when in fact there are inequalities between employees and employers, public authorities and corporations vis-à-vis individuals. Lastly, the distinction between distributive and corrective justice is unclear. In affirmative action for example, as in the case of Regents of the University of California V. Bakke 438 US 265 (1978), was it designed to create distributive justice by providing equality of educational opportunity or was it a form of corrective justice to redress inequality through past discrimination?

This is contrasted with the scheme that justice should be looked at from the point of view” of the citizen to whom just treatment is due”<sup>8</sup> and not from that of the just man. Prof. Dias, sums it well;

“it is not enough to work out a just scheme of distribution, from whatever point of view, but there is the further problem of getting it accepted and keeping it acceptable, which requires constant redistribution according to changing circumstances. Both initial acceptance and continued acceptance depend on people feeling that the scheme is at least not unjust.”<sup>9</sup>

This leads us to legal ethics. What do we mean by legal ethics? Firstly, ethics may be said<sup>10</sup> to be a major strand of philosophy and entails the study of moral philosophy asking questions about moral rightness. By legal ethics we deal firstly with the critical analysis of the ethical content of the rules and procedures encountered in the law itself in order to test them against ethical standards; and secondly, with, analysis of the contents of professional Codes of Conduct, the impact they have and what they ought to be.

In this paper, we look at the provisions that the law has made for the judicial resolution of court disputes, whether those provisions are adequate and suggest what in our humble view should be done to improve the provision of justice.

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<sup>8</sup> See Prof. Honore, "social justice" in Essays in Legal Philosophy (Ed. Summers) 6. Act p.62

<sup>9</sup> Dias, Jurisprudence, see note 1 above, p.6

<sup>10</sup> Hugh Brayne, Nigel Duncan & Richard Grimes, Clinical Legal Education: Active Learning in your Law School, Blackstone Press, London, 1998, p.212