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The Concept of Automatic Disqualification or Mandatory Recusal by Judges with Interest in Matters Before them: The Unsettling and Its Impact on Judicial Corruption in Nigeria

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ABSTRACT

This treatise critically examines the Concept of Mandatory Recusal by Judges with Interest in Matters before them and its Impact on Judicial Corruption in Nigeria. Lord Chief Justice Hobart's statement in Day v Savadge emphasized that statutes against natural equity, such as making a man judge in his own case, are inherently void. The theory of automatic disqualification, originating from Dimes v Grand Junction Canal, has become a tool for judges in Nigeria to manipulate justice and sideline political opponents. The unsettling trend of automatic disqualification based on bias is becoming prevalent, raising concerns about judicial integrity. Recent statements and actions by public officials, including Senator Adamu Bulkachuwa, suggest that the judiciary is influenced by political interests. The Nigerian Bar Association condemned Senator Bulkachuwa's admissions but no action has been taken, leaving the public skeptical about the judiciary's impartiality. This study argues for a strict and universally accepted application of the recusal doctrine to strengthen jurisprudence. Judges with any potential bias should recuse themselves to ensure justice is not only done but also seen to be done. While some legal scholars argue for practical reasons to abolish automatic disqualification, the need for judicial impartiality remains paramount. The Canadian Judicial Council emphasizes that judges, despite their experiences and opinions, must have an open mind and be free to consider different viewpoints. The work cites cases like R v Bow Street Magistrate; Ex parte Pinochet (No 2) to support the concept of automatic disqualification. It concludes that to combat corruption in the judiciary and restore public confidence, there must be collective agreement on the necessity of automatic disqualification for any interests, regardless of their magnitude. Upholding the principle of recusal is essential, as when a case is on trial, the judge's integrity is also at stake.

Keywords: Nemo Judex in Causa Sua; Natural Justice; Recusal; Automatic Disqualification; Judicial Corruption

Introduction

One of the principles of natural justice is *nemo judex in causa sua* i.e., rule against bias. Doctrine of nemo judex in causa sua otherwise called rule against bias is a latin maxim that states that one should not be a judge in his own case. It ensures that the decision-maker needs to remain fair and unbiased. The rule against bias or prejudice disqualifies an individual as a judge for two principles viz: firstly, in its own right, nobody should be a judge in his own case and secondly that Justice is not only required, but is seen to be implicitly practiced. Processes before a decision-making official can be vitiated for the reason that the situation before him becomes a skewed one or has its own purpose. Franks Committee Report has succinctly noted that the law against discrimination is reasonable because the impartiality of successful administration is a benefit. The doctrine of natural justice is not only to ensuring justice, but also of avoiding the error of justice. In *Ridge v. Baldwin* it was held that the theory of natural justice was inadequate to describe specifically, even in particular, what a rational individual might consider as a fair practice. Natural law rule is a Common Law rule, which is focused on the legal philosophy established by the courts that will, when making actions that adversely affect the interests of a private citizen, be enforced by all judicial, quasi-judicial and administrative authorities while passing the minimum fair procedure test centrally embodying equity, freedom and justice.

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Financial interference is central to the application of rule against bias or doctrine of nemo judex in causa sua. In the event of financial interference being implicated, an individual is barred from serving as a judge, notwithstanding how minor such interest might be. In disciplinary behavior, for a judge to be effectively sued on the grounds of personal partiality it must be demonstrated that there is a "fair presumption of partiality" or a "true probability of partiality for the suit to sail. However, in case of political bias this principle is somewhat relaxed but without losing it basic substance. Real probability of bias and reasonable suspicion test has each been canvassed in an attempt to situate which should sway in determining bias.

In *De Smith*, it was stated that the "real probability" test is focused on the Court's own probability assessment, while the "reasonable suspicion" test primarily looks at outward appearances – representing the most popular test in our legal jurisprudence. In *Metropolitan Properties Co. v. Lannon*, the test of real likelihood of bias was given a somewhat broader content as Lord Denning says that

> "The reason is plain enough. Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking that the Judge was biased"

The Scope of Likelihood of Bias

In *Omoniyi v. Central School Board* the Court of Appeal held that the term;

> "Real likelihood of bias" may not be capable of exact definition since circumstances giving rise to it may vary from case to case, but it must mean at least 'a substantial possibility of bias"

As the bias rule has expanded to take account of a great range of decision-makers, it has also become more elastic. However, the courts have constantly stressed that the bias rule must take cognizance of the particular features of the decision-maker and wider environment to which the rule is applied. Generally, bias may arise on account of personal attitudes and relationships, such as personal hostility, personal relationship, professional and vocational relationship, employer relationship, partisanship, in relation to the issue at stake and a host of other circumstances from which the inference of a real likelihood of bias may be drawn.

In the Trinidad and Tobago case of *Pittman & Ors v. Benjamin & Ors*, he appellants, soldiers in the Trinidad and Tobago Defense Force were brought to trial before a court – marital on a number of civil offences and breaches of the Defense Act, 1962. After objection was taken at the hearing of the court martial, it was adjourned and subsequently the appellants applied to the High Court by way of judicial review for an order prohibiting the respondents from continuing to sit to try the appellants on the ground, *inter alia*, that the Judge Advocate and the prosecuting counsel were all members of the same Department and remained serving officers created bias and, therefore, a breach of the rules of natural justice. The appeal was allowed by the Court of Appeal. Held

> "That the test of bias was not a subjective one, whereby the court seeks to discover whether the judge in question was in fact biased".

Two prong tests were formulated to be applied in deciding whether a judge was disqualified for bias, namely, the "the real likelihood of bias" and the **"**reasonable suspicion of bias" tests. The court, unlike the court of first instance, preferred the second test, so that what had to be decided was whether right – minded members of the public would on the materials available, reasonably feed the suspicion that the judge in question might be biased so that the persons charged might not have fair trial. In the present case, the court concluded that there would be such a suspicion that the Judge Advocate, because of his association with the prosecuting counsel, might not bring an impartial and unprejudiced mind to the performance of his duties. There is no doubt that the decision in this case contributed to giving the rule against bias a new lease of life. The "reasonable suspicion of bias" test is wider than the "real likelihood of bias" test ahead of the escalation of this principle by the Bangalore Principle of "a reasonable, fair-minded and informed person" that will vitiate the proceedings of a tribunal as was the case in the extant case.

In the Nigerian case of *Alakija v. Medical Disciplinary Committee* the Registrar was also the prosecutor in the case seeking to remove the Appellant's name from the Medical Register. The Appellant could prove that the Registrar was with the members of the Committee while they were considering their decision. The Supreme Court held:

> that the Registrar remaining with the Committee during their deliberation is violative of the principle of natural justice and which had gone to the root of their decision, making it unsustainable under our law.

The decision of the disciplinary committee was therefore reversed. In *R. v. Abingdon ex. P Cousins*, it was held that a Magistrate should not have adjudicated in a case where the defendant was one of his former pupils at a school of which he was a headmaster.

The Supreme Court of Canada explained that:

> "The contextual nature of the duty of impartiality" enables it to "vary in order to reflect the context of a decision maker's activities and the nature of its functions". *Imperial Oil Ltd v Quebec (Minister for Environment)*

Scalia J of the Supreme Court of America acknowledged this possibility when he explained that prejudice consisted of a

> "Favorable or unfavorable disposition that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess." *Liteky v United States*

Predisposition and other such qualities are not in themselves inappropriate. They only become so when they have no *rational* basis or connection to the case at hand. The connotation is that predispositions may be permissible if they are warranted or rational. The rationale being that law tolerates predisposition and other qualities that might appear to offend the rule against bias practically. Professor Lucy opined that absolute total impartiality

> "Might be possible but certainly not desirable."

According to his view,

> "Judges who seek absolute impartiality... would set aside what they know of human kind and their lives. The beings then judging us would know nothing at all of what standard human lives look or feel like or, knowing something, would completely ignore it. Expecting real judges to embody such an attitude would be to expect them to live debased lives. Just like us, their commitments and associated experiences make them the people they are; they serve to give judges both prior knowledge of human life and found various prejudgments and evaluations in their own lives.

The position held Professor Lucy above has introduced some kind of unsettling to this subject of bias and its scope. Certainly, there exist a great force in the argument that judges and other decision makers cannot, and should not, be devoid of experience and the inevitable preconceptions that experience may bring when deciding bias cases. The spot at which desirable experience becomes an objectionable baggage remains unsettled too.
The decision of the Supreme Court of Canada in *RDS* v *Her Majesty the Queen* provides a classical example. Facts of the case; A white police officer arrested a black 15-year-old who had allegedly interfered with the arrest of another youth. The accused was charged with unlawfully assaulting a police officer, with the intention of preventing an arrest, and unlawfully resisting a police officer in the lawful execution of his duty. The police officer and the accused were the only witnesses and their accounts of the relevant events differed widely. The Youth Court Judge weighed the evidence and determined that the accused should be acquitted. While delivering her oral reasons, the Judge remarked in response to a rhetorical question by the Crown, that police officers had been known to mislead the court in the past, which they had been known to overreact particularly with non-white groups and that that would indicate a questionable state of mind. She also stated that her comments were not tied to the police officer testifying before the court. The Crown challenged these comments as raising a reasonable apprehension of bias. After the reasons had been given and after an appeal to the Nova Scotia Supreme Court (Trial Division) had been filed by the Crown, the Judge issued supplementary reasons which outlined in greater detail her impressions of the credibility of both witnesses and the context in which her comments were made. The court opined thus

> "The courts should be held to the highest standards of impartiality. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. The trial will be rendered unfair if the

> words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer. Judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin. If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction. This excess of jurisdiction can be remedied by an application to the presiding judge for disqualification if the proceedings are still underway, or by appellate review of the judge's decision. A reasonable apprehension of bias, if it arises, colors the entire trial proceedings and cannot be cured by the correctness of the subsequent decision. The mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from the judge's other words or conduct. However, if the judge's words or conduct, viewed in context, do not give rise to a reasonable apprehension of bias, the findings of the judge will not be tainted, no matter how troubling the impugned words or actions may be".

The Crown's appeal was allowed and a new trial was ordered on the basis that the Judge's remarks gave rise to a reasonable apprehension of bias. The judgment was however upheld by a majority of the Nova Scotia Court of Appeal.

At issue here is whether the Judge's comments in her reasons gave rise to a reasonable apprehension of bias. The majority of the Justices reasoned that all judges would inevitably possess a measure of experience and preconceptions based upon their experience, which they would naturally draw upon in their decision-making, and that this judge had essentially done so. The majority of Justices did not simply reject the suggestion that the trial judge was biased, they also held that the experiences and associated preconceptions she held were an entirely permissible influence. Conversely, the minority Justices held that the reasoning of trial judge displayed both prejudice and prejudgment because she had effectively accepted that all police officers were racist liars, which according to them, clearly breached the rule against bias.

The Justices opined that

> "triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place" … that "Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function."… Concluding that this experience and associated predispositions would not breach the rule against bias "so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence."

The respected learned Justices drew support from a publication of the Canadian Judicial Council, which explained the importance of judicial experience in the following terms:

> "... there is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experiences would probably lack the very qualities of humanity required of a judge ... True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind."

While the *RDS v Her Majesty the Queen's* case concerned judicial decision-making, the principles promoted by the Supreme Court of Canada must without doubt apply to other decision-making bodies, such as tribunal members, ministers and bureaucrats. All such should bring their own personal knowledge, and very often a good measure of institutional experience, to their task.

The approach favored by the majority Justices (rule) case has been described as "contextual judging" which at one level simply draws attention to the obvious connection between decision-making and the wider context within which it occurs. At a deeper level, however, it implies that the personal values and experience of the decision-maker provide a legitimate part of that decisional context. The concept of contextual judging is arguably an inevitable consequence of the increasing importance placed on the need for a more representative judicial activism. While this goal is clearly deserving of admiration, contextual judging has significant ramifications for the rule against bias because it confers legitimacy upon attributes or qualities in a decision-maker which would otherwise offend the bias rule. Experience and the preconceptions that it gives rise to may be permissible in the guise of contextual judging but there is always the possibility that preconceptions may be so strong that they constitute prejudgment and afterwards backfire.

The Theory of Automatic Disqualification

The theory of automatic disqualification is generally traced to *Dimes v Grand Junction Canal*. Four inter-related points may be made out of the *Dimes* case, which has to be borne in mind - should automatic disqualification be adopted hook, line and sinker.

Firstly, automatic disqualification was applied without question in many cases after *Dimes*.

Secondly; the rule of automatic disqualification for pecuniary interest appeared to harden over time. The shareholding of the Lord Chancellor in *Dimes* was worth a fortune but later cases made it clear that a pecuniary interest would almost always lead to disqualification whatever is its value as what mattered was the nature of the interest rather than its size.

Thirdly, automatic disqualification provided a simple blunt solution to claims of bias in this context it offered no real solution to claims founded on other interests.

Finally, invocation of principle of automatic disqualification automatically too jettisons the test of the fair minded and informed observer, hence it essentially imposes a presumptive finding of bias without more.

The House of Lords did not share these concerns when it decisively affirmed automatic disqualification in *R v Bow Street Magistrate Ex parte Pinochet (No 2)* In *(Pinochet No 2)*, the issue in contention was that Lord Hoffman who had determined an appeal for the extradition of the former Chilean dictator (Pinochet) was closely associated with Amnesty International (Amnesty). Amnesty had mounted a long campaign seeking to hold dictators legally accountable for his actions. Amnesty was granted leave to pursue proceedings to which it did argue strongly in favour of extradition. As a matter of fact, Lord Hoffmann was not a member of Amnesty but was instead an unpaid Director of a charity that Amnesty wholly controlled. The case could have been disposed of by any formulation of the bias test, which would have led to the disqualification of Lord Hoffmann on the ground of reasonable apprehension of bias. The House of Lords instead held that Lord Hoffmann was subject to automatic disqualification. In effect the Lords did not simply affirm the rule of automatic disqualification but extended the reach of that doctrine to the perceived interest of Lord Hoffmann and, more generally, non-pecuniary interests. Lord Browne-Wilkinson stated the rationale for this extension in the following terms:

> "If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organization as is a party to the suit."

The House of Lords noted orbiter that Lord Hoffmann, Amnesty and the Charity were separate legal entities. Lord Hoffmann was not therefore, a party to the proceeding in a formal sense or a judge in his own cause but the Lords thought that the connection between Lord Hoffmann and Amnesty could still be characterized as an interest that should lead to disqualification. But the extension of the rule of automatic disqualification opened up another can of worms. The House of Lords accepted that mere non-directorial membership of Amnesty could have also required Lord Hoffmann's automatic disqualification. This aspect of the decision poses problems for judges who are linked to public "causes", and possibly counter the position of the jurists which led to Bangalore Principal formulation; engendering disqualification galore in its wake. The *Pinochet* case highlights the main disadvantage of the extension of automatic disqualification

Many English litigants quickly sought to test how far they could benefit or otherwise from the enlarged coast created in the limits of *Pinochet's case* - triggering a series of challenges to judges on many grounds, with counsels' poking history of the judge in their search for supposedly incriminating evidence. The Court of Appeal intervened and sought to stamp out this undesirable practice through a dogmatic judgment in the *Locobail* case, (*Locobail (UK) Ltd v Bayfield Properties Ltd.*) The Court of Appeal here outlined the various qualities that would never, or almost never, support a claim of bias. The Court held that bias could virtually

> "never" be founded upon a judge's gender, age, race, religion, class, wealth or sexual preferences etc".

Other factor that would "hardly ever" support a claim of bias included a judge's membership of professional, sporting or charitable associations, extra-judicial writings, the judge's political or social or educational background, any connections related to the judge's former chambers and, lastly, any Masonic Associations. The court held that what would ordinarily support a claim of bias included family connections, personal friendships and dislikes, and any close professional relationships. From this view, the categories devised by the Court of Appeal provide some insight into the potential reach of the rule of automatic disqualification after *Pinochet* case.

The High Court of Australia took a rather different view in *Ebner v Official Trustee* when it considered two joined appeals involving judges who held reasonably small shareholdings in a bank that was a party to proceedings over which the judges presided. The High Court could have decided each case on the basis of a *de minimis* exception to automatic disqualification. A majority of the court as an alternative held that there was no separate rule of automatic disqualification when a judge held a direct pecuniary interest in a party to a proceeding over which the judge presided. *Ebner v Official Trustee*. The majority of the Justices essentially reinterpreted *Dimes* by holding that that case did not, upon close reading, support automatic disqualification and also rejected the proposition that pecuniary and other interests could or should be treated differently, or that the latter should lead to automatic disqualification. Gleeson CJ, McHugh, Gummow and Hayne JJ in their majority opinion stated:

> "a rule of automatic disqualification would be anomalous. It is in some respects too wide and in other respects too narrow. There is no reason in principle why it should be limited to interests that are pecuniary, or why, if it were so limited, it should be limited to pecuniary interests that are direct. This is illustrated by the problem that concerned the House of Lords in Pinochet (No 2). The concept of interest is vague and uncertain. It is not logical to have one rule for interest and a different rule applying to disqualification for association."

According to this approach, the question of whether a pecuniary or other form of interest may give rise to a reasonable apprehension of bias should be determined "Firstly, by the identification of what is said might lead a judge (or juror) to decide a case other than on its legal and factual merits and further there must be an articulation (nexus) of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. They insisted that mere assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with propensity to departure from impartial decision making is articulated. Only then can the rationality of the asserted apprehension of bias be assessed to the extent that a party who does not, or cannot, articulate the rationality of connection between the interest and the resulting apprehension risks the objection being dismissed as a "bare assertion". *Hot Holdings Pty Ltd v Creasy*

Application of Doctrine of *Nemo Judex in Causa Sua:* Important Tests.

The modern rule against bias may be said to have debuted in 1610 in the case referred to as Dr. Bonham's Case where Chief Justice Coke went on to insist that

> "The Court could declare an Act of Parliament void if it made a man as judge in his own cause, or otherwise 'against common right and reason".

This was one of his grounds for disallowing the claim of the London College of Physicians to fine and imprison Doctor Bonham for practicing in the city of London without license. The Statute under which the College acted contrary to the rule of natural justice provided that fines should go half to the King, half to the College, making it glaring that the College had financial interest in its own judgment and worse still, a judge in its own cause. Dr.

Bonham was a Doctor of Physics of Cambridge University, Per Laskit, Bias is a prior opinion which is formed in a person's mind that precludes that person from evaluating data in a fair and objective manner. The human in man is that if a matter is brought to a judge in whom he has a mental attitude toward, the tendency is that something in him may prevent him from making a fair decision. As a result, the litigant's right to a fair trial is violated because of the bias. When a suit is brought and determined in a court which has no jurisdiction (in this case because of bias), it is regarded as *coram non judice* and the judgment thus delivered is considered void. It is trite that right should be served, and not just accomplished. Justice will never be believed to be served because an individual decides his or herself. The idea enjoys a universal application not only to the courts but also to quasi-judicial and administrative processes. Natural justice rule requires the lowest provision to have neutral people who behave equally, without bias and discrimination. A prejudiced verdict is nullity and the trial is not *coram judice* but "*Coram non-judicie*. There are two key facets of the law against preference:

i) Any private or contractual involvement in the results of the case shall be displayed by the individual of authority.
ii) Real probability of bias must be present. A subjective concept, which implies either true partiality or a fair presumption of partiality, is real probability of partiality. The state of mind of a human is hard to show. Consequently, the courts are of the opinion that there is reasonable reason to believe that the decisive factor was probably partial.

It isn't necessary that bias will only be of a nature where there is a personal or professional friendliness and animosity with the parties, and the individual strives to make favorable decisions for his friends and family while doing the opposite for rivals, *Mohd. Yunus Khan vs State of U.P. & Ors.* on 28 September 2010. The appellant upon been found guilty by the authority filed a lawsuit in court, and the court ruled that the individual who testified before the Disciplinary Committee could not punish the appellant or act as an inquiry officer, which the disciplinary authority did in this case. Thus, nemo judex in causa sua must rule, as a person should not adjudicate a case in which he or she has been involved in any way and a person acting as a witness is not allowed to vouch for the truthfulness of his or her own testimony.

Recusal of Judges

Recusal of judges in regard to the legal maxim "Nemo Judex in Causa Sua" is a critical concept, particularly in the countries like the United States and the United Kingdom. To bring legitimacy in the judgments of courts, and to further analyze the legal maxim it is important to understand the concept of "judges' recusal from the benches". Recusal means dismissal hence the term above refers to judges eliminating themselves from a case where they may have a potential conflict of interest. The founding and practice of this principle is to so do - to ensure impartiality in the courtroom and to adhere to the ethical principles that a judge must follow in order to dispense justice properly. A prudent judge would recuse because it is often said that in adjudication of a matter, "the trial judge is also on trial" *Indore Department Authority v Manohar Lal*. In this case, the bench was formed to re-examine a certain land acquisition matter, which had already received two verdicts, one of which was handed down by Justice Arun Mishra in 2018 and caused a lot of confusion at that time. Justice Arun Mishra was asked to recuse himself, but he refused, claiming that doing so would jeopardize the independence of the judiciary and was only a pretext for "forum shopping" which means that litigants are re-filing their legal cases in the court in the hopes of receiving a favorable judgment.

Types of Bias:

Bias manifests variously and affects a decision in a variety of ways. It can be loosely classified into six main categories:

Personal Bias

The tie of affection or animosity between the authority and the parties results either directly or indirectly (professionally). Friends or relatives are favored opposite party is not. It is clear that a candidate should absolutely preclude a candidate from the position of a judge, however minor a financial benefit might be in a question of practice." In *Motor Transport Ltd. v. Bangaruraju*, the Cooperative Corporation required a license. Around the same period, he became President of the Local Transit Authority providing the authority in favor. The collector was the Chairman of that community. The Court abrogated the ruling as it breached social justice standards

Pecuniary Bias

It is a general application that every minor financial interest is expected to vitiate regulatory intervention. In an English case of *R v. Hendon Rular District Council*, the Court in England annulled the Planning Committee decision that one of the representatives was an Estate Agent working for the petitioner who requested the approval.

Subject Matter Bias

Subject Matter Bias occurs when the cases in which the decision-making officer has the "subject" explicitly or implicitly. In *R v. Deal Justices Exparte Curling*, the judge was not found disqualified for trialing an animal's case of abuse because he belongs to the Royal Society for the Avoidance of Animal Cruelty and it did not show a clear risk of prejudice.

Departmental Bias

Departmental bias is inherent in the administrative process and can negate the very concept of fairness in the administrative procedure if it is not effectively checked. In *Gullapalli Nageswara Rao v APSRTC*, the government's order to nationalize road transport was challenged on the fact that the Secretary of the Transport Department was also responsible for implementing the scheme. The Court quashed the directive because the Secretary was limited under the conditions and thus unreasonable to continue.

Policy Bias

Policy Bias is similar to the departmental biasness and occurs or implied when the judge is interested in the projecting and pursuing the politics of the department.

Challenges in Practice

Contending challenges are known to have pervaded the application of automatic disqualification of judges or recusal. A commonly occurring type of conflict of interest is professional relationships between a judge, arbitrator or any other decision-making body and the parties or counsel. This was the point in issue in *Zuma's Case*. An infringement claim had been brought by Azumi, which operates Japanese restaurants under the name "Zuma", against Zoe Vanderbilt and her company, Zuma's Choice Pet Products. Vanderbilt had applied for summary judgment before a recorder who happened to also be a practicing counsel in the same chambers as counsel for the respondents. Demand for the recorder to recuse himself due to a perception of apparent bias (which he did not) and Lord Justice Floyd upheld this decision. Vanderbilt also unsuccessfully applied for Floyd L J to recuse himself as he had refused two previous applications. English courts have severally maintained that connections such as chambers, or law firms, in most circumstances do not compromise a judge's ability to maintain independence.

In contradistinction to the attitude of English courts to professional relationship, arbitration as an Alternative Dispute Resolution (ADR) mechanism stands on a more cautious perspective on issues of automatic disqualification on grounds of bias. Take for instance, in a London Court of International Arbitration decision in 2009, a dispute regarding an appearance of bias was upheld against the appointment of an arbitrator who was a commercial barrister specializing in insurance matters, and was regularly instructed by one of the respondents. A comprehensive evaluation revealed that those instructions in contention comprised 11% of all his instructions over the previous five years. The decision stated that it "did not follow that a fair-minded and informed observer should be as fully attuned with local traditions and culture as a member of the community, or wholly uncritical of it". So, despite the fact that the test under English law was the starting point (and the arbitration was seated in London), emphasis was placed on the fact that the challenge related to an international arbitration and therefore different considerations had to be taken into account to find reasons to rescue oneself. This is in direct contrast to *Zuma Case*, and also same in International Centre for Settlement of International Disputes (ICSID)'s decision in *Hrvatska Elektroprivreda v Slovenia*, where the tribunal itself disqualified a lawyer from appearing in the proceedings due to an apprehension that the lawyer's involvement might lead to an "appearance of impropriety" on the part of the President of the tribunal. Facts of the case; At a late stage in the proceedings, the respondent had appointed Counsel serving in the same Chambers as the President, and the claimant objected as they feared this would becloud the perception of the President's independence and impartiality even where it was accepted that there was no actual bias. Although the strange facts perhaps make this an outlier, it is also interesting to note that counsel for the claimant argued that their client (a Croatian entity) was

unfamiliar with the chambers system and derived no ease from the status of English barristers as separate, self-employed legal practitioners. Here, a mere appearance of potential bias was enough to uphold the challenge.

Another illustration where difficulties can arise is in the degree of interrelatedness connecting arbitrators and law firms. In *Blue Bank v Venezuela*, (ICSID case) an arbitrator was disqualified on the basis that an office of his law firm based in another jurisdiction was acting against Venezuela in a different arbitration. The arbitrator had no direct involvement in the parallel case, but was a member of the law firm's international arbitration Steering Committee. It was felt that the shared corporate name and the existence of the Steering Committee at a global level implied a degree of overall coordination between the different firms comprising the international firm as a whole. In all, arbitration provides its own peculiarities which are dissimilar to other adjudicating bodies. The standard prevalent under international arbitration is influenced by institutional rules, guidelines and national laws, all of which must exist within the framework of the jurisdiction in which they operate. As a result, it is no surprise that the results under the two regimes vary on similar issues but the test in *Porter v Magill* under English law engenders a realistic threshold which has been widely tested over the years. Recall that the judgment in Porter v Magill was to the effect that under English law, the test for establishing bias was whether a "fair minded and informed observer", having considered the facts, would conclude that there was a "real possibility" of bias.

Nigeria In Focus

In Nigeria generally, our courts have held that any breach of the principle embodied in the maxim *nemo judex in causa sua* will amount to a breach of the rule requiring fair hearing, consistent with the fact that the nemo judex rule applies in Nigerian law as well.

In *Obadara & Ors. v President of Ibadan West District Grade D Customary Court*, the court held that

> "The principle is one that is applicable in all civilized countries, and as such, cannot be different in our own jurisdiction".

The same stand was taken in *Akoh v, Abuh* it was held

> "That once an allegation of bias on the part of a trial judge is established by evidence, he is disqualified from adjudicating in the case, and it had already decided the matter; his decision will be set aside on appeal or upon review".

Automatic disqualification is the way to go, and I feel strongly that on account of the organismic nature of law and cognizance of the fast pacing financial and politico - economic blaze sweeping across the globe that does not intend to exclude judges and other arbiters alike, all should join the fight. The court's ruling above (as it were) finds expression in Section 33 (1) of the 1979 Constitution and section 36 (1) which states that:

> "In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law, and constituted in such a manner as to secure its independence and impartiality"

The reasoning by Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner v Official Trustee* is apposite as it lends support not only to automatic disqualification but an extension – more or less in an attitude or of the doctrine of "covering the field". The two learned Justices here stated:

> "a rule of automatic disqualification would be anomalous. It is in some respects too wide, and in other respects too narrow. There is no reason in principle why it should be limited to interests that are pecuniary, or why, if it were so limited, it should be limited to pecuniary interests that are direct. This is illustrated by the problem that concerned the House of Lords in Pinochet (No 2). The concept of interest is vague and uncertain. It is not logical to have one rule for interest and a different rule applying to disqualification for association."

To serve justice, it behooves on the court ultimately to decide whether the connection between the interest and the apprehension of bias can be articulated to a relevant degree, as the parties may now bear a heavier onus of proof. A party cannot simply be heard to rest on a "bare assertion" of a pecuniary interest and hopes he gets home dry. A party who does not, or cannot, articulate the connection between the interest and the resulting apprehension, or at least provide some basis to do so, risks the objection being dismissed as a "bare assertion".

Hot Holdings Pty. Ltd. v Creasy. The implication is therefore that predispositions may be permissible or rational if they are warranted one way or another. To this unsettling, Professor Lucy agrees and argues

> "That the courts attitudes must be case dependent as absolute total impartiality might be possible but certainly not desirable."

Agreeing further, the Canadian Judicial Council explained the importance of judicial experience in determination of cases of bias and ascribes real value to experience and expertise in arriving at a balanced decision in the following terms

> "... there is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experiences would probably lack the very qualities of humanity required of a judge ... True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind."

The Bangalore Principles of Judicial Conduct copiously supports recusal – otherwise automatic recusal under paragraphs 128 – 132, highlighting with calibrations, thus; A judge is ordinarily required to recuse self in a case, in which any member of his family (including a fiancé or fiancée) has participated or has entered an appearance as counsel.

Where a Lawyer's Family Member is Affiliated to Law Firm

Mandatory recusal is automatic (paragraph 129) because members of a law firm normally share profits or expenses in some manner and are motivated to acquire clients, in part, through the successful conclusion of their cases. Nevertheless, the fact that a lawyer in a proceeding is affiliated with a law firm with which a member of the judge's family is affiliated may not on itself ground the judge's automatic recusal. In appropriate circumstances, that the judge's impartiality may reasonably be in contention or that the relative is known by the judge to have an interest in the law firm that could be significantly affected by the outcome of the proceeding will require the judge's recusal. Factors for recusal of a judge shall be evaluated on case-to-case basis including but are not limited to the following:

(a) the appearance to the general public of the failure to recuse
(b) the appearance to other lawyers, judges and members of the public of the failure to recuse
(c) the administrative burden of the recusal on the courts
(d) the extent of the financial, professional, or other interest of the relative in the matter.

For justice to be done and seen to be done, anywhere a family member is employed in government department as provided in paragraph 130 also comes to mind. While government lawyers are paid a salary and no economic or profit motive is usually involved in the outcome of criminal or civil cases, the desire to attain professional accomplishment is a factor to be considered. thus, even if a family member who is employed in a public prosecutor's (or public defender's office) does not hold any supervisory or administrative position in that office, diligence should be put in strong contemplation and recusal from all cases from that office must be considered for two reasons. Firstly, because personnel in that office may share information or gossip on pending cases, there is a high propensity that the judge's family member would one way or another inadvertently be involved in, or influence, other cases coming from that office, even without direct supervisory responsibility and secondly that judge's impartiality might reasonably be questioned as the test is whether a "reasonable observer" have significant doubt over whether the judge might have a conscious or subconscious bias towards the professional success of the office in which the judge's family member serves on a regular basis?

Intimate Relationships Such as Dating with a Lawyer

Paragraph 131 also calls for scrutiny. Where a judge is socially involved in a dating relationship with a lawyer, the judge should ordinarily not sit on cases involving that lawyer, unless the appearance of the lawyer is purely formal or otherwise put on the record. Yet, the judge is not ordinarily required to recuse himself or herself in cases involving other members of that lawyer's firm or office.

Recusal Must be Activated in Jurisdictions in Which There is Only One Judge and One Lawyer Per Paragraph 132

In such jurisdictions where there is only one judge on the bench and one lawyer in the prosecutor's or defender's office, if that lawyer happens to be the son or daughter or other close relative of the judge, an immediate, mandatory or automatic disqualification should ordinarily inure. However, because his would impose hardship, not only on other judges in the jurisdiction that would be called upon to step into the gap for the disqualified judge, but also on the litigants. Such situation calls for extensive and detailed evaluation or it may backfire as speedy trial to which litigants are entitled may be impeded. Whereas disqualification may not be an absolute requirement or panacea in these circumstances, situations such as these should as much as is practicable, is reasonably avoided.

Conclusion

Automatic disqualification is the way to go as a panacea to check the fast-fading public confidence on the judiciary. As justice is in the exclusive list in the Constitution of the Federal Republic of Nigeria, the public have no alternative to seeking the services of our courts and other adjudicatory bodies. The time to act is now because if the current provocative courts decisions coming from all levels of our judicial system are allowed to continue, the public will be left with no alternative to self-help as a means of settling perceived injustice. If the situation is allowed to degenerate to such level, anarchy will take over and the "last hope of the common man" destroyed.

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