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(For Discussion)

**THE KENYAN JUDICIAL SERVICE CODE OF
CONDUCT AND ETHICS**

A review of its compliance with international standards;

An outline of implementation modalities; and

A performance evaluation mechanism.

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**A REVIEW AND ANALYSIS OF
THE JUDICIAL SERVICE CODE OF CONDUCT AND ETHICS
WITH RESPECT TO ITS COMPLIANCE WITH
INTERNATIONAL STANDARDS
INCLUDING THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT**

Terms of Reference

The Terms of Reference require me to review the Judicial Service Code of Conduct and Ethics of Kenya (the Kenyan Code) with respect to its compliance with international standards including the Bangalore Principles of Judicial Conduct (the Bangalore Principles).

International Standards

In formulating the Bangalore Principles, the Judicial Group on Strengthening Judicial Integrity (the Judicial Integrity Group), took account of all the relevant international standards. In a consultation process that extended over twenty months, and in which chief justices and senior judges from over 75 countries were involved, a consensus was achieved on the values and the principles, and their application to both common law and civil law systems. In November 2002, at a round-table meeting of Chief Justices from civil law countries, held at the Peace Palace at The Hague, at which Judges of the International Court of Justice also participated, the principles and their application were further refined, and the Bangalore Principles in their final form were adopted.

In April 2003, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, who had also participated in meetings of the Judicial Integrity Group, presented the Bangalore Principles to the United Nations Commission on Human Rights. By resolution 2003/43, which was adopted unanimously, the Commission brought the Principles “to the attention of Member States, the relevant United Nations organs and intergovernmental and non-governmental organizations for their consideration”.

In 2006, by resolution 2006/23, which was adopted without a vote, the Economic and Social Council of the United Nations (ECOSOC) endorsed the Bangalore Principles as complementing the UN Basic Principles on the Independence of the Judiciary, and invited Member States, consistent with their domestic legal systems, to encourage their judiciaries to take into consideration the Bangalore Principles when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary.

The Bangalore Principles, therefore, constitute the contemporary international standard. Accordingly, this review and analysis of the Kenyan Code will be made with reference to the Bangalore Principles.

In 2007, at the request of ECOSOC, a Commentary on the Bangalore Principles (the Commentary) was developed. Its final form emerged at a joint meeting of the Judicial Integrity Group and an Open-ended Intergovernmental Expert Group convened by UNODC. The Commentary is now considered to be the authoritative interpretation of the Bangalore Principles.

In 2010, the Judicial Integrity Group formulated a statement of Measures for the Implementation of the Bangalore Principles (the Implementation Measures). These were offered to national judiciaries and state authorities as guidelines or benchmarks for the effective implementation of the Bangalore Principles, and as an authoritative interpretation of the section on “Implementation” in the Bangalore Principles.

The Kenyan Code

The Kenyan Code was established in 2003 by the Judicial Service Commission in terms of section 5(1) of the Public Officer Ethics Act 2003. That section requires each commission responsible for a public service sector to establish a specific code of conduct and ethics for the public officers for which it is responsible. The specific code is required to be published in the Gazette within ninety days after the commencement of the Act, namely, 2 May 2003. The Bangalore Principles, in their final form, were presented to the UN Commission on Human Rights only on 29 April 2003, and are unlikely to have been available to the Judicial Service Commission when it prepared the Kenyan Code.

The specific code established by each commission is required to include in it the provisions of Part III of the Act which contains a general code of conduct and ethics. Many of the provisions in this Part are general in nature and do not appear to be inconsistent with the exercise of judicial office. However, the following three provisions ought not to be included in a code of judicial conduct:

- i. Section 11(3) states that a public officer may accept a gift given in his official capacity but, unless the gift is a non-monetary gift that does not exceed the value prescribed by regulation, such a gift shall be deemed to be a gift to the public officer’s organization. This sub-section is incompatible with the very stringent international rules relating to the acceptance of gifts by judges, especially if the gift is offered to the judge in his official capacity.
- ii. Section 11(5) states that the prohibition imposed by section 11(2)(c) on the use for the personal benefit of himself or another of information that is acquired in connection with the public officer’s duties and which is not public, “does not apply to the use of information for educational or literary purposes, research purposes or other similar purpose.” It would be improper for a judge to use information gathered in the course of his official duties which is not public to be used by him or disclosed to others for educational, literary, research or similar purpose. However, most court documents ought to be available to the

public except those referred to in article 14(1) of the International Covenant on Civil and Political Rights (ICCPR).

- iii. Section 12(3) states that a public officer whose personal interests conflict with his official duties shall – (a) declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and (b) refrain from participating in any deliberations with respect to the matter. This Rule cannot apply to a judge whose conduct in such a situation will be governed by the principles relating to recusal. Moreover, it is not by reference to a “superior” that this matter will need to be resolved but by discussion with counsel.

Part V of the Public Officer Ethics Act contains provisions relating to the enforcement of a code of conduct and ethics. These provisions appear to be incompatible with international standards relating to judicial ethics. Since this part of the report deals only with the content of a code of judicial conduct, the question of enforcement will be examined elsewhere.

Applicability of the Kenyan Code

The Final Report of the Task Force on Judicial Reforms (Task Force) states that the Kenyan Code has been construed by some as being not applicable to Judges, a view with which the Task Force disagrees. However, it is the considered view of the Task Force that separate codes of conduct should be developed for Judges, other judicial officers and staff. This recommendation of the Task Force has been made in view of Article 168(1)(b) of the Constitution which provides, as a ground for removal of a judge of a superior court, “a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament”. The question whether the breach of *any* provision of the code of conduct warrants removal from office is examined elsewhere. It is sufficient to note here that while a code of conduct for court personnel may be different in form and scope from one for judges, there appears to be no basis for differentiating between judges of superior courts and those of subordinate courts as far as principles of judicial conduct are concerned. The Bangalore Principles are intended to apply to every “judge”, and that term is defined as “any person exercising judicial power, however designated”.

A General Observation

While the Bangalore Principles constitute the international standard, they are primarily intended to provide guidance to judges and to afford the national judiciary a benchmark or framework for regulating judicial conduct, whether through a national code of conduct or other mechanism. The Bangalore Principles may be adapted to suit the circumstances of each jurisdiction. However, in so doing, it should be noted that the six values on which the Principles are based are both fundamental and universal and should not be derogated from. They are expected to be reflected in a national code.

Review of the Kenyan Code

I will now proceed to review the Kenyan Code by reference to the Bangalore Principles. I will use the term “judge” to include all those who exercise judicial power, whether it be in a superior or subordinate court.

As has been noted above, the Kenyan Code does not appear to have been prepared by reference to the Bangalore Principles. Consequently, the Kenyan Code is not based on the six core judicial values articulated in the Bangalore Principles. Nor does it state the principle derived from each core judicial value. It follows that several applications of each principle, which may be considered to be essential features of a national code, have been omitted. A distinct advantage in reflecting as closely as possible the language of the Bangalore Principles in a national code is the benefit that could be derived from the Commentary and the Implementation Measures.

Independence

“Independence” is perhaps the most important of the six judicial values. However, it has received the most meagre treatment in the Kenyan Code. Apart from a requirement in Rules 3(1) and (2) that the judge should be free from external influence; not be improperly influenced by the victim, accused person, plaintiff, defendant, witness or any individual or group having an interest in a case; and not discuss any case outside judicial circles, there is nothing else. Paragraphs 1.1, 1.2 and 1.6 of the Bangalore Principles are very inadequately addressed, while Paragraphs 1.3, 1.4 and 1.5 are omitted altogether. The core of the principle of judicial independence is the complete liberty of the judge to hear and decide a case; no outsider – be it government, pressure group, individual, or even another judge – should interfere or attempt to interfere with the way in which a judge conducts a case and makes a decision. There is no reference at all to the need for independence from the executive and legislative branches of government.

ii. Impartiality

“Impartiality” is dealt with only to the extent that certain grounds for disqualification are enumerated. Paragraphs 2.1, 2.2, 2.3 and 2.4 of the Bangalore Principles are omitted altogether. “Independence” and “Impartiality” are separate and distinct values. They are nevertheless linked as mutually reinforcing attributes of the judicial office. Independence is the necessary precondition to impartiality and is a prerequisite for attaining impartiality. A judge could be independent but not impartial (on a specific case by case basis), but a judge who is not independent cannot, by definition, be impartial (on an institutional basis). Therefore, “Impartiality” is a fundamental quality required of a judge and a core attribute of the judiciary. It should not be dealt with in a code of judicial conduct in a cursory manner.

iii. Integrity

The application of the judicial value of “Integrity” is expressed in the Bangalore Principles in two paragraphs. The first is omitted altogether in the Kenyan Code, while the second is expressed in terms that do not appear to convey the essence of it, namely that the behaviour and conduct of a judge must reaffirm the people’s faith in

the integrity of the judiciary. The Commentary has provided examples in respect of both paragraphs.

iv. Propriety

The judicial value of “Propriety” is expressed in the Bangalore Principles in 16 applications of it. All of them were included in the Bangalore Principles deliberately and after due consideration. Of these, nine are omitted in the Kenyan Code. Of the others, Rule 14, which deals with a judge’s freedom of expression, appears to be unnecessarily detailed. The provisions in the Public Officer Ethics Act, which refers to the use of information acquired by a public officer and which is not public, is inappropriate in a code of judicial conduct. Propriety, and the appearance of propriety, both professional and personal, are essential elements of a judge’s life, and ought to be addressed in a code of conduct in all its aspects, as the Bangalore Principles has sought to do.

v. Equality

The judicial value of “Equality” is not addressed in the Kenyan Code. Equality and equal treatment have for long been regarded as essential attributes of justice. Equality according to law is not only fundamental to justice, but is a feature of judicial performance strongly linked to judicial impartiality. Article 2(1) of the ICCPR, read with article 14(1), recognizes the right of every individual to a fair trial without any distinction whatsoever as regards race, colour, sex, language, religion, political or other convictions, national or social origin, means, status or other circumstances. The impact of recent regional and international efforts to address discrimination mean that the phrase “other circumstances” (or “other status”) has to be interpreted to include, for example, illegitimacy, sexual orientation, economic status, disability and HIV status.

vi. Competence and Diligence

There are significant omissions in the Kenyan Code relating to the judicial values of “Competence and Diligence”. Paragraphs 6.2, 6.4 and 6.7 are omitted. Paragraph 6.3 is broader in scope than Rule 3(8)(b) which requires a judicial officer to maintain professional competence in law. Rule 2, which requires a judicial officer to “respect and faithfully apply the laws of the land in the performance of his judicial functions” is a controversial provision that was proposed for inclusion in the Bangalore Principles, but was omitted after due consideration. The reasons for omitting it are discussed in the tabulated comparison of the two documents that follow.

vii. Implementation

The manner of applying and enforcing a code of judicial conduct is examined elsewhere. Rule 22 of the Kenyan Code does not appear to be compatible with the Implementation Measures for the Bangalore Principles.

A tabulated comparison of the Bangalore Principles and the Kenyan Code follows.

<p align="center">The Bangalore Principles of Judicial Conduct</p>	<p align="center">The Judicial Service Code of Conduct and Ethics of Kenya</p>	<p align="center">Comment</p>
<p align="center"><i>Preamble</i></p> <p>WHEREAS the <i>Universal Declaration of Human Rights</i> recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.</p> <p>WHEREAS the <i>International Covenant on Civil and Political Rights</i> guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.</p> <p>WHEREAS the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions.</p> <p>WHEREAS the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice.</p> <p>WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law.</p>	<p align="center">PREAMBLE</p> <p>The legal system of the Republic of Kenya is based on the principle that an independent, fair and competent Judicial Service will interpret and apply the laws of the land. The role of the Judicial Service is central to the concepts of justice and the rule of law. Intrinsic to all parts of this Code are the precepts that judicial officers individually and collectively, must respect and honour the judicial office they hold as a public trust and strive to enhance and maintain public confidence in the system. A judicial officer is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.</p> <p>The Code is intended to establish standards of ethical conduct of judicial officers and to be applied consistently with constitutional requirements, statutes, court rules and legal authorities and in the context of all relevant circumstances. The Code 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.</p> <p>While regulations governing the discipline and general conduct of judicial officers and the procedure to be followed in cases of breach of discipline may be found</p>	

<p>WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.</p> <p>WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.</p> <p>WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country.</p> <p>AND WHEREAS the <i>United Nations Basic Principles on the Independence of the Judiciary</i> are designed to secure and promote the independence of the judiciary, and are addressed primarily to States.</p> <p>THE FOLLOWING PRINCIPLES are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.</p>	<p>in the Judicial Service Commission Regulations, this Code contains general rules of conduct and ethics to be observed by judicial officers so as to maintain the integrity and independence of the Judicial Service.</p> <p>It should always be remembered that each judicial officer occupies a special and revered position which must be protected both in public and private life, so as not to bring the Judicial Service generally, into disrepute. It is imperative, therefore, that every judicial officer should adhere to this Code with scrupulous care.</p> <p>A judicial calling is one of sacrifice and restricted lifestyle. A lifestyle which is automatically accepted on appointment to the bench.</p>	
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<p style="text-align: center;">INDEPENDENCE</p>		<p>The Value is omitted</p>
<p style="text-align: center;"><i>Principle:</i></p> <p>Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.</p>		<p>The Principle is omitted.</p>
<p style="text-align: center;"><i>Application:</i></p> <p>1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.</p>	<p><i>Rule 3</i> INDEPENDENCE, INTEGRITY AND IMPARTIALITY</p> <p>1. Due to the complexity, sensitivity and vitality of the courts' jurisdiction in both criminal and civil cases, judicial officers shall be free and seen to be free from external influence from any quarter, as everyone is equal before the law.</p>	<p>Rule 3(1) inadequately reflects Paragraph 1.1. Confidence in the judiciary is eroded if judicial decision-making is perceived to be subject to inappropriate outside influences from a variety of sources, including the executive, the legislature, the media, and the public. The Commentary, by providing several examples of the application of this paragraph, demonstrates its relevance.</p>
<p>1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.</p>	<p><i>Rule 3</i> INDEPENDENCE, INTEGRITY AND IMPARTIALITY</p> <p>(2) They [judicial officers] shall not be improperly influenced by</p> <ul style="list-style-type: none"> (a) the sex, ethnic or national origin, religious belief, or political association of the victim of a crime, witness, accused person, plaintiff or defendant; (b) personal feelings concerning the plaintiff, defendant, victim of a crime or accused person; or (c) pressure from any individual or group of people, claiming to have an interest in 	<p>Paragraph 1.2 is broader in its application than Rule 3(2). Its special relevance is that the complete isolation of the contemporary judge from the community in which the judge lives is neither possible nor beneficial. Knowledge of the public is essential to the sound administration of justice since the judge is now called upon to address broad issues of social values and human rights, to decide controversial moral issues, and to do so in increasingly pluralistic societies. Therefore, a judge should, to the extent consistent with the judge's special role, while being independent in relation to society, remain closely in touch with the community. This paragraph also has significance well beyond that affecting the particular parties to any dispute since society as a whole must be able to trust the judiciary.</p>

	<p>a particular case.</p> <p>(3) Consequently judicial officers must refrain from consulting, discussing or seeking views outside judicial circles on matters which are before them or indeed any other court</p>	
<p>1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.</p>		<p>Paragraph 1.3 is omitted. At the core of the concept of judicial independence is the theory of the separation of powers: that the judiciary, which is one of three basic and equal pillars in the modern democratic state, should function independently of the other two, the legislature and the executive. This is necessary because the judiciary has an important role and functions in relation to the other two branches. It ensures that the government and the administration are held to account for their actions, and, with regard to the legislature, it is involved in ensuring that duly enacted laws are enforced and, to a greater or lesser extent, in ensuring that they comply with the national constitution and, where appropriate, with regional and international treaties that form part of municipal law. Therefore, to ensure a completely free and unfettered exercise of its independent legal judgment, the judiciary must be free from inappropriate connections with and influences by the other branches of government. It is equally important that the judiciary should be perceived as independent, and that the test for independence should include that perception. The Commentary has provided several examples of “inappropriate” connections and influence that may often be overlooked.</p>
<p>1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.</p>		<p>Paragraph 1.4 is omitted. Judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence that might come from the actions or attitudes of other judges. Although a judge may sometimes find it helpful to “pick the brain” of a colleague on a hypothetical basis, judicial decision-making is the responsibility of the individual judge, including each judge sitting in a collegiate appellate court.</p>

<p>1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.</p>		<p>Paragraph 1.5 is omitted. This paragraph requires the judge to be a staunch defender of his or her own independence. Since not everyone is familiar with the concept of judicial independence, and the public may not receive a completely balanced view of it from the media, the judge should take advantage of appropriate opportunities to help the public understand the fundamental importance of judicial independence.</p>
<p>1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.</p>	<p><i>Rule 3</i> INDEPENDENCE, INTEGRITY AND IMPARTIALITY</p> <p>4. An independent and honourable Judicial Service is indispensable to achieving justice in our society. A judicial officer should participate in establishing, maintaining, and enforcing high standards of judicial conduct. The provisions of this Code are intended to preserve the integrity and the independence of the Judicial Service; the Code should be construed and applied to further these objectives.</p>	<p>Rule 3(4) only partially reflects this paragraph. What Paragraph 1.6 requires is that the judge should demonstrate and promote a high standard of judicial conduct since public acceptance and support for court decisions depends upon public confidence in the integrity and independence of the judge. For example, the high standard requires the observance of the minimum guarantees for a fair trial</p>

IMPARTIALITY		The Value is omitted.
<p><i>Principle:</i></p> <p>Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.</p>		The Principle is omitted.
<p><i>Application:</i></p> <p>2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.</p>		Paragraph 2.1 is omitted.
<p>2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.</p>		Paragraph 2.2 is omitted. The Commentary provides several examples of conduct that should be avoided in court (such as constant interference in the conduct of a trial and ex parte communications) as well as conduct that should be avoided out of court (such as associations and business interests).
<p>2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.</p>	<p><i>Rule 10</i> PRIVATE INTEREST</p> <p>Every Judicial officer and any other officer in the judicial service is required to observe the following general principles in relation to his private interests -</p> <p>(a) to ensure that he</p>	<p>Neither Rule 10 nor the provision from the Public Officer Ethics Act addresses the mischief that Paragraph 2.3. seeks to avoid. The objective of this Paragraph is to reduce conflicts of interest arising from financial activity. A judge must not allow his or her financial activities to interfere with the duty to preside over cases that come before the court. Although some disqualifications will be unavoidable, a judge must reduce unnecessary</p>

	<p>does not subordinate his judicial or administrative duties to his private interests or put himself in a position where there is a conflict between his official duties and his private interests;</p> <p>(b) to undertake not to associate outside his official duties with any financial or other activities in circumstances where there could be suspicion that his or official information available to him was being turned to his private gain or that of his associates;</p> <p>(c) to undertake not to engage in any occupation or business which might prejudice his status as a member of the Judicial Service into disrepute; and</p> <p>(d) to maintain at all times the professional and ethical standards which the public expects of him in transacting official business with efficiency, integrity and impartiality.</p> <p><i>Rule 7</i> FIDUCIARY ACTIVITIES</p> <p>1. A judicial officer should not serve as administrator, executor or trustee of any estate except for the estate or trust of a member of his family and only if such service will not interfere with the proper performance of his judicial</p>	<p>conflicts of interest that arise when the judge retains financial interests in organizations and other entities that appear regularly in court, by divesting himself or herself of such interests. The judge should also discourage members of his or her family from engaging in dealings that would reasonably appear to exploit the judge's judicial position.</p>
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	<p>duties.</p> <p><u><i>The Public Officer Ethics Act 2003: General Code of Conduct and Ethics</i></u></p> <p>Conflict of interest.</p> <p>12.(1) A public officer shall use his best efforts to avoid being in a position in which his personal interests conflict with his official duties.</p> <p>(2) Without limiting the generality of subsection (1), a public officer shall not hold shares or have any other interest in a corporation, partnership of other body, directly or through another person, if holding those shares or having that interest would result in the public officer's personal interests conflicting with his official duties.</p> <p>(3) A public officer whose personal interests conflict with his official duties shall -</p> <ul style="list-style-type: none"> (a) declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict ;and (b) refrain from participating in any deliberations with respect to the matter. <p>(4) Notwithstanding any directions to the contrary under sub-section (3)(a), a public officer shall not award a contract, or influence the award of a contract, to -</p> <ul style="list-style-type: none"> (a) himself; (b) a spouse or relative; (c) a business associate; <p>or</p>	
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	<p>(d) a corporation, partnership or other body in which the officer has an interest.</p> <p>(5) The regulations may govern when the personal interests of a public officer conflict with his official duties for the purposes of this section.</p> <p>(6) In this section, “personal interest” includes the interest of a spouse, relative or business associate.</p>	
<p>2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.</p>		<p>Paragraph 2.4 is omitted. The issue of relations with the media arises under this paragraph, as do correspondence with litigants and public statements by judges on sentencing policy.</p>
<p>2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where</p> <p>2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;</p> <p>2.5.2 the judge previously served as a lawyer or was a material witness</p>	<p><i>Rule 5</i> DISQUALIFICATION</p> <p>A judicial officer shall disqualify himself in proceedings where his impartiality might reasonably be questioned including but not limited to instances in which-</p> <p>(a) he has a personal bias or prejudice concerning a party or his lawyer, or personal knowledge of facts in the proceedings before him;</p> <p>(b) he has served as a lawyer in the matter in controversy;</p>	<p>Rule 3 does not address all the matters dealt with in Paragraph 2.5.</p>

<p>in the matter in controversy; or</p> <p>2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:</p> <p>Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.</p>	<p>(c) he or his family or a close relation has a financial or any other interest that could substantially affect the outcome of the proceeding; or</p> <p>(d) he, or his spouse, or a person related to either of them or the spouse of such person or a friend is a party to the proceeding.</p>	
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<p style="text-align: center;">INTEGRITY</p>		<p>The Value is omitted.</p>
<p style="text-align: center;"><i>Principle:</i></p> <p>Integrity is essential to the proper discharge of the judicial office.</p>		<p>The Principle is omitted.</p>
<p style="text-align: center;"><i>Application:</i></p> <p>3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.</p>		<p>Paragraph 3.1 is omitted. This paragraph has been understood to mean, for example, that a judge should not violate universally accepted community standards, or engage in activities that clearly bring disrepute to the courts or the legal system.</p>
<p>3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.</p>	<p><i>Rule 12</i> PROFESSIONALISM AND COURTESY</p> <p>1.A judicial officer and any other officer in the Judicial Service shall ensure that his official and private conduct upholds at all times, the dignity and integrity of the Judicial Service by conducting himself both officially and in private, in a dignified, honest and impeccable manner.</p>	

PROPRIETY		The Value is omitted.
<p><i>Principle:</i></p> <p>Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.</p>		The Principle is omitted.
<p><i>Application:</i></p> <p>4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.</p>	<p><i>Rule 3</i></p> <p>INDEPENDENCE, INTEGRITY AND IMPARTIALITY</p> <p>5. In all activities, a judicial officer shall exhibit respect for the rule of law, comply with the law, avoid impropriety and the appearance of impropriety, and act in a manner that promotes public confidence in the integrity and the impartiality of the Judicial Service.</p>	
<p>4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.</p>		Paragraph 4.2 is omitted.
<p>4.3. A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.</p>		Paragraph 4.3. which concerns the judge's personal relations with lawyers, has been omitted.

<p>4.4 A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.</p>		<p>Paragraph 4.4, which concerns matters in which a family member appears for a party, has been omitted.</p>
<p>4.5 A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.</p>		<p>Paragraph 4.5 has been omitted. This provision anticipates a situation where the judge's spouse or other member of the judge's family is a lawyer. In such event, it would not be proper for the judge to share even a home telephone line with that person's legal practice since to do so could lead to the perception that the judge is also practising law, and potentially to inadvertent ex parte communications or the appearance or suspicion of such communications.</p>
<p>4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.</p>	<p>Rule 14 PUBLIC STATEMENTS AND COMMUNICATION WITH THE PRESS</p> <p>1. A judicial officer and any officer in the judicial service shall not make public statements on matters affecting government programmes or policies of the judicial service without the specific authority of the Chief Justice. A public statement includes communicating with the press.</p> <p>2. A judicial officer shall not, without the express permission of the chief justice -</p> <p>(a) act as the editor of any newspaper or take part directly or indirectly in the management thereof; nor</p> <p>(b) publish in any manner anything which may be reasonably regarded as of a political or administrative nature, whether under his own name, under a</p>	<p>Paragraph 4.6 recognizes that a judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge should always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary. It was considered necessary to confirm this right of a judge and, at the same time, to define the appropriate degree of involvement of the judiciary in public debate, which has been discussed in detail in the Commentary. Rule 14 appears to be unnecessarily detailed.</p>

	<p>pseudonym or anonymously.</p> <p>3. A judicial officer, and any officer in the judicial service whether on duty or on leave of absence, should not allow himself to be interviewed on questions of public policy affecting Kenya or any other country without the permission of the Chief Justice.</p> <p>4. Whilst it is not desired to interfere with a judicial officer's liberty of free speech any lack of discretion on his part likely to embarrass the government or the judicial service may result in appropriate consequences for the officer responsible.</p> <p><i>Rule 15</i> PROHIBITION FOR STANDING FOR ELECTION AS a MEMBER OF THE NATIONAL ASSEMBLY OR A LOCAL AUTHORITY</p> <p>A judicial officer shall not stand for election as a member of the national assembly or a local authority or hold any political office.</p> <p><i>Rule 16</i> POLITICAL ACTIVITY AND ATTENDANCE AT POLITICAL MEETINGS</p> <p>A judicial officer or any other officer in the judicial service is entitled to his own views on political matters but shall not be permitted to express those views publicly.</p>	
<p>4.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about</p>		<p>Paragraph 4.7 is omitted. This paragraph was considered necessary in order to avoid a situation where, consequent to his or her decision in a proceeding before the court, it appeared that the judge or a member of the</p>

<p>the financial interests of members of the judge's family.</p>		<p>judge's family, or other person in respect of whom the judge was in a fiduciary relationship, was likely to benefit financially.</p>
<p>4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.</p>	<p><i>Rule 3</i> INDEPENDENCE, INTEGRITY AND IMPARTIALITY</p> <p>6. A judicial officer shall not allow family, social, political or other relationships to influence his conduct or judgement.</p>	
<p>4.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.</p>	<p><i>Rule 3</i> INDEPENDENCE, INTEGRITY AND IMPARTIALITY</p> <p>6. A judicial officer shall not use or lend the prestige of his judicial office to advance his private interest or those of others. A judicial officer shall not knowingly convey or permit others to convey the impression that anyone is in a special position to influence him.</p> <p><i>Rule 17</i> CANVASSING</p> <p>Judicial officers or other officers in judicial service shall not canvass either directly or indirectly for any favours in the Judicial Service or in any other organization.</p>	
<p>4.10 Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.</p>	<p><u><i>The Public Officer Ethics Act 2003: General Code of Conduct and Ethics</i></u></p> <p>No improper enrichment.</p> <p>11. (1) A public officer shall not use his office to improperly enrich himself or others.</p> <p>(2) without limiting the</p>	<p>Section 11(5) of the Public Officer Ethics Act, which, when included in the Kenyan Code, allows a judge to use information acquired by him in his judicial capacity "and which is not public" for educational or literary purposes, research purposes or other similar purposes "for the personal benefit of himself or another", is clearly contrary to Paragraph 4.10.</p>

	<p>generality of subsection (1), a public officer shall not –</p> <p>(b) improperly use his office to acquire land or other property for himself or another person, whether or not the land or property is paid for; or</p> <p>(c) for the personal benefit of himself or another, use or allow the use of information that is acquired in connection with the public officer’s duties and that is not public.</p> <p>(5) Subsection (2)(c) does not apply to the use of information for educational or literary purposes, research purposes or other similar purposes.</p>	
<p>4.11 Subject to the proper performance of judicial duties, a judge may:</p> <p>4.11.1 write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;</p> <p>4.11.2 appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;</p> <p>4.11.3 serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or</p> <p>4.11.4 engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the</p>	<p>Rule 6 SOCIAL AND RECREATIONAL ACTIVITIES</p> <p>A judicial officer may engage in the arts, sports and other social and recreational activities, if such activities do not adversely affect the dignity of his office or interfere with the performance of his judicial duties.</p> <p>Rule 8 CIVIL AND CHARITABLE ACTIVITIES</p> <p>1. A judicial officer is part and parcel of the society in which he lives. Whereas, he should not be isolated, he is expected to remain within dignified limits. Above all, a judicial officer should regulate his extra-judicial activities to minimize the risk of conflict with judicial duties.</p> <p>2. A judicial officer may only participate in “Harambee” if</p>	<p>Paragraph 4.11.3 is omitted. It deals with the circumstances in which serving judges may agree to serve on commissions of inquiry on matters of public importance but which fall outside the scope of the functions of the judiciary. There are examples of judges becoming embroiled in public controversy and being criticized and embarrassed following the publication of reports of commissions on inquiry on which they have served. In some countries, judges are forbidden, for constitutional reasons, to undertake inquiries for the executive government and, even if permitted, are discouraged from doing so, depending on the subject matter and procedures for nominating the judge concerned.</p>

<p>performance of judicial duties.</p>	<p>the same does not reflect adversely upon his impartiality and so long as it does not interfere with the performance of his judicial duties.</p> <p>3. A judicial officer may contribute towards or attend a “Harambee” but should not play a central part in its organization or preside over the same.</p> <p>4. No judicial officer shall use his office to solicit for funds for a “Harambee” or any other purpose.</p> <p><i>Rule 9</i> LAW PRACTICE</p> <p>A judicial officer may engage in activities to improve the law, the legal system and the administration of justice.</p>	
<p>4.12 A judge shall not practise law whilst the holder of judicial office.</p>	<p><i>Rule 9</i> LAW PRACTICE</p> <p>A judicial officer should, however, not practice law either by offering legal advice or drafting legal documents or pleadings to litigants or members of the public whether for a fee or free of charge.</p> <p><i>Rule 13</i> PRIVATE AGENCIES</p> <p>No judicial officer may undertake any private agency in any matter connected with the exercise of his public duties.</p>	
<p>4.13 A judge may form or join associations of judges or participate in other organisations representing the interests of judges.</p>		<p>Paragraph 4.13 is omitted.</p>

<p>4.14 A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.</p>	<p><i>Rule 11</i> PROHIBITED CONDUCT</p> <p>1. A judicial officer and any officer in the Judicial Service shall neither ask for nor accept any property or benefit of any kind, for himself or for any person, on account of anything to be done, done or omitted to be done by him in the discharge of his duties or by virtue of his official position.</p> <p>2. Subject to this Rule, a judicial officer and any officer in the Judicial Service or members of his family shall not solicit or accept any gifts, gratuity, hospitality, free passages or favours from any person or any body corporate or unincorporated that might reasonably be thought to influence, or intended to influence, him in the performance of his duties.</p> <p>3. The provisions of sub-rule 2 apply not only to the judicial officer himself but also to the members of his family, and a judicial officer will be held responsible for their observance by the members of his family.</p> <p>4. For the purposes of sub-rules 2 and 3 the member of the family of an officer shall be defined in Rule 7.2.</p> <p>5. Subject to sub-rule 7 a gift or donation to a judicial officer or any other officer in the Judicial Service on any public or ceremonial occasion shall be treated as a gift to the Government.</p> <p>6. Where a gift or donation of the nature specified in sub-rule 2 is given without the knowledge of the officer or it would be offensive to</p>	
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	<p>custom or good public relations to refuse the gift, such officer shall forthwith report the matter to the Chief Justice who shall direct the appropriate mode of disposal of any such gift or donation and the officer shall comply with such direction.</p> <p>7. Notwithstanding any other provisions of this Rule to the contrary, but subject to section 11(3) of the General Code of Conduct and Ethics set out in Appendix 1 an officer may -</p> <ul style="list-style-type: none"> (a) accept gifts which are occasional and inexpensive or in the form of a souvenir; and (b) accept personal gifts or donations from relatives or friends on such special occasions as may be recognized by custom. <p>8. When presents are exchanged between officers acting on behalf of the Government in ceremonial intercourse with other Governments or their representatives, the presents received will be handed over to the Chief Justice, who shall direct the appropriate mode of disposal, and any reciprocal presents will be given at the expense of the Judicial Service.</p>	
<p>4.15 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.</p>		<p>Paragraph 4.15 is omitted. The Kenyan Code prohibits a judge and members of the judge's family from asking or accepting a gift, but does not require the judge to ensure that court staff do likewise. It was considered necessary to include this provision in the Bangalore Principles not only because court staff are subject to the judge's control and authority, but also because several service delivery surveys had</p>

		<p>indicated that, where a judge is so minded, it is through court staff that the judge seeks and obtains a gratification in connection with his or her duties or functions.</p>
<p>4.16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.</p>		<p>This is addressed in Rule 11 above.</p>

<p style="text-align: center;">EQUALITY</p>		<p>The Value is omitted.</p>
<p style="text-align: center;"><i>Principle:</i></p> <p>Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.</p>		<p>The Principle is omitted.</p>
<p style="text-align: center;"><i>Application:</i></p> <p>5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").</p>	<p>Rule 3 INDEPENDENCE, INTEGRITY AND IMPARTIALITY</p> <p>7. A judicial officer shall not hold membership in any organization he knows practices discrimination on the basis of race, sex, religion or ethnic or national origin.</p>	<p>Paragraph 5.1 is omitted. What it requires is not only that the judge recognize, and be familiar with, cultural, social and religious diversity, but also that the judge should attempt, by appropriate means, to remain informed about changing attitudes and values in society, and take advantage of suitable educational opportunities (which ought to be made reasonably available) that will assist the judge to be, and appear to be, impartial. None of this is reflected in the Kenyan Code. Moreover, the very limited prohibition in Rule 3(7) makes no mention of discrimination based on colour, disability, age, marital status or sexual orientation, all of which are now prohibited grounds of discrimination under international law.</p>
<p>5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.</p>	<p>.</p>	<p>Paragraph 5.2 is omitted. What it states is that a judge shall not, in the performance of his duties, <i>be</i> biased or prejudiced towards any person or group based on unjust discrimination. While bias based on any ground violates the judicial value of "impartiality", what the Bangalore Principles require in this paragraph, in respect of the judicial value of "equality" is that the judge should not <i>manifest</i> bias, through his or her words or conduct. It is a requirement that the judge should avoid comments, expressions, gestures or behaviour that might reasonably be interpreted as showing insensitivity or disrespect.</p>
<p>5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial</p>		<p>Paragraph 5.3 is omitted. Since it is the judge who sets the tone and creates the environment for a fair trial in his or her court, it was considered necessary to emphasize the judge's duty to ensure that all people in court are protected</p>

<p>colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.</p>		<p>from any display of prejudice based on race, gender, religion or other irrelevant grounds.</p>
<p>5.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.</p>		<p>Paragraph 5.4 is omitted. Since the first contact that a member of the public has with the judicial system is often with court staff, it was considered especially important that the judge ensures, to the fullest extent within his or her power, that the conduct of court personnel subject to the judge's direction and control, is consistent with the foregoing standards of conduct.</p>
<p>5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.</p>		<p>Paragraph 5.5 is omitted. This paragraph requires a judge to address clearly irrelevant comments made by lawyers in court or in the presence of the judge that are sexist or racist or otherwise offensive or inappropriate.</p>

<p align="center">COMPETENCE AND DILIGENCE</p>		<p>The Value is omitted.</p>
<p align="center"><i>Principle:</i></p> <p>Competence and diligence are prerequisites to the due performance of judicial office.</p>		<p>The Principle is omitted.</p>
<p align="center"><i>Application:</i></p> <p>6.1 The judicial duties of a judge take precedence over all other activities.</p>	<p><i>Rule 3</i> INDEPENDENCE, INTEGRITY AND IMPARTIALITY</p> <p>8. The judicial duties of a judicial officer take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards shall apply -</p> <p>(a) a judicial officer shall consider and decide all matters assigned to him except those in which his disqualification is required;</p> <p>(c) a judicial officer shall be faithful to the law and shall not deviate from the law to appease public clamour, to avoid criticism, or to advance an improper interest;</p>	
<p>6.2 A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.</p>		<p>Paragraph 6.2 has been omitted. The objective of this paragraph is to emphasize that, to some degree, every judge must manage as well as decide cases. The judge is responsible for the efficient administration of justice in his or her court. This involves case management (including the prompt disposition of cases), record-keeping, management of funds and supervision of court staff. If the judge is not diligent in monitoring and disposing of cases, the resulting inefficiency will</p>

		increase costs and undermine the administration of justice. This necessarily requires a judge to maintain professional competence in judicial administration in order to facilitate the performance of the administrative responsibilities of court officials.
6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.	<p><i>Rule 3</i> INDEPENDENCE, INTEGRITY AND IMPARTIALITY</p> <p><i>8(b)</i> a judicial officer shall maintain professional competence in the law;</p>	Paragraph 6.3 is broader in scope than Rule 3(8)(b). It requires the judge not only to maintain, but also to enhance, his or her professional competence in the law, by taking advantage of training and other facilities. Paragraph 6.3. also requires the judge to develop other skills and personal qualities necessary for the proper performance of judicial duties.
6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.		Paragraph 6.4 is omitted. In the context of the growing internationalisation of societies and the increasing relevance of international law in relations between the individual and the state, the powers entrusted to a judge must be exercised not only in accordance with domestic law but also, to the full extent that domestic law permits, in a way consistent with the principles of international law. A judge cannot, therefore, properly ignore, or claim ignorance of, international law, including the international law of human rights, whether it be derived from customary international law, the applicable international treaties, or the regional human rights conventions.
6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.	<p><i>Rule 3</i> INDEPENDENCE, INTEGRITY AND IMPARTIALITY</p> <p><i>8(f)</i> A judicial officer shall dispose of all judicial matters promptly, efficiently and fairly.</p> <p><i>Rule 12</i> PROFESSIONALISM AND COURTESY</p> <p>3. A judicial officer and any</p>	

	<p>other officer in the judicial service shall, at all times, be disciplined whether or not on official duty and shall, in particular -</p> <p>(a) maintain a standard of dressing and personal hygiene befitting the dignity and image of the judicial service;</p> <p>(b) observe official working hours, be punctual and meet deadlines;</p> <p>(c) not be absent from duty without proper authorization or reasonable cause;</p> <p>(d) perform his duties in an efficient and competent manner;</p> <p>(e) exercise diligence, care and attention and seek to achieve high standards of professionalism in the delivery of services;</p> <p>(f) practice and promote adherence to meritocratic principles and practices in appointments to judicial service whereof the guiding principles shall be qualifications, merit, competence and experience; and</p> <p>(g) seek to contribute and enhance the standards of performance and level of professionalism in the judicial service.</p> <p>4. A judicial officer and any other officer in the judicial service shall actively and personally promote a culture in the public service that aims at providing fast, friendly responsive and efficient service and shall be courteous to all persons in the provision of such service.</p>	
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<p>6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.</p>	<p><i>Rule 3</i> INDEPENDENCE, INTEGRITY AND IMPARTIALITY</p> <p><i>8(d)</i> a judicial officer shall take reasonable steps to maintain and ensure order and decorum in judicial proceedings before him;</p> <p><i>(e)</i> a judicial officer shall be patient ,dignified, and courteous to litigants, assessors, witnesses, lawyers and others with whom he deals in an official capacity, taking reasonable steps to maintain and ensure similar conduct from lawyers and from court staff and others subject to his direction and control;</p>	
<p>6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.</p>		<p>Paragraph 6.7 is omitted. The Commentary provides several examples of conduct incompatible with the diligent discharge of judicial duties.</p>
	<p><i>Rule 1</i></p> <p>A judicial officer and any other officer in respect of which the Judicial Service Commission exercises disciplinary control shall comply with all the requirements of the General Code of Conduct and Ethics set out in part III of the Public Officer Act 2003. Those requirements are set out in Appendix 1 and form part of this Code.</p>	<p>The desirability of including in a code of judicial conduct, sections of the General Code of Conduct applicable to all public officers, is examined in the main report.</p>
	<p><i>Rule 2</i> OATH OF OFFICE</p>	<p>There is no provision in the Bangalore Principles that corresponds to Rule 2. Indeed, the requirement that the judge</p>

	<p>A judicial officer shall be true and faithful both to his Oath of Allegiance and the Judicial Oath, taken on appointment. He should respect and faithfully apply the laws of the land in the performance of his judicial functions.</p>	<p>“should faithfully apply the laws of the land in the performance of his judicial functions” is a matter for some concern. A similar provision was considered for inclusion in the Bangalore Principles, but was omitted. While a judge is obliged to uphold the law, such a rule cannot be stated in absolute terms. A judge in Nazi Germany might not offend the principles of the judiciary by mollifying the application of the Nuremberg Law on racial discrimination. Likewise, the judge in apartheid South Africa. Sometimes a judge may, depending on the nature of the judge’s office, be confronted by the duty to enforce laws that are contrary to basic human rights and human dignity. If so confronted, the judge may be duty bound to resign the judicial office rather than compromise the judicial duty to enforce the law. In the circumstances, the wisdom, or the necessity, of retaining Rule 2 may need to be re-considered.</p>
IMPLEMENTATION		
<p>By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.</p>	<p><i>Rule 22</i> BREACH OF CODE</p> <p>Where an officer has committed a breach of this Code, appropriate action will be taken in accordance with the provisions of the Public Officer Ethics Act 2003, Judicial Service Commission Regulations or the Constitution as the case may be.</p>	<p>The manner of applying and enforcing a code of judicial conduct is examined elsewhere. Rule 22 does not appear to be compatible with the Implementation Measures for the Bangalore Principles.</p>
DEFINITIONS		

<p>In this statement of principles, unless the context otherwise permits or requires, the following meanings shall be attributed to the words used:</p>		
<p>"<i>Court staff</i>" includes the personal staff of the judge including law clerks.</p>		<p>There is no definition of "court staff" in the Kenyan Code.</p>
<p>"<i>Judge</i>" means any person exercising judicial power, however designated.</p>	<p style="text-align: center;">INTERPRETATION</p> <p>In this Code, unless the context otherwise requires -</p> <p>"judicial officer" shall mean and include any Judge, Magistrate, Registrar or Kadhi of all grades employed in the Judicial Service of Kenya.</p> <p>Reference to the masculine gender includes females.</p>	
<p>"<i>Judge's family</i>" includes a judge's spouse, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household.</p>	<p><i>Rule 7</i> FIDUCIARY ACTIVITIES</p> <p>2. A member of the family of a judicial officer includes his spouse, child, grandchild, parent, or other relative or person with whom the judicial officer maintains a close family relationship.</p>	
<p>"<i>Judge's spouse</i>" includes a domestic partner of the judge or any other person of either sex in a close personal relationship with the judge.</p>		<p>The Kenyan Code has omitted to define the expression "judge's spouse" and, in view of the definition it contains of the term "judge's family", may exclude a domestic partner or other person of either sex in close personal relationship with the judge. This would mean that the strict rules of conduct applicable to the judge's spouse, including those relating to the acceptance of gifts and the practice of law from the judge's residence, will not apply to such persons.</p>

II

IMPLEMENTATION MODALITIES FOR A CODE OF JUDICIAL CONDUCT

Terms of Reference

The Terms of Reference require me to “identify implementation modalities” for the developed code of judicial conduct, “in line with the Bangalore Principles of Judicial Conduct (the Bangalore Principles) and other international standards.” The Terms of Reference, perhaps advisedly, do not require me to identify Implementation modalities for the existing Judicial Service Code of Conduct and Ethics (the Kenyan Code). In my view, the Kenyan Code should be replaced with a new code of judicial conduct that mirrors the Bangalore Principles. It may be adapted to the extent necessary to suit local circumstances.

The implementation of a code of judicial conduct is essentially a matter for the national judiciary. Accordingly, the Bangalore Principles state thus:

By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

In this regard, the Kenyan Code states as follows:

Rule 22: BREACH OF THE CODE

Where an officer has committed a breach of the Code, appropriate action will be taken in accordance with the provisions of the Public Officer Ethics Act 2003, Judicial Service Commission Regulations or the Constitution as the case may be.

General Comment

In 2010, the Judicial Integrity Group offered a statement of measures as guidelines or benchmarks for the effective implementation of the Bangalore Principles. These were formulated having regard to contemporary international standards and national experience. Reference was also made to several national constitutions and to regional and international initiatives. The Group was of the view that the effective implementation of the Bangalore Principles required a holistic approach. The Implementation Measures fall into two categories. The first are measures required to be taken by the judiciary. The second are the institutional arrangements required to ensure judicial independence and which are exclusively within the competence of the State. While it is the responsibility of the judge to be free of inappropriate connections with the executive and the legislature, it is principally the responsibility of the State to establish the institutional arrangements that would secure the independence of the judiciary from the other two branches of government.

The following proposals for the implementation of a developed code of judicial conduct are based on the Implementation Measures recommended by the Judicial Integrity Group.

MEASURES TO BE TAKEN BY THE JUDICIARY

Revision of the Kenyan Code

Part I of this Report focuses on the extent to which the Kenyan Code falls short of the Bangalore Principles. It is necessary, therefore, that the judiciary should adopt a complete statement of the principles of judicial conduct that are now universally accepted in order to enable the judges to operate within a framework of generally accepted ethical standards.

Proposal 1

The judiciary should prepare a new code of judicial conduct based on the Bangalore Principles.

Dissemination of the code of judicial conduct

A code of judicial conduct is addressed not only to judges; it is also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. It will be a useful tool for the academic community and the media to monitor the performance and conduct of the judiciary. It is necessary, therefore, that the new code of judicial conduct should be widely disseminated in the community.

Proposal 2

The judiciary should ensure that the code of judicial conduct is disseminated in the community.

Training in judicial ethics

If a contemporary statement of judicial ethics is not already a part of the training curriculum for judges, it is necessary that the values and principles contained in a new code of judicial conduct should be used as the basis in training sessions for judges in judicial ethics. It is not suggested that judges should be “taught” judicial ethics. Instead, what is proposed is that a forum be created for judges to consider a variety of ethical problems and to discuss appropriate responses based on international standards. The forum should be participatory, with the judges being expected to participate actively, and with the course presenter assuming the role principally of a facilitator. The purpose of such a course should be to provide judges with a framework for analysing and resolving ethical issues that are likely to arise in a judge’s professional life. The “teaching” element in respect of the content of judicial ethics should be intended only to assist a judge to choose the most prudent course of

action when faced with an ethical issue. It is recommended that a judicial ethics training curriculum and training manual, similar to that prepared by UNODC for the Nigerian judiciary, be prepared, with case studies with a local context.

Proposal 3

The judiciary should ensure that judicial ethics, based on the new code of judicial conduct and/or the Bangalore Principles is an integral element in the training of judges.

Application of the code of judicial conduct

In the normal working life of a judge, it is possible that at some stage a question may arise in the judge's mind about the propriety of contemplated or proposed future conduct. While one judge may choose to advise himself or herself, another may wish to seek the advice of peers. It is the practice in many jurisdictions to establish a Judicial Ethics Advisory Committee from which a judge may request an advisory opinion about the propriety of contemplated or proposed future conduct. Such a committee will usually consist of a majority of active or retired judges, and one or two lawyers who are not in active practice, and the same number of citizens who are not admitted to practice law and are not employees of the government. The committee may also issue opinions on its own initiative on matters of interest to the judiciary.

The opinion of the committee will set forth the facts on which it is based and provide advice only with regard to those facts. It will cite the rules, cases, and other authorities, if any, upon which the advice is based, and cite the applicable provisions of the code of judicial conduct. The practice of many such committees is to send the original formal opinion to the person requesting the opinion, while an edited version that omits the names of persons, courts, places and any other information that might tend to identify the person making the request, is sent to the Supreme Court, all law school libraries, and published in a publication generally available to judges.

All opinions are advisory only, and are not binding; but compliance with an advisory opinion will usually be considered to be evidence of good faith in any proceedings relating to judicial discipline.

Proposal 4

The judiciary should consider establishing a judicial ethics advisory committee of sitting and/or retired judges and others to advise its members on the propriety of their contemplated or proposed future conduct.

Enforcement of the code of judicial conduct

A code of judicial conduct will do little to improve judicial performance and enhance public confidence if it is not enforceable. Therefore, the judiciary should consider establishing a credible independent Judicial Ethics Review Committee to receive,

inquire into, resolve and determine complaints of unethical conduct of members of the judiciary. The committee may consist of a majority of judges, but should preferably include sufficient lay representation to attract the confidence of the community. The committee should ensure that protection is accorded to complainants and witnesses, and that due process is secured to the judge against whom a complaint is made, with confidentiality in the preliminary stages of an inquiry if that is requested by the judge. Associating persons external to the judiciary (lawyers, academics and representatives of the society) in the monitoring of ethical principles will prevent a possible perception of self-interest and self-protection, while ensuring that judges are not deprived of the power to determine their own professional ethics.

In many jurisdictions in which such committees have been established, complaints into pending cases are not entertained, unless it is a complaint of undue delay. A complaint is required to be in writing and signed, and include the name of the judge, a detailed description of the alleged unethical conduct, the names of any witnesses, and the complainant's address and telephone number. The judge is not notified of a complaint unless the committee determines that an ethics violation may have occurred. The identity of the person making the complaint is not disclosed to the judge unless the complainant consents. It may be necessary, however, for a complainant to testify as a witness in the event of a hearing. All matters before the committee are confidential. If it is determined that there may have been an ethics violation, the committee usually handles the matter informally by some form of counselling with the judge. If the committee issues a formal charge against the judge, it may conduct a hearing and, if it finds the charge to be well-founded, may reprimand the judge privately, or place the judge on a period of supervision subject to terms and conditions. Charges that the committee deems sufficiently serious to require the retirement, public censure or removal of the judge are referred to the body responsible for exercising disciplinary control over the judge.

Although there is both an overlap and an interplay, principles of judicial conduct should generally remain independent of the disciplinary rules applicable to judges in the sense that failure to observe one of such principles should not necessarily constitute a disciplinary infringement. Conduct that gives rise to disciplinary sanctions must be distinguished from a failure to observe professional standards. Professional standards represent best practice, which judges should aim to develop and towards which all judges should aspire. They should not be equated with conduct justifying disciplinary proceedings. However, on occasion, the breach of professional standards may be considered to be sufficiently serious (for example, repeated breaches) to constitute conduct sufficient to justify and require disciplinary sanction.

Since Article 168(1)(b) of the Constitution of Kenya already provides that a judge of a superior court may be removed on the ground of a breach of the code of conduct, it appears to be essential to establish the filtering mechanism described above to ensure that only a breach that is deemed sufficiently serious to warrant removal is brought within the ambit of that constitutional provision.

Proposal 5

The judiciary should consider establishing a credible, independent judicial ethics review committee to receive, inquire into, resolve and determine complaints of unethical conduct of members of the judiciary.

The committee may refer sufficiently serious complaints to the body responsible for exercising disciplinary control over the judges.

Assignment of Cases

The judicial value of “impartiality” requires that the assignment of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. It also requires that a case should not be withdrawn from a particular judge without valid reasons. The Council of Europe has recommended that:

Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order or some similar system.

The Council of Europe has also recommended that:

A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges.

The International Bar Association has proposed that:

the division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.

The practice of European jurisdictions suggests a balancing exercise between organizational needs and institutional values. For example, in England and Wales, there is an informal and peer based system in which judges allocate cases lodged in their court between themselves, while the head of the court does not play any role in the process. In both civil and criminal matters, advocates are asked to estimate the time required for hearings and trials and, in general, the allocation of an individual judge to a case is dependent on two factors: his or her specialization, skills or expertise, and his or her availability or commitment to other cases. In the Netherlands, the assignment of cases is the task of the management board of the court. Cases are assigned to judges within a sector on the basis of the nature of the procedure (i.e. whether regular or summary); specialization; judicial continuity; and randomness (i.e. using the alphabet, postal code, etc.), in that order or priority. This procedure is automated, but in each sector a coordinating judge is responsible for the management of the distribution of cases among judges. In Italy, case assignment is highly formalized and based on criteria approved and enforced by the judicial council. Within a section, the assignment of a case to a single judge is random (e.g. based on the initial letter of the claimant or defendant, or date of filing). This complex process seeks to avoid judge-shopping and to ensure a fair distribution of cases among judges. It also generates strong rigidities affecting court effectiveness and the pace of litigation.

It is necessary, therefore, that a procedure should be devised to ensure that cases are assigned on clear and objective criteria and that the judge responsible for case assignments should not be able to achieve a desired result in a case through the exercise of his power to constitute benches. Reference to judges’ specialization alone

could lead to an unbalanced caseload among the judges. A random case assignment alone could avoid “judge shopping” but result in less specialization and consequently less efficiency. The challenge is to achieve a proper balance.

Based on the Implementation Measures recommended by the Judicial Integrity Group, the following proposals are made:

Proposal 6

The division of work among the judges of a court, including the distribution of cases, should ordinarily be performed under a predetermined arrangement provided by law or agreed by all the judges of the relevant court. Such arrangements may be changed in clearly defined circumstances such as the need to have regard to a judge’s special knowledge or experience. The allocation of cases may, by way of example, be made by a system of alphabetical or chronological order or other random selection process.

Proposal 7

A case should not be withdrawn from a particular judge without valid reasons. Any such reasons and the procedures for such withdrawal should be provided for by law or rules of court.

Court Administration

The principal responsibility for court administration, including the appointment, supervision and disciplinary control of non-judicial support staff (“court personnel”) must vest in the judiciary, or in a body in which the judiciary is represented and has an effective role. Since a judge’s primary duty is the due performance of the judicial function which involves the hearing and determination of cases, the management of the court may be delegated to a registrar or court administrator on the basis that there exists a shared responsibility between the head of court and the court administrator for the overall management of the court. The court may be supported by an Inspectorate. (1) It is noted that the Task Force has recommended that there be a separation of judicial functions from court administration through the establishment of an autonomous court administration structure to oversee the administration and management of courts.

Court personnel are the initial contact point and the providers of information to those who seek to invoke the jurisdiction of the court. They are also responsible for the administrative and technical non-judicial tasks that contribute to the outcome of a judicial proceeding. Since court personnel have the potential to undermine the integrity of the judicial process, through neglect of duty, abuse of power or corruption, the judiciary should ensure that their conduct is regulated and monitored. The Principles of Conduct for Judicial Personnel that were adopted by the Judicial Integrity Group in 2005 prescribes detailed standards of conduct in respect of fidelity to duty, confidentiality, conflict of interests and performance of duties.

The judiciary should endeavour to complement (or replace where resources permit) the paper based court record systems with electronic information and communication technology (ICT). ICT will enable case records to be kept up to date, accurately, promptly and in an easily accessible form.

The judiciary also has the responsibility to promote the quality of justice, and to periodically review public satisfaction with the delivery of justice. Apart from being sensitive to contributions from academia, the judiciary should, through regular case audits, surveys of court users and other stakeholders, and discussions with court user committees, endeavour to identify systemic weaknesses in the judicial process with a view to remedying them.

Proposal 8

The responsibility for court administration, including the appointment, supervision and disciplinary control of court personnel should vest in the judiciary or in a body subject to its direction and control.

Proposal 9

The judiciary should adopt and enforce principles of conduct for court personnel, taking into consideration the Principles of Conduct for Court Personnel formulated by the Judicial Integrity Group in 2005.

Proposal 10

The judiciary should endeavour to utilize information and communication technologies with a view to strengthening the transparency, integrity and efficiency of justice.

Proposal 11

In exercising its responsibility to promote the quality of justice, the judiciary should, through case audits, surveys of court users and other stakeholders, discussion with court-user committees and other means, endeavour to review public satisfaction with the delivery of justice and identify systemic weaknesses in the judicial process with a view to remedying them.

Proposal 12

The judiciary should regularly address court users' complaints, and publish an annual report of its activities, including any difficulties encountered and measures taken to improve the functioning of the justice system.

Case Management

It is now recognized that the judiciary should actively monitor and control the progress of a case, especially in the original courts, from institution to judgment,

including the completion of all the post-judgment steps. Traditionally, the parties to a dispute control the movement of a case, with judges and court personnel merely acting as facilitators. The active management by the court of the progress of a case is designed to encourage the just, orderly and expeditious resolution of disputes. There are several techniques of case management. For example, the individual docket system favoured in Australian federal courts is based on the principle that the judge to whom a case is randomly allocated is responsible for managing the case until final disposition. This involves the case being handled by the same judge from beginning to end; the early fixing of a near-immutable trial date; the judge himself fixing the timetable and giving relevant directions in the pre-trial period; and the same judge trying the case if it goes to trial. The active involvement of the judge enables him or her to deal effectively with the critical areas of litigation, such as defective pleadings, excessive discovery of documents and other tactics frequently employed by lawyers to delay the proceedings to frustrate legitimate claims. It will also facilitate the continuous hearing of a case instead of short and incomplete hearings spread over several weeks or months.

Proposal 13

The judiciary should institute modern case management techniques to ensure the just, orderly and expeditious conduct and conclusion of court proceedings

Access to Justice

Access to justice is effectively denied if potential litigants do not know how to use the system. The judiciary must, therefore, provide standard, user-friendly forms and instructions, and furnish clear and accurate information on matters such as operating policies and procedures, and filing fees. Potential litigants, witnesses and other court users are entitled to easily readable signs, publicly displayed courthouse orientation guides, court schedules, and the assistance of court personnel to respond to questions. The judiciary should also establish public information desks in close proximity to entrances, and customer service and resource centres in easily accessible places. Court premises ought to be safe, clean, convenient and user-friendly, with comfortable waiting areas, adequate public space, and amenities for special-need users, such as children, victims, and the disabled.

Proposal 14

Access to justice is of fundamental importance to the rule of law. The judiciary should, within the limits of its powers, adopt procedures to facilitate and promote such access.

Proposal 15

To facilitate access to the judicial system, the judiciary should ensure that standard, user-friendly forms and instructions, and clear and accurate information on matters such as filing fees, court procedures and hearing schedules are made available to potential court users.

Proposal 16

The judiciary should ensure that witnesses, other court users and interested members of the public have access to easily readable signs and publicly displayed courthouse orientation guides. Sufficient court personnel should be provided to respond to questions through public information services. They should be available close to court entrances. Customer service and resource centres should be provided in an accessible place. Court users should have access to safe, clean, convenient and user-friendly court premises, with comfortable waiting areas, adequate public space, and amenities for special-need users, such as children, victims, and the disabled.

Proposal 17

When there is no sufficient legal aid publicly available, the high costs of private legal representation make it necessary for the judiciary to consider, where appropriate and desirable, such initiatives as the encouragement of pro bono representation of selected litigants by the legal profession of selected litigants, the appointment of amici curiae (friend of the court), alternative dispute resolution, and community justice procedures, to protect interests that would otherwise be unrepresented in court proceedings; and the provision of permission to appropriate non-qualified persons (including paralegals) to represent parties before a court.

Transparency in the Exercise of Judicial Office

The right to a public trial and to the public pronouncement of judgment underscores the importance of transparency in the delivery of justice. The principle of transparency also requires the judiciary to demystify the judicial process. The judiciary must ensure not only that judicial proceedings are open to the public and the media, but also that the public and the media have ready access, whether on a court website or through a record room, to court documents, including reasoned judgments, pleadings, motions, evidence and court-related administrative information. Where legitimate grounds exist to exclude the public or the media from a particular judicial proceeding, the judge should issue and display a written order explaining the reason for doing so.

In some jurisdictions, judicial outreach programmes have enabled the judiciary to address misconceptions about the judicial system and educate the public on the role of the judiciary in society. In a departure from the traditional belief that judges should remain isolated from the community to ensure their independence and impartiality, judicial outreach now involves proactive measures by judges and direct interaction with the communities they serve. Experience suggests that increased public knowledge about the law and court processes promote not only judicial transparency but also public confidence. Recent outreach approaches have included town hall meetings, the production of radio and television programmes, and the dissemination of awareness-raising materials such as court user guides in the form of short

pamphlets providing basic information on arrest, detention and bail, criminal and civil procedures, and useful contacts for crime victims, witnesses and other users.

Proposal 18

Judicial proceedings should, in principle, be conducted in public. The publicity of hearings ensures the transparency of proceedings. The judiciary should make information regarding the time and venue of hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the hearing.(2)

Proposal 19

The judiciary should actively promote transparency in the delivery of justice, and ensure that, subject to judicial supervision, the public, the media and court users have reliable access to all information pertaining to judicial proceedings, both pending and concluded, whether on a court website or through appropriate and accessible records. Such information should include reasoned judgments, pleadings, motions and evidence, but affidavits or like evidentiary documents that have not yet been accepted by the court as evidence may be excluded.

Proposal 20

The judiciary should consider initiating outreach programmes designed to educate the public on the role of the justice system in society and to address common uncertainties or misconceptions about the justice system.

Proposal 21

The judiciary should afford access and appropriate assistance to the media in the performance of its legitimate function of informing the public about judicial proceedings, including decisions in particular cases.

Judicial Training

It is through the quality of judicial decisions that public confidence in the judicial process can be enhanced. The quality of judicial decisions will depend, among other factors, on the legal training of the legal professionals involved in judicial proceedings. For judges, this means that there should be high quality legal training at the commencement of their professional career and a continuous training programme thereafter to maintain and improve professional techniques. While the State has a duty to provide the judiciary with the necessary means, the responsibility for organising and supervising judicial training rests with the judiciary, either by itself or through an independent body such as a Judicial Service Commission or a Judicial

Training Institute. Judges' associations can also play a valuable role in encouraging and facilitating training, working in conjunction with the judicial or other independent body that has direct responsibility. Where the training is entrusted to a special autonomous training academy, it is important that it is carried out by judges and by experts in each discipline.

While judges who are recruited at the commencement of their professional career obviously need to be trained, the question arises where judges are selected from among the most experienced lawyers. The Consultative Council of European Judges (CCJE) is of the view that both groups should receive initial training. The performance of judicial duties is a new profession for both, and involves a particular approach in many areas, notably with respect to the professional ethics of judges, procedure, and relations with all persons involved in court proceedings. On the other hand, it is important to take the specific features of recruitment methods into account so as to target and adapt the training programmes appropriately. Experienced lawyers need to be trained only in what is required for their new profession. The CCJE therefore recommends mandatory initial training by programmes appropriate to appointees' professional experience.

In order that candidates for appointment as judges receive quality training, the training institution should create and develop a programme for initial training designed to develop and deepen not only their legal knowledge of the national and international substantive and procedural law and practice, but also to develop complementary skills, e.g. knowledge of foreign languages, ethics, alternative dispute resolution, so that society may be served by judges capable of applying the law correctly, and of critical and independent thinking, social sensitivity and open-mindedness.

In-service training is made indispensable not only by changes in the law, technology and the knowledge required to perform judicial duties, but also by the possibility that judges will acquire new responsibilities when they take up new posts. In-service programmes should therefore offer the possibility of training in the event of career changes, such as a move between criminal and civil courts; the assumption of a specialist jurisdiction (e.g. in a family, juvenile or social court) and the assumption of a post such as the presidency of a chamber or court.

It has been argued that it would be unrealistic to make in-service training mandatory in every case. The fear is that it would then become bureaucratic and simply a matter of form. The CCJE considers that the training must be attractive enough to induce judges to take part in it, as participation on a voluntary basis is the best guarantee for the effectiveness of the training. This should also be facilitated by ensuring that every judge is conscious that there is an ethical duty to maintain and update his or her knowledge.

The desirability of arranging continuous judicial training in a way that embraces all levels of the judiciary has been stressed by the CCJE. Whenever feasible, the different levels should all be represented at the same sessions, giving the opportunity for exchange of views between them. This assists to break-down hierarchical tendencies, keeps all levels of the judiciary informed of each other's problems and

concerns, and promotes a more cohesive and consistent approach throughout the judiciary.

Proposal 22

To the full extent of its powers, the judiciary itself should organize, conduct or supervise the training of judges.

Proposal 23

If adequate training facilities do not exist, the judiciary should, through the appropriate channels, seek the assistance of appropriate national and international bodies and educational institutions in providing access to such facilities or in developing the local knowledge capacity.

Proposal 24

All appointees to judicial office should have or acquire, before they take up their duties, appropriate knowledge of relevant aspects of substantive national and international law and procedure. Duly appointed judges should also receive an introduction to other fields relevant to judicial activity such as management of cases and administration of courts, information technology, social sciences, legal history and philosophy, and alternative dispute resolution.

Proposal 25

The training of judicial officers should be pluralist in outlook in order to guarantee and strengthen the open-mindedness of the judge and the impartiality of the judiciary.

Proposal 26

While it is necessary to institute training programmes for judges on a regular basis, in-service training should normally be based on the voluntary participation of members of the judiciary.

Proposal 27

The training programmes should take place in, and encourage, an environment in which members of different branches and levels of the judiciary may meet and exchange their experiences and secure common insights from dialogue with each other.

Immunity of Judges

The principle that a judge should be free to act upon his or her convictions without fear of personal consequence is of the highest importance for the proper administration of justice. Liability to answer to anyone who feels aggrieved by the

action of a judge would be inconsistent with the independence of the judiciary. This principle is, of course, without prejudice to the right which an individual should have to compensation from the state for injury incurred by reason of negligence or fraudulent or malicious abuse of authority by a court, and this right should be assured by an effective remedy. Moreover, a judge who in the conduct of his or her office commits what would in any circumstances be regarded as a crime (e.g. accepting a bribe) cannot claim immunity from ordinary criminal process.

Proposal 28

A judge should be criminally liable under the general law for an offence of general application committed by him or her and cannot therefore claim immunity from ordinary criminal process.

Proposal 29

A judge should enjoy personal immunity from civil suits for conduct in the exercise of a judicial function.

Proposal 30

The remedy for judicial errors (whether in respect of jurisdiction, substance or procedure) should lie in an appropriate system of appeals or judicial review.

Proposal 31

The remedy for injury incurred by reason of negligence or misuse of authority by a judge should lie only against the State without recourse by the State against the judge.

Proposal 32

Since judicial independence does not render a judge free from public accountability, and legitimate public criticism of judicial performance is a means of ensuring accountability subject to law, a judge should generally avoid the use of the criminal law and contempt proceedings to restrict such criticism of the courts.

MEASURES TO BE TAKEN BY THE STATE

The protection of the administration of justice from political influence or interference cannot be achieved by the judiciary alone. While judicial independence is in part a state of mind of members of the judiciary, the State is required to establish a set of institutional arrangements that will enable the judge and other relevant office holders to enjoy that state of mind. While it is the responsibility of the judge to be free of inappropriate connections with the executive and the legislature, it is the responsibility of the State to establish the institutional arrangements that would secure the independence of the judiciary from the other two branches of government. The Judicial Integrity Group has determined that the effective implementation of the Bangalore Principles requires the measures set out below to be taken by the State.

The new Constitution of Kenya already incorporates many, if not all, of the measures referred to below. However, they are set out, for purposes of record, as being the contemporary international standards.

Constitutional Guarantee of Judicial Independence

The principle of judicial independence requires the State to provide guarantees through constitutional or other means:

- (a) that the judiciary shall be independent of the executive and the legislature, and that no power shall be exercised as to interfere with the judicial process;
- (b) that everyone has the right to be tried with due expedition and without undue delay by the ordinary courts or tribunals established by law subject to appeal to, or review by, the courts;
- (c) that no special ad hoc tribunals shall be established to displace the normal jurisdiction otherwise vested in the courts;
- (d) that, in the decision-making process, judges are able to act without any restriction, improper influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason, and exercise unfettered freedom to decide cases impartially, in accordance with their conscience and the application of the law to the facts as they find them;
- (e) that the judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature, and that no organ other than the court may decide conclusively its own jurisdiction and competence, as defined by law;
- (f) that the executive shall refrain from any act or omission that preempts the judicial resolution of a dispute or frustrates the proper execution of a court decision;

- (g) that a person exercising executive or legislative power shall not exercise, or attempt to exercise, any form of pressure on judges, whether overt or covert;
- (h) that legislative or executive powers that may affect judges in their office, their remuneration, conditions of service or their resources, shall not be used with the object or consequence of threatening or bringing pressure upon a particular judge or judges;
- (i) that the State shall ensure the security and physical protection of members of the judiciary and their families, especially in the event of threats being made against them; and
- (j) that allegations of misconduct against a judge shall not be discussed in the legislature except on a substantive motion for the removal or censure of a judge of which prior notice has been given.

Qualifications for Judicial Office

Persons selected for judicial office should be individuals of ability, integrity and efficiency with appropriate training or qualifications in law.

The assessment of a candidate for judicial office should involve consideration not only of his or her legal expertise and general professional abilities, but also of his or her social awareness and sensitivity, and other personal qualities (including a sense of ethics, patience, courtesy, honesty, commonsense, tact, humility and punctuality) and communication skills. The political, religious or other beliefs or allegiances of a candidate, except where they are proved to intrude upon the judge's performance of judicial duties, should not be relevant.

In the selection of judges, there should be no discrimination on irrelevant grounds. A requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory on irrelevant grounds. Due consideration should be given to ensuring a fair reflection by the judiciary of society in all its aspects. "Irrelevant grounds" means race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes.

The Appointment of Judges

Provision for the appointment of judges should be made by law.

Members of the judiciary and members of the community should each play appropriately defined roles in the selection of candidates suitable for judicial office.

In order to ensure transparency and accountability in the process, the appointment and selection criteria should be made accessible to the general public, including the qualities required from candidates for high judicial office. All judicial vacancies

should be advertised in such a way as to invite applications by, or nominations of, suitable candidates for appointment.

One mechanism which has received particular support in respect of States developing new constitutional arrangements consists in the creation of a Higher Council for the Judiciary, with mixed judicial and lay representation, membership of which should not be dominated by political considerations.

Where an independent council or commission is constituted for the appointment of judges, its members should be selected on the basis of their competence, experience, understanding of judicial life, capacity for appropriate discussion and appreciation of the importance of a culture of independence. Its non-judge members may be selected from among outstanding jurists or citizens of acknowledged reputation and experience chosen by an appropriate appointment mechanism.

The promotion of judges, when not based on seniority, should be made by the independent body responsible for the appointment of judges, and should be based on an objective appraisal of his or her performance, having regard to the expertise, abilities, personal qualities and skills required for initial appointment.

The procedure in certain states of the Chief Justice or President of the Supreme Court being elected, in rotation, from among the judges of that court by the judges themselves, is not inconsistent with the principle of judicial independence and may be considered for adoption by other states.

Tenure of Judges

It is the duty of the State to provide a full complement of judges to discharge the work of the judiciary.

A judge should have a constitutionally guaranteed tenure until a mandatory retirement age or the expiry of a fixed term of office. (3) A fixed term of office should not ordinarily be renewable unless procedures exist to ensure that the decision regarding re-appointment is made according to objective criteria and on merit.

The engagement of temporary or part-time judges should not be a substitute for a full complement of permanent judges. Where permitted by local law, such temporary or part-time judges should be appointed on conditions, and accompanied by guarantees, of tenure or objectivity regarding the continuation of their engagement which eliminate, so far as possible, any risks in relation to their independence.

Because the appointment of judges on probation could, if abused, undermine the independence of the judiciary, the decision whether or not to confirm such appointment should only be taken by the independent body responsible for the appointment of judges.

Except pursuant to a system of regular rotation provided by law or formulated after due consideration by the judiciary, and applied only by the judiciary or by an

independent body, a judge should not be transferred from one jurisdiction, function or location to another without his or her consent.(4)

Remuneration of Judges

The salaries, conditions of service and pensions of judges should be adequate, commensurate with the status, dignity and responsibilities of their office, and should be periodically reviewed for those purposes.

The salaries, conditions of service and pensions of judges should be guaranteed by law, and should not be altered to their disadvantage after appointment.

Discipline of Judges

Disciplinary proceedings against a judge may be commenced only for serious misconduct.(5) The law applicable to judges may define, as far as possible in specific terms, conduct that may give rise to disciplinary sanctions as well as the procedures to be followed.

A person who alleges that he or she has suffered a wrong by reason of a judge's serious misconduct should have the right to complain to the person or body responsible for initiating disciplinary action.

A specific body or person should be established by law with responsibility for receiving complaints, for obtaining the response of the judge and for considering in the light of such response whether or not there is a sufficient case against the judge to call for the initiation of disciplinary action. In the event of such a conclusion, the body or person should refer the matter to the disciplinary authority.(6)

The power to discipline a judge should be vested in an authority or tribunal which is independent of the legislature and executive, and which is composed of serving or retired judges but which may include in its membership persons other than judges, provided that such other persons are not members of the legislature or the executive.

All disciplinary proceedings should be determined by reference to established standards of judicial conduct, and in accordance with a procedure guaranteeing full rights of defence.

There should be an appeal from the disciplinary authority to a court.

The final decision in any proceedings instituted against a judge involving a sanction against such judge, whether held in camera or in public, should be published.

Each jurisdiction should identify the sanctions permissible under its own disciplinary system, and ensure that such sanctions are, both in accordance with principle and in application, proportionate.

Removal of Judges from Office

A judge may be removed from office only for proved incapacity, conviction of a serious crime, gross incompetence, or conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary.

Where the legislature is vested with the power of removal of a judge, such power should be exercised only after a recommendation to that effect of the independent authority vested with power to discipline judges.

The abolition of a court of which a judge is a member should not be accepted as a reason or an occasion for the removal of the judge. Where a court is abolished or restructured, all existing members of that court should be re-appointed to its replacement or appointed to another judicial office of equivalent status and tenure. Where there is no such judicial office of equivalent status or tenure, the judge concerned should be provided with full compensation for loss of office.

Budget of the Judiciary

The budget of the judiciary should be established in collaboration with the judiciary, care being taken that neither the executive nor legislature authorities is able to exert any pressure or influence on the judiciary when setting its budget.

The State should provide the judiciary with sufficient funds and resources to enable each court to perform its functions efficiently and without an excessive workload.

The State should provide the judiciary with the financial and other resources necessary for the organization and conduct of the training of judges.

The budget of the judiciary should be administered by the judiciary itself or by a body independent of the executive and the legislature and which acts in consultation with the judiciary. Funds voted for the judiciary should be protected from alienation and misuse.

A PERFORMANCE EVALUATION MECHANISM FOR A CODE OF JUDICIAL CONDUCT

(A note for discussion)

Objective

Article 14, paragraph 1, of the International Covenant on Civil and Political Rights states that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligation 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.

The objective of a code of judicial conduct is to ensure compliance with the above provision of international law. The Bangalore Principles seek to achieve that objective by requiring judges to commit themselves unreservedly to the judicial values of independence, impartiality, integrity, propriety, equality, and competence and diligence.

Criteria

The criterion for evaluating compliance with the judicial values referred to above is sustained public confidence in the moral sanction of the judiciary. This is achieved by:

- (a) complete detachment in fact and in appearance from the executive and legislative branches of government;
- (b) impartiality in the hearing and determination of judicial proceedings, both subjectively and objectively;
- (c) the maintenance of high standards of conduct in private as well as public life;
- (d) the observance of propriety and the appearance of propriety in both professional and personal life;
- (e) ensuring equality of treatment to all who appear before the court;
- (f) possessing or acquiring the requisite knowledge, skill, thoroughness and preparation in the performance of judicial duties, and the ability to dispose of matters before the court efficiently, fairly and promptly and with due regard to the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay.

Methodology

The methodology for appraising compliance with a code of judicial conduct may include the following:

- (a) public perception surveys of the independence, impartiality and integrity of judges;
- (b) decisions of the judicial ethics review committee on complaints of unethical conduct;
- (c) frequency of participation in training programmes for the purpose of acquiring appropriate knowledge of relevant aspects of substantive national and international law and procedure;
- (d) willingness to participate in training programmes for the purpose of receiving an introduction to matters relevant to judicial activity such as management of cases and administration of courts, information technology, social sciences, legal history and alternative dispute resolution.
- (e) Decisions of appellate courts;
- (f) Academic review of judgments;
- (g) Court-user committees, especially to ascertain the court's accessibility and its treatment of court-users in terms of fairness, equality and respect;
- (h) Public complaints boxes;
- (i) Case audits to ascertain timeliness in the disposal of cases and causes for delay, including systemic weaknesses;
- (j) Service delivery surveys among stakeholders;
- (k) Random court inspections;
- (l) Focus group discussions with stakeholders;
- (m) Consultative workshops on court administration and case management;
- (n) Town hall meetings at which judges address concerns of the community;
- (o) Publication of annual reports on court performance.

Possible linkages between evaluation and incentives/disincentives

It is not recommended that judges be rewarded for good performance. Nor is it recommended that undue importance be attached to statistics. An emphasis on productivity often has an adverse effect on quality and on the right to a fair trial; it also overlooks systemic weaknesses. The need to conduct periodic and substantial evaluations of judges is closely tied to the bureaucratic mode of recruitment in civil law systems and appears to be inappropriate in a common law jurisdiction where judges are initially recruited after having acquired experience at the Bar.

Endnotes

. An Inspectorate is usually a body created by statute to inspect and report to the Head of the Judiciary on the system that supports the carrying on of the business of the courts and the services provided for those courts.

2. The requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations, or to pre-trial decisions. Article 14(1) of the International Covenant on Civil and Political Rights acknowledges that a court has the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.

3. National practice appears to favour a specified retirement age for judges of superior courts. The constitutionally prescribed retirement age for judges of the highest court ranges from 62 in Belize, Botswana and Guyana to 65 in Greece, India, Malaysia, Namibia (with the possibility of extension to 70), Singapore, Sri Lanka and Turkey, 68 in Cyprus, 70 in Australia, Brazil, Ghana, Peru and South Africa, to 75 in Canada and Chile. In some of these jurisdictions (for example, Belize and Botswana), however, provision exists to permit a judge who has reached retirement age to continue in office “as long as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age”.

4. The transfer of judges has been addressed in several international instruments since transfer can be used to punish an independent and courageous judge, and to deter others from following his or her example.

5. Conduct that gives rise to disciplinary sanctions must be distinguished from a failure to observe professional standards. Professional standards represent best practice, which judges should aim to develop and towards which all judges should

aspire. They should not be equated with conduct justifying disciplinary proceedings. However, the breach of professional standards may be of considerable relevance, where such breach is alleged to constitute conduct sufficient to justify and require disciplinary sanction.

6. Unless there is such a filter, judges could find themselves facing disciplinary proceedings brought at the instance of disappointed litigants.